

# Commentary

## A View From Paris

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### Introduction\*

During the first quarter of 2009, the French courts handed down many noteworthy international arbitration decisions, so it was difficult to decide which one to SPOTLIGHT for this issue of *A View From Paris*. Ultimately, however, we settled on the recent French Supreme Court decision in *Thalès v. Republic of China Navy (Taiwan)*.<sup>1</sup> There, the Supreme Court vacates a Paris Court of Appeal decision declining to set aside an arbitral award that takes jurisdiction over claims concerning alleged bribes and kickbacks at the center of one of the largest corruption scandals in modern times.

Cases profiled in our SEE ALSO section are no less interesting and address a series of intriguing questions: Can a former ICC employee, who becomes a judge on the Court of Appeal, decide applications to set aside ICC awards? Do the difficulties of doing conflict checks in a multinational law firm excuse an arbitrator from failing to learn of connections between his firm and the corporate group of one of the parties to the arbitration? Should an arbitral tribunal be able to rule on its own jurisdiction where a dispute resolution clause appears both to provide for arbitration and

grant exclusive jurisdiction to a state court? Can the ICC be held liable for negligence in its administration of arbitrations under its rules?

We would also like to thank all our readers who provided feedback on last quarter's inaugural 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: Thalès v. Republic Of China Navy (Taiwan)

The arbitration at issue in *Thalès* concerns a contract dated 31 August 1991 (known as the "Bravo" contract), under which Thomson-CSF delivered six frigates to Taiwan.<sup>2</sup>

*Thalès*, a defense contractor in which the French State holds a significant minority, is the successor-in-interest to Thomson-CSF, the seller under the contract. *Thalès Naval*, which is *Thalès*'s co-respondent in the arbitration, is a successor-in-interest to Thomson-CSF NSC. Together, we refer to *Thalès* and *Thalès Naval* simply as *Thalès*.<sup>3</sup>

The buyer of the frigates was the Plans Office of the Republic of China Navy, acting on behalf of the Republic of China Navy and the Republic of China,<sup>4</sup> otherwise known as Taiwan.

In September 2004, the arbitral tribunal (composed of Messrs. Andrea Giardina (chairman), Laurent Lévy and Albert Jan van den Berg (co-arbitrators))<sup>5</sup> with its seat in Paris handed down a partial award in which it

found, among other things, that (1) it had jurisdiction to hear the case, (2) Taiwan's claims were arbitrable and (3) those claims could be heard and settled in keeping with Thalès's right to a fair trial.<sup>6</sup>

Thalès asked the Paris Court of Appeal<sup>7</sup> to set aside the award on the grounds that (1) there was no valid agreement to arbitrate, (2) enforcement of the award would violate public policy, and (3) Thalès had been denied due process.<sup>8</sup> Specifically, Thalès contended, among other things, that Taiwan's claims necessarily implicated national security secrets that Thalès was not permitted to disclose. According to Thalès, Taiwan's claims were therefore not arbitrable and any alleged agreement to arbitrate such claims was invalid. In requiring Thalès to arbitrate Taiwan's claims, the partial award put Thalès in what it submitted was an untenable position: to defend itself, Thalès would have to disclose national security secrets (something it could not do as a matter of French criminal law and international public policy); to keep national security secrets confidential, Thalès would have to forgo defending itself (resulting in its being denied due process).<sup>9</sup> Taiwan contended that Thalès's arguments were meritless and should be dismissed.<sup>10</sup>

In its decision dated 29 June 2006, the Court of Appeal rejected Thalès's arguments on these points. In this regard, the Court stated simply that, "since the arbitral tribunal rightfully considered that, in terms of their subject matter, the claims were arbitrable and could be settled by means of a fair trial; [and] that the arbitral tribunal decided nothing further," the application to set aside the award was rejected.<sup>11</sup> Thalès appealed the Court of Appeal's decision to the French Supreme Court.<sup>12</sup> On appeal, Thalès contended, among other things, that the Court of Appeal's decision violated article 455 of the French Code of Civil Procedure (CPC)<sup>13</sup> because it was not sufficiently reasoned.<sup>14</sup>

