

Commentary

A View From Paris — June 2010

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Introduction*

Because the French courts hand down so many noteworthy international arbitration decisions, it is frequently difficult for us to settle on just one to SPOTLIGHT. This time, we simply could not manage it. Hence our having two in this issue of *A View From Paris*.

Our first discusses the Paris Court of Appeal decision in *Commercial Caribbean Niquel v. Overseas Mining Invs. Ltd.*,¹ where the Court sets aside an award on the grounds that the tribunal denied due process for failing to invite the parties' comments in connection with its award of damages. The decision illustrates the Court's approach to considering due process challenges and addresses the (alleged) differences between damages for lost chance and damages for lost profit. Our second considers the decision of the *Tribunal des conflits* in *INSERM v. Fondation Letten F. Saugstad*,² where the *Tribunal* decides that the French judicial courts — as opposed to the French administrative courts — have jurisdiction over INSERM's application to set aside the arbitral award rendered in favor of the Fondation. The decision arises in the context of growing openness on the part of the French State

to allowing arbitration of disputes concerning French administrative contracts that French law has historically held inarbitrable.

Several of the cases in our SEE ALSO section also grapple with delicate issues, such as what actions may lead the French courts to find that a party has tacitly waived its agreement to arbitrate (*Inversiones Errazuriz Limitada*). Another explores what constitutes sufficient reasoning in an arbitral award (*Chantiers de l'Atlantique*), while a third considers what consequences (if any) befall an award when a receiver in bankruptcy lacked authority to enter into the arbitration agreement on which it was based (*Air Namibia*).

As always, we would like to thank all our readers who provided feedback on last quarter's issue of *A View From Paris*. Time and space permitting, we have taken your suggestions onboard and look forward to your continued interest and input.

Spotlight I: Commercial Caribbean Niquel v. Overseas Mining Invs. Ltd.

In September 1998, Commercial Caribbean Niquel (CCN, a Cuban company) and Overseas Mining Investments Limited (OMI, a Channel Islands company) entered into a contract to create a joint venture to mine nickel in Cuba. In 2004, CCN terminated the contract and OMI brought an arbitration under the UNCITRAL rules, pursuant to the terms of the arbitration agreement contained in the parties' contract. The arbitral tribunal (Horacio A. Grigera Naón (chair), Julio Fernandez de Cossio and Jan Paulsson) ultimately ordered CCN to pay OMI

more than USD 45 million in damages for breach of contract.³

CCN asked the Paris Court of Appeal to set the award aside on the grounds that, among other things, the arbitral tribunal had denied it due process. In support of its position, CCN argued that it had not had sufficient time to respond to OMI's expert report on damages, which OMI submitted late in the proceedings. According to CCN, the report contained complex figures upon which the tribunal relied in making its award. CCN also argued that the tribunal had awarded OMI damages for lost chance to pursue the mining venture, something OMI had never claimed and against which CCN had never had an opportunity to put on a defence.⁴ In response, OMI contended CCN had in fact submitted a response to its expert report on damages and that the arbitral tribunal had based its award of damages on contractual obligations the parties addressed expressly during the arbitration. And in any event, OMI argued, the tribunal was not obliged to seek the parties' comments with respect to its reasoning on the calculation of damages.⁵

The Court of Appeal rejected CCN's first argument in short order. The Court noted that OMI submitted its expert report on damages at the end of May 2007. CCN filed its final submissions at the beginning of October that same year (i.e., four months later). In complaining that it did not have sufficient time to respond to the report, CCN failed to explain how its response would have been different or more effective if it had had more time. Under these circumstances, the Court found CCN's first argument insufficient to establish that the tribunal had denied it due process.⁶

Turning to its second argument, however, the Court agreed with CCN that the tribunal had denied due process in awarding damages for lost chance. In reaching this conclusion, the Court (quoting extensively from the award)⁷ noted that OMI had sought damages for its "lost profit" on the foregone mining venture.⁸ The tribunal, however, considered that it was not 100% certain that the project would have succeeded, even if CCN had performed its obligations. Accordingly, "in place of the compensation criteria" urged by OMI, the tribunal decided that OMI should "be compensated for the loss of the chance to continue the project."⁹ In the tribunal's view, the "potential financial profit that

was lost cannot be assessed with certainty, but the lost chance to collect it can indisputably be valued."¹⁰ The arbitral tribunal stated that the "compensation model based on lost chance involves an economic calculation method that is less certain, but the arbitral tribunal considers it appropriate to opt for a less restrictive and conservative approach than that put forward by OMI."¹¹ The tribunal emphasized that "compensation for lost chance is not the same as that for lost profit [. . .] because the compensation is grounded on the premise that the victim of the damage must be compensated for the economical value of the lost chance, not for the lost profit it claims."¹²

In light of this, the Court concluded that the tribunal had "substituted the compensation claimed by OMI based on lost profit, which they considered inadequate here, with compensation based on the loss of the chance to see the project through, which OMI did not raise." The Court understood that this substitution was "not a mere method for evaluating the damage"; rather, it "modifie[d] the basis for compensation of OMI." In failing to invite the parties to make submissions on this issue, the arbitral tribunal breached due process, and the Court set the award aside in its entirety.¹³

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Under French international arbitration law, the French courts may set aside an arbitral award rendered in France (or deny enforcement of a foreign award) where the arbitral tribunal denies due process.¹⁴ As a matter of both French international arbitration law and French international public policy, all parties must be afforded due process throughout the arbitration.¹⁵ Under French law, due process requires that every party to an arbitration be given a reasonable opportunity to present its case. This means that all information submitted to the tribunal by a party to the arbitration must be provided to all other parties as well. It also means that every party must have a reasonable opportunity to present its factual and legal arguments, and a reasonable opportunity to respond to the arguments put forth by the other parties, before the arbitral tribunal decides the case.¹⁶

Further (and most importantly for *Caribbean Niquel*), where the arbitral tribunal believes that there is a material factual or legal issue that has not been raised by

the parties, the arbitral tribunal should raise the issue with the parties and expressly invite their comments before taking any decision with respect to that issue.¹⁷ That said, due process does not require the tribunal to invite the parties' comments on an issue they have failed to address, but which was necessarily at play in the arbitration.¹⁸ The parties are deemed to have had an opportunity to comment on such an issue, whether they in fact did so or not.¹⁹

Based on the quotations set forth in the decision,²⁰ the award at issue in *Caribbean Niquel* appears to have left little room for the Court of Appeal to do anything but annul. The arbitral tribunal expressly states that damages for lost profit (which OMI claimed) are "not the same" as damages for lost chance (which OMI did not claim).²¹ And in awarding OMI damages for lost chance, the tribunal goes out of its way to emphasize that it is not awarding OMI the "lost profit it claims," but rather the "economical value of the lost chance" to pursue the project.²² Against this backdrop, the failure to invite the parties to make submissions on a potential award of damages that were not even claimed — much less debated — looks like a stark due process violation. (It also arguably smacks of *ultra petita*, an issue the Court does not reach in light of its due process decision.)

Having said this, on the facts presented here, the distinction the tribunal draws between damages for lost profit and damages for lost chance may well be one without a difference. Any computation of damages for lost profit from a business venture that never was is inherently speculative. As Yoggi Berra said, "It's tough to make predictions, especially about the future." In *Caribbean Niquel*, even if all parties had lived up to their contractual obligations, it is uncertain whether the mining venture would have turned a profit at all, much less the profit that was projected. Hence the problem with OMI quantifying its loss-of-profit damages without taking into account the chance that the venture might not have performed as foreseen — a problem the tribunal rightfully flags. In international arbitration, tribunals routinely discount such claims by the venture's chance of success. It is for this reason that, properly computed, damages for lost profit require multiplying the reasonable projected profits of the foregone venture by the odds that the venture would have been successful. The resulting damages for lost profits represent the value of the "loss

of the chance to continue the project" — i.e., they are generally one and the same.

To the extent damages for lost profits and lost chance amount to the same thing, the Court's decision to strike down the award on due process grounds looks questionable because the parties had an opportunity to make submissions on OMI's claim for lost profits. The fact that the tribunal decided not to award the full amount of lost profits OMI sought is neither here nor there. In evaluating quantum, arbitral tribunals are not confined to taking all or nothing decisions on the amount of damages claimed and frequently award something more than zero, but less than what the claimant requested.²³ This is usually because the respondent raises fair points in attacking claimant's quantum analysis — including points concerning the odds that the venture would have succeeded — points the tribunal then takes into account in rendering its award. And, as OMI pointed out, arbitrators are not under the duty to submit their reasoning with respect to the evaluation of the damages to the parties for comment before rendering their award.

