

Commentary

A View From Paris — August 2009

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Introduction*

As explained in our inaugural issue (February 2009), *A View From Paris* tracks developments in French international arbitration law exclusively. This quarter, however, we have decided to SPOTLIGHT *General Motors France SAS v. Champs de Mars Automobiles SA*,¹ one of a trio of decisions rendered in the context of domestic French disputes where the Paris Court of Appeal grapples with the question, *What is arbitration?*² At first blush, this may seem an odd choice. As a general matter, French law draws a distinction between domestic arbitration and international arbitration and decisions taken in the context of one are usually irrelevant to the other.³ *General Motors* is a domestic case, not an international one, so why should we (who report only on developments in international arbitration) cover it at all, much less as the SPOTLIGHT? Moreover, the French courts consistently state that international arbitration agreements are subject to no national law, so why should we (who care only about agreements to arbitrate international disputes) mind how the French courts define arbitration? Answer: *General Motors* is an example of one of the rare cases decided in the domestic context

that may well be equally relevant to international arbitration.⁴

Unlike our SPOTLIGHT, all of the cases in our SEE ALSO section arise in the context of international arbitration. As usual, they address a wide variety of significant issues, including the dramatically different consequences under French law that flow from an arbitration's being considered domestic or international, the sometimes awkward relationship between bankruptcy and international arbitration, the policing of fraudulent awards and the ease with which the French courts find non-signatories to be parties to arbitration agreements.

Spotlight: General Motors France SAS v. Champs de Mars Automobiles SA

The *General Motors* case concerns a distribution agreement between General Motors France SAS (General Motors), an importer of Opel brand cars into France, and Champs de Mars Automobile SA (Champs de Mars) an automobile distributor. The Agreement, which took effect in October 2003, was for an indefinite term and required the parties to agree on sales objectives before the end of the first quarter of each calendar year. In the event the parties could not agree, the Agreement provided (in a clause entitled "Arbitration") that the parties should submit their dispute to a "commission" composed of three third-party experts — one appointed by General Motors, one appointed by Champs de Mars and the third appointed by the first two.⁵

The parties failed to agree on sales objectives for 2007 and submitted their dispute to a commission

of experts. In June 2008, the commission rendered a “decision” setting the sales objective for Champs de Mars for 2007 at 388 private vehicles.⁶ General Motors then purported to appeal the commission’s “award,” asking the Court of Appeal, among other things, to reverse the award and set Champs de Mars’s private vehicle objective for 2007 at 535.⁷ Champs de Mars responded that the appeal of the commission’s decision was inadmissible and the Court elected to decide this issue first.⁸

In this regard, Champs de Mars argued that the dispute resolution clause in the Agreement was not an arbitration clause, and the commission’s decision was not an arbitral award. Accordingly, the commission’s decision could not be appealed pursuant to the provisions of French domestic arbitration law that allow for the appeal of arbitral awards.⁹ By contrast, General Motors noted that the dispute resolution provision was entitled “arbitration clause” and applied where the parties disagreed about the performance of their contractual obligations.¹⁰ The parties had agreed to submit disputes to the commission, which had heard the parties’ opposing views as to the appropriate sales objective. According to General Motors, the commission had jurisdictional powers since its decisions were to be binding. Under these circumstances, General Motors argued that the commission’s decision should be considered an arbitral award and therefore subject to appeal.¹¹ The Court of Appeal disagreed.¹²

The Court of Appeal explained that, for purposes of determining whether a decision is an award, the terms the parties use in their dispute resolution agreement (e.g., “arbitration clause”) are irrelevant, as are the terms the decision makers use to characterize their own decision. Rather, what determines whether a decision is an award is the nature of the mission the parties entrusted to the decision maker. Here, the Court noted, there was no dispute between the parties that General Motors had the right to impose annual sales objectives on Champs de Mars and that Champs de Mars was contractually obliged to meet those objectives. The mission the parties entrusted to the commission was of a “fact-finding” and “technical” nature exclusively.¹³ The parties did not ask the commission to decide a legal dispute and the commission did not draw any legal conclusions from its decision. The parties did not even ask the commission to decide how the fees for its work should be allocated

between the parties — the agreement providing that they would be shared equally. As it is not possible to have arbitration without a legal dispute, the Court concluded that the proceedings before the commission did not constitute an arbitration and the decision of the commission did not constitute an award. The Court accordingly held General Motors’ purported appeal against the commission’s decision inadmissible pursuant to the provisions for the appeal of domestic arbitral awards.¹⁴

* * *

France is widely regarded as a thought leader in the field of international arbitration. Its arbitration act is one of the most arbitration-friendly in the world, and its courts develop innovative approaches to arbitration issues in accordance with a pro-arbitration policy that is reflected in a consistent body of case law enforcing agreements to arbitrate and arbitral awards. One of these innovations concerns the approach of the French courts with respect to the law applicable to arbitration agreements in international arbitration.

Under French international arbitration law, the arbitration agreement is separable from the main contract in which it is contained. As a practical matter, this means that the enforceability of the arbitration agreement must be evaluated independently from the enforceability of the main contract. Issues affecting the enforceability of the main contract do not necessarily have any impact on the enforceability of the arbitration agreement.¹⁵

In addition, the separability of the arbitration agreement means that the law applicable to the main contract does not apply to the arbitration agreement. Under French international arbitration law, parties wishing a particular law to govern their arbitration agreement must expressly say so. If they do not, as is usually the case, French courts have for many years taken the innovative view that no national law governs the agreement to arbitrate.¹⁶ This is because the French courts consider international arbitration agreements to be transnational instruments that, as such, are not subject to any national law.

