

# Commentary

## A View From Paris

By  
Jennifer Kirby  
and  
Denis Bensaude

[Editor's Note: Jennifer Kirby is a Partner at Herbert Smith LLP, Paris, France and a member of the New York Bar ([jennifer.kirby@herbertsmith.com](mailto:jennifer.kirby@herbertsmith.com)). Denis Bensaude, Bensaude, Paris, France is a member of the Paris and New York Bars ([bensaude@orange.fr](mailto:bensaude@orange.fr)). Both are former members of the Secretariat of the ICC International Court of Arbitration. Copyright 2009 by Jennifer Kirby and Denis Bensaude.]

### Introduction\*

As this is the inaugural issue of *A View From Paris*, a few words of introduction.

Paris is one of the world's leading centers for international arbitration, and French international arbitration law is a common reference for practitioners in the field, often influencing the evolution of arbitration law in other countries. Few French court decisions are translated into English, however, and many risk going unremarked by Anglophone lawyers. *A View From Paris* is designed to keep *Mealey's* readers up to date — in English — with the latest international arbitration decisions handed down by the French Court of Appeal (*Cour d'appel*) and Supreme Court (*Cour de cassation*).

Each quarter, *A View From Paris* will translate a recent French international arbitration decision into English and comment the decision briefly in its *Spotlight* section. It will also gather other recent French international arbitration decisions and note them in a summary fashion in its *See Also* section. In this way, *A View From Paris* will keep readers informed of the latest developments in French international arbitration law.

Readers wishing further information about cases addressed in *A View From Paris* are invited to contact the authors directly.

\* \* \*

This issue of *A View From Paris* spotlights *Czech Republic v. Nreka*,<sup>1</sup> a decision in which the Paris Court of Appeal effectively invites investors to resolve through ad hoc arbitration in Paris investment disputes that might well be dismissed for lack of jurisdiction if brought to the International Centre for the Settlement of Investment Disputes (ICSID). And the cases in *See Also* illustrate how consistently the French courts enforce agreements to arbitrate and international arbitral awards, whether rendered in France or outside its borders.

### Spotlight: **Czech Republic v. Nreka**

Pren Nreka is a Croatian citizen and the sole shareholder of a Czech company called ZIPimex. In 1996, ZIPimex entered into a "work agreement" and lease with the Prague Pedagogical Center, a public institution under the authority of the Czech Ministry of Youth, Schools and Physical Education. Pursuant to the work agreement, ZIPimex was to renovate the first two floors of the building occupied by the Center (and owned by the Czech Republic). In exchange, pursuant to the lease, the Center was to rent ZIPimex approximately 300 square meters of the renovated space for a period of fifteen years to operate a pizzeria.<sup>2</sup>

In January 2002, the Ministry wished to centralize its offices and decided to retake possession of the entire

building, including the space leased to ZIPimex. The Ministry asked ZIPimex to vacate the premises. When ZIPimex refused, the Czech Republic secured a decision from the Prague courts terminating the lease on the grounds that the lease (1) had not been authorized by the competent government authority, (2) did not specify the rent amount and (3) did not contain a provision allowing the Czech government to unilaterally terminate the lease (a provision required by Czech law for leases of non-residential, government-owned property).<sup>3</sup> Thereafter, and under threat of criminal prosecution, Mr. Nreka vacated the premises in July 2004.<sup>4</sup>

In March 2005, Mr. Nreka filed for arbitration against the Czech Republic on the basis of a bilateral investment treaty (BIT) of 5 March 1996 between Croatia and the Czech Republic.<sup>5</sup> The BIT provided that disputes between one of the Contracting Parties — i.e., Croatia or the Czech Republic — and an investor from the other Contracting Party could be submitted, at the investor's option, either to an ad hoc arbitral tribunal established under the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL Rules) or to the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID Convention).<sup>6</sup>

In his notice of arbitration, Mr. Nreka opted for ad hoc arbitration under the UNCITRAL Rules.<sup>7</sup> Mr. Nreka claimed that the Czech Republic had violated its obligations under article 3 of the BIT, which guarantees investors fair and equitable treatment, and article 4, which prohibits expropriation or equivalent actions by the State, by denying him the right to occupy the premises he had leased in exchange for the renovations he had paid for, thereby destroying his investment.<sup>8</sup> Mr. Nreka sought, among other things, damages amounting to over US\$ 1 000 000, interest, costs and attorney's fees.<sup>9</sup>

The arbitral tribunal, which was composed of Rolf Schütze, Fred Wennerholm and Lucius Cafilich, fixed Paris as the place of arbitration.<sup>10</sup> In a partial award of 5 February 2007, the arbitral tribunal held that the Czech Republic had failed to meet its obligation under the BIT to treat Mr. Nreka fairly and equitably

and therefore had to compensate Mr. Nreka for his resulting loss.<sup>11</sup>

\* \* \*

On 15 March 2007, the Czech Republic filed an application with the Paris Court of Appeal (*Cour d'appel de Paris*)<sup>12</sup> to have the tribunal's award set aside on the ground, among others, that there was no agreement to arbitrate.<sup>13</sup> Specifically, the Czech Republic argued, among other things, that the tribunal only had jurisdiction to hear disputes relating to an "investment," and that the dispute with Mr. Nreka did not involve an investment.

According to the State, neither the work agreement nor the lease between the Center and ZIPimex were an investment. Rather, the transaction between the parties was an ordinary commercial transaction that did not meet the criteria for being an investment under ICSID case law because it did not involve (1) a significant capital contribution (2) over an extended period of time (3) involving risk and regular flow profit for the investor that (4) made an appreciable contribution to the State's economic development.<sup>14</sup>

Mr. Nreka responded that the State's application should be dismissed.<sup>15</sup>

The Paris Court of Appeal rejected the Czech Republic's application in its entirety. In doing so, the Court examined de novo whether there was an agreement to arbitrate. In this regard, the Court noted that it was irrelevant whether the specific jurisdictional arguments at issue had been raised before the arbitral tribunal. Provided the Czech Republic had consistently objected to the arbitral tribunal's jurisdiction during the course of the arbitration (which it had), it could not be said that the State had accepted jurisdiction.<sup>16</sup>

The only test for jurisdiction, the Court explained, was whether the transaction at issue was covered by the terms of the BIT such that the claims made fell within the scope of the BIT's arbitration clause.<sup>17</sup> The Court noted that the "BIT provisions . . . do not provide for any criteria identifying what is an investment, but rather give a list, that is moreover non-exhaustive, of cases considered an investment."<sup>18</sup> As the BIT's broad definition of investment includes, without limitation, any contractual right, the Court

found that the transaction at issue — whereby Mr. Nreka had invested monies in renovations in exchange for receiving a fifteen-year lease — constituted an investment under the terms of the BIT.<sup>19</sup> The dispute therefore fell within the scope of the arbitration clause in the BIT and the arbitral tribunal had jurisdiction.<sup>20</sup> The Court found that the “conditions raised by the Czech Republic regarding the definition of investment would constitute an addition to the text of [article 1 of] the BIT[;] moreover, that definition of investment is not a condition for jurisdiction [in article 9 of the BIT].”<sup>21</sup>

\* \* \*

France is widely regarded as among the most arbitration-friendly jurisdictions in the world. The French courts routinely enforce agreements to arbitrate and arbitral awards, and it is rare that an application to set aside an award finds favor before the French courts. The Court of Appeal’s decision in *Czech Republic* is of a piece with this and reconfirms France’s pro-arbitration credentials, this time in the context of investment arbitration under BITs. In refusing to import into ad hoc investment arbitration the relatively narrow definition of “investment” that has developed in the context of ICSID investment arbitration, the Court of Appeal effectively invites those investors who have a choice to sidestep the higher jurisdictional hurdles at ICSID and bring their investment claims to ad hoc arbitration in Paris instead.