Here, however, in defending against OMI's claim for 100% of its projected lost profits, CCN apparently did not protest that the valuation of damages for lost profits needs to take into account the chance that the venture would have succeeded. Why CCN did not do so is unclear (though it allegedly felt pressed for time in responding to OMI's expert report on quantum). In any event, the tribunal spots the issue and takes it into account in determining quantum in its award without seeking further comments from the parties. In and of itself, this was not necessarily problematic. As explained above, the issue of chance of success is generally inherent in any claim for damages for lost profits based on a venture that never was. The issue was therefore arguably on the table in the arbitration and the parties had an opportunity to comment on it. This is all that due process requires.²⁴ Provided the arbitral tribunal considered it had sufficient information to assess the venture's chance of success in computing damages for lost profit,²⁵ there was no obligation for it to seek further input from the parties. But the tribunal did not discuss the issue in these terms, stating instead that it was not awarding damages for lost profits at all but something else, something OMI had not even claimed. Under these circumstances, the Court should perhaps be forgiven for understanding that the tribu-

nal's talk of "lost chance" did not merely concern the "method for evaluating the damage" — which would have been fine — but rather "modifie[d] the basis for compensation of OMI" — which was not.²⁶

Spotlight II: INSERM v. Fondation Letten F. Saugstad

The contract at issue in *INSERM* concerned the construction of a building for neurological research on land belonging to a public university in Marseille. Under the terms of the contract, the Fondation was offered the opportunity to participate in funding these public works. Disputes arose and, in May 2007, a sole arbitrator (Jean Guigue) rendered an award in France in favor of the Fondation and INSERM sought to have the award set aside in the French courts.

France, like many civil law countries, has two sets of courts. There are the administrative courts (*juridictions de l'ordre administratif*), which handle most disputes involving French public entities, and the judicial courts (*juridictions de l'ordre judiciaire*), which generally handle disputes between private parties. In seeking to have the award set aside, INSERM — a French public institution whose full name is Institut National de la Santé et de la Recherche Médicale — applied to both the Paris Court of Appeal (a judicial court) and the French Council of State (*Conseil d'Etat*, the supreme administrative court),²⁷ but asked the Court of Appeal to stay its proceedings pending the decision of the Council of State. In November 2008, the Court of Appeal rejected INSERM's request for a stay. The Court of Appeal considered that it had jurisdiction to determine INSERM's application to set aside the award, which application it rejected.²⁸

Despite this, INSERM continued to press its application that the award be set aside before the Council of State. In that regard, INSERM argued that the contract at issue was an "administrative" contract — namely, in this matter, a contract for public works — and that, as a consequence, only the French administrative courts (and not the French judicial courts) have jurisdiction to decide on the enforcement of international awards concerning administrative contracts that involve a French public entity. In July 2009, the Council of State stayed its proceedings on INSERM's application and asked the French *Tribunal des conflits* — a special court with the power to resolve serious issues

of jurisdiction between the French administrative and judicial courts²⁹ — to decide whether the French administrative courts or the French judicial courts had jurisdiction over the matter.³⁰

The *Tribunal des conflits* decided that the judicial courts had jurisdiction over INSERM's application to set aside the award. In reaching its decision, the *Tribunal* stated that applications to set aside an award in disputes arising out of contracts between a French public entity and a foreign entity to be performed in France and that involve international trade — such as that at issue in *INSERM* — should be brought before the judicial courts. The *Tribunal* emphasized that this is so even if the contract at issue constituted an "administrative" contract under French law. In the view of the *Tribunal*, this general rule did not offend the principle of the separation of administrative and judicial authorities.³¹

The *Tribunal* stated, however, that there is an exception to the general rule "where the challenge involves reviewing whether the award complies with mandatory rules of French administrative law" on (1) contracts concerning the occupancy of French public property, (2) public procurement contracts, (3) PPP contracts, or (4) contracts delegating the performance of public services.³² The *Tribunal* stated that "[t]hese contracts are governed by a mandatory administrative regime, [and] challenges to an arbitral award rendered in a dispute arising out of the performance or termination of such a contract falls under the jurisdiction of the administrative courts."³³ As the contract at issue in *INSERM* was none of these, the *Tribunal* held that the judicial courts had jurisdiction over INSERM's application to set aside the award.³⁴

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The division between administrative and judicial authorities — including the division between the administrative and judicial courts — is hardwired into the French legal system. It is also far from unique. Many civil law countries draw the same distinction. At its most elemental (and theoretical), the judicial courts are to protect "private interests" and therefore handle most disputes between private parties, and the administrative courts are to protect the "public interest"³⁵ and therefore handle most disputes involving French public entities.

In practice, however, the private and public sometimes intersect, particularly when the French State contracts with private parties for goods and services. While most such contracts are presumably domestic and do not concern international trade, some — like that at issue in *INSERM* — do and provide for arbitration in France in the event of disputes. The hybrid nature of these contracts created ambiguity as to whether applications to set aside awards flowing from such contracts should be brought before the French administrative courts or French judicial courts. The decision of the *Tribunal des conflits* in *INSERM* clarifies that such applications should be brought to the judicial courts — namely, the Court of Appeal specialized in arbitration-related matters — like nearly all other arbitration-related cases.

The exception the *Tribunal* carves out — providing that the Council of State should hear applications (1) to set aside international awards (2) in disputes arising out of contracts between a French public entity and a foreign entity (3) to be performed in France that (4) relate to a contract concerning the occupancy of French public property, public procurement contract, PPP contract or contract delegating the performance of public services — is narrow,³⁶ and may be even narrower than it first appears. To fall within the jurisdiction of the administrative courts, such an application must raise issues as to whether the award complies with mandatory rules of French administrative law. What is not clear from the decision of the *Tribunal* is whether it considers that such issues are necessarily at play on all set-aside applications involving the four contracts listed above — even, for example, applications based on the irregular constitution of the arbitral tribunal — or whether the application must expressly raise such issues for the Council of State to have jurisdiction. If it is the latter, the exception the *Tribunal* defines is so narrow that one might be forgiven for wondering whether it is a null set. Having said this, in all events, *INSERM* arguably represents an important further step towards allowing more disputes concerning French state contracts to be arbitrated.

Historically, most disputes concerning contracts for the occupancy of French public property, public procurement contracts, PPP contracts or contracts delegating the performance of public services — archetypal public interest, administrative contracts — were not arbitrable under French law and subject to

the jurisdiction of the French administrative courts. In the last fifteen years, however, French law has signalled a growing openness to allowing arbitration in these areas.³⁷ The decision in *INSERM* encourages this trend by accommodating concerns that questions as to whether an award complies with mandatory rules of French administrative law — questions directly implicating the public interest and squarely within the administrative law expertise of the Council of State — will be heard by that body. In short, *INSERM* has little (if any) effect on applications to set aside the types of awards generally rendered to date, but invites the development of a regime for reviewing awards to be rendered in areas that are just opening to arbitration.

How that regime will develop and operate in practice has yet to be seen. Rules of procedure have yet to be elaborated for applications to set aside awards subject to the *INSERM* exception.³⁸ Such rules may well end up looking a lot like the rules the judicial courts already apply with respect to such applications — Why reinvent the wheel? — but not necessarily. The decision of the *Tribunal des conflits* may also encourage industrious lawyers to litigate (in both the judicial and administrative courts, and again all the way up to the *Tribunal des conflits*) the boundaries of the *INSERM* exception and the scope of review by the Council of State. Some of the potential questions that leap to mind include the following: Is the contract underlying the challenged award really one of the four to which the *INSERM* exception applies? Does the application to set aside the award actually raise any issue regarding mandatory rules of French administrative law? Which rules of French administrative law are *mandatory* anyway? Will all rules of administrative law considered mandatory in the domestic context, necessarily be considered mandatory in the international context? Assuming the Council of State finds a violation of such a mandatory rule, should it necessarily set the award aside? Or perhaps only do so in cases where enforcement of the award would violate French international public policy in a blatant, real and concrete way? In short, will the Council of State treat awards subject to the *INSERM* exception any differently from the way the judicial courts would have treated them and, if so, how? Pending answers to these questions, parties entering into contracts that might arguably fall within the *INSERM* exception may wish to sidestep them by

negotiating that the seat of any potential arbitration be outside France.

See Also

In this issue's SEE ALSO section, we present the case summaries in chronological order.

Enforcement Of Awards • Scope Of Arbitral Tribunal's Mission • Due Process • International Public Policy

In *Groupe Antoine Tabet SA [Lebanon] v. Republic of Congo* (14 January 2010),³⁹ the Paris Court of Appeal declined to annul a fourth partial award issued in an ICC arbitration seated in Paris.⁴⁰ In 1992 and 1993, the parties entered into two contracts governed by French law under which Groupe Antoine Tabet (GAT) was to finance public works to be done in Congo. Disputes arose and Congo filed for arbitration against GAT with the ICC pursuant to the arbitration agreements in the contracts. The tribunal issued a series of partial awards, including a fourth in February 2008. In that award, the arbitral tribunal, among other things, (1) rejected GAT's request that it retract its second partial award⁴¹ despite GAT's allegations that that award resulted from Congo's having submitted false documents to the tribunal, (2) listed the amounts paid between the parties and their dates of payment, (3) decided that an interest rate of 10% applied until 31 December 2004, and 4.5% thereafter, to certain monies Congo was to pay to GAT under one of the contracts, which the tribunal had found (in its second partial award) to be a current account agreement, (4) found GAT liable for damages flowing from its failure to comply with provisional measures at issue in the tribunal's third partial award, and (5) refused to order that interest be compounded.