As a consequence, when a party challenges the enforceability of an international award¹⁷ before the French courts on the ground that there was no valid

arbitration agreement, the French courts will only examine whether there was a “common intention of the parties” to arbitrate the dispute settled in the award, subject only to the limits of French international public policy that may affect the existence, validity or scope of the arbitration agreement. And French courts are liberal in finding a “common intention of the parties” to arbitrate. If there is an arbitration agreement to be found, they will find it. The parties do not need to have signed the contract containing the arbitration clause or even be named in that contract. The French courts frequently find that parties intended to arbitrate their disputes based solely on their involvement in the performance of a contract containing an arbitration clause.¹⁸ As a result, French court decisions denying enforcement of an international award for lack of a valid arbitration agreement are rare. But is it really correct to say that, in international arbitration, the French courts apply no national law to determine whether a valid arbitration agreement exists? Arguably, no — the French courts apply French law.¹⁹

As a preliminary matter, the no-national-law approach applies only in *international* arbitration cases, and the French courts look to French law to determine whether the case at issue concerns international arbitration — i.e., an arbitration that involves the interests of international trade.²⁰ If so, French law, as developed by the French courts, provides that an *agreement* to arbitrate exists where the parties have a “common intention” to resolve disputes by arbitration, nothing more (subject only to the limits of French international public policy). And, although they rarely say so expressly, the French courts also look to French law to determine whether the parties’ agreement is for *arbitration* or something else. This is where *General Motors* comes in.

The term arbitration is left undefined in the French code. As a result, the French courts periodically examine and define — most often in the context of domestic disputes — what arbitration is, particularly as distinguished from other forms of dispute resolution (e.g., mediation, conciliation, expertise). To have arbitration, parties must agree to submit a genuine legal dispute to a third-party with jurisdictional authority to render a binding decision.²¹ As explained in *General Motors*, purely factual disputes do not an arbitration make. This is so whether the alleged arbitration

is domestic or international, making this one of the rare areas where cases concerning domestic disputes — such as *General Motors* — can have relevance for international arbitration.

It is amazing how much law may apply when no national law applies.

See Also

Enforcement Of Agreements To Arbitrate • Competence-Competence

In *Gefu Kuchenboss GmbH & Co.Kg* [Germany] *v.* *Corema* [France],²² the French Supreme Court vacated a decision of the Toulouse Court of Appeal that the Toulouse Commercial Court had rightly taken jurisdiction over a dispute related to an agency contract that contained a dispute resolution clause referring to arbitration. The clause at issue provided that any dispute be resolved by an arbitrator appointed jointly by the parties within three months from one party’s giving notice of a dispute to the other. In case the arbitration could not be implemented, the clause provided that the Toulouse Commercial Court would have exclusive jurisdiction.

Upon Gefu Kuchenboss’s termination of the contract, and despite the terms of the arbitration clause, Corema sent a dispute notice purporting to appoint its own counsel as arbitrator and invited Gefu Kuchenboss to appoint an arbitrator. Gefu Kuchenboss did not do so. Thereafter, Corema initiated proceedings before the Toulouse Commercial Court and Gefu Kuchenboss relied on the arbitration agreement to object to that court’s jurisdiction. The Toulouse Commercial Court nevertheless retained jurisdiction and the Toulouse Court of Appeal affirmed its decision on the basis that Gefu Kuchenboss’s refusal to participate in the arbitral proceedings and in the appointment of the arbitral tribunal within the three-month deadline had rendered the arbitration agreement void. The Supreme Court vacated that decision for violation of the competence-competence principle. Specifically, the Supreme Court noted that the Court of Appeal’s decision did not amount to a finding that the arbitration agreement was manifestly void or manifestly inapplicable — the only two grounds under French arbitration law upon which an arbitral tribunal may be denied its priority to decide on its own jurisdiction.²³

**Enforcement Of Awards • Bankruptcy •
Fraudulent Awards •
International Public Policy**

In *Receivers of Viva Chemical (Europe) NV* [Belgium] *v. Allied Petrochemical Trading & Distribution LC* [Isle of Man],²⁴ the Paris Court of Appeal annulled an enforcement order the Paris First Instance Court (*Tribunal de Grande Instance*) had stamped on a foreign award on the grounds that recognition and enforcement of the award would be contrary to French international public policy. On 28 September 2006, Viva Chemical (now bankrupt) purchased 3 400 tons of base oil from a company called Petroval. Viva Chemical never paid for the oil, however. Despite this, on 13 October 2006, Viva Chemical sold the oil on to Allied Petrochemical. For its part, Allied Petrochemical never paid Viva Chemical in full for the oil. Allied Petrochemical subsequently sold some of the oil back to Viva Chemical, who then sold it on to a third party. Viva Chemical made this sale partly on its own behalf and partly on behalf of Allied Petrochemical. Eventually, in November and December 2006, Petroval and another creditor of Viva Chemical seized the oil, which at the time of seizure was located in France. Allied Petrochemical objected to the seizure in the French courts on the grounds that it owned part of the oil. The objection was rejected on 15 May 2007 and, on 22 May 2007, Viva Chemical decided to file for bankruptcy, which it did on 24 May 2007.

At the same time, on 22 May 2007, two days before Viva Chemical filed for bankruptcy, Allied Petrochemical and Viva Chemical jointly appointed a sole arbitrator who rendered an award by consent the following day, deciding that Allied Petrochemical was the owner of part of the oil and that the vendor, Viva Chemical, was to bear certain costs. (This subsequent agreement to arbitrate was different to the one included in the original contract of sale between Allied Petrochemical and Viva Chemical, which provided for three arbitrators to act under the London Court of International Arbitration (LCIA) rules.) On 28 June 2007, however, Allied Petrochemical agreed with the receivers of Viva Chemical that it was in fact the receivers who should decide within four months who owned the oil. Despite this, less than a month later, on 23 July 2007, Allied Petrochemical obtained an order for enforcement of the award by consent from the Paris First Instance Court. The receivers of Viva Chemical appealed that order on the grounds that the

award by consent was fraudulent and its recognition and enforcement would violate the principle of equality between creditors. Petroval and another creditor of Viva Chemical intervened in the appeal and also requested, among other things, the annulment of the order enforcing the award by consent.