In its decision of 11 February 2009, the Supreme Court agreed that the reasoning in the Court of Appeal's decision was lacking. Specifically, the Supreme Court found that, "[i]n so deciding, by way of a standard formula, devoid of any specific reasoning or any express reference to the grounds for the arbitrators' reasoning — reasoning the Court of Appeal considered pertinent — the Court of Appeal did not put the Supreme Court in a position to carry out its review

[of the Court of Appeal's decision] and therefore did not satisfy the requirements of [article 455]." For this reason, the Supreme Court vacated the Court of Appeal's decision, putting "the matter and the parties back in the state they were" prior to the Court of Appeal's decision.<sup>15</sup>

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The reasoning in French Court of Appeal decisions, particularly when rejecting applications to set aside arbitral awards, is normally abbreviated. It is not uncommon for the Court of Appeal to dismiss the complaining party's arguments in a formulaic manner with little explanation, especially where the party raised the same arguments before the arbitral tribunal and the tribunal rejected them. This applies even to issues the Court of Appeal has the power to review de novo, including issues of arbitral jurisdiction, the arbitrability of claims, due process and international public policy. Although the Court of Appeal has the power to look into these matters for itself from scratch, in practice it rarely does so, often deferring (to a greater or lesser extent) to the findings and decisions of the arbitral tribunal. The Court of Appeal's decision in *Thalès* fits this mold.

The Supreme Court does not often vacate as insufficiently reasoned Court of Appeal decisions refusing to set aside arbitral awards. Does *Thalès* mean that the Supreme Court now wants more? Are the floodgates now open for parties to challenge as insufficiently reasoned the run-of-the-mill Court of Appeal decision denying annulment of an award? Probably not. While the Supreme Court wanted more in the *Thalès* case, it would probably be a mistake to think that similar Court of Appeal decisions are likewise open to attack. In part, this is because French court decisions — even Supreme Court decisions — do not carry the precedential weight they do in common law jurisdictions.<sup>16</sup> More importantly, however, *Thalès* is a special case.

The sale of the six frigates at issue in *Thalès* lies at the core of a high profile corruption scandal supposedly involving hundreds of millions of dollars in bribes and kickbacks and allegedly implicating government officials in Taiwan, China and France. Thalès is alleged, among other things, to have paid bribes to Chinese officials to get them to drop their objections to the frigate sale to Taiwan. Some of this money has

allegedly made its way back to France into the pockets of French officials. Several alleged witnesses have died under unusual circumstances.<sup>17</sup>

The arbitration at issue in *Thalès* relates directly to this scandal. Specifically, in the arbitration, Taiwan seeks, among other things, to recover monies Thalès allegedly paid in bribes to grease the sale of the frigates. The payment of such bribes allegedly breached the terms of the Bravo contract and illegitimately inflated the price Taiwan paid for the frigates. The Supreme Court's decision in *Thalès* should probably be viewed in light of the sensitive factual context of the arbitration — a context which may go far in explaining why the Supreme Court felt that the Court of Appeal's decision in *Thalès* merited more explanation than the Court of Appeal customarily gives.

Moreover, depending on the specific circumstances of the claims and defenses in the arbitration, as well as the nature of the evidence at issue, there could be a tension between preserving national security secrets and Thalès's ability to defend itself. The Supreme Court may have wanted to know more about whether such a tension actually exists in this case and, if so, why this does not prevent the case from moving forward. In our experience, national security concerns rarely prove an insurmountable obstacle to an arbitration proceeding,<sup>18</sup> though creative thinking is sometimes employed in fashioning the procedure to be followed. In this regard, the privacy and procedural flexibility of arbitration arguably make it particularly well suited to such challenges.