GAT asked the Court of Appeal to annul the fourth partial award with respect to these decisions. Specifically, and among other things, GAT contended that the tribunal had acted outside the scope of its mission in finding one of the two contracts to be a current account agreement and had in fact acted as *amiable compositeur* in determining the interest rates applicable to the monies Congo owed GAT under that contract, as its interest determination was not in accordance with French law. GAT also contended that the tribunal had violated due process in (1) characterizing that contract as a current account agreement and (2) ordering payment of 4.5% interest post-31

December 2004 on monies due under that contract, because the parties had not had an opportunity to be heard on these issues. Finally, GAT contended that the fourth partial award should be set aside as contrary to international public policy. In this regard, GAT contended that (1) the tribunal's interest rate decisions in the fourth partial award conflicted with decisions it took in its second partial award, (2) the tribunal could not find GAT liable for damages for non-compliance with the provisional measures in the third partial award because the tribunal had reserved in the fourth partial award its decision on the parties' request to modify those measures, and (3) the fourth partial award flowed from an alleged fraud Congo committed in failing to produce material documents and in submitting forged documents to the arbitral tribunal, documents that were allegedly essential to the tribunal's determinations.⁴²

The Court rejected GAT's application in its entirety. The Court noted that the tribunal's decision to characterize one of the contracts as a current account agreement was not taken in its fourth partial award — the award at issue — but rather in its second, which was not before the Court. The Court rejected GAT's arguments based on the second partial award as irrelevant to its consideration of the fourth. Further, in rejecting GAT's request that it retract its second partial award, the tribunal confined itself to considering the authenticity of the documents Congo submitted, how those documents were obtained and whether they were pertinent to the issues at stake in the arbitration. Moreover, concerning the tribunal's decision to impose a 4.5% interest rate, the Court found that the arbitral tribunal acted within the scope of its mission in applying general principles of French law to assess the common intent of the parties with respect to interest. Similarly, on the issue of due process, the Court noted that, prior to the rendering of the fourth award, the Republic of Congo requested that the French legal rate apply to sums due under the current account agreement as from July 2002 (or at the latest from the rendering of the third award), whereas GAT had requested that the contractual rate of 10% should apply until the rendering of the fourth award. In light of this, the Court found that (1) the principle of reducing the interest rate was on the table in the arbitration, and (2) the tribunal was under no obligation to submit its reasoning to the parties for comment before rendering its award. The tribunal

therefore did not violate due process in fixing an interest rate of 4.5% as from 1 January 2005.

The Court likewise found that recognition and enforcement of the award would not violate international public policy. Specifically, the Court found that GAT could not rely upon the second partial award to allege it conflicted with the fourth, since the second was not before the Court. In any event, the Court found no contradiction between the interest decisions taken in the second and fourth partial awards, as the decisions at issue concerned two different contracts. With respect to the third partial award, the Court noted that the tribunal had rejected GAT's request that it retract that award and had not granted any stay with respect to the provisional measures that GAT had violated. Moreover, GAT had failed to explain how enforcement of the tribunal's decisions in this regard would violate international public policy since its request for modification of the third partial award did not suspend execution of that award. Finally, the Court noted that the tribunal had rejected GAT's request that it retract its second partial award after considering the documents Congo had allegedly forged, as well as those it had withheld, and finding them immaterial to the tribunal's decision. In these circumstances, the Court found that GAT's public policy argument on this score was no more than an attempt to have the Court revisit the merits of the tribunal's decision, something the Court was not empowered to do.

Enforcement Of Awards • Existence Of An Arbitration Agreement • Waiver Of Right To Arbitrate • Estoppel • Scope Of Arbitral Tribunal's Mission

In *Inversiones Errazuriz Limitada SA [Chile] v. Kreditanstalt für Wiederaufbau [Germany]* (21 January 2010),⁴³ the Paris Court of Appeal rejected the application of *Inversiones Errazuriz Limitada* (Inverraz) to set aside an October 2007 award rendered in an ICC arbitration in Paris. Inverraz is the holding company of a Chilean corporate group involved in a variety of economic sectors. Kreditanstalt für Wiederaufbau (KfW) is a state-owned bank that specializes in making loans related to the export of German goods abroad. In 1995, the parties entered into two contracts, subject to German law, pursuant to which KfW financed Inverraz's purchase of certain German equipment (the "Financing Contracts"). The Financing

Contracts were later amended to increase the amount of Inverraz's credit and require Inverraz to issue promissory notes for each individual loan granted under the Financing Contracts. It was expressly agreed that the issuance of the notes would not affect the parties' rights and obligations under the loans. In 2002, Inverraz defaulted on its debt obligations and KfW filed a number of court actions in Chile, while also negotiating a restructuring of Inverraz's debt, which led to the parties signing a Protocol Agreement and a Settlement Agreement. In 2005, KfW filed for arbitration with the ICC, pursuant to the terms of the arbitration clauses in the Financing Contracts. In its final award, the tribunal granted KfW over USD 48 million in principal and interest due under the Financing Contracts.

Inverraz applied to the Paris Court of Appeal to set the award aside on the grounds that the arbitral tribunal lacked jurisdiction and had acted outside the scope of its mission. Specifically, Inverraz argued that the tribunal had no jurisdiction to decide the parties' dispute because KfW tacitly waived its right to arbitrate. Inverraz contended that KfW waived its right to arbitrate by filing actions in the Chilean courts to force the liquidation of both Inverraz and Unimarc (a subsidiary of Inverraz) and to obtain recognition of a signature on a promissory note issued in connection with the Financing Contracts, as well as recognition of the debt owed under that note. Inverraz also claimed that KfW waived its right to arbitrate by entering into the Protocol Agreement, which provided for the jurisdiction of the German courts, and the Settlement Agreement, which contained no arbitration clause and provided for a waiver of all current or future actions by the parties. According to Inverraz, the parties abandoned their right to arbitrate under the Financing Contracts by entering into the Settlement Agreement. Inverraz also argued that KfW was estopped from bringing a claim in arbitration because KfW had previously and consistently contended in the Chilean courts that the German courts had jurisdiction over Inverraz's 2003 request that payments under one of the promissory notes issued in connection with the Financing Contracts be rescheduled. Finally, Inverraz argued that the tribunal exceeded the scope of its mission in taking decisions concerning the Settlement Agreement, which the Chilean Supreme Court had said was subject to the jurisdiction of the German courts. For its part, KfW both opposed the

merits of Inverraz's application and contended that it was inadmissible because Inverraz had failed to make its objections before the arbitral tribunal and was therefore barred from complaining before the Court of Appeal.

The Court of Appeal first found that Inverraz's application to set aside the award was admissible. The Court noted that Inverraz had raised jurisdictional objections at the outset of the arbitration and thereafter decided not to participate in the arbitration. Under these circumstances, the Court concluded that Inverraz could not be criticized for having failed to raise any objection before the tribunal. The Court went on, however, to reject Inverraz's application in its entirety. With respect to waiver, the Court noted that a party can only tacitly waive its right to arbitrate if its intention to do so is beyond any doubt. Neither the limited action KfW brought in the Chilean courts to obtain recognition of a signature on a promissory note (which is a specific action concerning an autonomous instrument), nor its action to force the liquidation of Unimarc (an action that could only be brought in the Chilean courts and that did not concern KfW's contracts with Inverraz), were sufficient to establish that KfW intended to waive its right to arbitrate disputes related to the Financing Contracts. Moreover, for the Court, Inverraz's 2003 request that the Chilean courts reschedule payments due under a promissory note was outside the scope of the arbitration agreements in the Financing Contracts. Accordingly, KfW's objection that Inverraz's request be brought in the German courts — which did not involve making any submissions on the merits of the request — did not evidence any intent on the part of KfW to waive its rights under the arbitration agreements contained in the Financing Contracts, nor could it serve as a basis for finding KfW estopped from bringing claims to arbitration. The Court also found that the Protocol Agreement, which only concerned the rescheduling of Unimarc's debt, did not support a finding that KfW intended to waive its right to arbitrate disputes with Inverraz, as that Agreement did not affect the legal relationship between KfW and Inverraz. The Court likewise found that the Settlement Agreement did not support a finding that KfW had waived its right to arbitrate because it did not contain any provision to that effect. On the contrary, in addressing the scope of the tribunal's mission, the Court found that any disputes

concerning the Settlement Agreement fell within the scope of the arbitration agreements in the Financing Contracts, and that the arbitral tribunal therefore did not exceed its mission in taking decisions with respect to that Agreement.

**Enforcement Of Awards • Irregular
Constitution Of Arbitral Tribunal •
Consolidation • Amiable Composition •
Scope Of Arbitral Tribunal's Mission •
International Public Policy • Estoppel**

In *Alea Europe Ltd. [Switzerland] v. Liquidators of Compagnie Internationale de Caution pour le Développement [France]* (18 February 2010),⁴⁴ the Paris Court of Appeal set aside part of an award rendered in Paris in April 2008 on the grounds that the arbitral tribunal failed to comply with its mission. Compagnie Internationale de Caution pour le Développement (ICD) filed a series of arbitrations before the same arbitral tribunal against Alea, a reinsurer — one arbitration under each contract between the parties. All but one of the arbitration clauses provided that the tribunal was to decide the parties' dispute as *amiable compositeur*. The tribunal — which was identical to the tribunal at issue in the *Globale Re*, *Riverstone* and *Gothaer Re* cases, also involving ICD and summarized in the SEE ALSO section of the March 2010 issue of *A View From Paris* — ultimately invited the parties to make consolidated submissions for all of the Alea arbitrations and rendered a single award ordering Alea to pay certain amounts to ICD.

