

Commentary

A View From Paris — December 2009

By
Denis Bensaude
and
Jennifer Kirby

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

Introduction*

Pursuant to the competence-competence principle, an arbitral tribunal has jurisdiction to rule on its own jurisdiction. Many countries embrace this principle, but France embraces it passionately. French law not only gives arbitral tribunals priority to rule on their own jurisdiction, but also restricts the power of the French courts to examine the validity and scope of an arbitration agreement before an award is rendered. For this issue of *A View From Paris*, we SPOTLIGHT the French Supreme Court's decision in *Encore Orthopedics Inc. v. Liquidator of Akthea SAS*,¹ one of the rare decisions finding an arbitration agreement "manifestly inapplicable." The decision, which concerns a liquidator's claim for abusive support, shows how the principle of competence-competence can bend when passing through the prism of bankruptcy.

Our SEE ALSO section in this issue summarizes a variety of interesting cases, including *INSERM v. Fondation Letten F Saugstad*, a significant case working its way through the French legal system. France, like many civil law countries, has two sets of courts. There are the administrative courts, which handle

most disputes involving French public entities, and there are the judicial courts which handle disputes between private parties. French public entities sometimes enter into international contracts for goods and services and agree to arbitrate disputes that arise out of those contracts. Are there circumstances where applications to set aside arbitral awards flowing from these agreements must be brought before the French administrative courts instead of the French judicial courts that are specialized in arbitration-related matters? This is the important question INSERM tees up for decision.² We look forward to spotlighting that decision when it comes down.

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

Spotlight: Encore Orthopedics Inc. v. Liquidator Of Akthea SAS

Akthea SAS (Akthea) was the exclusive distributor in France of orthopedic prostheses manufactured by Encore Orthopedics Inc. (Encore). Disputes arose between the companies regarding payment for deliveries. Pursuant to the terms of the parties' distribution contract, the dispute was submitted to arbitration under the auspices of the International Chamber of Commerce (ICC). In July 2003, a final award was issued ordering Akthea to pay money to Encore.³

At some point, Akthea went into liquidation and, in January 2006, its liquidator filed proceedings against

Encore in the Montauban Commercial Court (*Tribunal de commerce*), which was handling Akthea's bankruptcy. Specifically, the liquidator brought what is known as a claim for "abusive support" (*soutien abusif*). The liquidator alleged that Akthea had been economically dependent on Encore, making Encore the *de facto* manager of Akthea. Despite Akthea's growing financial problems, Encore had improperly propped up Akthea, thereby allowing it to continue to do business and become more and more indebted to creditors. The liquidator brought his claim for abusive support on behalf of Akthea's creditors to have Encore pay Akthea's debts.⁴

Encore objected to the jurisdiction of the Commercial Court in light of the arbitration agreement contained in the distribution contract. The liquidator contended that arbitration agreement was invalid. In June 2006, the Commercial Court found that the parties had not concluded an agreement to arbitrate and that the arbitration clause at issue was therefore invalid. Specifically, in the dispositive section of its decision, the Commercial Court (1) declared that "there was never any arbitration clause between Encore and [the liquidator]" and (2) found that the "arbitration clause between Encore and [the liquidator], which Encore invoked, never existed and is therefore manifestly void in these proceedings."⁵ The Commercial Court accordingly concluded that it had jurisdiction over the liquidator's claims.

Encore appealed the Commercial Court's decision on jurisdiction to the Toulouse Court of Appeal. According to Encore, the liquidator's claims concerned the performance of the distribution contract and therefore had to be arbitrated pursuant to the arbitration agreement contained in that contract. Encore further argued that the fact that the liquidator was not a party to the arbitration agreement did not mean that the arbitration agreement was invalid or that it could not be enforced against him. In response, the liquidator contended, among other things, that the Court of Appeal should uphold the decision of the Commercial Court.⁶

The Court of Appeal upheld the decision of the Commercial Court. The Court of Appeal found that the liquidator's claim for abusive support did not relate to the performance of the distribution contract containing the arbitration clause and fell within the exclu-

sive jurisdiction of the Commercial Court handling Akthea's bankruptcy. The Court of Appeal explained that, as a matter of public policy, Encore could not invoke the arbitration clause in the distribution contract to oust the jurisdiction of the Commercial Court.⁷

The Court of Appeal further noted that the liquidator's claims were based on actions Encore took in connection with equipment rental, not distribution. Encore itself had never contended that the arbitration agreement was intended to cover disputes related to equipment rental. To the contrary, Encore had sued Akthea over equipment rental disputes in the Texas courts, thereby acknowledging that such disputes fall outside the scope of the parties' arbitration agreement.⁸

Under these circumstances, the Court of Appeal concluded that, even if (contrary to what the Commercial Court held) the arbitration clause were valid, and even if there could be a debate as to whether the clause were enforceable against the liquidator, the Commercial Court's decision must be upheld. The Court of Appeal accordingly "confirm[ed] all provisions of the appealed decision" in the operative part of its own decision.⁹

* * *

Encore appealed the Court of Appeal decision to the French Supreme Court.¹⁰ There, Encore raised a series of technical arguments based on the Court of Appeal's having "confirm[ed] all provisions of the appealed decision" in the operative part of its own decision. Encore contended that, in doing so, the Court of Appeal incorporated into the operative part of its decision the operative part of the Commercial Court's decision. As a result, according to Encore, the Court of Appeal like the Commercial Court, (1) declared in the operative part of its decision that "there was never any arbitration clause between Encore and [the liquidator]" and (2) found in the operative part of its decision that the "arbitration clause between Encore and [the liquidator], which Encore invoked, never existed and is therefore manifestly void in these proceedings."¹¹ In Encore's view, this resulted in reversible error principally because the Commercial Court erred in taking the decisions it took, and the Court of Appeal therefore erred likewise when it effectively adopted those decisions and made them its own.

In this regard, Encore noted that, in the operative section of its decision, a French court may only decide a claim. And under French law, there is no possibility for a party to bring a claim for a declaration that an arbitration clause is null and void or does not exist.¹² Rather, a French court may decide that an arbitration clause is manifestly void when rejecting a challenge to its own jurisdiction, and even then only in the reasoning that justifies the court's decision to retain jurisdiction, not in the dispositive section.¹³ According to Encore, the Commercial Court therefore erred when it declared in the operative section of its decision that there had never been an arbitration clause between Encore and the liquidator and found the arbitration clause manifestly void. By confirming these provisions in the operative section of its own decision, the Court of Appeal committed the same error.¹⁴

The Supreme Court rejected all of Encore's arguments and upheld the Court of Appeal decision. The Supreme Court found that the Court of Appeal correctly stated — based both on its own reasoning and that it adopted from the Commercial Court — that the liquidator brought a claim for abusive support against Encore on behalf of Akthea's creditors to have Encore (as Akthea's *de facto* manager) pay Akthea's debts. The Supreme Court further noted that, based on the reasoning it adopted from the Commercial Court, the Court of Appeal found that the liquidator was not a party to the arbitration clause binding Akthea and Encore. According to the Supreme Court, it flowed from these findings that the arbitration clause was manifestly inapplicable and that the Court of Appeal decision was therefore justified in law.¹⁵

* * *

Under French international arbitration law, competence-competence not only provides that an arbitral tribunal shall have a priority to rule on its own jurisdiction, but also that the French courts generally shall not examine the validity and scope of an arbitration agreement at the outset of a dispute. The arbitral tribunal's power is embodied in article 1466 of the French Code of Civil Procedure (CPC). Pursuant to that article, “[i]f a party challenges the principle or scope of the arbitrator's jurisdiction before the arbitrator, the arbitrator shall decide upon the validity or scope of his jurisdiction.” The restrictions placed on the French courts are covered in CPC article 1458. This says two things.