As a preliminary matter, the Court of Appeal held that, while the receivers' appeal was admissible, Petroval and the other creditor could not join in the proceedings as they had not been parties to the arbitration leading to the award by consent. Turning to the merits of the appeal, the Court of Appeal noted that the various transactions with respect to the oil made it unclear who the owner of the oil was. In the face of this ambiguity, Allied Petrochemical and Viva Chemical modified their arbitration agreement to obtain within 24 hours an award by consent stating that Allied Petrochemical was the owner of the oil in question. The award was issued by a sole arbitrator without any investigation whatever on the eve of Viva Chemical's filing for bankruptcy — i.e., within the suspect period when pre-bankruptcy transactions may be declared void to protect the principle of equality between creditors. Under these circumstances, the Court of Appeal found that the award by consent had been rendered in the absence of a dispute between the parties and had for its sole purpose to impose a *fait accompli* on the receivers in breach of the parties' 28 June 2007 agreement that the receivers should decide who owned the oil. As a result, the Court of Appeal held that the award was fraudulent and its recognition and enforcement in France would be contrary to French international public policy, and accordingly annulled the enforcement order.

**Enforcement Of Arbitral Awards • Set-Off •
Due Process • International Public Policy**

In *Montréal Montajes y Realizaciones SA*. [Spain] *v. Siemens AG* [Germany],²⁵ the Paris Court of Appeal rejected Montréal's request to set aside an ICC partial award of 2007 rendered in Paris that declined jurisdiction over Montréal's set-off claim in the arbitral proceedings. The parties had entered into two separate agreements in 2001. The first contract concerned the rehabilitation of Eritrea's electricity network; the second contract concerned the renovation of the Bahamas' electricity network. On both contracts, Montréal and Siemens were members of a consortium; Montréal was head of the consortium

on the Eritrea contract and Siemens was head of the consortium on the Bahamas contract. After Siemens demanded payment from Montreal of approximately US\$ 1 million under the Eritrea contract, Montréal, in response, demanded payment from Siemens of approximately US\$ 5.7 million under the Bahamas contract. Siemens then commenced ICC arbitral proceedings pursuant to the arbitration clause in the Eritrea contract to recover the sums due from Montréal under the Eritrea contract. In its defense, Montréal claimed the amounts Siemens allegedly owed it under the Bahamas contract and argued that any amounts awarded Siemens under the Eritrea contract should be set-off against the amounts Siemens owed Montréal under the Bahamas contract, in order for the entire dispute to be resolved in a single arbitration. In its partial award, the tribunal declined jurisdiction over Montréal's set-off claim.

Montréal applied for annulment of the partial award on three grounds. First, it argued that by declining jurisdiction over its set-off claim, the tribunal had breached due process by depriving Montréal of its only defense and preventing it from making its submissions on the merits. As a result of this, Montréal also contended that the recognition and enforcement of the award would be in breach of French international public policy. Finally, Montréal argued that, by refusing to hear it on set-off, which is considered under Swiss law (the law applicable to merits) as a means to discharge a principal debt, the tribunal had effectively refused to make a determination as to the existence of the principal obligation, and therefore failed to comply with its mission to determine the claim put before it.

In rejecting Montréal's application, the Court of Appeal found that the parties had agreed that the tribunal should first decide on whether the tribunal had jurisdiction over Montreal's set-off claim and had made submissions to the tribunal on that issue. Then, noting that the tribunal held it did not have jurisdiction over the set-off claim pursuant to the terms of the Eritrea contract, which expressly excluded such defense, the Court concluded that the arbitral tribunal had not breached due process. The Court of Appeal also held that Montréal had not explained how the recognition and enforcement of the award would be in breach of French international public policy. Moreover, by challenging the tribunal's interpretation of Swiss law, Montréal had effectively sought

a revision of the award, which is not permissible in annulment proceedings under French international arbitration law. Finally, the Court of Appeal found that the tribunal, sitting pursuant to the arbitration clause in the Eritrea contract, did not fail to comply with its mission when it declined jurisdiction on the grounds that Montréal's claim under the Bahamas contract had then not yet been determined in a separate arbitration.

Enforcement Of Awards • Bankruptcy • International Public Policy

In *Liquidator of Jean Lion [France] v. Income [Egypt]*,²⁶ the French Supreme Court vacated on grounds of French international public policy a Paris Court of Appeal decision upholding an order issued by the Paris First Instance Court enforcing a foreign award. Jean Lion (now bankrupt) and Income entered into three contracts for the sale and purchase of crystallized sugar. The contracts contained a dispute resolution provision providing for arbitration before the Refined Sugar Association. Following difficulties in the performance of the contracts, Income initiated arbitration proceedings in 2001. In 2003 (during the course of the arbitration), Jean Lion filed for bankruptcy in the French courts and, later that year, the courts ordered that Jean Lion be liquidated. In 2004, while the liquidation of Jean Lion was ongoing, the arbitral tribunal rendered an award ordering Jean Lion to pay to Income US\$5 million with interest. In 2006, the Paris First Instance Court stamped an enforcement order on the award. The liquidator of Jean Lion appealed the enforcement order before the Paris Court of Appeal on the grounds that the arbitral tribunal had not complied with due process and that recognition and enforcement of the award would be contrary to French international public policy. Income opposed the appeal and represented to the Court of Appeal that, if the Court let the enforcement order stand, Income would not take steps to collect on the award. On 7 November 2008, the Court of Appeal dismissed the appeal on the ground that the liquidator was estopped from opposing the enforcement of the award because, despite being fully informed of the arbitral proceedings, it had not participated in them. Further, even though the award ordered a liquidated party to make payment to one of its creditors, the Court of Appeal found that recognition of the award would not violate French international public policy in an actual and concrete manner in light of Income's

representation that it would not seek collect on the award.