In seeking to have the Court of Appeal set aside the award, Alea argued, among other things, that the arbitrator appointed by ICD violated the secrecy of deliberations in the arbitration at issue in *Globale Re* when he informed ICD of the content of an addendum before it was rendered in that case in September 2009. Alea contended that this showed that the arbitrator was partial and that his presence in the Alea arbitration rendered the arbitral tribunal irregularly constituted. Alea also argued that the award breached international public policy because ICD did not provide evidence for certain amounts awarded. Finally, Alea complained that the tribunal improperly consolidated the proceedings and failed to comply with its mission. Specifically, Alea argued that the tribunal decided on all contracts as *amiable compositeur* when one of the arbitration agreements at issue did not vest the tribunal with these powers. As a consequence, the

award violated the arbitration agreement that did not call for *amiable composition*.

The Court of Appeal first rejected Alea's contention that the tribunal had been irregularly constituted. The Court reasoned that Alea could not rely on issues arising out of an arbitration to which it was not a party (namely, the arbitration at issue in *Globale Re*) and had failed to explain how facts occurring more than a year after the award was rendered in the Alea arbitration could have affected that award. Further, the Court rejected Alea's international public policy arguments because (1) Alea had failed to demonstrate the violation was actual, blatant and concrete, and (2) the arbitral tribunal had acted within the scope of its mission when determining the amounts due and had not decided on the basis of a complete lack of evidence. In this respect, the Court found that Alea's allegations were actually designed to have the Court review the merits of the award, which the Court cannot do. Finally, the Court considered Alea estopped from complaining that the proceedings had been improperly consolidated because Alea had spontaneously filed consolidated submissions without objection during the arbitration proceedings. However, the Court noted that the tribunal had decided on all claims as *amiable compositeur*. The tribunal had therefore failed to comply with its mission in respect of the one arbitration agreement that did not provide for *amiable composition*. The Court accordingly set aside that part of the award that ordered payment under the contract containing this arbitration agreement.

Enforcement Of Awards • Due Process

In *Fédération Française d'Etudes et de Sports Sous-Marins* [France] *v. Cutner & Assocs. P.C.* [United States] (25 February 2010),⁴⁵ the Paris Court of Appeal upheld a September 2008 enforcement order of the President of the Paris First Instance Court (*Tribunal de Grande Instance* (TGI)) on an award rendered by a sole arbitrator in New York City in June 2007 in an AAA arbitration. The award ordered Fédération Française d'Etudes et de Sports Sous-Marins (Fédération), its President and General Secretary (all three together, FFESSM) jointly and severally to pay certain sums to Cutner. The arbitration was initiated in accordance with the AAA arbitration clause contained in the parties' contract, which was drafted in English. FFESSM did not participate in the arbitration.

Before the Court of Appeal, the Fédération, its President and General Secretary (all domiciled outside Paris) argued, among other things, that (1) the President of the Paris TGI neither had subject-matter nor territorial jurisdiction to grant the enforcement order, and that it was the *juge de l'exécution*⁴⁶ of their domicile, or of the place where execution of the award is sought, that had jurisdiction, (2) due process had been violated because they had not been notified of the arbitrator's appointment and because the arbitration was conducted in English, and (3) Cutner misled the arbitrator in obtaining an award against FFESSM when only the Fédération was a party to the contract.

In dismissing FFESSM's application, the Court of Appeal noted that only the President of the TGI has subject-matter jurisdiction to grant enforcement orders on awards and the President of the Paris TGI has territorial jurisdiction in international disputes like this one. The Court further noted that FFESSM had been informed of every step in the arbitration and that article 14 of the AAA International Arbitration Rules provides that, absent agreement of the parties or decision of the tribunal to the contrary, the language of arbitration shall be that of the documents containing the arbitration agreement (in this case, English). Accordingly, due process had not been violated. Finally, the Court noted that the Fédération, its President and General Secretary all signed the contract with Cutner on their own behalf. Under these circumstances, the Court rejected FFESSM's argument that Cutner misled the arbitrator to render an award against all three as an attempt to have the Court review the merits of the award, which the Court cannot do.

Enforcement Of Agreements To Arbitrate • Competence-Competence

In *Pacific Auto* [France] *v. Komatsu Asia & Pac. PTE Ltd.* [Singapore] (17 March 2010),⁴⁷ the Supreme Court vacated a decision of the Noumea Court of Appeal (French Polynesia) affirming the decision of the Noumea Commercial Court taking jurisdiction over a dispute between Pacific Auto and Komatsu Asia & Pacific (KAP). Pacific Auto and KAP entered into a contract containing a dispute resolution clause providing for arbitration under the rules of the Singapore International Arbitration Centre (SIAC). Separately, an affiliate of Pacific Auto entered into similar contracts with Komatsu Japan and Komatsu Australia that provided, respectively, for disputes to be resolved

through arbitration in Tokyo and before the New South Wales courts. Following termination of the contracts, Pacific Auto brought tort claims against all three Komatsu companies before the Noumea Commercial Court. KAP raised jurisdictional objections in light of its arbitration agreement with Pacific Auto. The Noumea Commercial Court, as affirmed by the Noumea Court of Appeal, retained jurisdiction on the grounds that Pacific Auto's claims were indivisible and that the dispute resolution clauses in all contracts were incompatible.

KAP appealed the Noumea Court of Appeal decision before the Supreme Court, where Pacific Auto submitted, among other things, that KAP's appeal was inadmissible because the decision on jurisdiction did not terminate the proceedings. The Supreme Court first noted that appeals before it are immediately admissible where a judge exceeds his powers, as is the case where a judge takes jurisdiction in breach of the principle of competence-competence. Pursuant to that principle, a court must decline jurisdiction in the face of an arbitration agreement unless that agreement is manifestly void or manifestly inapplicable. The Court then found that the alleged indivisibility of Pacific Auto's claims did not affect the applicability of the arbitration agreement contained in the contract between Pacific Auto and KAP and, accordingly, reversed the decision of the Noumea Court of Appeal.

Enforcement Of Awards • International Public Policy • Due Process

In *Federal State Unitary Russian Satellite Commc'ns Co. [Russia] v. Orion Satellite Commc'n Inc. [British Virgin Islands]* (18 March 2010),⁴⁸ the Paris Court of Appeal upheld a Paris TGI enforcement order granted on an award rendered in Moscow in December 2004 by a sole arbitrator in an arbitration under the rules of the International Commercial Arbitration Court at the Chamber of Commerce & Industry of the Russian Federation. The award, among other things, ordered the Federal State Unitary Russian Satellite Communications Company (RSCC), a Russian "unitary company" whose assets are under the supervision of the Federal Agency for State Property Management (Federal Agency), to transfer shares in a third-party company to Orion Satellite Communication.

Before the Court of Appeal, RSCC alleged that the award violated international public policy because,

under Russian law, RSCC has no right to freely dispose of its assets, which are legally owned by the Federal Agency. RSCC also argued that, because the Federal Agency was the legal owner of RSCC's assets, the Federal Agency was a necessary party to the arbitration, and the arbitral tribunal had therefore violated due process because the Federal Agency was not in fact a party to the arbitration. In rejecting RSCC's application, the Court noted that the alleged violation of public policy was only based on Russian law, and that the Russian expert opinion before the Court did not expressly state that RSCC had no right to freely dispose of its assets. Moreover, RSCC did not explain how enforcement of the award would violate French international public policy, nor how the absence of the Federal Agency in the arbitration resulted in a due process violation.

Enforcement Of Awards • International Public Policy • Scope Of Arbitral Tribunal's Mission

In *Chantiers de l'Atlantique SA [France] v. Gaz Transport et Technigaz [France]* (1 April 2010),⁴⁹ the Paris Court of Appeal upheld an order of the Paris TGI enforcing an award rendered in London in February 2009. In December 2001, the parties entered into a technology licensing agreement in connection with the construction of three ships for transporting gas. Disputes arose and Chantiers de l'Atlantique (CAT) filed for arbitration with the ICC. The tribunal dismissed the claims of CAT and awarded Gaz Transport et Technigaz (GTT) over EUR 3 million. The Paris TGI issued an order enforcing the award. CAT asked the Court of Appeal to vacate the enforcement order on two grounds. First, CAT contended that recognition and enforcement of the award would be contrary to international public policy. Specifically, CAT alleged that, after the TGI issued its enforcement order rumors circulated that GTT had provided false information and forged documents to the tribunal and had failed to produce documents it was obliged to produce. In support of its allegations of misrepresentation, CAT submitted witness testimony to the Court of Appeal, but no documentary evidence supporting its contentions because confidentiality restrictions allegedly prevented CAT from doing so. In light of this, CAT also commenced a criminal action against GTT, which CAT submitted would shed light on the alleged facts and asked the Court of Appeal to stay its decision pending the outcome of the criminal case. Second, CAT contended that the arbitral tribu-

nal had failed to act in accordance with its mission because decisions in certain paragraphs of its award started with the sentence “Having examined the parties’ positions and supporting documents, the Arbitral Tribunal considers,” and were therefore not reasoned, as required by the ICC rules.