Most BITs, like the one at issue in *Czech Republic*, contain a broad definition of what constitutes an investment under the treaty.<sup>22</sup> In the context of ICSID arbitration, however, it is not sufficient for jurisdiction that the transaction at issue fall within the definition of investment contained in the BIT. The transaction must also be an “investment” as that term is used in the ICSID Convention.<sup>23</sup> Although the Convention itself does not define what constitutes an investment, over the years the Convention has been interpreted by commentators and in ICSID case law to cover transactions that (1) involve a substantial commitment on the part of the investor, (2) have a significant duration, (3) involve an element of risk on both sides, (4) provide a regular return for the investor and (5) are significant to the State’s development.<sup>24</sup> This definition of investment is narrower than the definition of investment contained in most BITs and

serves to limit the types of claims that can be brought to arbitration at ICSID.<sup>25</sup>

Recently, some States have argued that the more restrictive definition of investment developed in case law under the ICSID Convention should apply in non-ICSID (e.g., ad hoc) cases as well.<sup>26</sup> In *Czech Republic*, however, the Paris Court of Appeal has flatly rejected this argument. This is good news for investors because a significant number of BITs — like that at issue in *Czech Republic* — give the investor the option of bringing its claims to ICSID or before an ad hoc arbitral tribunal under the UNCITRAL Rules.<sup>27</sup> By electing ad hoc arbitration in Paris, investors can pursue BIT claims that might well be dismissed for lack of jurisdiction if brought to ICSID.

### See Also

In *La Marocaine des Loisirs* [Morocco] v. *France Quick* [France],<sup>28</sup> the Paris Court of Appeal rejected Marocaine des Loisirs’ application to set aside an ad hoc final award.<sup>29</sup> On its application, Marocaine des Loisirs argued that the final award had been rendered on the basis of terms of reference that were null and void. This was allegedly because they had been signed by the original arbitrator appointed by France Quick, who thereafter resigned for lack of independence. Marocaine des Loisirs also contended that the final award disregarded the interests of a third party who had not participated in the arbitration, and that enforcement of the award would violate international public policy because the award was rendered on the basis of allegedly forged documents that gave rise to criminal proceedings (filed by Marocaine des Loisirs) that were pending in Morocco.

The Court of Appeal found that the alleged nullity of terms of reference did not constitute a ground to set aside an arbitral award under French law. The nullity of the agreement to arbitrate could serve as a basis to set aside an award, but Marocaine des Loisirs had not argued that the terms of reference were the parties’ agreement to arbitrate. In any event, the Court of Appeal found that Marocaine des Loisirs had signed revised terms of reference after France Quick’s original arbitrator was replaced and had thereafter participated in the arbitration without objection. For the Court of Appeal, Marocaine des Loisirs was therefore now estopped from attempting to set aside the final award on these grounds. As to Marocaine des Loisirs’ argu-

ment that the final award disregarded the interests of a third party, the Court of Appeal found that Marocaine des Loisirs was effectively inviting the Court of Appeal to pass judgment on the merits of the arbitral tribunal's award, something the Court of Appeal could not do. Finally, the Court of Appeal rejected Marocaine des Loisirs' arguments based on allegedly forged documents, finding that the filing of a criminal complaint was not, in and of itself, evidence of a violation of French international public policy.

In *SAS Société Merial [France] v. Klocke Verpackungs Service GmbH [Germany]*,<sup>30</sup> the Paris Court of Appeal rejected Merial's application to set aside a majority award rendered under the Rules of Arbitration of the International Chamber of Commerce (ICC Rules). Merial argued that the dissenting opinion that accompanied the award effectively revealed the deliberations of the tribunal in breach of a requirement that deliberations be kept secret and constituted a violation of international public policy that required the award be set aside. Merial also contended that (1) the tribunal improperly shifted the burden of proof to Merial (when it rightfully rested with Klocke) and (2) denied Merial due process by failing to offer Merial an opportunity to answer Klocke's final submission, which was filed approximately two months prior to the final hearing and contained new claims. And finally, Merial complained that the tribunal had gone beyond the scope of its mission (*ultra petita*) by deciding a tort-based counterclaim raised by Klocke, when the terms of reference limited the mission of the arbitral tribunal to deciding contract-based claims.

In rejecting Merial's application, the Court of Appeal noted that the ICC Rules governed the arbitration, and that French domestic provisions on the secrecy of deliberations therefore did not apply to the arbitration. The Court of Appeal added that, in any event, a breach of the secrecy of deliberations is not a ground for setting aside an award under French law, which permits arbitrators to issue dissenting or separate opinions. The Court considered that Merial's argument regarding an alleged shifting of the burden of proof amounted to a criticism of the merits of the award, something the Court had no power to review. As to due process, the Court noted that Merial never objected before the arbitral tribunal that it had been denied due process — even though it had the opportu-

nity to do so — and the Court therefore found Merial estopped from using this as a ground to request that the award be set aside. Finally, the Court noted that, although Klocke's counterclaim was not included in the terms of reference as originally signed, the arbitral tribunal had later decided to hear it, as permitted by the ICC Rules. Moreover, Merial had signed the minutes of the hearing that closed the proceedings without objection. Under these circumstances, the Court of Appeal again found Merial estopped from attacking the award on this ground.

In *United Kingdom Mutual Steamship Insurance Association Bermuda Ltd [Bermuda] v. SA Groupama Transport [France]*,<sup>31</sup> Groupama, a French insurance company, filed suit before a French court seeking reimbursement from shipowners of monies paid to a charterer in connection with a breach of a sea transport contract. The lower court found it had jurisdiction to hear the case, but the Paris Court of Appeal reversed in favor of sending the case to arbitration in London. The Court of Appeal found that Groupama's claim arose in the context of a charter party that provided for disputes to be arbitrated in London, and that Groupama, who had stepped into the shoes of the original charterer under that charter party, therefore had to arbitrate its claims.

In *Limak Insaat San Vetic [Turkey] v. Weatherford Kopp GmbH [Germany]*,<sup>32</sup> the Paris Court of Appeal upheld a lower court decision to assist in the constitution of an arbitral tribunal where the arbitration clause provided only that the place of arbitration would be Paris and the language of arbitration English. Pursuant to French law, lower court decisions to assist with respect to the constitution of an arbitral tribunal may not be appealed unless that lower court judge "exceeds his powers." Limak and its co-appellant, Punj Lloyd Limited [India], contended that the clause at issue was a "blank clause" that was insufficient to give the judge the power to assist in the constitution of the arbitral tribunal. Accordingly, appellants argued, the judge exceeded her powers when she invited the parties to provide their comments on the number of arbitrators and suggest names of people who might serve on the tribunal. The Court of Appeal rejected this argument, noting that while such clauses are void under French domestic arbitration law, they are not void under French international arbitration law.