First, where a dispute submitted to an arbitral tribunal is then filed with a French court, upon the request of a party, the court shall decline jurisdiction — no ifs, ands or buts.¹⁶ Second, if a dispute has not yet been submitted to an arbitral tribunal, a French court shall also decline jurisdiction upon the request of a party, unless the arbitration agreement is “manifestly void.”¹⁷

Encore is thus correct when it points out that it is not possible for a party to file a claim in a French court seeking a declaration that an arbitration agreement is void. A French court can find an arbitration agreement manifestly void, but only if a party objects to the French court's jurisdiction in light of an alleged arbitration agreement. In ruling on this objection to its own jurisdiction, a French court may consider whether or not the alleged arbitration agreement is manifestly void. If the court finds that it is, the court will decide to retain jurisdiction; if there is any doubt, the court must decide to decline jurisdiction.¹⁸

Manifestly void is a high hurdle to clear. In determining whether an alleged arbitration agreement is manifestly void, a French court is barred from carrying out a substantive, in-depth examination of the arbitration agreement.¹⁹ A clause that is manifestly void is, as those words suggest, void on its face. In other words, under article 1458, a French court reviews the arbitration clause on a *prima facie* basis. Where there are any doubts, the court should decline jurisdiction and allow the arbitral tribunal, once constituted, to rule on its own jurisdiction. As a consequence, French court decisions finding an alleged arbitration agreement manifestly void are rare.

In *Encore*, the Commercial Court wanders some distance off the reservation in finding the arbitration agreement in the distribution contract manifestly void. Based on the information in the court decisions, there is nothing to suggest that arbitration agreement is even void, much less manifestly so. The real question in *Encore* is whether the arbitration agreement is “manifestly inapplicable” — i.e., whether it may be enforced against the liquidator with respect to his claim for abusive support. Although article 1458 only expressly speaks of an arbitration agreement being manifestly void, French case law has interpreted article 1458 also to allow a French court to retain jurisdiction in cases where the arbitration agreement

is manifestly inapplicable.²⁰ In light of the *prima facie* nature of the court's inquiry under article 1458, however, manifest inapplicability also rarely provides a basis for a French court to retain jurisdiction, all doubts again being resolved in favor of arbitration.²¹

The French courts' usual approach to questions of manifest inapplicability is well illustrated in *AIG Europe v. Nuovo Pignone*, summarized in this issue's SEE ALSO section. That case concerned a chain of contracts related to a turbine that changed hands several times. Only the first contract in the chain contained an arbitration agreement. Buyers and sellers farther down the chain filed claims in the French commercial courts. Nuovo Pignone objected to the jurisdiction of the commercial courts on the basis of the arbitration agreement in the first contract. The buyers and sellers who were not parties to the first contract contended the arbitration agreement was manifestly inapplicable. The French Supreme Court considered that the parties' arguments necessarily required an interpretation of the legal situation of each of the parties to the transaction and upheld the Court of Appeal's decision that the arbitration agreement could not be said to be manifestly inapplicable.²²

Encore is one of the rare decisions where the Supreme Court finds an arbitration clause manifestly inapplicable. In doing so, the Supreme Court endorses the Court of Appeal's detailed analysis of the nature of the liquidator's claim and whether it fell within the scope of the arbitration agreement, as well as its adoption of the Commercial Court's finding that the liquidator was not a party to the arbitration clause binding Akthea and Encore. Such an analysis arguably goes substantially beyond the *prima facie* inquiry article 1458 requires and stands in contrast to the approach the French courts usually take to questions of manifest inapplicability. What explains the difference? In a word, bankruptcy.

Bankruptcy and arbitration make awkward bedfellows. Under French law, a party may bring a claim in arbitration against a company in liquidation, but must name the liquidator as a respondent in the arbitration. Accordingly, had Encore wished to bring a claim in arbitration against Akthea for breach of the distribution contract, it would have been able to do so, but would have had to name Akthea's liquidator in the action. Any objection by the liquidator that

the case should be brought in the French courts because the arbitration agreement was manifestly inapplicable would get nowhere. (To this extent, it may therefore be a bit too simplistic for the Supreme Court to find the arbitration agreement manifestly inapplicable on the basis that the liquidator is not a party to the arbitration agreement between Encore and Akthea.)

In *Encore*, however, it is a liquidator who is bringing a claim for abusive support "in the interest of the creditors" against a party (Encore) with whom the bankrupt (Akthea) has entered into an arbitration agreement. The Supreme Court finds that the liquidator does not have to bring his claim to arbitration because he is acting in the interest of Akthea's creditors, not Akthea itself. But a liquidator is by definition acting in the interest of the bankrupt's creditors, so it is not clear why the arbitration agreement should apply when the liquidator is named as a respondent, but not when he acts as a claimant. It is likewise unclear that the liquidator's claim for abusive support falls outside the scope of the arbitration agreement.²³ That claim is based on the French bankruptcy code, but may well also relate to the distribution contract containing the arbitration agreement. Indeed, it appears that it is at least in part on the basis of the distribution contract, and how it was performed, that the liquidator alleges Encore was a *de facto* manager of Akthea. To say, on the facts of *Encore*, that the arbitration agreement is manifestly inapplicable, seems to give those words a meaning they do not ordinarily have. But that's the point: in the bankruptcy context, those words can mean something different.

When it comes to claims in bankruptcy, the French courts do not always adhere strictly to the *prima facie* analysis article 1458 requires. Hence the Supreme Court's endorsement of the Court of Appeal's detailed analysis of the nature of the liquidator's claim and the scope of the arbitration agreement — an analysis that would be unnecessary if the arbitration agreement were truly manifestly inapplicable. That analysis, however, allows the French courts to retain jurisdiction over claims for abusive support, and is of a piece with an earlier Supreme Court decision on the same point in the context of French domestic arbitration.²⁴ The Supreme Court's decision in *Encore* places claims for abusive support outside the reach of international arbitration as well.

See Also

Enforcement Of Agreements To Arbitrate •

Waiver Of Objection To State Court Jurisdiction

In *Global Asset Capital LLC [United States] v. Pierre-Yves M. [United Kingdom]* (1 July 2009),²⁵ the Paris Court of Appeal upheld a decision of the Paris Commercial Court holding inadmissible Global Asset Capital's objection to the jurisdiction of the French courts based on the existence of an arbitration agreement. In 2005, Pierre-Yves M. filed a claim before the Paris Commercial Court against Global Asset Capital and an individual, Ron P. (together, GAC) for payment of fees arising out of an agency contract. That contract provided for arbitration with the ICC in Geneva. In response, GAC first contended that Pierre-Yves M.'s complaint was null and void.²⁶ The Commercial Court rejected that argument in February 2007 and ordered the parties to file briefs on the merits of the claim. Pierre-Yves M. then asked the Commercial Court to order GAC to make provisional payment of his fees and produce certain documents. At this point, in April 2007, GAC objected for the first time that the Commercial Court lacked jurisdiction in light of the arbitration clause contained in the agency contract. The Commercial Court rejected that objection in September 2007 on the basis of CPC article 74. (That article provides in pertinent part that any procedural objections are only admissible if raised (1) all together and (2) before any defence on the merits or any defence based upon the inadmissibility of the claim.)²⁷

On appeal,²⁸ GAC argued that its objection to jurisdiction was admissible because GAC filed it before making submissions on the merits and because Pierre-Yves M. substantially modified his claims after the Commercial Court's February 2007 decision. In rejecting GAC's appeal, the Court of Appeal noted that the claim Pierre-Yves M. filed in 2005 — which the Court of Appeal found was not in fact substantially modified in 2007 — was based on the agency contract containing the arbitration clause. GAC should accordingly have raised any objection it had to the Commercial Court's jurisdiction at the same time it raised its contention that Pierre-Yves M.'s complaint was null and void. The Court of Appeal also ordered GAC to pay Pierre-Yves M. EUR 6,000 as damages for using dilatory tactics to prevent Pierre-Yves M.

from having his claims heard on the merits for over four years.