Before the Supreme Court, the liquidator of Jean Lion first argued that the Court of Appeal had itself breached due process in finding the liquidator estopped from arguing that the arbitration proceedings breached due process. This is because, according to the liquidator, the issue of estoppel had not been raised, as Income had only argued before the Court of Appeal that the liquidator had waived its right to complain. The Supreme Court disagreed, finding that the Court of Appeal has the power to ensure good faith conduct on the part of parties involved in arbitration. Where a party refuses to participate in arbitral proceedings, the Supreme Court explained, that party is both estopped from arguing that the proceedings breached due process and must be considered to have waived its right to complain on this score. The liquidator also contended that, although it had had notice of the arbitration, it had not been a party to the arbitration and therefore had not been in a position to make submissions to the arbitral tribunal, including submissions to complain about the conduct of the proceedings. The Supreme Court rejected this argument, as well. The Court noted that the liquidator had been informed of all steps in the arbitral proceedings, and the Refined Sugar Association had expressly invited the liquidator to contact it for information and documents related to the proceedings. Under these circumstances, the Supreme Court considered that the liquidator could have raised procedural objections during the course of the arbitration and that the Court of Appeal therefore did not err in finding that it was now estopped from doing so. The liquidator further contended that the Court of Appeal had itself noted that there “had been no debate” before the arbitral tribunal, in breach of due process. The Supreme Court rejected this argument too on the grounds that all parties had had the opportunity to exchange written pleadings and could have objected to the arbitral tribunal’s deciding the case on a documents-only basis, had any party wished to do so.

The Supreme Court nevertheless vacated the Court of Appeal decision, thereby denying the award recognition and enforcement in France. It did so on the basis that recognition of an award that orders a bankrupt party to make payment to an individual creditor would violate the principle that bankruptcy suspends

actions by individual creditors actions against the bankrupt party — a principle that forms part of French international public policy.

Enforcement Of Awards • Due Process

In *CIECH [Poland] v. Comexport Companhia de Comercio Exterior [Brazil]*,²⁷ the French Supreme Court upheld a 2007 decision of the Paris Court of Appeal that refused to set aside an ICC award rendered in France in 2005 by a sole arbitrator. On 1 January 1993, the parties entered into a contract for the sale of sulfur that contained a dispute resolution clause providing for arbitration under the ICC rules. Disputes arose and, in 2003, Comexport filed for arbitration with the ICC. In 2005, a sole arbitrator rendered an award ordering CIECH to pay close to US\$ 2.5 million to Comexport. CIECH asked the Paris Court of Appeal to set the award aside on the grounds that the sole arbitrator had violated due process by referring in his award to certain Polish case law and scholarly writings concerning the Polish statute of limitation, upon which it alleged the parties had had no opportunity to comment. In rejecting CIECH’s request to set aside the award, the Court of Appeal found that these references were mere dicta that were not essential to the arbitrator’s reasoning and decision. Before the Supreme Court, CIECH argued that the references at issue were in fact pivotal to the award’s reasoning and that, in making its decision, the Court of Appeal had in fact reviewed the reasoning of the award (something the Court of Appeal does not have the power to do) and misinterpreted the content of the award. The Supreme Court disagreed, finding that the references at issue were superfluous to the arbitrator’s reasoning, and that the arbitrator’s decision only rested on matters debated by the parties. The Supreme Court accordingly found that the Court of Appeal had neither exceeded its powers nor misinterpreted the award and upheld its decision.

Enforcement Of Arbitral Awards • Existence Of An Arbitration Agreement • Composition Of The Arbitral Tribunal

In *Suba France [France] v. Pujol [France]*,²⁸ the Paris Court of Appeal declined to set aside an award rendered in France under the auspices of the Arbitration Chamber of Paris. In July 2005, Pujol entered into a contract with Suba France for the production of seeds. Although not a party to the contract, Suba & Unico, an Italian company, was involved in the negotiation

and performance of the agreement. (Together, we refer to Suba France and Suba & Unico as Suba.) Following Suba's refusal to take delivery and pay for certain seeds, in February 2007, Pujol filed for arbitration against Suba in accordance with the rules of the International Seed Trade Federation applicable to international seed trade disputes (FIS Rules), as provided in the arbitration clause contained in the contract. (The Arbitration Chamber of Paris administers cases under the FIS Rules, among others.) Both Pujol and Suba France appointed arbitrators, and the chairman, a person to whom Pujol had sent a copy of its request for arbitration in March 2007,²⁹ was later appointed by the Arbitration Chamber of Paris. (Suba & Unico raised jurisdictional objections and did not participate in the constitution of the arbitral tribunal.) In its award of 8 August 2007 (followed by an interpretative decision of 2 November 2007), the tribunal ordered Suba to pay Pujol sums due under the contract. In October 2007, the Paris Court of First Instance ordered enforcement of the award, as did the Court of Appeal of Bologna in February 2008.

Suba asked the Paris Court of Appeal to set the award aside on the grounds that there was no agreement to arbitrate between Suba & Unico and Pujol because Suba & Unico was not a party to the contract containing the arbitration clause. Suba further contended that the arbitral tribunal was improperly constituted because (1) Suba & Unico had not had an equal opportunity to participate in the constitution of the tribunal, (2) the Arbitration Chamber of Paris should have constituted the entire tribunal in accordance with its rules applicable to multiparty arbitration, and (3) Pujol had improperly influenced the selection of the chairman of the arbitral tribunal.³⁰ Pujol opposed Suba's application on the grounds that Suba had waived its right to seek annulment of the award because it had failed to appeal the award before another tribunal, as allowed by the FIS Rules.