In *SARL Bio Planète Huilerie FJ Moog* [France] v. *Sunny Land SRL* [Italy],<sup>33</sup> the Paris Court of Appeal rejected Bio Planète's application to set aside an award rendered under the auspices of the Arbitration Chamber of Paris. Bio Planète contended the award should be set aside because it had been denied due process when, after the parties' lawyers had pleaded the case and the proceedings had been closed, the arbitral tribunal heard the parties themselves as witnesses, without offering their lawyers a new opportunity to comment. The Court of Appeal noted that Bio Planète did not raise any objection at the time the alleged due process violation occurred and had therefore waived its right to complain. As a consequence, the alleged procedural defects could not serve as grounds for setting aside the award.

In *CNIEC Shaanxi Corporation* [China] v. *SARL Compagnie des Métaux France – Commet France* [France],<sup>34</sup> the Paris Court of Appeal upheld a lower court decision dismissing CNIEC's lawsuit in the French courts in favor of arbitration. The parties had concluded three sales contracts, each providing that disputes be arbitrated before the China International Economic and Trade Arbitration Commission (CIETAC). The parties thereafter concluded a fourth contract concerning, among other things, the payment of sums owing and overdue under the previous three contracts. However, this fourth contract did not contain an arbitration clause. CNIEC attempted to obtain an order for immediate payment of US\$ 158 000 under the fourth contract before a *juge des référés*.<sup>35</sup> (A French *juge des référés* has the power to order payment of a debt where the requesting party demonstrates that the debt cannot be seriously contested. Pursuant to French arbitration law, a party may seek a payment order from a *juge des référés* even if the party's claim is subject to an agreement to arbitrate, provided the party can show emergency (*urgence*)<sup>36</sup> in addition to showing that the debt cannot be seriously contested. The decision of a *juge des référés* is not binding on the arbitral tribunal, however.)

Commet objected that CNIEC's claim was subject to arbitration and the *juge des référés* denied CNIEC's request for a payment order. In upholding the lower court decision, the Court of Appeal noted that a French court must decline jurisdiction over a dispute allegedly covered by an agreement to arbitrate unless the arbitration clause at issue is manifestly

inapplicable to the dispute or void on its face.<sup>37</sup> The Court of Appeal found that the arbitration clause in the three initial contracts, which was not manifestly void, applied also to the fourth agreement, which made specific reference to provisions of the three prior contracts. The Court also found unconvincing CNIEC's arguments as to urgency, which were based on allegations that Commet's solvency was doubtful in light of its payments being two years overdue and the fact that it had not yet filed its 2007 financial statements with the commercial court. Accordingly, for the Court of Appeal, the *juge des référés* was right to dismiss the case in favor of arbitration, thereby allowing the arbitral tribunal to rule on the question of its own jurisdiction in accordance with the principle of competence-competence.

In *Jacques C.* [France] v. *Jacques R.* [France],<sup>38</sup> the Paris Court of Appeal confirmed a lower court decision rejecting a claim for damages against all three members of an ad hoc arbitral tribunal sitting in Paris in an international arbitration. The arbitration was filed by Jacques C. and CNCA-CEC Centre Extérieur de Co-ordination in 2002 against a third party from Angola. The parties to the arbitration agreed in the minutes of a meeting held in June 2002 that the arbitration should be considered international. After the tribunal issued a partial award in August 2002, the chairman of the tribunal resigned. A new chairman was appointed in November 2003 and hearings were held in January, April and July 2004, as well as in March 2005. The tribunal declared the proceedings closed in April 2005. During the course of the arbitration, and prior to the closing of the proceedings, the arbitral tribunal decided to extend a variety of procedural time limits in light of delays in the production of documents and the filing of written submissions. In July 2005, after the proceedings had been closed, one of the parties asked the chairman of the tribunal to resign on the grounds that he was not impartial. The chairman refused. A few weeks later, in September 2005, all parties to the arbitration agreed to dismiss the entire arbitral tribunal from the case. Eventually, a new tribunal was constituted and a final award rendered in June 2008.

Jacques C. and CNCA-CEC asked the Court of Appeal to reverse the lower court and order the members of the dismissed tribunal to reimburse the monies the parties had paid to them in fees (approximately EUR

300 000) on the grounds that they had (1) failed to accomplish their mission within the six-month time limit for rendering a final award that applies in French domestic arbitration (art. 1456 CPC) and (2) otherwise failed to perform their mission diligently. In rejecting the request, the Court of Appeal noted that the arbitration at issue was international and that the time limits applicable in domestic arbitration therefore do not apply. Moreover, Jacques C. and CNCA-CEC had not raised any concern that the alleged six-month time limit had expired until after the proceedings were closed. Also, the Court found the arbitral tribunal at liberty to extend the time limits as it had done because it was the arbitral tribunal (rather than the parties) that had established those time limits in the first place. In the Court's view, this did not reflect a lack of diligence, but rather a reasonable adaptation of the procedural calendar in light of the parties' litigious behavior throughout the arbitration.

In *INSERM [France] v. Fondation Letten F Saugstad [Norway]*,<sup>39</sup> the Paris Court of Appeal rejected INSERM's application to set aside an award rendered in France in 2007 that ordered INSERM to pay money to the Letten Foundation. INSERM — whose full name is the Institut National de la Santé et de la Recherche Médicale — is a French, public institution dedicated to medical research. In 1998, INSERM entered into a contract with the Letten Foundation for the construction of a neurobiology research center to be financed in part with funds from Norway. That contract contained an arbitration agreement. INSERM contended that the award should be set aside on the ground that the arbitration agreement was null and void because, as a public entity, INSERM was prohibited from entering into arbitration agreements. INSERM also asked the Court of Appeal to stay the set aside proceedings pending a decision of the French Counsel of State (*Conseil d'Etat*)<sup>40</sup> on the validity of that arbitration agreement.

The Court of Appeal rejected INSERM's request for a stay because it is for the Court of Appeal to decide all applications to set aside awards rendered in France. As a consequence, it was for the Court of Appeal — not the Counsel of State — to determine the validity of the arbitration agreement at issue, any decision by the Counsel of State on that issue being irrelevant in this context. The Court of Appeal then rejected INSERM's contention that the arbitration agreement

was null and void. In that regard, the Court of Appeal found that the prohibition on public entities entering into arbitration agreements related only to French domestic contracts, whereas INSERM's contract with the Letten Foundation was international in nature.

In *GFI Informatique [France] v. Engineering Engegn-eria Informatica SPA [Italy]*,<sup>41</sup> the Paris Court of Appeal upheld a decision of the lower court to enforce in France a majority award rendered in Italy,<sup>42</sup> the dissenting arbitrator having refused to sign the award and issued a dissenting opinion. Before the Court of Appeal, GFI argued that the award should not be enforced because (1) the tribunal failed to comply with its mission by disregarding arguments raised in GFI's final submissions, (2) the lower court exceeded its powers in ordering enforcement of the award because the award had not been translated by a translator registered in France,<sup>43</sup> and (3) the arbitrators failed to deliberate in person, as required by Italian law when an arbitrator so requests. GFI also contended that the tribunal's deliberations had not been properly conducted because there was no true confrontation of ideas between the arbitrators, as allegedly required by French international public policy.