Enforcement Of Awards •

Existence Of An Arbitration Agreement • International Public Policy

In *SOERNI [France] v. ASB Air Sea Broker Ltd. [Switzerland]* (8 July 2009),²⁹ the French Supreme Court upheld a 2008 decision of the Paris Court of Appeal that rejected the application of SOERNI to annul a Paris First Instance Court (*Tribunal de Grande Instance*) order of enforcement on an award rendered in 2006 in London by a sole arbitrator.³⁰ SOERNI (whose full name is Société d'Etudes et Représentations Navales et Industrielles) entered into a transportation contract with ASB that did not contain an arbitration agreement. In connection with the transportation contract, ASB issued SOERNI a bill of lading that also apparently contained no arbitration agreement. Thereafter, the parties entered into a "hold harmless letter" in relation to the transportation contract. The hold harmless letter provided that disputes would be resolved by arbitration pursuant to the rules referred to in "Clause 16" of a bill of lading different from the bill of lading ASB had previously provided to SOERNI. At the time the parties entered into the hold harmless letter, ASB did not provide SOERNI with a copy of the bill of lading specifying the arbitration rules to which reference had been made. Disputes arose, and ASB filed for arbitration against SOERNI. In February 2006, the sole arbitrator issued his award ordering SOERNI to make payments to ASB. The Paris First Instance Court issued an order enforcing the award in August 2006.

In 2006, after receiving the award, SOERNI filed a criminal complaint against ASB before the French courts, complaining that the bill of lading upon which ASB relied in the arbitration was not the one that ASB had issued to SOERNI in connection with the transportation contract. SOERNI also filed an action before the Paris Court of Appeal to annul the enforcement order. There, SOERNI contended that the arbitrator had rendered the award in the absence of an arbitration agreement because SOERNI had had no knowledge of the arbitration clause at issue when it entered into the transportation contract. SOERNI also argued that it was an employee without authority to bind SOERNI who had signed the hold harmless letter. Finally, SOERNI contended that enforcement

of the award would violate international public policy because, among other things, the bill of lading upon which ASB relied in bringing the arbitration was not the bill of lading ASB had issued in connection with the transportation contract. However, in making its application, SOERNI also asked the Court of Appeal to stay its proceedings and wait to take its decision until SOERNI's criminal complaint was resolved. The Court of Appeal declined to stay its proceedings, rejected all of SOERNI's arguments and upheld the order enforcing the award.

SOERNI then appealed the Court of Appeal decision to the French Supreme Court. There, SOERNI contended that the Court of Appeal had violated due process in refusing to stay its proceedings. Specifically, SOERNI argued that, in denying the stay, the Court of Appeal relied on a recently modified version of article 4 of the French Code of Criminal Procedure to which neither party had referred, thereby denying the parties an opportunity to comment on it. (Before March 2007, article 4 of the French Code of Criminal Procedure provided that the filing of a criminal complaint necessarily stayed any related pending civil actions. In March 2007, this article was revised to give civil courts discretion as to whether or not to grant a stay in the face of a related criminal complaint. Under French law, changes to procedural rules (like article 4) take effect immediately and apply to all pending cases, as well as any cases filed in the future. Accordingly, the "new" article 4 was in effect when the Court of Appeal took its decision in the *SOERNI* case in May 2008.)

SOERNI also argued that the Court of Appeal misapplied French law in failing to require ASB to demonstrate that it reasonably believed that SOERNI's employee had authority to bind SOERNI in signing the hold harmless letter. SOERNI further contended that the Court of Appeal misapplied French international arbitration law. Specifically, SOERNI noted that the arbitration clause at issue was not set forth in the hold harmless letter, but incorporated by reference to a bill of lading SOERNI had never seen at the time the transportation contract was executed. SOERNI contended that, under French international arbitration law, an arbitration clause incorporated by reference can only be binding if a party knows its contents at the time it signs the contract that refers to it. Finally, SOERNI contended that enforcement of the award would be contrary to international public

policy because ASB's reliance on an arbitration clause in a bill of lading SOERNI had never seen was somehow fraudulent.

The Supreme Court rejected all of SOERNI's arguments and upheld the Court of Appeal decision. Specifically, the Supreme Court explained that the Court of Appeal did not violate due process in failing to invite the parties' comments on the revised version of article 4 of the Code of Criminal Procedure because it had no obligation to do so, particularly as it was immediately applicable and no party had argued that the "old" version of article 4 should apply. The Supreme Court further noted that, whether or not a company has entered into a valid international arbitration agreement is not subject to any national law, but is a function of the parties' common intent to arbitrate, taking into account the requirement of good faith and the reasonableness of a party's belief that the person signing on behalf of a company has the power to bind the company with respect to its day-to-day affairs. The Supreme Court considered the Court of Appeal justified in finding that SOERNI's employee had bound it to arbitrate in light of, among other things, (1) the employee's having been ASB's only contact during negotiations of the hold harmless letter, (2) ASB's having never been informed before or after the execution of the hold harmless letter that the employee lacked the power to bind SOERNI, and (3) the clear reference to an arbitration clause in the hold harmless letter. Finally, the Supreme Court found that SOERNI failed to demonstrate that recognition or enforcement of the award was contrary to French international public policy. The Supreme Court found that SOERNI's argument on this score was merely designed to call into question the Court of Appeal's finding that ASB had not engaged in any procedural fraud, a finding that fell squarely within the province of the Court of Appeal and which the Supreme Court declined to review.

**Enforcement Of Awards •
Principle Of Collegiality •
International Public Policy**

In *Marocaine des Loisirs* [Morocco] v. *France Quick* [France] (8 July 2009),³¹ the French Supreme Court upheld a decision of the Paris Court of Appeal rejecting Marocaine des Loisirs' application to set aside an ad hoc partial award rendered on 29 January 2007 by a three-member arbitral tribunal. After the arbitral pro-

ceedings commenced, the parties agreed that the arbitral tribunal would render a partial award on or before 1 February 2007. However, on 20 December 2006, the arbitrator designated by France Quick resigned for lack of independence, and was replaced by another on the very day the partial award was rendered. Before the Court of Appeal, Marocaine des Loisirs argued that the partial award should be set aside because the terms of reference were null and void for having been signed by an arbitrator who lacked independence. The Court of Appeal rejected Marocaine des Loisirs' position on the basis that the setting aside of an award is only available on the limited grounds provided for under CPC article 1502, which do not include the nullity of terms of reference. In reaching its decision, the Court of Appeal noted that Marocaine des Loisirs had not raised any arguments for setting aside the award based on the award's having been rendered by an arbitral tribunal that included an arbitrator whose appointment only became effective the day the award was rendered.³²

Before the Supreme Court, Marocaine des Loisirs stated that it had argued before the Court of Appeal that the newly appointed arbitrator had not been in a position to study the case in detail. The Court of Appeal therefore misstated Marocaine des Loisirs' arguments and should have set the award aside for breach of the principle of collegiality, which requires that arbitrators have an opportunity to deliberate together, and which forms part of French international procedural public policy.