Perhaps most obviously, because arbitration in commercial cases is private, it is usually possible to exclude the general public from the proceedings. Countries whose national security secrets are at issue might give the arbitrators and other key people in the case limited security clearances for purposes of the arbitration, or grant access to sensitive documents in a secure location to which only defined persons could have access.<sup>19</sup> It may also be possible to craft confidentiality agreements or orders that limit the people who can see certain pieces (or portions) of documentary evidence (e.g., "for counsel and arbitrators' eyes only") or be present when certain witnesses are testifying or certain arguments are being made by counsel.<sup>20</sup> And in some cases, it may be possible to organize the proceedings to sidestep national security concerns altogether. For

example, it may be possible to carve out for early decision in a partial award issues that can be heard and determined without implicating national security concerns. Depending on the nature and importance of such issues, the outcome of the partial award might resolve the merits of the case outright or prompt the parties to settle, thereby avoiding any alleged potential tension between national security and due process.<sup>21</sup>

As the Court of Appeal decision in *Thalès* said nothing about why the arbitral tribunal determined the case could go on, it is not clear whether the tribunal considered Thalès's national security/due process concerns meritless or manageable (though Thalès's grounds for appeal suggest that the tribunal may have found them to be a bit of both).<sup>22</sup> That decision now vacated, Thalès may again go before the Court of Appeal to request annulment of the partial award. Should it do so, the Court of Appeal will likely give more explanation as to the reasons for both the arbitral tribunal's decision and its own.

## See Also

### Enforcement Of Awards • Res Judicata

#### Effect Of Awards • Arbitrator Independence

In *Papillon Group Corp. [Panama] v. Arab Republic of Syria*,<sup>23</sup> the Paris Court of Appeal rejected Papillon's request to set aside an ICC award of 2007 declining jurisdiction and ordering Papillon to bear the costs of arbitration. The arbitration concerned a framework agreement concluded in 1986 between Papillon and an entity called Golan concerning organization of the Mediterranean Games Syria held in the late 1980s. In concluding the framework agreement, Golan acted in its own name and in the name of a Syrian ministerial committee with no legal personality that had been created by the President of Syria. Further to the framework agreement, Papillon also entered into several related publicity and marketing agreements with Golan and another entity called Gota, a Syrian state entity concerned with international trade and commerce.

Disputes arose and, in 1999, Papillon filed with the ICC a request for arbitration against Golan and Syria pursuant to the arbitration clause in the framework agreement. In 2001, the arbitral tribunal in that case (sitting in Paris) found that it had jurisdiction over Papillon's claims against Syria and decided the

case in Papillon's favor on the merits. Syria asked the Paris Court of Appeal to set the tribunal's award aside. In 2003, the Court of Appeal rejected Syria's application.

In 2003, Papillon filed a second arbitration with the ICC pursuant to the same arbitration clause. This time, Papillon named as respondents Golan, Syria and Gota. In 2007, the arbitral tribunal in the second case (also sitting in Paris) issued an award finding that it did not have jurisdiction over Papillon's claims against Syria. Papillon asked the Paris Court of Appeal to set aside the 2007 award on the grounds, among others, that its negative decision on jurisdiction was barred by the *res judicata* effect of the positive decision on jurisdiction in the 2001 award. In declining jurisdiction, the arbitral tribunal had thus failed to fulfill its mission. Papillon also argued that the tribunal was not properly constituted because the chairman, who had published pro-Syria articles in the press — a fact that was not disclosed at the time of his appointment — lacked impartiality. (Papillon had challenged the chairman on this basis during the arbitration; the ICC Court had rejected the challenge.) Moreover, according to Papillon, the arbitral tribunal did not behave in an impartial manner — raising *sua sponte* arguments that favored Syria and excluding evidence tending to establish Syria's liability — thereby violating due process. Finally, Papillon contended that the tribunal did not abide by its obligation of collegiality because the chairman excluded from deliberations the co-arbitrator nominated by Papillon.