The Court rejected all of CAT’s arguments and upheld the order enforcing the tribunal’s award. With respect to CAT’s request for a stay, the Court noted that it was not obliged to stay its proceedings in light of a related criminal action, even where that action bears directly on the issues before the Court of Appeal.⁵⁰ In the present case, however, CAT had failed to provide any evidence that the issues at stake in the criminal case would necessarily impact the issues before the Court of Appeal at all. With respect to CAT’s public policy arguments, the Court found that CAT had failed to demonstrate that (1) GTT had falsified documents, (2) GTT even had the documents it allegedly failed to produce, or (3) the unproduced documents would have made any difference to the tribunal’s decision. The Court also questioned whether CAT had really learned of the alleged non-production only after the tribunal had rendered its award. Finally, with respect to the reasoning in the award, the Court noted that the length of the award — 247 pages and 1,417 paragraphs — in and of itself showed that the award was scrupulously reasoned, regardless of whether CAT disliked that reasoning. Moreover, the Court found that the five paragraphs at issue represented conclusions reached after a thorough examination of the parties’ positions, and that an attentive reading of the award showed that CAT’s complaints on this score were unfounded.

Enforcement Of Awards • Existence Of An Arbitration Agreement • Irregular Constitution Of The Arbitral Tribunal • International Public Policy

In *Air Namibia (PYT) Ltd. [Namibia] v. Receiver of Challengair SA [Belgium]* (8 April 2010),⁵¹ the Paris Court of Appeal rejected the application of Air Namibia to set aside a partial award rendered by a sole arbitrator in Paris under the UNCITRAL rules in August 2008. In March 1998, Challengair entered into a contract to sub-lease an aircraft to a company called Transnamib Holdings Ltd. The same parties also entered into a related aircraft maintenance contract. In connection with these arrangements, Transnamib

was represented by Air Namibia. The two contracts contained dispute resolution clauses providing for arbitration under the International Air Transport Association (IATA) rules. Shortly thereafter, in July 1998, Challengair filed for bankruptcy in the Belgian courts. In light of disputes concerning the contracts, the receiver of Challengair filed for arbitration with IATA in May 2001 against both Transnamib and Air Namibia (together, Namibia) and an arbitrator was appointed. In December 2005, however, the parties entered into a new arbitration agreement to arbitrate under the UNCITRAL rules instead. A new sole arbitrator was then appointed pursuant to those rules and rendered the partial award at issue in favor of Challengair.

Namibia asked the Paris Court of Appeal to set aside the partial award on the grounds that there was no agreement to arbitrate between the parties, that the tribunal had been irregularly constituted and that recognition and enforcement of the award would violate French international public policy. Specifically, Namibia contended that the agreement to arbitrate under the UNCITRAL rules was null and void because the Belgian court had not authorized the receiver of Challengair to enter into that agreement, as required by Belgian law as a matter of Belgian public policy. This being the case, Namibia argued that both the appointment of the sole arbitrator and the award were likewise null and void, and enforcing the award under these circumstances would be contrary to French international public policy.

The Court of Appeal rejected Namibia’s application in its entirety. As a preliminary matter, the Court found Namibia’s application inadmissible to the extent it contended that there was no agreement to arbitrate and that the tribunal had been irregularly constituted. Namibia had failed to raise these points during the course of the arbitration and therefore could not complain now. With respect to Namibia’s international public policy argument, the Court noted that Namibia’s failure to raise this argument before the arbitral tribunal did not preclude it from raising it now. Namibia’s application to set aside the award was therefore admissible to that extent. The Court found, however, that Namibia had failed to demonstrate that enforcement of the award would violate a fundamental principle of bankruptcy law. In this regard, the Court noted that, in their contracts (which pre-dated

Challengair's filing for bankruptcy) the parties had agreed to settle disputes through IATA arbitration, which the receiver, who had been regularly appointed, had pursued in good faith; the decision to change the arbitrator and the rules was of little importance. The arbitrator went on to render an award in favor of the bankrupt party. Under these circumstances, Namibia had failed to demonstrate that enforcing the award would violate French international public policy in a blatant, actual and concrete manner.

Enforcement Of Awards • Award v. Procedural Order

In *NYKCool AB* [Sweden] *v. Fruidor SA* [France] (15 April 2010),⁵² the Paris Court of Appeal rejected the application of NYKCool to set aside an "interlocutory award" rendered by an arbitral tribunal in February 2008 pursuant to the rules of the *Chambre Arbitrale Maritime de Paris*. There, the tribunal took a variety of procedural decisions, including decisions concerning a request to stay proceedings, production of documents and the procedural calendar. In response to NYKCool's set aside application, Fruidor contended that the interlocutory award was not in fact an award at all, and that the set-aside action should therefore be dismissed as inadmissible. The Court of Appeal agreed, finding that the interlocutory award contained only procedural decisions that in no way concerned the merits of the dispute and therefore could not be subject to an action for setting aside.

Enforcement Of Agreements To Arbitrate • International v. Domestic Arbitration • Competence-Competence

In *Georges E.* [France] *v. Nest* [Denmark] (12 May 2010),⁵³ the Supreme Court upheld a decision of the Paris Court of Appeal⁵⁴ confirming a lower court decision that declined jurisdiction over Georges E.'s action to void certain contracts he had with Nest — contracts that contained an arbitration clause referring to the Danish Arbitration Institute. The Court of Appeal had found the contracts to be international in character in light of the economic relationships between the parties and considered that the requirements for the validity of domestic arbitration agreements therefore did not apply to the arbitration clause at issue. The Court of Appeal had accordingly declined Georges E.'s invitation to find the clause void under French domestic arbitration law.

Before the Supreme Court, Georges E. argued that the contract did not involve the cross-border movement of any goods or payments. The arbitration clause was therefore domestic, not international. Georges E. also argued that, even if the arbitration clause were international, it was void under French consumer law. Georges E. finally contended that the Court of Appeal should have examined whether the cost of arbitrating the dispute affected his rights to a fair trial under the European Convention on Human Rights.

In rejecting Georges E.'s application in its entirety, the Supreme Court noted that, according to the competence-competence principle, arbitrators have a priority to decide on their jurisdiction, unless the arbitration agreement is manifestly void or manifestly inapplicable. The Court of Appeal had found that the transaction at issue involved the assignment of intellectual property rights to a Danish company and transfer to that company of all the resulting worldwide income. That transaction accordingly concerned the movement of goods and payments across borders and the Court of Appeal therefore correctly applied French international arbitration law in sending the parties to arbitration.

Endnotes

- * This article represents the personal views of the authors and should not be interpreted to represent the views of HERBERT SMITH LLP. Annaïg Combe, an intern at BENSUADE, assisted in the preparation of this article.
- 1. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 25 Mar. 2010, case no. 08/23901. An English translation of *Caribbean Niquel* is annexed. Page citations to the decision are to the translation.
- 2. Tribunal des conflits [TC], 17 May 2010, case no. 3754. An English translation of *INSERM* is annexed. Page citations to the decision are to the translation.
- 3. See *Caribbean Niquel* at 2-3.