The Supreme Court rejected Marocaine des Loisirs' arguments and upheld the Court of Appeal decision. Specifically, the Supreme Court found that the Court of Appeal had correctly noted that the only grounds for setting aside an award are those listed in article 1502, which do not include the nullity of the terms of reference. The Supreme Court also found that the Court of Appeal did not misstate Marocaine des Loisirs' submission when it stated that Marocaine des Loisirs had not raised any arguments for setting aside the award based on the timing of the replacement arbitrator's appointment. Finally, the Supreme Court explained that, even though the principle of collegiality requires that each arbitrator be offered an opportunity to discuss any decision with his fellow arbitrators, recognition or enforcement of the partial award would not be contrary to international public

policy unless there were evidence that the newly appointed arbitrator had not participated in the deliberations that led to the award, and the Supreme Court found none.

Enforcement Of Awards • Jurisdiction Of Administrative And Judicial Courts

In *INSERM [France] v. Fondation Letten F. Saugstad [Norway]* (31 July 2009),³³ the French Council of State (*Conseil d'Etat*) — the supreme administrative court in France — stayed its proceedings on INSERM's application to set aside an international arbitral award rendered in France and asked the French *Tribunal des conflits* to decide whether the French "administrative" courts (*juridictions de l'ordre administratif*) or the French "judicial" courts (*juridictions de l'ordre judiciaire*) have jurisdiction over the matter.

The contract at issue in *INSERM* concerned the construction of a building for neurological research on land belonging to a public university in Marseille. Under the terms of the contract, the Foundation was offered the opportunity to participate in funding these public works. Disputes arose and, in May 2007, an arbitral tribunal rendered an award in favor of the Foundation.

In seeking to have the award set aside, INSERM — a French public institution whose full name is Institut National de la Santé et de la Recherche Médicale — applied to both the Paris Court of Appeal (*juridiction de l'ordre judiciaire*) and the French Council of State (*juridiction de l'ordre administratif*),³⁴ but asked the Court of Appeal to stay its proceedings pending the decision of the Council of State. In November 2008, the Court of Appeal rejected INSERM's request for a stay. The Court of Appeal considered that it had jurisdiction to determine INSERM's application to set aside the award, which application it rejected.³⁵

Before the Council of State, INSERM continued to press its application that the award be set aside. In that regard, INSERM argued that the contract at issue was an "administrative" contract — namely, in this matter, a contract for public works — and that only the French administrative courts (and not the French judicial courts) have jurisdiction to decide on the enforcement of international awards concerning administrative contracts that involve a French public entity.

Rather than decide the question of its own jurisdiction, however, the Council of State decided to refer it to the *Tribunal des conflits*, a special court with the power to resolve serious issues of jurisdiction between the French administrative and judicial courts.³⁶

**Enforcement Of Awards • Corruption •
International Public Policy • Due Process •
Res Judicata • Ultra Petita**

In *M Schneider Schaltgeratebau und Elektroinstallationen GmbH [Austria] v. CPL Indus. Ltd. [Nigeria]* (10 September 2009),³⁷ the Paris Court of Appeal refused to set aside an ICC award rendered by a sole arbitrator in Paris in 2008 that ordered M Schneider to pay certain sums to CPL Industries and rejected all of M Schneider's counterclaims. In February 2005, the parties entered into an exclusive promotion contract and a joint venture agreement whereby CPL Industries and other Nigerian companies were to provide M Schneider with assistance in the negotiation and performance of public tender contracts in Nigeria. The exclusive promotion contract was destined, among other things, to provide M Schneider with access to "the wide connections of the eminent members of CPL Industries' board of directors in Nigeria." One of the signatories of the contracts was the daughter of the president of Nigeria, who was herself a public servant. Moreover, she signed the contracts using a fake name. In the award, the sole arbitrator nevertheless decided, among other things, that the evidence presented in the case was insufficient to prove corruption.

M Schneider applied to the Paris Court of Appeal to have the award set aside for violating French international public policy. Specifically, M Schneider contended that (1) "fraud corrupts everything" (*fraus omnia corruptit*) and that the arbitrator failed to draw the appropriate legal consequences from his findings of fact that misrepresentations had been made that prejudiced M Schneider, and (2) the award effectively allows corruption. M Schneider further contended that the award violated French international public policy because it disregarded the *res judicata* effect of a prior partial award rendered by the sole arbitrator. In this regard, M Schneider contended that the sole arbitrator dismissed its claims in the final award for lack of jurisdiction, even though the sole arbitrator had previously found in a partial award that he had jurisdiction.

The Court of Appeal rejected all of M Schneider's public policy arguments. The Court of Appeal first noted that its role is only to examine whether the recognition or enforcement in France of the solution reached in the award would violate French international public policy, and that the violation must be blatant, actual and concrete. The Court of Appeal found that M Schneider had failed to show that the solution reached in the award violated French international public policy because (1) the sole arbitrator had conducted a detailed examination of the facts — facts of which M Schneider was aware — in concluding that they did not constitute sufficient evidence of corruption, and (2) M Schneider's arguments before the Court of Appeal based on corruption allegations raised in the arbitration were designed to have the court review the merits of the award, which the court cannot do when considering an application to set an award aside. The Court of Appeal also dismissed M Schneider's argument that fraud corrupts everything because M Schneider had not raised its arguments based on misrepresentation in the arbitration, even though it was aware of the material underlying facts at that time. Finally, the Court of Appeal found that the sole arbitrator had in fact retained jurisdiction over M Schneider's claims, which he rejected. The final award, therefore, did not disregard the *res judicata* effect of the partial award on jurisdiction.

M Schneider also contended before the Court of Appeal that the award should be set aside because the sole arbitrator violated due process. Specifically, M Schneider criticized the sole arbitrator for having (1) failed to communicate to the parties transcripts of the hearing that had been held in March 2008, and precipitously closed the proceedings in May 2008, thereby preventing the parties from commenting on the evidence and arguments presented at that hearing, all of which allegedly disappeared along with the transcripts, and (2) invited CPL Industries to clarify the legal grounds for part of its claim just before the hearing, without inviting M Schneider to comment or do the same. Finally, M Schneider also claimed that the award should be set aside because the sole arbitrator did not abide by his mission in declining jurisdiction over M Schneider's counterclaim and ordering M Schneider to pay 100% of certain costs, when CPL Industries had only claimed for 51% of those costs (*ultra petita*).

The Court of Appeal rejected all of these arguments as well. The Court of Appeal found that M Schneider had not requested copies of the hearing transcripts or raised any objection on this score during the arbitration and therefore could not complain about it now. The Court of Appeal further found that, under French law, an arbitrator does not violate the principle that parties must be treated equally when he invites one and not the other to provide additional explanation with respect to its claims. As to the sole arbitrator's mission, the Court of Appeal again noted that the sole arbitrator had not dismissed M Schneider's claims for lack of jurisdiction. Finally, the Court of Appeal noted that the sole arbitrator awarded CPL Industries no more than the 51% of the costs it was seeking and therefore did not exceed the scope of his mission.

**Enforcement Of Agreements To Arbitrate •
Competence-Competence •
Manifest Inapplicability**

In *AIG Europe [France] v. Nuovo Pignone [Italy]* (30 September 2009),³⁸ the French Supreme Court confirmed a decision of the Versailles Court of Appeal finding the parties had to arbitrate their dispute. In 1995, General Electric and Nuovo Pignone entered into a contract under which Nuovo Pignone was to manufacture a gas generation turbine for General Electric. That contract contained an arbitration agreement providing for arbitration under the ICC rules. Thereafter, General Electric sold the turbine to Thomassen Stewart & Stevenson BV (TSS), who in turn sold it to Girondine de Cogénération (SOGICO). TSS also installed the turbine for SOGICO.