The Court of Appeal found admissible Suba's application to set aside the award. The Court explained that Suba's failure to appeal the award under the FIS Rules could not be considered a waiver of Suba's right to ask the Court of Appeal to set aside the award under the French Code of Civil Procedure (CPC). The Court of Appeal rejected Suba's application on the merits, however. As to the issue of whether there was an arbitration agreement between Suba & Unico and Pujol, the

Court explained that entities directly involved in the performance of a contract containing an arbitration clause are bound by that clause. And the Court found that Suba had waived its right to complain about the constitution of the arbitral tribunal because it had had knowledge of the material facts concerning the constitution of the tribunal but had raised no objection during the arbitral proceedings.

**Enforcement Of Agreements To Arbitrate •
Pathological Arbitration Clauses •
Competence-Competence**

In *Inéos European Holding Ltd.* [United Kingdom] *v.* *UOP* [Belgium],³¹ the French Supreme Court upheld a decision of the Paris Court of Appeal dismissing a case in favor of arbitration. The dispute between the parties arose out of a May 2000 contract containing an arbitration clause providing for arbitration before the French Arbitration Association (AFA) as well as before the "International Chamber of Commerce of Paris."³² Pursuant to the contract, UOP was to perform certain works in a factory owned and run by a company called Naphtachimie, a subsidiary of Inéos European Holding. Part of the factory where the works had been performed appeared to be dysfunctional. Naphtachimie's shareholders and clients brought expedited proceedings (before a *juge des référés*) against both Naphtachimie and UOP for the appointment of an expert to determine the cause of the dysfunction. (A French *juge des référés* has the power to order provisional measures in advance of the constitution of an arbitral tribunal.)

Thereafter, Naphtachimie and its shareholders filed proceedings against UOP before the Aix-en-Provence Commercial Court to obtain a provisional order for damages. UOP objected to the jurisdiction of the Aix-en-Provence Commercial Court, but that court found in September 2005 that the arbitration agreement was inapplicable and that it was competent to hear the parties' dispute. The Aix-en-Provence Court of Appeal affirmed the decision of the lower court in February 2006, but the French Supreme Court later vacated the Court of Appeal's decision and remanded the case to the Paris Court of Appeal in February 2007. Naphtachimie and its shareholders argued before the Paris Court of Appeal that the references in the arbitration clause to both the AFA and the "International Chamber of Commerce of Paris" rendered that clause manifestly void or manifestly

inapplicable. On 28 November 2007, the Court of Appeal dismissed this argument and held that (1) it was undisputed between the parties that the contract contained an arbitration clause, and (2) the ambiguity in the clause did not make it manifestly void or manifestly inapplicable. Indeed, the Court of Appeal considered that the clause's ambiguity did not affect the common intent of the parties to resolve their disputes through arbitration, as evidenced both by the clause at issue and the arbitration clauses contained in two previous contracts between the same parties on the same subject-matter.

Naphtachimie and its shareholders appealed this decision to the Supreme Court on various grounds. First, they argued that the Paris Court of Appeal had failed to apply the law when it found that a common intent to arbitrate existed between the parties without examining whether the clause was in fact inapplicable. They also argued that it was neither within the judge's nor within the arbitral tribunal's remit to decide which of the arbitral institutions was to administer the dispute; according to Naphtachimie and its shareholders, the two institutional designations cancelled each other out. They further argued that the Court of Appeal violated the principle of competence-competence when it failed to find that the clause was inapplicable for designating two institutions. In addition, Naphtachimie and its shareholders claimed that the Court of Appeal misstated its arguments when stating that the parties' intended that their disputes be resolved by arbitration, when in fact Naphtachimie and its shareholders had only acknowledged that the clause existed and claimed it could not be given effect. Naphtachimie and its shareholders further argued that, as the arbitration clause provided for arbitration even in case of expedited proceedings, UOP had waived its right to arbitrate when it participated in the expedited proceedings for the appointment of an expert. Finally, Naphtachimie and its shareholders argued that the Court of Appeal violated article 455 of the CPC (which requires that the Court of Appeal issue reasoned decisions) when it failed even to address their contention that they were not parties to the contract and therefore to the arbitration clause it contained, much less explain how they could be considered parties to the arbitration clause.

In rejecting these arguments, the Supreme Court noted that, pursuant to the principle of competence-

competence under French law, it is for the arbitrator to decide on the validity and extent of his appointment, unless the clause is manifestly void or manifestly inapplicable. The Supreme Court found that the Court of Appeal had not misstated the parties' submissions and had correctly held that UOP and Naphtachimie had agreed to arbitrate, and that UOP's participation in expedited proceedings could not amount to a waiver of the agreement to arbitrate. Finally, the Supreme Court found that the Court of Appeal had correctly decided that the clause's ambiguities were insufficient to make it manifestly void or manifestly inapplicable and that, as a consequence, it was for the arbitral tribunal (if need be, appointed by a judge with jurisdiction to constitute the tribunal) to exercise its priority to decide on the validity and extent of its jurisdiction, including who the proper parties to the arbitration were.

Enforcement Of Arbitral Awards • International Versus Domestic Arbitration • Infra Petita

In *Kristine K. [France] v. Eversheds LLP* [United Kingdom],³³ the Paris Court of Appeal rejected Kristine K.'s request to set aside an ad hoc award rendered in Paris in January 2008. In 2003, Kristine K. became an equity partner with the French law firm Frère Cholmeley, which Eversheds subsequently subsumed. In 2006, Eversheds expelled Kristine K. from the partnership and she brought an arbitration before the Paris Bar Council³⁴ for the losses sustained as a result of her dismissal. The sole arbitrator appointed by the Paris Bar Council declined jurisdiction in light of the arbitration agreements contained in both the partnership agreement of Frère Cholmeley and that of Eversheds, both of which provided for arbitration under the rules of the London Court of International Arbitration (LCIA). The parties thereafter agreed to an ad hoc arbitration in Paris under the UNCITRAL rules with three arbitrators, the chair being the arbitrator previously appointed by the Paris Bar Council. The arbitral tribunal awarded Kristine K. her share of the profits of the firm pursuant to the partnership agreements, but denied her claim for damages for pecuniary and non-pecuniary losses.