In upholding the decision of the lower court, the Court of Appeal noted that a tribunal's failure to expressly address each and every argument a party submits does not constitute a ground to refuse enforcement in France of a foreign arbitral award. Moreover, the Court of Appeal found that the arbitral tribunal had in fact addressed all of the parties' claims. As to the contention that the lower court exceeded its powers, the Court of Appeal found that this is not a ground to refuse enforcement in France of a foreign arbitral award. Further, neither the New York Convention nor French law require that an award's translator be registered at the place where enforcement is sought. As to the deliberations, the Court of Appeal noted that the arbitrators had met twice in person to deliberate and that the dissenting arbitrator, who attended these meetings, was granted the opportunity to discuss the issues to be determined with the other arbitrators. As a consequence, the Court of Appeal considered that neither Italian law nor French international public policy had been violated.

In *Republic of Uzbekistan v. Romak SA Geneva [Switzerland]*,<sup>44</sup> the Paris Court of Appeal upheld a

lower court decision granting Romak's request for an interim measure of protection freezing a bank account held in the name of Uzbekistan Airways.<sup>45</sup> The interim measure was granted pending the outcome of a BIT-based, ad hoc investment arbitration under the UNCITRAL Rules between Romak and the Republic.<sup>46</sup> The purpose of the measure was to guarantee that there would be funds available to pay any award that might eventually be rendered against the Republic. In order to grant an interim measure of this kind, a lower court must consider that the underlying claim appears likely to succeed on the merits (*apparaît fondée en son principe*).<sup>47</sup> The Republic appealed the lower court decision on the grounds that (1) the frozen account belonged to Uzbekistan Airways and not the Republic, and (2) Romak's claim in the arbitration was doomed to fail for lack of jurisdiction because it did not concern an "investment" as that term has been interpreted under the ICSID Convention.

In upholding the lower court decision, the Court of Appeal noted that, although the bank account at issue was nominally held by Uzbekistan Airways, the Republic had previously pledged the funds in that account as security for a loan the Republic took from the bank HSBC. The Court of Appeal therefore considered that Uzbekistan Airways could not claim sole ownership of the funds in the account because these funds had also been used by the Republic to guarantee its own debts. The Court of Appeal also rejected the Republic's reliance on ICSID precedents in support of its argument that Romak's claim before the arbitrator would be dismissed for lack of jurisdiction. As in *Czech Republic*, the Court of Appeal in *Republic of Uzbekistan* found ICSID case law on the meaning of the term "investment" under the ICSID Convention irrelevant in the context of an ad hoc arbitration under the UNCITRAL Rules. As Romak's claim appeared to concern an investment as that term was defined in the BIT between Switzerland and Uzbekistan, the Court of Appeal considered that the Republic failed to show that Romak's claim before the arbitral tribunal appeared unlikely to succeed on the merits.

In *Eutelsat [France] v. Deutsche Telecom AG [Germany]*,<sup>48</sup> the Paris Court of Appeal confirmed a lower court decision to dismiss a case in favor of arbitration. The parties' dispute concerned the interpretation and implementation of a series of contracts that contained

contradictory dispute resolution provisions. Specifically, in 1999, Eutelsat and Deutsche Telecom entered into three related contracts, at least one of which — known as the Eurobird Contract — contained an arbitration agreement. These three contracts were amended in 2001 by way of a fourth contract that provided for disputes to be submitted to the exclusive jurisdiction of the Paris courts. In 2006, Eutelsat filed suit against Deutsche Telecom and one of its German subsidiaries (T-Systems Business Services GmbH) before the Paris courts for breach of all four contracts. The lower court dismissed the case in favor of arbitration and Eutelsat appealed. Before the Court of Appeal, Eutelsat argued that the Paris-court clause in the fourth contract had superseded the arbitration clause in the Eurobird Contract.

In confirming the lower court decision, the Court of Appeal noted that the parties' dispute related, among other things, to both the Eurobird Contract and the question of whether the parties intended the Paris-court clause in the fourth contract to supersede the arbitration clause in the Eurobird Contract. The Court of Appeal found that the parties' intent on this point was not obvious and the arbitration clause in the Eurobird Contract was therefore not manifestly inapplicable to the parties' dispute. Under the circumstances, the Court of Appeal found that it would be for the arbitral tribunal to interpret the terms of the fourth contract to determine the true intent of the parties in this respect.

In *Bratex [France] v. Dane Technologies [USA]*,<sup>49</sup> the Paris Court of Appeal upheld a decision of the lower court to enforce in France an award rendered in the United States by a sole arbitrator under the International Arbitration Rules of the American Arbitration Association. The parties had entered into a distribution contract which contained an arbitration agreement covering all disputes arising out of or in connection with the contract. The contract was subsequently terminated and a dispute concerning the contract's termination and its consequences was submitted to arbitration. Bratex argued before the Court of Appeal that there was no valid arbitration agreement because the parties' dispute concerned facts that arose after the contract had been terminated. Bratex also argued that enforcement of the award would violate both French and European competition law and thereby French international public policy.

In rejecting both arguments, the Court of Appeal first noted that, under French international arbitration law, the arbitration agreement is considered separable from the main contract, and termination of the main contract therefore provided no basis to conclude that the arbitration agreement had been terminated as well. Moreover, the parties' dispute fell within the scope of the arbitration agreement. With respect to Bratex's competition law argument, the Court of Appeal noted that for an award to be set aside on international public policy grounds, the public policy violation must be blatant, actual and concrete. Bratex, the Court of Appeal found, did not even explain — much less show — how enforcement of the award would result in an actual, blatant and concrete violation of French or European competition law.

In *Refcomp SPA [Italy] v. AXA Corporate Solutions Assurance [France]*,<sup>50</sup> the Paris Court of Appeal overruled a lower court decision to take jurisdiction of the case, rather than refer it to arbitration. The case concerned a dispute between Refcomp and Climaveneta SPA on the one side, and AXA Corporate Solutions and Emerson Network on the other. The Court of Appeal's decision to refer the case to arbitration was based on an arbitration agreement providing for arbitration under the ICC Rules that was contained in an exclusive distribution contract between Climaveneta and Emerson only. Pursuant to that contract, Climaveneta manufactured and sold to Emerson an air conditioning system that was subsequently incorporated into a newly constructed building. The air conditioning system did not function properly, however, because it contained defective compressors that had been manufactured by Refcomp. AXA Corporate Solutions was the insurer of the owners of the building. After making payments to the owners of the building for the defects in the air conditioning systems, AXA Corporate Solutions became legally subrogated to their rights and sued Climaveneta, Emerson and Refcomp for reimbursement of the payments it had made and the lower court took jurisdiction over the case.

Climaveneta argued before the Court of Appeal that the arbitration agreement in its distribution contract with Emerson should apply to AXA Corporate Solutions' claims against it. In this regard, Climaveneta contended that the lower court had erred in consider-

ing that AXA Corporate Solutions could not be bound by that arbitration agreement because the owners of the building had had no knowledge of its existence. In finding for Climaveneta, the Court of Appeal noted that, under French law, an issue with respect to the assignment of an arbitration clause is subject to rules of French international arbitration law and that rules regarding conflicts of laws do not apply. The Court considered that, as a matter of French law, the claim of AXA Corporate Solutions against Climaveneta was a contractual claim, even though the owners of the building had no direct contractual relationship with Climaveneta. Further, the Court noted that, under French international arbitration law, where chains of contracts for the sale of goods are concerned, an arbitration clause contained in one contract is automatically transmitted with any rights of action that may pass from one party to another, such as the rights of action now held by AXA Corporate Solutions against Climaveneta. As a consequence, the Court of Appeal decided that the arbitration clause contained in the distribution contract between Climaveneta and Emerson applied to AXA Corporate Solution's claim against Climaveneta and that that claim should therefore be submitted to arbitration.