The turbine, as installed, did not function properly, and both SOGICO and its insurer, AIG Europe, filed a complaint against TSS, General Electric and Nuovo Pignone in a French Commercial Court. Nuovo Pignone objected to the jurisdiction of the Commercial Court on the basis of the arbitration agreement in its contract with General Electric. The Commercial Court rejected Nuovo Pignone's jurisdictional objections on the grounds that the arbitration agreement was manifestly inapplicable because SOGICO was not a party to the contract in which it was contained.

Nuovo Pignone appealed the Commercial Court's decision to the Versailles Court of Appeal. There, SOGICO and AIG Europe argued that the Com-

mercial Court's decision should stand. Specifically, they contended that there was in fact no evidence that Nuovo Pignone had actually built the turbine at issue. They contended that the turbine had in fact been built by General Electric and delivered directly to TSS, who in turn sold it to SOGICO. According to SOGICO and AIG Europe, the contract between General Electric and Nuovo Pignone had been executed purely for tax reasons. The Court of Appeal rejected these arguments and reversed the decision of the Commercial Court. The Court of Appeal found that, even if the contract between General Electric and Nuovo Pignone was executed for tax purposes, this did not make the arbitration agreement manifestly inapplicable. Indeed, the Court of Appeal found that SOGICO and AIG Europe's allegations concerning the roles of the various parties in the transactions at issue demonstrated that the arbitration agreement was not manifestly inapplicable.

AIG Europe appealed to the Supreme Court. There, it contended that the Court of Appeal decision violated both CPC articles 455³⁹ and 954⁴⁰ because it did not address the Commercial Court's decision that the arbitration agreement was manifestly inapplicable because SOGICO was not a party to the contract in which it was contained. AIG Europe also contended that the Court of Appeal violated article 5 of European Union regulation 44/2001. (That regulation sets forth the rules of conflict of jurisdictions that apply to European courts. It has been interpreted to prohibit a European court from finding that a choice of court clause in a sale of goods contract is enforceable against subsequent buyers and sellers of those goods.⁴¹ The regulation expressly provides that it does not cover arbitration.)

The Supreme Court rejected AIG Europe's arguments. The Supreme Court considered that the Court of Appeal could not be faulted for finding that the arbitration agreement could not be considered manifestly inapplicable once it determined that the arguments of SOGICO and AIG Europe in and of themselves demonstrated that an interpretation of the legal situation of each of the parties to the transactions at issue was necessary to determine whether the arbitration clause applied. The Supreme Court also rejected as inapposite AIG Europe's argument based on article 5 of European Union regulation 44/2001.

Enforcement Of Awards •**Third-Party Objections To Awards •****Domestic v. International Arbitration**

In *Marc F. [France] v. Société Historique et Littéraire Polonaise [France]* (8 October 2009),⁴² the French Supreme Court upheld a Paris Court of Appeal decision denying individuals, who had not been parties to the arbitration at issue, an opportunity to object to an award, despite their contention that the award affected their rights. The award was rendered in 2003 in a dispute between two foundations — namely, the Académie Polonaise des Sciences et des Letters (PAU) and the Société Historique et Littéraire Polonaise (SHLP) — concerning the ownership of a building in Paris and a library in that building. Several members of SHLP filed a complaint before the Paris First Instance Court contesting the validity of certain deliberations that had taken place among SHLP's members. The deliberations concerned, among other things, the decision to submit part of SHLP's dispute with PAU to arbitration. These claimants also attacked the award by way of *tierce opposition* (a procedure that is specific to French domestic arbitration, whereby a third-party, that did not participate in an arbitration, may contest an award's reasoning and decisions to the extent they affect the third-party's rights). In June 2005, the first instance court declined to annul the deliberations at issue and declared claimants' claim by way of *tierce opposition* inadmissible, and the Paris Court of Appeal upheld that decision in October 2006.

Before the Supreme Court the claimants contested, among other things, the Court of Appeal decision declaring their claim by way of *tierce opposition* inadmissible. Claimants argued that the arbitration should be considered domestic rather than international. The Supreme Court rejected this view and upheld the Court of Appeal decision. The Supreme Court found that the arbitration that produced the award was international because the operation of the building and the library at issue was financed with monies from abroad. The award therefore could not be attacked by way of *tierce opposition*.

Enforcement Of Awards •**Existence Of An Arbitration Agreement •****International Public Policy**

In *O.A.O. NPO Saturn [Russia] v. Unimpex Entreprises Ltd. [British Virgin Islands]* (15 October 2009),⁴³ the Paris Court of Appeal upheld an order

enforcing an award rendered in Prague that ordered Saturn to pay over US\$ 21 million to Unimpex. In February 1996, Unimpex entered into a contract with a Russian company called Rybinske Motory (Saturn's predecessor-in-interest) to sell Rybinske Motory an airplane, thirteen engines and spare parts. In exchange, Rybinske Motory agreed to service seven engines for Unimpex. This contract contained an arbitration clause. Ultimately, Rybinske Motory only serviced five engines instead of seven. In light of this, in November 1996, Rybinske Motory and Unimpex agreed an amendment to the contract providing for the transfer of over 45,000 shares in Rybinske Motory to Unimpex.

Disputes arose when Rybinske Motory failed to transfer the shares as agreed, and in August 2002 a three-member arbitral tribunal rendered the award mentioned above in favour of Unimpex. In July 2007, the President of the Paris First Instance Court granted an order enforcing the award. Saturn appealed that order before the Paris Court of Appeal. On appeal, Saturn argued that only the original contract was subject to the arbitration agreement, not the amendment, so there was in fact no agreement to arbitrate the dispute at issue. Saturn further contended that Russian law did not permit arbitration of disputes concerning the transfer of shares. According to Saturn, the award should therefore not be recognized or enforced in light of article V.2 of the New York Convention. Saturn further contended that both the contract and the amendment were null and void under Russian law and that therefore the arbitration clause was likewise null and void. Finally, Saturn argued that enforcement of the award would violate international public policy for ordering Rybinske Motory to transfer shares it did not own, in violation of Russian company law.

The Court of Appeal rejected all of Saturn's arguments. The Court of Appeal first decided that Saturn was barred from arguing on appeal that the arbitration agreement was null and void or inapplicable to the amendment because Saturn had not raised any of these arguments before the arbitral tribunal. The Court of Appeal further found Saturn's arguments based on the New York Convention and Russian arbitration law inapposite. Under French law — which is the law of the country where enforcement of the award is sought — disputes concerning the transfer of

shares are arbitrable; and it is the law of the country where enforcement is sought that matters under article V.2 of the New York Convention. The Court of Appeal further found that French international public policy barred Saturn from relying on restrictive provisions of its own law to escape an arbitration it agreed to. The Court of Appeal also refused to decide upon the alleged nullity of the contract and the amendment because (1) this would require a review of the merits, which the court cannot undertake, and (2) it is also irrelevant to the validity of the arbitration agreement, which is separable from the main contract and the amendment. Finally, the Court of Appeal rejected Saturn's international public policy argument because Saturn did not demonstrate how enforcing the tribunal's order for payment would violate international public policy in a blatant, actual and concrete manner. Under these circumstances, the Court of Appeal found that Saturn's public policy argument amounted to another attempt to have the court review the award on the merits, which the Court of Appeal again declined to do.