Kristine K. filed both an appeal and, in the alternative, an action to set the award aside before the Paris Court of Appeal. (Under French arbitration law, it is possible to appeal an award rendered in a domestic

arbitration in France to the French courts. This is not possible with awards rendered in international arbitration in France. The only way to attack an international award rendered in France in the French courts is through an action to set aside the award.³⁵ The Paris Court of Appeal joined both actions and first considered whether the arbitration was domestic or international. Kristine K. argued that this arbitration was domestic since it did not involve the interests of international trade. In support of her position, Kristine K. pointed out that (1) French law was applicable; (2) the activity of a law firm is not commercial, and Frère Cholmeley was estopped from arguing otherwise because it had previously represented to the tax authorities that its activity was non-commercial in order to benefit from certain tax exemptions; (3) she only practiced as a French lawyer in Paris; (4) she and the partnership were bound by the rules and regulations of the Paris Bar; and (5) her remuneration was paid from a French bank account into her own French bank account.³⁶ In case the Court of Appeal were to find that the arbitration was international, Kristine K. also applied for the award to be set aside on the grounds that the arbitral tribunal had failed to comply with its mission in failing to reason its award (as required by the UNCITRAL rules) and failing to decide on all of Kristine K.'s claims (*infra petita*).

The Court of Appeal stated that, pursuant to article 1492 of the CPC, an arbitration is international when it involves the economy of more than one country.³⁷ Looking at the case at hand, the Court found that the arbitration was commercially connected with more than one country because (1) Kristine K.'s capital contribution to the partnership was made through a loan in pounds sterling granted by a bank located in the United Kingdom; (2) her profit share was calculated on the basis of the profits of both Frère Cholmeley and Eversheds; and (3) the part of her profit share stemming from the profits of Eversheds was paid to her from a bank account in the United Kingdom. As a result, the Court of Appeal dismissed Kristine K.'s appeal as inadmissible. As to her action to set aside the award, the Court of Appeal found the arbitral tribunal's award to be reasoned. The Court of Appeal also found that the arbitral tribunal's alleged failure to decide all claims submitted to it did not constitute a ground for setting aside the award, as any such claim could be submitted again to an arbitral tribunal.

Endnotes

- * This article represents the personal views of the authors and should not be interpreted to represent the views of Herbert Smith. Special thanks are due to Emily Fox, an associate at Herbert Smith, for her assistance and insights.
1. Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 2 Apr. 2009, case no. 08/14550 ("*General Motors*"). An English translation of the Court of Appeal's decision in *General Motors* is annexed. In these notes, page citations to the decision are to the translation.
 2. The other two decisions are *General Motors France SAS v. Espace Automobiles SAS*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 2 Apr. 2009, case no. 08/14551 and *General Motors France SAS v. Auto Service Réparation ASR SAS*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 2 Apr. 2009, case no. 08/14552. The three cases are substantively identical.
 3. Provisions of French arbitration law are divided between those applicable to international arbitration in articles 1491 to 1507 of the French Code of Civil Procedure (CPC), and those applicable to domestic arbitration in articles 2059 to 2061 of the French Civil Code and articles 1442 to 1491 of the CPC. The provisions applicable to domestic arbitration are generally not applicable to international arbitration. There are three exceptions to this general rule, however. First, French international arbitration provisions sometimes expressly provide that certain French domestic arbitration provisions also apply to international arbitration (*see, e.g.*, arts. 1493, 1500 and 1507 CPC). Second, French courts have held certain provisions of French domestic arbitration law to be applicable to international arbitration (*e.g.*, arts. 1458 and 1466 CPC). And third, although rare in practice, parties to an international arbitration may expressly agree that some or all of the French domestic arbitration provisions shall apply to their dispute.
 4. Other areas where French court decisions in domestic arbitration cases may also apply in the context of international arbitration include, for example, decisions on the independence, appointment and

- challenge of arbitrators, the separability of the arbitration agreement and competence-competence.
5. *General Motors* at 2.
 6. *Id.*
 7. *Id.*
 8. *Id.*
 9. In contrast to French international arbitration law, French domestic arbitration law provides that parties may appeal domestic arbitral awards rendered in France. *See* art. 1482 CPC. A party wishing to challenge an international arbitration award rendered in France has no right of appeal, but may ask the French courts to set the award aside. *See* art. 1504 CPC.
 10. *General Motors* at 2.
 11. *Id.*
 12. *Id.* at 3.
 13. *Id.*
 14. *Id.* Under French law, it is sometimes possible to challenge the decision of an expert, even where parties have agreed that the expert's decision is to be final, but it is not easy. Specifically, in certain circumstances, a party may be able to go before a French trial level court (*Tribunal de grande instance*) and contend that the expert's decision should be annulled because the expert was not independent or committed a manifest error (*erreur grossière*). *See* article 1592 of the French Civil Code. In no event, however, do the provisions of French law concerning the appeal and setting aside of arbitral awards apply to expert determinations.
 15. Arbitration agreements are nevertheless considered ancillary to the contract in which they are contained. As a consequence, arbitration agreements are generally transferred to assignees of the main contract at the time of assignment, unless the arbitration agreement was expressly said to be non-assignable. However, the invalidity of the assignment of the main contract does not necessarily prevent transfer of the arbitration agreement it contains.
 16. *See, e.g., Gatoil v. National Iranian Oil*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 17 Dec. 1991, case no. 90-1957. *See also* PHILIPPE FOUCHARD, ET AL., ON COMMERCIAL ARBITRATION ¶¶ 436-446 (Emmanuel Gaillard & John Savage eds., Kluwer 1999) (explaining the history, application and merit of the no-national-law approach to assessing the existence and validity of international arbitration agreements).
 17. Under French international arbitration law, there are two types of international arbitration awards: (1) foreign awards, i.e., those rendered in arbitrations where the seat of the arbitration is outside France, and (2) international awards rendered in France, i.e., those rendered in international arbitrations where the seat of the arbitration is in France. Under French law, an arbitration is international if the subject matter of the dispute is commercially connected to more than one country at the time the arbitration is commenced. An arbitration is therefore international under French law even if the seat of the arbitration is in France, so long as the parties' dispute is commercially connected to more than one country. Foreign awards will be treated as international awards under French law even if they resolve a dispute that involves the economy of only one country.
 18. *See, e.g., Suba France v. Pujol*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 7 May 2009, case no. 08/02025, summarized below in our SEE ALSO section.
 19. *See* Sylvain Bollée, *Quelques remarques sur la pérennité (relative) de la jurisprudence Dalico et la portée de l'article IX de la Convention européenne de Genève (A propos de l'arrêt Sté Uni-Kod c/ Sté Ouralkali)*, 2006 JDI 127 (in French).
 20. *See* art. 1492 CPC. Under French law, the standards for finding a valid agreement to arbitrate in the domestic context are substantially tougher than those that apply in the international context. Indeed, many valid agreements to arbitrate international disputes would not pass muster as agreements to arbitrate domestic disputes.
 21. *See* Charles Jarrosson, *Les frontières de l'arbitrage*, 2001 REVUE DE L'ARBITRAGE 5, 18-24 (in French);