---

## Endnotes

- \* This article represents the personal views of the authors and should not be interpreted to represent the views of Herbert Smith. Thanks are due to Laurence Franc-Menget, Sarah Fulton and Simon Chapman, all associates at Herbert Smith, for their assistance and insights.
1. Cour d'appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 25 Sept. 2008. An English translation of the Court's decision in *Czech Republic* is annexed. In these notes, page citations to *Czech Republic* are to the translation.
  2. *Id.* at 3.
  3. *Id.*
  4. *Id.* at 4.



5. *Id.* at 2, referring to the Agreement between the Republic of Croatia and the Czech Republic for the Promotion and Reciprocal Protection of Investments of 5 March 1996.
6. *Id.* at 3.
7. *Id.*
8. *Id.* at 4.
9. *Id.*, note 1.
10. *Id.* at 3.
11. *Id.* at 2.
12. The Paris Court of Appeal (*Cour d'appel de Paris*) has jurisdiction over all applications to set aside international arbitration awards rendered in France. Moreover, the judges in section C of the First Chamber of the Court, which issued the decision in *Czech Republic*, specialize in international arbitration and private international law matters and hear, among other things, nearly all applications made to the Court to set aside international arbitral awards rendered in France, as well as applications concerning the enforcement in France of foreign arbitral awards.
13. See the French Code of Civil Procedure (CPC), art. 1502-1. Together, articles 1502 and 1504 of the CPC set forth the grounds on which an international arbitration award rendered in France may be set aside. Specifically, such an award may be set aside where (1) there is no agreement to arbitrate (art. 1502-1), (2) the arbitral tribunal was irregularly constituted (art. 1502-2), (3) the arbitral tribunal failed to abide by its mission (art. 1502-3), (4) there was a breach of due process in the course of the arbitration (art. 1502-4), and (5) where enforcement of the award would violate French international public policy (art. 1502-5). On its application, the Czech Republic also invoked grounds (3) and (5), both of which the Court likewise rejected.
14. *Czech Republic* at 3.
15. *Id.* at 2. On its set-aside application, the Czech Republic also sought costs and attorney's fees under article 700 of the CPC (as did Mr. Nreka in opposing the application). Under that article, the Court of Appeal has the power to award a successful party costs and attorney's fees. This is different from the so-called "American Rule" that generally applies in the United States, whereby each party usually must bear its own attorney's fees no matter the outcome of the case. Here, upon rejecting the Czech Republic's application to set aside the award, the Court ordered the State to pay Mr. Nreka EUR 70 000 in costs and attorney's fees.
16. *Id.* at 3.
17. *Id.* at 4.
18. *Id.*
19. *Id.*
20. *Id.* at 4-5.
21. *Id.* at 4.
22. See, e.g., Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, US-Arg., 14 Nov. 1991, S. TREATY DOC. No. 103-2, 1994, art. I(1)(a) ("investment" means every kind of investment . . . such as equity, debt, and service and investment contracts; and includes without limitation . . ."); Treaty between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, US-Kaz., 19 May 1992, S. TREATY DOC. No. 12 (1993), art. I(1)(a) (same); Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, US-Lith., 14 Jan. 1998, S. TREATY DOC. No. 106-42 (2000), art. I(1)(a) (same).
23. See the ICSID Convention, art. 25(1), 18 Mar. 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, which confines the jurisdiction of ICSID arbitration tribunals to "legal dispute[s] arising directly out of an investment."
24. See LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 15 (Kluwer Law

- Int'l 2004) (giving examples of what constitutes an investment under the ICSID Convention). To the best of the authors' knowledge, this definition of the term investment in the ICSID Convention was first suggested in 1978. See DOMINIQUE CARREAU, PATRICK JUILLARD & THIEBAUT FLORY, *DROIT INTERNATIONAL ECONOMIQUE* 363-364 (1st ed. 1978) and 560, 563 (3rd ed. 1990).
25. This limitation, however, may be eroded in the future. In a recent ICSID case, the arbitral tribunal found that the definition of the term investment in the ICSID Convention does not necessarily limit the jurisdiction ICSID tribunals as has been suggested in the past. Specifically, the tribunal noted that the drafters of the Convention had deliberately left the term investment undefined. The tribunal was reluctant to mechanically apply the usually definitional criteria. Given the broad definition of investment that often exists in BITs, the tribunal considered that a narrow interpretation of the term investment in the Convention might contradict individual agreements purporting to give jurisdiction to ICSID and run counter to international consensus. See *Biwater Gauff (Tanzania) Ltd. (U.K.) v. Tanzania*, ICSID ARB/05/22, Award, ¶¶ 312-314 (24 Jul. 2008). See also Andrea K. Bjorklund, *ICSID Tribunal Finds Tanzania to Have Violated Bilateral Investment Treaty but Declines to Award any Damages*, 12(27) ASIL INSIGHT, INT'L ECON. L. EDITION (31 Dec. 2008).
  26. See, e.g., *Mytilineos Holdings SA v. Serbia & Montenegro*, Partial Award on Jurisdiction, ¶¶ 111-120 (8 Sept. 2006) (UNCITRAL Rules) (commenting that, in the "present ad hoc arbitration under the UNCITRAL Rules . . . the only requirements that have to be fulfilled in order to confer *ratione materiae* jurisdiction on this Tribunal are those under the BIT").
  27. See, e.g., Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, US-Arg., 14 Nov. 1991, S. TREATY DOC. No. 103-2, 1994, art. VII(3); Treaty between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, US-Kaz., 19 May 1992, S. TREATY DOC. No. 12 (1993), art. VI(3); Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, US-Lith., 14 Jan. 1998, S. TREATY DOC. No. 106-42 (2000), art. VI(3).
  28. Cour d'appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 9 Oct. 2008.
  29. The Court of Appeal had previously rejected an earlier application by *Marocaine des Loisirs* to set aside a partial award issued by the same tribunal. That decision was on appeal before the French Supreme Court at the time the Court of Appeal rejected *Marocaine des Loisirs'* application to set aside the final award. *Marocaine des Loisirs* had asked the Court of Appeal to stay its decision with respect to the final award until the Supreme Court made its ruling with respect to the partial award, but the Court of Appeal rejected the request for a stay in the absence of any new arguments concerning the setting aside of the partial award.
  30. Cour d'appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 9 Oct. 2008.
  31. Cour d'appel [CA] [regional court of appeal] Paris, 5e ch. (section A), 15 Oct. 2008.
  32. Cour d'appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 23 Oct. 2008.
  33. Cour d'appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 23 Oct. 2008.
  34. Cour d'appel [CA] [regional court of appeal] Paris, 14e ch. (section B), 24 Oct. 2008.
  35. The term *juge des référés* does not have an exact equivalent in English.
  36. In practice, it is rare for a *juge des référés* to find that there is in fact *urgence* in cases where the enforcement of an arbitration agreement is at issue.
  37. Article 1458 of the CPC provides that "[w]here the dispute has not yet been submitted to an arbitral tribunal, the court shall . . . decline jurisdiction unless the arbitration agreement is manifestly void." When applying article 1458 and determining