**Enforcement Of Agreements To Arbitrate •
Competence-Competence •
Manifest Inapplicability**

In *Scanpartners Int'l AB Sweden [Sweden] v. Sanofi Pasteur [France]* (15 October 2009),⁴⁴ the Paris Court of Appeal reversed a Paris Commercial Court decision of April 2009 that accepted jurisdiction over all parties to a dispute concerning the transportation of vaccines. Sanofi contracted with a company called Saga Air Transport for transportation of vaccines from Stockholm to Sydney in isothermal containers furnished by Scanpartners. Article 17 of the contract between Sanofi and Saga provided for disputes to be resolved in the Paris Commercial Court. Saga subcontracted the transportation of the containers to a company called Strait Air Transport, who subcontracted to a company called Emirates Sky Cargo, who subcontracted to a company called Spirit Air Cargo. Ultimately, the vaccines had to be destroyed upon arrival because the temperature in the containers had not been maintained at 4°C during transportation.

Sanofi and the insurer of the vaccines, Carraig, sued Saga in the Paris Commercial Court. Saga asserted claims against Scanpartners and Strait. Strait in turn asserted claims against Scanpartners, Spirit and Emir-

ates. Relying on CPC article 333,⁴⁵ the Commercial Court decided it had jurisdiction over all parties to the dispute.

Strait appealed this decision to the Paris Court of Appeal on the grounds that it had agreed with Saga that all disputes relating to its services were to be arbitrated before the Stockholm Chamber of Commerce (SCC). The Court of Appeal noted that Strait and Saga had been engaged in a continuous business relationship for many years. During the course of this relationship, Strait's invoices to Saga referred to general conditions that provided for arbitration before the SCC. As this arbitration clause was neither manifestly void nor manifestly inapplicable, the Court of Appeal overruled the Commercial Court's decision and decided that the dispute between Saga and Strait should be arbitrated. Scanpartners, Emirates and Spirit also contested the jurisdiction of the Commercial Court before the Court of Appeal, arguing on the basis of the 1929 Warsaw Convention as amended by the 1999 Montreal Convention,⁴⁶ that Saga and Strait should file their respective claims against Strait, Emirates and Spirit before the courts of Dubai, Stockholm or Sydney. Noting that CPC article 333 does not apply in international matters, the Court of Appeal agreed with appellants and reversed the decision of the Commercial Court.

The Court of Appeal confirmed the Commercial Court's decision that it had jurisdiction over the dispute between Sanofi, Saga and Carraig in view of the dispute resolution clause contained in the contract between Sanofi and Saga.

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 Marie-Pier Michon and Boris Ayache Bourgoin, both interns at Herbert Smith, for their assistance and insights.

1. Cour de cassation [Cass. 1e civ.] [supreme court], 1 Jul. 2009, case no. W 08-12.494 ("Encore"). An English translation of the Supreme Court's decision

- in *Encore* is annexed. In these notes, page citations to the decision are to the translation.
2. For an explanation (in French) as to why the French administrative courts should stay out of international arbitration, see Serge Lazareff, *Arbitrage administratif?*, GAZETTE DU PALAIS, 25-27 October 2009, at 3.
 3. See *Encore* at 1.
 4. See *id.* at 1-2. The liquidator's action for abusive support appears to be designed (at least in part) to allow Akthea to escape paying the award Encore won against it in 2003. If the liquidator's action were to succeed, Encore would become responsible for Akthea's debts, including the award in favour of Encore.
 5. See *id.* at 2.
 6. For details of the arguments raised before the Court of Appeal, see *Encore Orthopedics Inc. v. Liquidator of Akthea SAS*, Cour d'appel [CA] [regional court of appeal], Toulouse, 2e ch. (section 2), 8 Jan. 2008, case no. 07/03666 (in French).
 7. See *Encore* at 4.
 8. See *id.*
 9. See *id.*
 10. In French, an appeal from the Court of Appeal to the Supreme Court is not, strictly speaking, called an appeal (*appel*), but rather a *pourvoi*. The two different words highlight that, on *appel*, the Court of Appeal can review de novo both questions of law and fact, while on *pourvoi* the Supreme Court may only review de novo questions of law and cannot, in principle, review questions of fact at all.
 11. See *Encore*. at 2.
 12. See *id.*
 13. See *id.*
 14. See *id.* Encore also considered that the Court of Appeal decision was internally inconsistent. According to Encore, in confirming the provisions of the Commercial Court's decision, the Court of Appeal effectively found in the dispositive section of its decision that the arbitration clause was void. However, Encore contended that, in reasoning its decision, the Court of Appeal stated, contrary to the Commercial Court's decision, that if any doubt existed as to the enforceability of the arbitration clause, the clause should be deemed valid. Encore considered this an inconsistency justifying that the Supreme Court reverse the Court of Appeal decision. See *id.* at 2-3.
 15. See *id.* at 3.
 16. Under French law, a case is considered submitted to the arbitral tribunal once the tribunal is fully constituted, that is to say, once all members of the tribunal have accepted to act as arbitrators.
 17. See FOUCARD, GAILLARD & GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 650-688 (Emmanuel Gaillard & John Savage eds., Kluwer 1999) (explaining the effects of the competence-competence principle).
 18. See *Jules Vernes v. ABS*, Cour de cassation [Cass. 1e civ.] [supreme court], 7 Jun. 2006, case no. T 03-12.034, Rev. Arb. 2006, 945, note Gaillard (in French).
 19. See *id.*
 20. See *Quattro Children's Books Ltd. v. Editions du Seuil*, Cour de cassation [Cass. 1e civ.] [supreme court], 16 Oct. 2001, case no. U 99-19.319, Rev. Arb. 2002, 919, note Cohen (in French).
 21. Unlike the Commercial Court, the Court of Appeal sees that the issue is one of manifest inapplicability, but without saying so. Instead, in an effort to save the Commercial Court, the Court of Appeal dances around the issue — going out of its way to explain that the liquidator's abusive support action does not relate to the distribution contract, and falls within the exclusive jurisdiction of the Commercial Court as a matter of public policy — without saying outright that the Commercial Court reached the right result for the wrong reasons. This hesitation allows Encore to raise the

host of technical arguments it brings before the Supreme Court about the tension between the Court of Appeal's reasoning and the operative decisions it adopts from the court below. In coming to the rescue of the Court of Appeal, however, the Supreme Court, cuts to the chase, finding that it flows from the bits and pieces cobbled together in the Court of Appeal's decision that the arbitration agreement is manifestly inapplicable to the liquidator's claim.