- see also* Charles Jarrosson, *Variations autour de la notion d'arbitrage*, 2005 REVUE DE L'ARBITRAGE 1049 (in French).
22. Cour de cassation [Cass. 1e civ.] [supreme court], 8 Apr. 2009, case no. Q 08-17.548.
 23. Although French arbitration law empowers arbitral tribunals to rule on their own jurisdiction, this is not to say that they have the last word on the matter. The Court of Appeal retains the power to later deny enforcement of an award if it concludes that in fact the arbitral tribunal lacked jurisdiction — an issue the Court of Appeal reviews *de novo*. The competence-competence principle under French law thus gives the arbitral tribunal a priority to decide on its own jurisdiction, but not the final say.
 24. Cour d'appel [CA] [regional court of appeal], Paris 1e ch. (section C), 9 Apr. 2009, case no. 07/17769.
 25. Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 9 Apr. 2009, case no. 08/03824.
 26. Cour de cassation [Cass. 1e civ.] [supreme court], 6 May 2009, case no. R 08-10.281.
 27. Cour de cassation [Cass. 1e civ.] [supreme court], 6 May 2009, case no. 07-20.345.
 28. *See supra* note 18.
 29. The circumstances under which Pujol sent its request for arbitration to the person the Arbitration Chamber of Paris eventually appointed as chairman of the arbitral tribunal are unclear from the Court of Appeal's decision.
 30. Exactly how Pujol allegedly improperly influenced the selection of the chairman is unclear from the Court of Appeal's decision.
 31. Cour de cassation [Cass. 1e civ.] [supreme court], 4 Jun. 2009, case no. 08-13.983.
 32. There is no entity called the "International Chamber of Commerce of Paris." The reference does, however, bear a resemblance to the International Chamber of Commerce (ICC), whose headquarters is located in Paris.
 33. Cour d'appel [CA] [regional court of appeal], Paris, Pôle 1 (Ch. 1), 11 Jun. 2009, case no. 08/02094.
 34. The Paris Bar Council represents, regulates and sanctions lawyers who are members of the Paris Bar. Pursuant to article 21 of law 71-1130, disputes between members of the Paris Bar shall be submitted to arbitration with the head of the Paris Bar Council (*Bâtonnier*) acting as sole arbitrator.
 35. *See supra* note 9.
 36. The Paris Bar intervened in the proceedings to request that the Court of Appeal find the arbitration domestic so that all disputes between Paris-based law firms and their Paris-based partners would be subject to a uniform regime.
 37. Article 1492 of the CPC defines an international arbitration as "one that involves the interests of international trade." ■

PARIS COURT OF APPEAL^[i]
1st Chamber – Section C
Decision of 2 April 2009

Docket number: **08/14550**

Decision referred to the Court: Arbitral award of 26 June 2008 rendered by the Commission of Third-Party Experts: Messrs. Pierre BETSCH, Marco DARMON and Claude MAUGUIT

APPLICANT:

GENERAL MOTORS FRANCE SAS

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Acting through its legal representatives

Represented by SCP MONIN-D'AURIAC DE BRONS
avoués à la Cour^[ii]
Assisted by Xavier HENRY of SELAS VOGEL & VOGEL
Cloakroom P 151

DEFENDENT:

CHAMPS DE MARS AUTOMOBILES SA

With its registered office at 3 boulevard Rabatau
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Acting through its legal representatives

Represented by SCP FISSELIER-CHILOUX-BOULAY
avoués à la Cour
Assisted by Christian BOURGEON MERESSE of SCP THREAD BOURGEON
MERESSE
Cloakroom P 166

THE COURT:

The case was heard in a public session on 12 March 2009 and the report was read out before the Court, comprising:

Mr. PÉRIÉ, President
Mr. MATET, Judge
Ms. BOZZI, Judge
Who deliberated thereupon.

Clerk during the hearing: Ms. FALIGAND

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.