- whether or not the alleged agreement to arbitrate is “manifestly void”, the French court is barred from carrying out a substantive, in-depth examination of the arbitration agreement. A clause that is “manifestly void” is, as those words suggest, void on its face. Where there are any doubts, the French court should decline jurisdiction and allow the arbitral tribunal once constituted to rule on its own jurisdiction. This approach is more arbitration friendly than that generally followed by courts in the United States. See Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? or Can Something Indeed Come from Nothing*, 13 AM. REV. INT’L ARB. 19 (2002) (explaining the American approach).
38. Cour d’appel [CA] [regional court of appeal] Paris, 1e ch. (section B), 6 Nov. 2008.
  39. Cour d’appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 13 Nov. 2008.
  40. The *Conseil d’Etat* is the supreme administrative court in France. The French administrative courts have jurisdiction over a wide variety of disputes relating to public institutions.
  41. Cour d’appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 27 Nov. 2008.
  42. The formalities necessary in order to enforce an international award in France are covered by article 1477 of the CPC. Specifically, to be enforceable in France, an international award must be stamped with an enforcement order (*exequatur*) by the President of the First Instance Court (*Tribunal de Grande Instance*) with jurisdiction. For international awards rendered in France, the President with jurisdiction is that of the First Instance Court with territorial jurisdiction over the place in France where the award was rendered. For foreign awards (that is, awards rendered outside of France), the President with jurisdiction is that of the First Instance Court of Paris or that of the First Instance Court with territorial jurisdiction over the place where the assets that are the target of execution of the award are located. The President may delegate his powers to another judge within his court.
  43. Article 1499 of the CPC provides that the “existence of an arbitral award is established by submission of an original thereof together with the arbitration agreement, or of copies of such documents satisfying the conditions required to ascertain their authenticity. If such documents are not in the French language, the party shall produce a certified translation by a translator registered on the list of experts.” In practice, the French courts permit that the translation of a foreign award be made by a sworn translator registered at the place of arbitration.
  44. Cour d’appel [CA] [regional court of appeal] Paris, 8e ch. (section B), 4 Dec. 2008.
  45. The interim measure was granted by a *juge de l’exécution*, which is a judge that has the power, among other things, to freeze assets in France that may be needed to satisfy an arbitral award. The term *juge de l’exécution* does not have an exact equivalent in English.
  46. The arbitration was brought on the basis of a BIT between Switzerland and Uzbekistan dated 16 April 1993.
  47. The expression *apparaît fondée en son principe* does not have an exact equivalent in English. In practice, a party establishes that its claim *apparaît fondée en son principe* by making an ex parte submission that states a claim upon which relief can be granted and provides documentary support that appears to the court, in the absence of countervailing evidence, to satisfy the party’s burden of proof.
  48. Cour d’appel [CA] [regional court of appeal] Paris, 1e ch. (section D), 10 Dec. 2008.
  49. Cour d’appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 18 Dec. 2008.
  50. Cour d’appel [CA] [regional court of appeal] Paris, 19e ch. (section B), 19 Dec. 2008. ■

**PARIS COURT OF APPEAL  
1st Chamber – Section C  
Decision of 25 September 2008**

Docket number: **07/04675**

APPLICATION TO SET ASIDE an arbitral award rendered on 5 February 2007 in Paris by an arbitral tribunal composed of Messrs. Rolf Schutze, Fred Wennerholm and Lucius Caflisch

**APPLICANT:**

**The CZECH REPUBLIC**

Finance Ministry, Finance Minister  
Whose main office is at: Letenska 15 11810 PRAGUE 1  
CZECH REPUBLIC

Represented by SCP DUBOSCQ-PELLERIN,  
*avoués à la Cour*<sup>[i]</sup>  
Assisted by Eric TEYNIER of SCP TEYNIER PIC et associés<sup>[ii]</sup>  
Cloakroom J 053

**DEFENDANT:**

**Mr. Pren NREKA**

Residing at: Ulica Nella Qarantotta  
No. 7HR-52210 ROVINJ  
REPUBLIC OF CROATIA

Represented by Gilbert THEVENIER  
*avoué à la Cour*  
Assisted by Joachim KUCKENBURG of [KUCKENBURG BURETH]<sup>[iii]</sup>  
Of the Paris Bar  
Cloakroom P 0529

**THE COURT:**

The case was heard in a public session on 29 May 2008 and the report was read out before the Court, comprising:

Mr. PÉRIÉ, President  
Mr. MATET, Judge  
Mr. HASCHER, Judge  
Who deliberated thereupon.

**Clerk** during the hearing: Ms. ROULLET

**Public Prosecutor:**

The case file was communicated to the Public Prosecutor

**DECISION:**

- rendered after hearing all parties
- given in a public session by Mr. PÉRIÉ, President
- signed by Mr. PÉRIÉ, President, and by Ms. FALIGAND, Clerk present when the ruling was made.

\*\*\*\*\*

On 15 March 2007, the Czech Republic, represented by its Finance Ministry, filed an application to set aside an ad hoc partial arbitration award rendered in Paris on 5 February 2007 by Messrs. Schütze and Wennerhold (arbitrators) and Mr. Caflisch (chairman), who decided upon the basis of the bilateral investment treaty (BIT) of 5 March 1996 entered into between Croatia and the Czech Republic, and held that the Czech Republic failed to meet its obligation under the treaty to provide the investments, the investors, and the income of the investors from the other contracting Party – in this case, Mr. Pren Nreka – with fair and equitable treatment, and that therefore the Czech Republic had to compensate Mr. Nreka for the resulting loss.

In support of its application, the Czech Republic raises three grounds for the setting aside of the award: lack of an arbitration agreement (art. 1502-1 CPC), failure of the arbitral tribunal to comply with its mission (art. 1502-3 CPC) and violation of international public policy (art. 1502-5 CPC). The Czech Republic asked the Court to order Mr. Nreka to pay the costs and the amount of EUR 50,000 pursuant to article 700 of the Civil Procedure Code (CPC).

Mr. Nreka, a Croatian citizen, argues the application should be dismissed and the Czech Republic ordered to pay Mr. Nreka EUR 70,000 pursuant to article 700 CPC in addition to court costs.

**HAVING SAID THIS, THE COURT:**

Regarding the first ground for setting aside for lack of an arbitration agreement (article 1502-1 CPC):

The Czech Republic argues that the arbitral tribunal only had jurisdiction to hear disputes involving an investment, and no other types of disputes. In this case, it claims the dispute with Mr. Nreka did not involve an investment, since neither [A] the "work agreement" between the Czech company ZIPimex whose sole shareholder is Mr. Nreka, and the Prague Pedagogical Centre, a public institution under the authority of the Ministry of Youth, Schools and Physical Education, for renovations on the ground floor and first storey of a building owned by the Czech government and occupied by the Pedagogical Centre, nor [B] the lease, which provided that once the renovations for a total of EUR 300,000 were completed, ZIPimex could rent a surface area of 309m<sup>2</sup> on the ground floor and lower level for commercial purposes for a period of fifteen years, contributed significantly to the country's economic development.<sup>[iv]</sup>

The Czech Republic adds that the transaction was carried out in violation of Czech law, which the Czech courts found in a final ruling, and therefore may not constitute an investment protected under the BIT to which it has given its consent for the arbitration.