22. See also *Scanpartners Int'l AB Sweden v. Sanofi Pasteur* (considering the manifest inapplicability of an arbitration agreement in one of a series of transportation contracts), summarized in this issue's SEE ALSO section.
23. Neither the Court of Appeal nor the Supreme Court set forth the text of the arbitration agreement at issue in *Encore*.
24. See *Prodim v. Logidis*, Cour de cassation [Cass. Comm.] [supreme court], 14 Jan. 2004, case no. J 02-15.541 (finding a domestic arbitration agreement manifestly inapplicable to a liquidator's claim for abusive support), Rev. Arb. 2004, 591, note Ancel (in French).
25. Cour d'appel [CA] [regional court of appeal], Paris, pôle 5, ch. 10, 1 Jul. 2009, case no. 08/10616.
26. GAC's grounds for contending the complaint was null and void are not mentioned in the Court of Appeal decision.
27. Pursuant to CPC article 122, defences based on the inadmissibility of a claim are those that seek to have a claim declared inadmissible without the judge needing to examine the merits. These include defences based on *res judicata*, a party's failure to state a claim upon which relief can be granted or a party's lack of standing, as well as contentions that the claims are time-barred.
28. Before appealing the Commercial Court's decision that its jurisdictional objections were inadmissible, GAC initially contested that decision before the Paris Court of Appeal at the end of 2007 by means of a *contredit* procedure. By way of a *contredit*, a party may contest a lower court's decision on jurisdiction without need of engaging an *avoué*, as is required when bringing an appeal. The filing of a *contredit* also operates to stay the Commercial Court from proceeding to hear the merits of the case. In May 2008, however, the Court of Appeal rejected GAC's *contredit* on the grounds that the Commercial Court had not in fact taken a decision on jurisdiction, but rather had ruled that GAC's jurisdictional objections were inadmissible. Under these circumstances, the Court of Appeal invited GAC to engage an *avoué*, which GAC thereafter did.
29. Cour de cassation [Cass. 1e civ.] [supreme court], 8 Jul. 2009, case no. J 08-16.025.
30. When the *Tribunal de Grande Instance* issues an order of enforcement for an arbitral award, it typically stamps its order directly on the award. This is known as *exequatur*.
31. Cour de cassation [Cass. 1e civ.] [supreme court], 8 Jul. 2009, case no. N 08-17.661.
32. For further information about this case, see *Marocaine des Loisirs v. France Quick*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 9 Oct. 2008, case no. 07/14539, summarized in the SEE ALSO section of the February 2009 inaugural issue of *A View From Paris*.
33. Conseil d'Etat [council of state], 31 Jul. 2009, case no. 309277.
34. INSERM initially filed its application to set aside the award with the administrative courts in Marseille. Its application was thereafter put before the Council of State.
35. See *INSERM v. Fondation Letten F. Saugstad*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch. (section C), 13 Nov. 2008, case no. 08/00760, summarized in the SEE ALSO section of the February 2009 inaugural issue of *A View From Paris*.
36. Article R. 771-2 of the French Code of Administrative Justice provides that, where a court has to render a final decision on a serious issue (*une difficulté sérieuse*) concerning the separation of jurisdiction between the administrative courts and the judicial

- courts, the court may refer the issue to the *Tribunal des conflits*.
37. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 10 Sept. 2009, case no. 08/11757.
38. Cour de cassation [Cass. 1e civ.] [supreme court], 30 Sept. 2009, case no. Q 08-15.708.
39. Article 455 requires the Court of Appeal to reason its decisions. It is discussed in our SPOTLIGHT of the French Supreme Court's decision in *Thalès v. Republic of China Navy (Taiwan)* in the May 2009 issue of *A View From Paris*.
40. Article 954 provides in pertinent part that, when a party to an appeal simply asks the Court of Appeal to confirm a lower court decision without setting forth reasons justifying its request, that party is deemed to be setting forth the reasoning of the lower court in support of its request.
41. See Case C-26/91, *Jakob Handte & Co. v. Traitements Mécano-chimiques des Surfaces SA*, 1992 E.C.R. I-03967 ("Article 5(1) of the Convention is to be understood as meaning that it does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose").
42. Cour de cassation [Cass. 1e civ.] [supreme court] 8 Oct. 2009, case no. Y 07-21.991.
43. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 15 Oct. 2009, case no. 07/17049.
44. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 15 Oct. 2009, case no. 09/10091.
45. Article 333 provides that a third-party joined in an ongoing procedure before a French court is bound to appear before that court and cannot object to the territorial jurisdiction of that court, or even invoke a jurisdiction clause.
46. These Conventions provide, among other things, that in relation to the carriage of goods performed by the actual carrier, an action for damages must be brought, at the option of the claimant, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination. ■

C.F.

Civ. 1**SUPREME COURT^[i]****Public hearing of 1 July 2009**

Dismissal

Mr. BARGUE, President

Decision No. 775 F-D

Appeal No. W 08-12.494

FRENCH REPUBLIC**IN THE NAME OF THE FRENCH PEOPLE**

THE SUPREME COURT, FIRST CIVIL CHAMBER, rendered the following decision:

Deciding on the appeal^[ii] filed by Encore Orthopedics Inc., an [American] company, with its registered office at 9800 Metrics Boulevard Austin, 78758 Texas (United States),

against the decision rendered on 8 January 2008 by the Toulouse Court of Appeal (2nd chamber, section 2), in the dispute against Mr. Jean-Claude Enjalbert, residing at 13 rue de l'Hôtel de Ville, 82000 Montauban, in his capacity as liquidator of Akthea, [SAS],

Defendant on the appeal;

The Appellant relies upon the two grounds for appeal appended to this decision;

Considering the communication made to the public prosecutor;

THE COURT, in the public hearing of 3 June 2009, where were present: Mr. Bargue, President, Ms. Pascal, Reporting Judge, Mr. Pluyette, Senior Judge, Mr. Legoux, Advocate General, and Ms. Aydalot, Chamber Clerk;

Based on the report from Ms. Pascal, Judge, the observations submitted by Mr. Foussard, counsel for Encore Orthopedics Inc., and by SCP Tiffreau, counsel for Mr. Enjalbert in his capacity as liquidator of Akthea, and the written submissions of Mr. Legoux, Advocate General, and after deliberating in accordance with the law;

On all branches of the two grounds:

[1] Under an exclusive distribution agreement dated 11 and 19 August 1999 including an arbitration clause, the company Akthea was distributing in France prostheses manufactured by the US company Encore Orthopedics. A dispute between the two companies was decided in an arbitral award dated 21 July 2003. As the courts ordered the liquidation of Akthea, its liquidator, Mr. Enjalbert, summoned Encore Orthopedics

before the [Montauban] Commercial Court, which in his opinion had exclusive jurisdiction [to grant the relief he sought – namely,] to declare Encore Orthopedics the *de facto* manager of Akthea and to order Encore Orthopedics to pay all of Akthea's debts. [Encore Orthopedics] invoked the arbitration clause.

[2] Encore Orthopedics criticizes the [Court of Appeal] decision (Toulouse, 8 January 2008) for having stated in its operative section, "Confirms the referred decision [of the Montauban Commercial Court] in all of its provisions". [According to Encore Orthopedics the Court of Appeal] thereby made the terms of the operative section of the first judge's decision its own. [The operative section of the first judge's decision provided] as follows: "Declares that there never was any arbitration clause between Encore and Mr. Enjalbert", and then, "Finds that the arbitration clause between Encore and Mr. Enjalbert, which Encore invoked, never existed and is therefore manifestly void in these proceedings". [Encore Orthopedics contends that the Court of Appeal erred in adopting these decisions for the following reasons]:

[3] 1) In the operative section of his decision, a judge may only decide a claim; since [under French law] it is not possible for a party to file a claim seeking a declaration that an arbitration clause is null and void, a judge may not decide upon the nullity of an arbitration clause in the operative section of his decision; in doing otherwise by declaring the arbitration clause null and void in the operative section of its decision, the [Court of Appeal] violated article 1458 of the Code of Civil Procedure, the "competence-competence" principle, and the principle that a party cannot bring a claim seeking a declaration that an arbitration clause is null and void;

[4] 2) A judge is authorized to decide that a clause is manifestly void in rejecting a challenge to his jurisdiction, but he may only do so in the reasoning that justifies his decision on jurisdiction, [not the operative section of his decision]; a judge may decide on the nullity of an arbitration clause once an award is rendered, but he may only do so in the reasoning that supports his decision setting aside the award in the operative section; in deciding the arbitration clause null and void in the operative section of its decision, the [Court of Appeal] violated article 1458 of the Code of Civil Procedure, the "competence-competence" principle, and the principle that a party cannot bring a claim seeking a declaration that an arbitration clause is null and void;