4. *See Caribbean Niquel* at 3. According to CCN, the issue of damages for lost chance had only been raised in connection with CCN's counterclaim, which the tribunal dismissed in its entirety. *See id.*
5. *See id.*
6. *See id.*
7. As noted in the accompanying English translation of *Caribbean Niquel* (*see* Translator's Note iii), it appears that the tribunal's award was not originally written in French. It was probably written in English, but the language of arbitration is not specified in the Court's decision and we do not have a copy of the original award. As a consequence, our comments on what the award said are based on the few excerpts that were translated into French and included in the Court's decision. We have no way of knowing the quality of that translation, nor do we have the benefit of seeing the quoted excerpts in context.
8. *See Caribbean Niquel* at 3 (quoting from the award) (internal quotation marks omitted).
9. *Id.* at 3-4 (quoting from the award) (internal quotation marks omitted).
10. *Id.* at 4 (quoting from the award) (internal quotation marks omitted).
11. *Id.* (quoting from the award) (internal quotation marks omitted).
12. *Id.* (quoting from the award) (internal quotation marks omitted).
13. *Id.*
14. *See* French Code of Civil Procedure (CPC) articles 1502-4 and 1504.
15. *See Citel v. Eamonn M.*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 12 Jun. 2003, case no. 2001/16937; *C.C.M. Sulzer v. Somgec*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section Supp.), 27 Nov. 1987, case no. 86/4787. Because due process forms part of French international public policy, an alleged denial of due process may also provide grounds to challenge enforcement of an award under CPC article 1502-5.
16. *See* FOUCHARD, GAILLARD & GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1639 (Emmanuel Gaillard & John Savage eds., Kluwer 1999) (discussing what due process requires under French international arbitration law).
17. *See Engel Austria GmbH v. Don Trade*, Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 3 Dec. 2009, case no. 08/13618 (setting aside an award based on an issue of Austrian law, where the award stated that the parties had not had an opportunity to address the issue), summarized in the SEE ALSO section of the March 2010 issue of *A View From Paris*. *See also Thyssen Stuhlunion v. Maaden*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 6 Apr. 1995, case no. 93/17055 (observing that the "principle of due process implies that the arbitral tribunal cannot introduce any new legal or factual issue without inviting the parties to comment on it"), discussed in FOUCHARD, GAILLARD & GOLDMAN ¶ 1639.
18. *Cf.* FOUCHARD, GAILLARD & GOLDMAN ¶ 1639 (explaining that, for example, "where the rule relied upon by the arbitrators is so general in nature that it must have been implicitly included in the pleadings . . . the arbitrators can dispense with the need to call for a specific discussion on that point").
19. The tribunal is likewise not obliged to seek the parties' comments on issues that are ancillary to the decisions it takes (i.e., *dicta*). *See CIECH v. Comexport Companhia de Comercio Exterior*, Cour de cassation [Cass. 1e civ.] [supreme court], 6 May 2009, case no. 07-20.345 (rejecting a due process challenge to an award because the issue the parties had not had an opportunity to debate was immaterial to the tribunal's decision), summarized in the SEE ALSO section of the August 2009 issue of *A View From Paris*.
20. *See supra* note 7.
21. *Caribbean Niquel* at 4 (quoting from the award) (internal quotation marks omitted).

22. *Id.* (quoting from the award) (internal quotation marks omitted).
23. The French courts recognize that, depending on the circumstances of the case, evaluating damages in international arbitration can sometimes be more of an art than a science. Arbitral tribunals seated in France generally enjoy substantial latitude in how they go about assessing quantum, and French courts generally frown on complaints that a tribunal arrived at figures different than those urged by the parties. For a good example of that approach, in the context of an interest rate determination, see *Groupe Antoine Tabet SA v. Republic of Congo* (dismissing a due process challenge to an award setting an interest rate between those the parties advocated), summarized in the SEE ALSO section of this issue of *A View From Paris*.
24. Indeed, there is something a bit rich about CCN's complaint before the Court of Appeal. Had the tribunal (wrongly) granted OMI 100% of the projected lost profits of the venture, without taking into account the venture's chance of success, CCN would have been on the hook for more money and there would have been no grounds to set aside the award. Instead, the arbitral tribunal (properly) takes chance of success into account — despite CCN's apparent failure to address the issue — and orders CCN to pay merely a fraction of what OMI sought, only to have CCN complain that it was denied due process and that the award should be set aside. *Note to arbitrators everywhere*: no good deed goes unpunished.
25. Assessing the chance of success of a foregone venture can often be a fact-intensive and speculative exercise. Depending on the venture at issue, a tribunal might wish to consider everything from the barriers to entry facing potential new competitors to the stability of global credit markets to the chance of natural disaster. In light of this, the value of getting fulsome submissions from the parties on the pertinent issues is obvious. On what basis the tribunal in *Caribbean Niquel* assessed the chance of success of the mining venture in arriving at its award of damages is not explained in the Court's decision.
26. See *Caribbean Niquel* at 4.
27. INSERM initially filed its application to set aside the award with the administrative courts in Marseille. Its application was thereafter put before the Council of State.
28. See *INSERM v. Fondation Letten F. Saugstad*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 13 Nov. 2008, case no. 08/00760, summarized in the SEE ALSO section of the February 2009 inaugural issue of *A View From Paris*.
29. Article R. 771-2 of the French Code of Administrative Justice provides that, where a court has to render a final decision on a serious issue (*une difficulté sérieuse*) concerning the separation of jurisdiction between the administrative courts and the judicial courts, the court may refer the issue to the *Tribunal des conflits*.
30. See *INSERM v. Fondation Letten F. Saugstad*, Conseil d'Etat [council of state], 31 Jul. 2009, case no. 309277, summarized in the SEE ALSO section of the December 2009 issue of *A View From Paris*.
31. See *INSERM* at 3.
32. See *id.*
33. *Id.*
34. See *id.*
35. The public interest (*intérêt général*) is difficult to define in the abstract. Generally speaking, however, public interest activities are those that are not-for-profit, long term and for the benefit of the public at large. Most traditionally, these include, among other things, education, infrastructure, fire and safety and public health services. See Pierre-Laurent Frier, *PRÉCIS DE DROIT ADMINISTRATIF* ¶¶ 306-309 (Montchrestien, 2d ed. 2003) (explaining the concept of public interest under French law) (in French).
36. It bears emphasizing that *INSERM* only addresses applications to set aside awards and in no way affects the jurisdiction of the judicial courts over other arbitration-related applications (e.g., aid in constituting the arbitral tribunal) or challenges to the enforceability of foreign arbitral awards (i.e., awards rendered outside France).
37. See, e.g., Ordinance of 17 June 2004, no. 2004-559 (permitting the use of arbitration to settle disputes

- with respect to PPP contracts). *See also* Pierre Heitzmann, *The Contrat de Partenariat: A New Form of French Public Private Partnership Allowing the Use of Arbitration to Adjudicate Disputes*, Int'l Const. Law Review 20 (2006).
38. In 2007, and upon the initiative of the French Ministry of Justice, a working group from the Council of State prepared a report and suggested a draft law on the use of arbitration by French public entities and bodies (the *Labetoulle* report). The draft law was not enacted, however.
39. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 14 Jan. 2010, case no. 08/06826.
40. This case is related to the Paris Court of Appeal's prior decision in *Groupe Antoine Tabet SA v. Republic of Congo*, Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 29 Oct. 2009, case no. 08/18544 (rejecting the application of Groupe Antoine Tabet (GAT) to set aside a procedural order that GAT contended was in fact an award that had not been scrutinized by the ICC Court in accordance with the ICC rules). That decision concerns the tribunal's third partial award and is summarized in the SEE ALSO section of the March 2010 issue of *A View From Paris*.
41. The tribunal rendered the second partial award on 4 June 2002. On 14 May 2009, the Paris Court of Appeal declared inadmissible GAT's request to set that award aside because GAT had acquiesced in the award when GAT (1) informed Congo in June and July 2002 that it intended to enforce that award, and (2) relied on the terms of the award in further proceedings before the arbitral tribunal in January 2003. *See* Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 14 May 2009, case no. 08/06824.
42. GAT also asked the Court of Appeal to strike from the record a document Congo had submitted in the proceedings GAT brought to set aside the second partial award. The Court rejected this request on the grounds that GAT had failed to articulate any basis to support it.
43. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 21 Jan. 2010, case no. 08/19673.
44. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 18 Feb. 2010, case no. 08/22135.
45. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 25 Feb. 2010, case no. 08/22780.
46. In France, the *juge de l'exécution* is, among other things, the judge in charge of the enforcement of judgments. The term *juge de l'exécution* does not have an exact equivalent in English.
47. Cour de cassation [Cass. 1e civ.] [supreme court], 17 Mar. 2010, case no. 08-21641.
48. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 18 Mar. 2010, case no. 08/20998.
49. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 1 Apr. 2010, case no. 09/07068.
50. Article 4 of the French Code of Criminal Procedure grants the Court of Appeal discretion as to whether or not to stay its proceedings pending related criminal proceedings. *See, e.g., SOERNI v. ASB Air Sea Broker Ltd.*, Cour de cassation [Cass. 1e civ.] [supreme court], 8 Jul. 2009, case no. J 08-16.025, summarized in the SEE ALSO section of the December 2009 issue of *A View From Paris*.
51. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 8 Apr. 2010, case no. 08/21144.
52. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 15 Apr. 2010, case no. 08/19111.
53. Cour de cassation [Cass. 1e civ.] [supreme court], 12 May 2010, case no. 09-11872.
54. The decision of the Court of Appeal is summarized in the SEE ALSO section of the May 2009 issue of *A View From Paris*. ■

PARIS COURT OF APPEAL^[i]
Division 1 – Chamber 1
Decision of 25 March 2010

Docket number: **08/23901**

APPLICATION TO SET ASIDE an arbitral award of 10 October 2008 rendered in Paris by the arbitral tribunal made up of Dr. Julio Fernandez de Cossio, Mr. Jan Paulsson and Mr. Horacio A. Grigera Naón, chairman.

APPLICANT:

COMMERCIAL CARIBBEAN NIQUEL

With its registered office at Reparto 5 de Diciembre Rolo Monterrey, Municipio Moa,
Provincia Holguin – CUBA
Acting through its chairman, Mr. Cristobal SAAVEDRA

Represented by SCP DUBOSCQ-PELLERIN
avoués à la Cour^[ii]

DEFENDANT:

OVERSEAS MINING INVESTMENTS LIMITED

With its registered office at 26 New Street, St Helier,
Jersey, Channel Islands JE2 3RA

Represented by SCP FISSELIER-CHILOUX-BOULAY
avoués à la Cour
Assisted by Mr. Louis Christophe DELANOY of BREDIN PRAT AARPI
Lawyer at the Paris Bar
Cloakroom T 12

THE COURT:

The case was heard in a public session on 25 February 2010 and the report was read out before the Court, comprising:

Mr. PERIE, President
Ms. BADIE, Judge
Ms. GUIHAL, Judge

Who deliberated thereupon.