Whereas Mr. Nreka, according to the arbitration request dated 30 March 2005, initiated proceedings against the Czech Republic on the basis of article 8-2 of the BIT signed on 5 March 1996 between the Czech Republic and the Republic of Croatia, under which disputes between one

of the Contracting Parties and an investor from the other Contracting Party are to be submitted, at the investor's option, either to an ad hoc tribunal established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) or to the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965;

Whereas it is undisputed between the parties that consent to arbitration results from Mr. Pren Nreka's acceptance of the Czech Republic's offer to arbitrate arising from the aforementioned provisions of the BIT and that Mr. Nreka opted for an ad hoc arbitration whose seat was fixed in Paris by the arbitral tribunal;

Whereas the Court, in assessing the meaning and scope of the arbitration agreement contained in the above provisions of the BIT, reviews de novo the parties' grounds and arguments in fact and in law; contrary to what the Czech Republic or Mr. Nreka argued with regards to the applicability of the rule of estoppel, it is of little importance whether the arguments raised in these setting aside proceedings regarding the lack of an arbitration agreement were raised before the arbitrators, provided an objection to jurisdiction was raised during the arbitration procedure, as the fact that an argument was not previously raised before the arbitrators does not imply that the applicant accepted their jurisdiction;

Whereas the dispute arose from the signing of a "work agreement" in December 1996 and a lease agreement between the Czech company ZIPimex, whose business is trade in goods, brokerage, space rental and the provision of services, and the Pedagogical Centre of the Ministry of Youth, Schools and Physical Education, an organisation that has a separate legal personality. Under these agreements, ZIPimex undertook to renovate and fit out the premises on the first floor of a building managed by the Pedagogical Centre, as well as to lease part of the premises for commercial activities, namely, operating a pizzeria, for a period of 15 years;

Whereas the Ministry, owner of the premises, decided in January 2002 to retake possession of the entire building, including the premises leased to ZIPimex, for its own uses in order to centralise its offices, and asked ZIPimex to vacate the premises. When the tenant refused to comply, the Czech Republic obtained annulment of the lease from the Prague courts on the basis that the competent authority had not given its prior authorisation, that the rent amount was not specified, and that no clause allowed the government to unilaterally terminate the lease, contrary to the requirements of Czech law covering the lease of non-residential premises;

Whereas the Czech Republic claimed that the disputed transaction was a mere commercial transaction that could not be considered an investment in light of five generally accepted criteria: [1] a significant capital contribution [2] for a significant duration that [3] involves risk as well as [4] a regular flow of profit for the investor, [5] while making an appreciable contribution to the host State's economic development. In support of this definition of investment, the Czech Republic cited arbitration case law and ICSID case law in particular.<sup>[v]</sup>

Whereas the 5 March 1996 BIT between Croatia and the Czech Republic sets out in article 1-2:

1. "The term "investor" shall mean any natural or legal person who invests in the territory of the other Contracting Party.

(a) The term "natural person" shall mean any natural person having the nationality of either Contracting Party in accordance with its laws. . . .

2. The term "investment" shall mean any kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party, provided that they have been made in accordance with the

laws and regulations of the other Contracting Party and shall include, in particular, though not exclusively:

- (a) movable and immovable property, as well as any other property rights, rights in rem, such as mortgages, liens, pledges and similar rights;
- (b) shares, stocks and debentures of companies or any other form of participation in companies;
- (c) claims to money or to any performance having an economic value associated with an investment;
- (d) intellectual and industrial property rights, including copyrights, trade marks, patents, industrial designs, technical processes, know-how, trade secrets, trade names and goodwill associated with an investment;
- (e) any right conferred by laws or under contract and any licenses and permits pursuant to law, including the concessions to search for, extract, cultivate or exploit natural resources and rights granted by a public authority to carry out an economic activity";

Whereas the BIT provisions set out above do not provide for any criteria identifying what is an investment, but rather give a list, that is moreover non-exhaustive, of cases considered an investment; the conditions raised by the Czech Republic regarding the definition of investment would constitute an addition to the text of [article 1 of the] the BIT[;] moreover, that definition of investment is not a condition for jurisdiction [in article 9 of the BIT];<sup>[vi]</sup>

Whereas the only test is to determine whether the transaction that serves as a basis for the claim comes within the frame of the BIT's provisions in order to verify that this claim can indeed be covered by the treaty's offer to arbitrate; this requirement is satisfied in this case by the premises leased for 15 years in consideration of renovations, which constitutes an investment under the very broad terms of the BIT cited above which, among other things, encompass any contractual right;

Whereas the award that says "regarding its jurisdiction, the sole task of the Tribunal is to determine whether the claims brought by the Claimant [Mr. Pren Nreka] come within the frame of jurisdiction set up in the treaty concerned. At this stage, the issue is not whether the Claimant's allegations are grounded, rather the only issue is what the nature of the claims or requests are" (para. 76), must be approved;

Whereas Mr. Nreka, who created a business by investing monies in consideration for a 15-year lease, complained that the loss of the contractual right to occupy the premises – and the resulting destruction of his investment, since he had to vacate the premises in July 2004 because he was facing the risk of criminal prosecution – entailed a violation by the Czech Republic of its obligations under the BIT, in particular article 3 guaranteeing investors fair and equitable treatment and article 4 prohibiting expropriations or measures with the same effect; since article 8-1 of the BIT envisions the possibility of an arbitration in the broadest terms and covers disputes without any other condition, the arbitral tribunal did have jurisdiction;

Whereas according to the terms of article 1 of the BIT mentioned above, the investment must have been made "in accordance with the laws and regulations of the other Contracting Party", a condition that the arbitrators found did not allow the Czech Republic to deprive an investment of protection, "since the State's argument based on domestic law is allegedly contrary to its obligations to provide fair and equitable treatment and its obligations of good faith under the BIT" (para. 117); the arbitrators having noted: it was understood that the lease was valid at the time it was entered into, and indeed was performed for several years; the lease was even approved by

administrative services of the city of Prague in August 1997; the work agreement, which constituted the prerequisite and consideration for the lease, was clearly valid, and the works were completed in accordance with Czech law (paras. 114-116);

Whereas the requirement of compliance with the laws and regulations of the Czech Republic referred to in the aforementioned article 1-2 of the BIT concerns the investment's conformity with the law on investment and the investor's compliance with that law; it does not concern a situation where a lease with a public entity was declared null and void because, among other things, the authorities did not provide the necessary authorisations; this is especially because a public entity is necessarily under the duty to ensure that its consent is lawful;

That the first ground for setting aside is therefore dismissed;

On the second ground for setting aside for failure of the arbitral tribunal to comply with its mission (article 1502-3 CPC):

The Czech Republic further asserts that the arbitral tribunal, whose mission was to rule on the infringement of the obligation to provide fair and equitable treatment to investments and investors, went beyond such mission [A] in deciding that the applicant breached its contractual obligations under the lease agreement, [B] in considering the Czech Republic liable for the breach of contract committed by the Prague Pedagogical Centre, and [C] in applying upon its own motion a rule of law other than the provisions of the BIT selected by the parties.<sup>[vii]</sup>

The applicant adds that the arbitral tribunal also did not comply with its mission by disregarding systematically the three arguments upon which the Czech courts based their decision to cancel the lease agreement, despite the fact that no claim for denial of justice by the Czech courts had been submitted to the tribunal, which is the only circumstance under which the arbitrators would have been allowed to rule on any misjudgement from the courts of the host State under international investment law.