[5] 3) In the operative part of his decision, a judge may only decide a claim; since a party may not bring a claim seeking a declaration that an arbitration clause does not exist, a judge cannot decide that an arbitration clause does not exist in the operative section of his decision; in doing so, the [Court of Appeal] violated article 1458 of the Code of Civil Procedure, the "competence-competence" principle, and the principle that a party may not bring a claim seeking a declaration that an arbitration clause does not exist;

[6] 4) A judge is authorized to decide that an arbitration clause is manifestly non-existent in rejecting a challenge to his jurisdiction, but he may only do so in the reasoning that supports his decision on jurisdiction; a judge may decide that an arbitration clause does not exist after the arbitral award was rendered, but he may only do so in the reasoning that supports his decision setting aside an award in the operative section; in doing otherwise by declaring the arbitration clause non-existent in the operative section of its decision, the [Court of Appeal] violated [article 1458 of the Code of Civil Procedure, the "competence-competence" principle, and the principle that a party cannot bring a claim seeking a declaration that an arbitration clause is nonexistent];

[7] 5) Apart from a clause being manifestly non-existent or manifestly inapplicable, only if a clause is manifestly null and void may a judge retain jurisdiction; the [Court of Appeal] noted that the action brought by the liquidator was subject to the exclusive jurisdiction of the Commercial Court because the purpose of the action was to obtain a finding that (1) Akthea was economically dependent on Encore Orthopedics, (2) Encore Orthopedics was the *de facto* manager of Akthea, and (3) because of its negligence as manager, Encore Orthopedics should bear all or part of Akthea's debts; the Court of Appeal did not find in its reasoning that the arbitration clause was manifestly null and void; accordingly, the Court of Appeal decision has no legal basis under article 1458 of the Code of Civil Procedure and the competence-competence principle;

[8] 6) And in any event, there was a contradiction between the operative section and the reasoning of the Court of Appeal decision; on the one hand, the Court of Appeal adopted the operative section of the

Commercial Court decision, and thereby decided in the operative section that the arbitration clause was void; on the other hand, in its reasoning, the Court of Appeal expressly stated, contrary to the Commercial Court decision, that if any doubt existed as to the enforceability of the arbitration clause, the clause should be deemed valid;

[9] 7) The Court of Appeal also noted that (1) the arbitration clause only covered implant deliveries and not equipment rental, and (2) Encore Orthopedics summoned Akthea before a Texas state court; but the Court of Appeal could only decide as it did if it had first determined that the arbitration clause was manifestly inapplicable and set forth the reasons for its determination; in failing to do so, the Court of Appeal decision has no legal basis under both article 1458 of the Code of Civil Procedure and the competence-competence principle;

[10] However, the Court of Appeal decision correctly states – both upon its own reasoning and that it adopted from the Commercial Court – that the action, brought by Mr. Enjalbert as liquidator of Akthea and in the interests of creditors against Encore Orthopedics, is an action for abusive support and discharge of liabilities; it also found, based on the reasoning it adopted from the Commercial Court, that Mr. Enjalbert was not a party to the arbitration clause binding Akthea and Encore Orthopedics; these findings alone, from which it followed that the arbitration clause at issue was manifestly inapplicable, justified the Court of Appeal decision in law;

FOR THESE REASONS:

DISMISSES the appeal;

Orders Encore Orthopedics Inc. to pay the costs;

Pursuant to article 700 of the Code of Civil Procedure, dismisses Encore Orthopedics Inc.'s request and orders it to pay Mr. Enjalabert, in his capacity as liquidator of Akthea, the amount of EUR 2,500; dismisses the remainder of the claim;

So done and judged by the Supreme Court, first civil chamber, and pronounced by the President at its public hearing of first of July two thousand and nine.

GROUNDS APPENDED to the decision

Grounds submitted by Me. Foussard, *avocat aux Conseils*^[iii] for Encore Orthopedics Inc.

FIRST GROUND OF APPEAL

[11] The decision [of the Court of Appeal] should be criticized for having stated in its operative section, "Confirms the referred decision [of the Montauban Commercial Court] in all of its provisions"; [the Court of Appeal] thereby made the terms of the operative section of the first judge's decision its own; [the operative section of the first judge's decision provided] as follows: "Declares that there never was any arbitration clause between Encore and Mr. Enjalbert", and then, "Finds that the arbitration clause between Encore and Mr. Enjalbert, which Encore invoked, never existed and is therefore manifestly void in these proceedings";

[12] The Court of Appeal reached its decision based on the following reasoning: "The Commercial Court was asked by initial summons of 26 January 2006 (1) to say that Akthea was economically dependent on Encore Orthopedics and that Encore Orthopedics was the *de facto* manager of Akthea, and (2) to order Encore Orthopedics to bear all of Akthea's debts; as this action for discharge of liabilities was brought in the interests of creditors, and is independent from the performance of the distribution agreement, it comes under the exclusive jurisdiction of the Montauban Commercial Court, the court handling the bankruptcy proceedings, pursuant to article 339 of the decree of 28 December 2005; the arbitration clause in the contract between the two companies, for which Encore Orthopedics does not even submit a translation into French, cannot defeat this public policy jurisdiction; moreover, according to the liquidator (and not denied by [Encore Orthopedics]), the award rendered on 21 July 2003 by the arbitral tribunal did not forbid Akthea from bringing a legal action and, in particular, did not constitute an obstacle to the action brought by the liquidator to recover for insufficient assets; in any event, Encore Orthopedics does not contest that the arbitration clause only covered the contract for implant deliveries and that such clause was not intended to apply to equipment rental; on this particular issue, Encore Orthopedics actually summoned Akthea before a Texas civil court, thereby acknowledging that the disputed services were not within the scope of the arbitration clause; the liquidator, in this dispute, blames Encore Orthopedics with, among other things, having abusively supported Akthea when invoicing equipment rentals; the examination of this claim escapes the arbitrators' jurisdiction and can only come under the national judge's exclusive jurisdiction; therefore, and even if contrary to the decision of the Commercial Court the arbitration clause is fully valid [and] only its scope could be subject to debate, and the Commercial Court's decision must be purely and simply confirmed; this solution is all the more correct given that the arbitration award does not bear an order for enforcement (*exequatur*) (...)" (Court of Appeal decision, pp. 3 and 4, §§ 1 and 2);

[Repeats in substantively identical terms paragraphs [3] through [6] of the Supreme Court decision.]

SECOND GROUND OF APPEAL

[Repeats in substantively identical terms paragraphs [2], [12] and [7] through [9] above.]

Decision on appeal: Toulouse Court of Appeal, 8 January 2008

TRANSLATORS' NOTES

ⁱ *General:* French Supreme Court decisions, and particularly the grounds for appeal attached to them, are written in a formal, legalistic style that frequently makes them difficult for the uninitiated reader to understand. To translate them word-for-word into English would only compound the problem. As a consequence, in translating the Supreme Court's decision in *Encore*, we have not felt constrained to replicate the original style and grammatical structure where doing so would, in our view, tend to obscure the meaning of the text. In this regard, unless otherwise indicated, we have added all bracketed text for ease of understanding.

ⁱⁱ In French, an appeal from the Court of Appeal to the Supreme Court is not, strictly speaking, called an appeal (*appel*), but rather a *pourvoi*. The two different words highlight that, on *appel*, the Court of Appeal can review de novo both questions of law and fact, while on *pourvoi* the Supreme Court may only review de novo questions of law and cannot, in principle, review questions of fact at all.

ⁱⁱⁱ In France, an *avocat aux Conseils* is a lawyer who has rights of audience before the French Supreme Court (both civil and administrative). Currently, there are only approximately 90 such lawyers.