Clerk during the hearing: Ms. FALIGAND

DECISION:

- rendered after hearing all parties,
- deposited with the Court Clerk's office, with prior notice given to the parties in accordance with the conditions set out in paragraph 2 of article 450 of the Code of Civil Procedure [CPC],
- signed by Mr. PERIE, President, and by Ms. Raymonde FALIGAND, Clerk present when the ruling was made.

By contract of 12 September 1998, COMMERCIAL CARIBBEAN NIQUEL SA (CCN) and OVERSEAS MINING INVESTMENTS Ltd (OMI) decided to create a joint venture to exploit nickel deposits in Cuba.

The cooperation agreement was terminated by CCN; disputing CCN's asserted grounds [for termination], OMI submitted a request for arbitration governed by the UNCITRAL rules of arbitration in accordance with the arbitration clause contained in the agreement.

By way of an award rendered in Paris on 10 October 2008, the arbitral tribunal made up of Horacio A. Grigera Naón, chairman, and Jan Paulsson and Julio Fernandez de Cossio Rodriguez, arbitrators, decided that:

"(I) CCN is the sole respondent in this arbitration and this final arbitration award is issued solely with regard to OMI and CCN;

(II) The contracts were terminated on 6 August 2004 further to the termination letter sent by CCN;

(III) Given that the contracts may not be performed, the claimant has no grounds to request specific performance;

(IV) In terminating the contracts, CCN breached Article 16 of the AGREEMENT;

(V) In attempting to impose Minmetals as a partner in the E.M. without the consent of OMI, CCN breached the AGREEMENT as well as agreements and understandings between the parties in relation thereto;

(VI) In committing the contractual breaches mentioned under sub-paragraphs (IV) and (V) above, CCN also breached its duty to act in good faith in accordance with clause 12-1 of the AGREEMENT;

(VII) OMI is not entitled to a declaration that CCN failed to meet its confidentiality obligations under clause 11 of the Agreement;

(VIII) CCN's counterclaim is denied;

(IX) OMI is entitled to receive compensation from CCN in an amount of USD 45,814,560 for the termination of the contracts and other contractual breaches for which CCN is responsible;

(X) CCN is entitled to be reimbursed by OMI for its unrecoverable costs resulting from the cancellation of the hearing that should have started on 30 March 2007, in an amount of USD 28,555.54.

(XI) CCN shall pay OMI an amount of USD 45,786,004.46 obtained by offsetting the amount of USD 25,555.54 against that of USD 45,814,560;

(XII) CCN shall bear its own legal costs and will pay claimant's reasonable costs and legal fees in this arbitration, namely: (a) GBP 2,482,952.32; (b) GBP 190,316.06; (c) USD 264,858.82; and (d) AUD 5,480.89;

(XIII) CCN shall pay the costs and fees of the arbitrators, which amount to USD 2,150,000. As a consequence, CCN shall reimburse OMI an amount of USD 999,233.66 paid by OMI into the arbitral tribunal's account for the arbitration;

(XIV) CCN shall pay OMI interest at an annual rate of 9% to be compounded on a yearly basis on all amounts in USD (or amounts converted into this currency in order to calculate the interest in accordance with this final arbitral award) payable by CCN to OMI in accordance with sub-paragraphs (XI), (XII) and (XIII) from the date of this final award until the date of full and final payment of these amounts to OMI; and

(XV) Any other remedy, declaration, order, claim or counterclaim brought or made in these arbitration proceedings and not expressly accepted within the meaning of paragraph 241 was denied.^{mii}

CCN filed an application to set aside the award on three grounds: [1] the arbitral tribunal did not comply with its mission (article 1502-3 CPC); [2] the arbitral tribunal violated international public policy (article 1502-5 CPC); [3] the arbitral tribunal did not abide by equality of arms thereby violating both due process and procedural public policy (article 1502-4 and 5 CPC).

In its written submission of 18 February 2010, [CCN] asks the Court as a consequence to set aside the award and order OMI to pay EUR 80,000 in accordance with article 700 CPC.

In its written submission of 23 February 2010, OMI objects to the request and asks the Court to [1] declare that dismissal of the request to set aside constitutes an order to enforce the award and [2] order CCN to pay EUR 140,000 pursuant to article 700 CPC.

HAVING SAID THIS, THE COURT:

On the ground to set aside based on breach of due process and procedural public policy (article 1502-4 and 5 CPC):

Under this heading, CCN criticises the arbitrators for, among other things, having accepted KPMG's expert report, which presented a complex set of figures upon which the arbitral tribunal relied to justify the amount of compensation. [The tribunal accepted the report] despite OMI's submitting it late in the proceedings after more than two years of exchanges. [Moreover,] despite its objections, CCN only had a short period of time in which to respond to this document. [CCN also criticizes the arbitrators for] having compensated OMI for lost chance, when this issue was not discussed by the parties, it being of no importance that the issue of lost chance was raised with regard to CCN's counterclaim.

OMI argues in response that CCN had the necessary time to answer, and did answer, the KPMG report on the merits, that the arbitrators have in fact decided on the basis of a contractual liability that was expressly raised; and that arbitrators are not under a duty to submit their reasoning, in particular, their reasoning on the evaluation of the damages, [to the parties] for comment before rendering their award.

On the first point, CCN says that, due to lack of time, it was not in a position to address the KPMG report. [However, CCN] fails to identify how having more time (the report was submitted in the proceedings on 31 May 2007 and the last submission was filed by CCN on 1 October 2007) would have enabled it to make different and more persuasive observations than those it submitted; [accordingly,] this argument lacks any factual basis.

On the second point, the arbitral tribunal said (paras. 220 and 221) that OMI is entitled to compensation, which according to [OMI] consisted "*in the lost profit calculated in accordance with KPMG's financial model*" or, alternatively, represented "*38% of the cash flow it would have received when applying the parameters of the AMLC report*". [The tribunal] then (paras. 223, 224 and 225) proceeded to critique the calculation of the damages so claimed [and] decided (para. 226), "*For all the above reasons, [that] the arbitral tribunal considers that, in place of the compensation*

criteria set out in OMI's letter of 16 May 2007 mentioned above, OMI should be compensated for the loss of the chance to continue the project [...]. [The tribunal] then [stated] (para. 227) [that] "[...] the potential financial profit that was lost cannot be assessed with certainty, but the lost chance to collect it can indisputably be valued" and (para. 228) [that] "[...] the compensation model based on loss of chance involves an economic calculation method that is less certain, but the arbitral tribunal considers it appropriate to opt for a less restrictive and conservative approach than that put forward by OMI [...]. [The tribunal] finally concluded, before proceeding with the valuation of lost chance (para. 229), [that] "[...] the compensation for lost chance is not the same as that for lost profit [...] because the compensation is grounded on the premise that the victim of the damage must be compensated for the economical value of the lost chance, not for the lost profit it claims [...]"^[iv].

Therefore, in their reasoning, the arbitrators substituted the compensation claimed by OMI based on lost profit, which they considered inadequate here, with a compensation based on the loss of the chance to see the project through, which OMI did not raise.

This substitution is not a mere method for evaluating the damage, but modifies the basis for compensation of OMI. In failing to invite the parties to make arguments on this issue, the arbitrators breached due process. The fact that in its counterclaim CCN made reference to lost chance on its part is irrelevant in this regard.

As a consequence, the arbitral award must be set aside without the need to examine the other parts of this argument and other arguments submitted.

On the claims brought under article 700 CPC:

As OMI is unsuccessful and its claim is being dismissed, [OMI] shall pay [EUR] 80,000 to CCN.

FOR THESE REASONS:

SETS ASIDE the arbitral award rendered in Paris on 10 October 2008 by Horacio A. Grigera Naón, Jan Paulsson and Julio Fernandez de Cossio Rodriguez;

ORDERS OVERSEAS MINING INVESTMENTS Ltd to pay COMMERCIAL CARIBBEAN NIQUEL SA EUR 80,000 pursuant to article 700 CPC;

ORDERS OVERSEAS MINING INVESTMENTS Ltd to bear the costs and grants the benefit of article 699 CPC to SCP Duboscq-Pellerin.

TRANSLATORS' NOTES

ⁱ Unless otherwise indicated, the translators have added the bracketed text throughout the decision for ease of understanding.

ⁱⁱ In France, an *avoué à la Cour* is a lawyer whose practice consists solely of representing clients before the Court of Appeal. Lawyers wishing to make submissions on behalf of clients before the Court of Appeal must do so by working with an *avoué*.

ⁱⁱⁱ Our translation of excerpts from the tribunal's award is most likely a translation of a translation. This is because the tribunal almost certainly drafted its award in English or Spanish, necessitating that the award be translated into French for the proceedings before the Court of Appeal.