Whereas the award's statements that are criticised by the Czech Republic found both a breach of the contract and a breach of the treaty:

"The arbitral tribunal shares the defendant's [Czech Republic] point of view that usually a mere failure to perform an investment contract cannot entail the liability of the host State. However, as already indicated [...] the situation is different in the case at hand: the defendant not only failed to meet its contractual obligations but, with complete disregard for the investor's legitimate expectations, took concrete steps to obtain the annulment of the agreement. Even if a private party to the agreement could have perhaps acted in the same way, the defendant was bound by its additional obligations under the BIT. Here, the State's obligation to provide fair and equitable treatment, under article 3 of the BIT, required the State to refrain from relying on the formal legal situation under Czech law and to refrain from filing suit. The fact that ZIPimex or the plaintiff [Mr. Pren Nreka] could have asked for compensation before the Czech courts has no bearing on this conclusion" [paragraph 227];

Whereas the above-mentioned provisions on arbitration in article 8-1 of the BIT concern jurisdiction over disputes of any kind arising between one of the Contracting Parties and an investor from the other Contracting Party and are not limited to disputes rooted in a breach of the BIT but also apply to any dispute concerning an investment, regardless of the cause, including a breach of contract and especially a breach of a contract that was entered into with a public entity;



Whereas the arbitrators' mission was to settle the dispute between the investor and the host State relating to the investment foreseen in the BIT, without excluding the contractual aspects;

Whereas the fact that a breach of the BIT may also constitute a breach of contract does not reduce or modify in any way the mission of the arbitral tribunal before which Mr. Nreka requests compensation for violation by the Czech Republic of its obligation to guarantee fair and equitable treatment to investments and investors under article 3(1) and (2) of the BIT, as well as its obligation, provided for under article 4 of the BIT, to refrain from taking, directly or indirectly, expropriation measures;<sup>1</sup>

Whereas, furthermore, it is not for the court to pass judgment on the conditions under which the arbitrator determines and implements the rule of law selected, or to verify the rules of law applicable to the case at hand; the applicant's request to set aside the award on the ground that the arbitrators took a decision at odds with the decision of the Czech courts on the cancellation of the lease agreement is tantamount to asking this Court to pass judgment on the arbitrators' reasoning and the substance of their decision, a path this Court cannot go down;

Whereas the second ground must therefore also be rejected;

On whether the recognition of the award would be contrary to international public policy (article 1502-5 CPC):

Lastly, the Czech Republic asserts that the award seriously disregards its fundamental right to take legal action, in this case, to request the court-ordered termination of the lease agreement. However, notwithstanding the recognition of such a right by international human rights conventions and by all French and European Community courts, the arbitral tribunal held that the Czech Republic breached its obligations under the investment protection treaty and was internationally liable for bringing a legal action before its courts, as a party to the agreement, in order to seek annulment of the lease.

---

<sup>1</sup> Mr. Pren Nreka's claims, as set out in his last submissions of 1 November 2006 to the arbitrators, are as follows:

(1) Payment of compensation

Order the Czech Republic to pay Mr. Pren Nreka the amount of CZK 26,210,685 within 14 days of the notification of the award

(2) Interest

Order the Czech Republic to pay Mr. Pren Nreka interest on the amount of CZK 26,210,685 at a rate 7% higher than the basic national rate from 17 July 2004 and until final payment

(3) Order to withdraw the action for unjust enrichment

Order the Czech Republic to withdraw its action and to refrain from bringing any action for unjust enrichment against Mr. Pren Nreka or ZIPimex due to the use of the premises located at 1035, Praha 1, Na porici 4, between 20 December 1996 and 16 July 2004

(4) Costs, expenses and fees

Order the Czech Republic to reimburse Mr. Pren Nreka in full for all costs, expenses and fees (including lawyers' fees) relating to this arbitration

Whereas Mr. Nreka complained about the Czech Republic's breach of its obligation under the BIT to treat him and his investment in a fair and equitable manner by bringing a suit in order to obtain the annulment of the lease and the eviction of ZIPimex from the leased premises;

Whereas the arbitral tribunal considered that:

"[T]he Defendant's actions may freely be examined at the international level. Such an examination would not appear, in particular, to circumvent the limits applicable to the judicial review of legal actions. The Tribunal sees no valid reason why the filing of a legal action filed by the Defendant's executive authorities, could not be considered independently from the conduct of the action before the courts. For the tribunal, the filing of a legal action may in and of itself, constitute unfair or inequitable treatment, regardless of its legitimacy under national law" (paragraph 160);

Whereas the arbitral tribunal ruled that the Czech Republic and its organs created legitimate expectations upon which Mr. Nreka could have reasonably relied for the purpose of making his investment – i.e., expectations that the lease agreement would be performed until its term – and which were subsequently breached by the filing of a suit against ZIPimex, the proceedings and the result of the proceedings not being at issue here;

Whereas the award places no substantial restrictions on the Czech Republic's right to file a legal action, a right upon which limits may nevertheless be set for the purpose of reconciling it with other fundamental rights, such as the right to legal security that the State must provide under fair and equitable treatment, and under which investors' legitimate trust or expectations must, as shown by the award, be protected;

Finally, the right for a State to file a counterclaim in a proceeding may always be exercised before an arbitral tribunal;

Whereas the recognition or enforcement of the award does not violate French international public policy, the third ground, and together with it, the entire application, must be rejected;

On costs and article 700 CPC:

Whereas the Czech Republic whose application was denied, will bear the costs and may not claim compensation under article 700 CPC, and will pay an amount of EUR 70,000 to Mr. Pren Nreka pursuant to such provision.

**FOR THESE REASONS:**

Dismisses the application against the ad hoc award rendered in Paris on 5 February 2007,

Orders the Czech Republic to pay Mr. Pren Nreka the amount of EUR 70,000 pursuant to the provisions of article 700 CPC,

Rejects all other claims,

Orders the Czech Republic to bear costs and grants Mr. Thevenier, *avoué*, the rights provided under article 699 CPC.

---

**Translators' notes:**

<sup>i</sup> In France, an *avoué à la Cour* is a lawyer whose practice consists solely of representing clients before the Court of Appeal, where only *avoués* have rights of audience. Lawyers wishing to make submissions on behalf of clients before the Court of Appeal must do so by working with an *avoué*. The Minister of Justice has recently proposed reforms, however, that would dispense with the need for *avoués*. There is no exact equivalent in English for the term *avoué*.

<sup>ii</sup> The expression *et associés* means "and partners". As it forms part of the legal name of the firm, it has been left untranslated in the text.

<sup>iii</sup> The bracketed text has been added to specify the name of Mr. Kuckenburger's firm, which the original opinion has as SELARL KUCKENBURG.

<sup>iv</sup> The bracketed letters in this paragraph have been added by the translators for ease of reading.

<sup>v</sup> The bracketed numbers in this paragraph have been added by the translators for ease of understanding.

<sup>vi</sup> The bracketed text in this paragraph has been added by the translators for ease of understanding.

<sup>vii</sup> The bracketed letters in this paragraph have been added by the translators for ease of reading.