Effective 1 October 2003, GENERAL MOTORS FRANCE SAS, an importer of OPEL brand vehicles into France, entered into a distribution contract for an unlimited term with CHAMPS DE MARS AUTOMOBILE in the context of a quantitative selective distribution system within the meaning of Exemption Regulation EC 1400/2002 on agreements for the distribution of motor vehicles within a designated area (namely, a geographical area). According to this contract, the parties must agree on sales objectives before the end of the first quarter of each calendar year (article 10 of the contract) and, in the event of disagreement, must have recourse to a commission of third-party experts composed of three persons appointed jointly by the distributor and GENERAL MOTORS FRANCE SAS, whereby each party appoints one expert and the two experts then appoint the third.

As the parties were unable to agree on sales objectives for 2007, CHAMPS DE MARS AUTOMOBILE requested that the procedure set out in article 23.7 of the distribution contract be implemented.

The commission, composed of Messrs. Betsch, Mauguit and Darmon, set the sales objective for 2007 at 388 Opel private vehicles for [CHAMPS DE MARS AUTOMOBILE]^[iii] in a "decision" of 26 June 2008.

GENERAL MOTORS FRANCE SAS lodged an appeal against the award, asking the Court to [1] reverse the award, [2] hold that the PV (private vehicles) objective for 2007 for CHAMPS DE MARS AUTOMOBILE be set at 535 PV (private vehicles) and [3] order [CHAMPS DE MARS AUTOMOBILE] to pay it an amount of EUR 4,000 pursuant to Article 700 of the Code of Civil Procedure [CPC].

CHAMPS DE MARS AUTOMOBILE having submitted that the appeal is inadmissible, the Court rescheduled the hearing for the parties to argue on this objection only.

CHAMPS DE MARS AUTOMOBILE is asking the Court to declare the appeal inadmissible and to order GENERAL MOTORS FRANCE SAS to pay it an amount of EUR 2,000 pursuant to Article 700 [CPC].

CHAMPS DE MARS AUTOMOBILE asserts that [1] the decision rendered by the commission of third-party experts on 26 June 2008 is not an arbitral award subject to appeal under article 1482 [CPC]; [2] article 23.7 of the authorized dealer contract is not an arbitration clause; [and 3] this contractual arbitration process is comparable to the opportunity provided for in article 1592 of the Civil Code to have recourse for the determination of a sale price by a third party whose decision may not be appealed.

GENERAL MOTORS FRANCE SAS contends that the plea for inadmissibility of the appeal should be dismissed.

In essence, it argues that [1] article 23.7 of the contract constitutes a true arbitration clause – it is entitled arbitration clause and provides that it is to be applied in case of disagreement between the parties regarding performance of their contractual obligations, [2] the parties agreed to submit their dispute to the commission, [3] in the case at hand, two adverse positions are set in opposition, each party proposing a different sales objective, and [4] the third-party experts are vested with jurisdictional powers since their decision is binding. GENERAL MOTORS FRANCE SAS therefore contends that the decision rendered must be considered an arbitral award that is subject to appeal.

HAVING SAID THIS, THE COURT:

Whereas, according to article 1482 [CPC], an arbitral award is subject to appeal; qualification of an award as an award does not depend on the terms used by the parties in their agreement or used by the arbitral tribunal, but strictly depends on the [nature of the] mission entrusted by these parties to a third person;

Whereas, according to article 23.7 of the distributor contract entered into by GENERAL MOTORS FRANCE SAS and CHAMPS DE MARS AUTOMOBILE, entitled "arbitration clause", "*in the event of a disagreement between the parties concerning the performance of their contractual obligations and, more specifically [...] determination and performance of sales objectives [...] the parties agree to submit the dispute to a commission of third-party experts composed of three persons appointed jointly by the distributor and GENERAL MOTORS FRANCE*".^[iv]

Whereas, in the case at hand, according to the terms used by the third-party experts, the "decision of the Commission" "*sets the sales objectives for CHAMPS DE MARS AUTOMOBILE in 2007 at 388 Opel private motor vehicles*" and "*also recalls that, in accordance with the provisions of article 23.7 of the Contract, the fees and expenses of its members will be borne in half, therefore in equal shares, by CHAMPS DE MARS AUTOMOBILE and GENERAL MOTORS FRANCE SAS*";

Whereas, in the first instance, the disagreement over the volume of the sales objectives does not challenge the principle that the distributor is subject to sales objectives imposed by GENERAL MOTORS FRANCE SAS on a yearly basis, the mission conferred upon the "Commission" of third-party experts is of a fact-finding and technical character exclusively; further, the third-party experts did not draw any legal conclusions from their decision, as CHAMPS DE MARS AUTOMOBILE does not dispute that it is contractually bound to meet its sales objectives; therefore, the existence of a dispute, without which there may be no legal arbitration, has not been established, and the instrument presented before this Court does not constitute an arbitral award and the appeal against this "decision" is inadmissible;

Whereas it is appropriate to order GENERAL MOTORS FRANCE SAS, as the unsuccessful party, to pay CHAMPS DE MARS AUTOMOBILE an amount of EUR 1,000 pursuant to Article 700 [CPC];

FOR THESE REASONS:

Declares that the appeal brought by GENERAL MOTORS FRANCE SAS is inadmissible,

Orders GENERAL MOTORS FRANCE SAS to pay CHAMPS DE MARS AUTOMOBILE an amount of EUR 1,000 pursuant to the provisions of Article 700 of the Code of Civil Procedure,

Orders GENERAL MOTORS FRANCE SAS to bear the costs and grants SCP FISSELIER-CHILOUX-BOULAY, *avoués*, the rights provided under Article 699 of the Code of Civil Procedure.

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, 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*.

ⁱⁱⁱ The original opinion erroneously refers to AUTO SERVICE REPARATION SAS, the defendant in one of the other two *General Motors* decisions issued the same day. See *General Motors France SAS v. Auto Service Reparation ASR SAS*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 2 Apr. 2009, case no. 08/14552; *General Motors France SAS v. Espace Automobiles SAS*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 2 Apr. 2009, case no. 08/14551.

^{iv} The bracketed text in this paragraph is original.