^{iv} In this paragraph, all bracketed ellipses are original to the Court decision.

**TRIBUNAL
DES CONFLITS^[i]****No. 3754**

Jurisdictional issue further to request
by the Council of State (article 35)Institut national de la santé et de la recherche médicale
v. Fondation Letten F. Saugstad

Mr. Jean-Louis Gallet
Reporting judge

Mr. Mattias Guyomar
Government representative

Hearing of 12 April 2010
Rendered on 17 May 2010**FRENCH REPUBLIC****IN THE NAME OF THE FRENCH PEOPLE****TRIBUNAL DES CONFLITS**

Having seen the decision of the Council of State, sitting on appeal, dated 31 July 2009 and registered with the secretariat on 6 August 2009, to give to this Court pursuant to article 35 of the Decree of 26 October 1849 as amended the task of deciding on the issue of jurisdiction related to the request of Institut national de la santé et de la recherche médicale (INSERM) to (i) set aside the arbitral award rendered on 4 May 2007 by the arbitrator appointed by the President of the *Tribunal de Grande Instance* [first instance court] in the dispute between INSERM and the Fondation Letten F. Saugstad following the termination by [the Fondation] of the memorandum of understanding they entered into for the construction and financing of a building to house a research institute as part of a joint scientific program, and (ii) order the Fondation to pay EUR 3,506,327.40;

Having seen the written submissions filed on behalf of INSERM and registered on 24 March 2006, which (i) contend that whether the administrative or judicial courts have jurisdiction to decide on [a challenge to] an arbitral award depends upon whether the agreement pursuant to which the award was rendered is a public or private law agreement; (ii) assert that the fact that the dispute involves international trade is irrelevant; (iii) note that the [French Code of Civil Procedure (CPC)] that grants jurisdiction to the Court of Appeal only has a value *règlementaire*^[ii] and cannot have for a purpose or effect to transfer the administrative courts' jurisdiction deriving from the [French] Constitution to the judicial courts; and (iv) indicate that the contract at issue meets the criteria for qualification as an administrative contract; and therefore (v) conclude that the administrative courts have jurisdiction;

Having seen the written submissions filed on behalf of the Fondation Letten F. Saugstad and registered on 4 December 2009, which (i) contend that the memorandum of understanding binding upon the parties did not formalize any final agreement, but was a mere plan or, at the very most, an agreement in principle; (ii) point to the private law nature of the [memorandum of understanding]; and (iii) argue that the [memorandum of understanding] involves the interests of international trade

and therefore does not fall within the category of administrative contracts; and (iv) [conclude] that the judicial courts have exclusive jurisdiction over INSERM's challenge to the arbitral award;

Having seen the other documents in the file;

Having seen the Law of 16-24 August 1790 and the Decree of 16 *Fructidor* year III;^[iii]

Having seen the Law of 24 May 1872;

Having seen the Decree of 26 October 1849 as amended;

Having seen book IV of the [CPC] and in particular its provisions of titles V and VI;

After hearing, in a public session:

- the report of Mr. Jean-Louis Gallet, member of the Court,
- the observations filed by SCP Waquet, Farge, Hazan for INSERM,
- the observations filed by SCP Piwnica-Molinié for Fondation Letten F. Saugstad,
- the submissions of Mr. Mattias Guyomar, Government Representative;

On 4 August 1998, [INSERM] and the Fondation Letten F. Saugstad, a Norwegian not-for-profit organization, entered into a [contract] entitled "memorandum of understanding" under which the parties, in light of their respective spheres of activity, agreed "*to pool their efforts in order to facilitate the implementation of a construction project for a neurobiology research centre called the Mediterranean Institute of Neurobiology (IMED) Saugstad-INSERM research centre*". The Fondation undertook to pay a total amount of FRF 25 million [in three instalments] in accordance with the work-progress for the building designed to house IMED, which was to be constructed on land belonging to the University of Aix-Marseille. INSERM undertook to submit two successive budget requests for FRF 5 million each. The [memorandum of understanding] stipulated that, in the event any difficulties arose in its implementation, and should no amicable solution be found and mediation fail, the parties would resort to arbitration. Disputes subsequently arose and the Fondation Letten F. Saugstad, which had paid the first instalment of FRF 2 million on 28 April 1999, notified INSERM of the termination of their contractual relationship by letter of 28 August 2000. INSERM filed proceedings against the Fondation for payment of the balance of its financial undertaking, namely EUR 3,506,327.40, before the Paris *Tribunal de Grande Instance*, which granted the claim. The Paris Court of Appeal overturned the judgment, declared that the *Tribunal* did not have jurisdiction to hear the case, and referred the parties to arbitration on the basis of the arbitration clause contained in the memorandum of understanding. The arbitrator, appointed by *référé*^[iv] decision of the President of the Paris *Tribunal de Grande Instance* upon INSERM's request, rendered his award on 4 May 2007 dismissing INSERM's claim for payment of EUR 3,506,327.40 and ordering INSERM to reimburse the Fondation Letten an amount of EUR 304,878.03 paid on 28 April 1999 with compound interest. In a request of 12 July 2007, INSERM brought an appeal before the Marseille Administrative Court of Appeal, asking the court to (i) set aside the arbitral award on the basis that the arbitration clause was void, and (ii) order the Fondation to comply with its financial commitments. [INSERM] simultaneously filed an application to set aside the same award before the Paris Court of Appeal, and on 13 November 2008 that court dismissed the application and claims made by INSERM. [The Court of Appeal] accepted jurisdiction on the basis of [CPC] article 1505 considering that [1] the prohibition against the State entering into arbitration agreements is limited to domestic contracts, subject to any legislative provisions to the contrary, and [2] in light of the principle of the validity of international arbitration clauses, this prohibition is [in any event] not part of international public policy. The Council of State, which was in charge of the application initially filed with the [Marseille]

Administrative Court of Appeal, considered that the application raised serious [jurisdictional] issues justifying resort to the procedure set out in article 35 of the Decree of 26 October 1849 as modified by the Decree of 25 July 1960.

An application to set aside an arbitral award [A] rendered in France, on the basis of an arbitration agreement, [B] in a dispute arising out of the performance or termination of a contract between a French public entity and a foreign individual or entity, [C] performed on the French territory and involving international trade, is to be brought before the Court of Appeal under whose jurisdiction the arbitral award was rendered, pursuant to [CPC] article 1505, even if that contract is an administrative contract according to the criteria under French domestic law [– and this] does not affect the principle of the separation of administrative and judicial authorities. However, the situation is different with a challenge against an award rendered under the same circumstances where the challenge involves reviewing whether the award complies with mandatory rules of French administrative law on [1] the occupancy of French public property or those governing public contracts and applicable to [2] public procurement contracts, [3] PPP contracts and [4] contracts delegating the performance of public services. These contracts are governed by a mandatory administrative regime, [and] challenges to an arbitral award rendered in a dispute arising out of the performance or termination of such a contract falls under the jurisdiction of the administrative courts.

The memorandum of understanding, [which is] [1] between INSERM, a scientific and technological [French] public entity, and [2] the Fondation Letten F. Saugstad, a not-for-profit entity governed by Norwegian private law, [3] for the purpose of constructing a building in France to house a research institute that is, from a legal and institutional point of view, part of INSERM, [and which] provides that [4] the institute will receive part of its financing from the Fondation, involves the interests of international trade. As a consequence, the application to set aside the arbitral award rendered in the dispute between the parties on the performance and termination of this contract, which is not among those contracts governed by the above-mentioned mandatory rules of French administrative law, falls under the jurisdiction of the judicial courts.

DECIDES:

Article 1: The judicial courts have jurisdiction to hear the application to set aside brought by INSERM against the arbitral award rendered in the dispute between INSERM and the Fondation Letten F. Saugstad, as well as the claim for payment brought against the Fondation.

Article 2: This decision will be notified to the [French Minister of Justice], who is in charge of ensuring its enforcement.

TRANSLATORS' NOTES

ⁱ The *Tribunal des conflits* settles questions of jurisdiction between the administrative and judicial courts. Its members are judges from the *Conseil d'Etat*, the supreme administrative court, and the *Cour de cassation*, the supreme judicial court and it is chaired by the French Minister of Justice.

Unless otherwise indicated, the translators have added the bracketed text throughout the decision for ease of understanding.

ⁱⁱ The provisions on international arbitration in the French Code of Civil Procedure, including those granting jurisdiction to the Court of Appeal to decide on applications to set aside arbitral awards,

were not enacted by the French legislature. Rather, they were established by an executive decree of 1981 and are therefore *règlementaire*.

ⁱⁱⁱ *Fructidor* in the French Republican (Revolution) calendar corresponds to the period between 18 August and 16 September of each year – i.e., when the fruits become ripe. 16 *Fructidor* year III corresponds to 2 September 1795.

^{iv} Pursuant to CPC article 1457, the President of the Paris *Tribunal de Grande Instance* shall decide upon a request regarding issues affecting the constitution of the tribunal ‘as in expedited proceedings’ (*référé*).