In rejecting Papillon's application, the Court of Appeal found that the 2001 award was not *res judicata* on the issue of jurisdiction in the second case principally because both the evidence upon which the arbitral tribunals relied and the parties in the two cases were different (Gota being present in the second arbitration, but not the first). In addition, Syria had signed terms of reference in the first arbitration, which it had not done in the second. Looking at the question of jurisdiction — which the Court of Appeal has the power to review *de novo* — the Court of Appeal found that the arbitral tribunal did not err in finding it lacked jurisdiction over Papillon's claims against Syria. In this regard, the Court noted that Syria had not signed the contracts at issue, and those contracts did not purport to impose obligations on Syria. Moreover, the Court found that the ministerial committee had no authority to enter

into arbitration agreements on behalf of Syria. The Court likewise found unpersuasive the fact that one contract provided that “the prime minister bears all liability for the signed contracts”. Finally, the involvement of Syrian ministers in the organization of the Games and discussions concerning the marketing agreements could not bind Syria to contracts it did not sign.

As to the chairman's alleged lack of impartiality, the Court considered that the two press articles the chairman published in support of Syria's stance on the Israel/Palestine conflict were insufficient to establish that he was a “champion of the Syrian cause.” Regarding the tribunal's alleged violation of due process, the Court considered that, in view of the tribunal's lengthy discussion on jurisdiction in the award, its complementary findings on issues it raised *sua sponte* in Syria's favor did not amount to treating the parties unequally or a breach of due process. The Court likewise found that it could not consider the tribunal's exclusion of evidence supporting Syria's liability, as to do so would amount to reviewing the merits of the tribunal's award.<sup>24</sup> As to the alleged lack of deliberations, the Court of Appeal found no breach of collegiality in light of the excluded co-arbitrator's having filed a dissenting opinion and made reference in a letter to a meeting of the arbitral tribunal in Paris.

#### **Enforcement Of Awards • Role Of Arbitral Institutions • International Public Policy**

In *Aimery de P. [France] v. Trioplast [Sweden]*,<sup>25</sup> the French Supreme Court upheld a decision of the Paris Court of Appeal refusing to set aside an ICC award rendered in 2006 in France by a sole arbitrator. The award dismissed Aimery de P.'s claim for damages against Trioplast. Aimery de P. contended that the Court of Appeal had violated his right to an impartial tribunal under the European Convention on Human Rights. Specifically, Aimery de P. complained that a judge on the Court of Appeal panel that declined to set aside the ICC award was a former Deputy Secretary General of the ICC Court. Aimery de P. also contended that the Court of Appeal had violated public policy in refusing to verify whether the sole arbitrator had correctly applied provisions of the applicable law that constitute international public policy for countries in the European Union (EU).

The Supreme Court rejected both grounds for appeal. As to the first, the Supreme Court noted that

the ICC Court merely administers arbitrations and does not have jurisdiction over the cases proceeding under its rules. Accordingly, there was no basis to question the impartiality of the judge of the Court of Appeal who had previously worked for the ICC. As to international public policy, the Supreme Court noted that the role of the Court of Appeal is to determine whether recognition or enforcement of the award in France would be contrary to French international public policy. In this regard, it is the solution reached in the award, not the award's reasoning, the Court of Appeal should examine. The Court of Appeal cannot review whether the arbitral tribunal correctly applied the law. Rather, the Court of Appeal may only decline to enforce an award on public policy grounds where the violation of international public policy is actual, blatant and concrete. As the Court of Appeal had correctly declined to consider whether the sole arbitrator had properly applied the law, the Supreme Court upheld its decision refusing to set aside the award.

#### **Enforcement Of Awards • Arbitrator Independence • Disclosure Obligations**

In *J&P Avax* [Greece] *v. Tecnimont* [Italy],<sup>26</sup> the Paris Court of Appeal set aside an ICC partial award on liability rendered in Paris on the grounds that the arbitral tribunal had not been properly constituted because the chairman lacked independence. The co-arbitrators jointly nominated the chairman in November 2002. At that time, the chairman disclosed that, "last year, the Washington and Milan offices of [the chairman's law firm] provided assistance to Tecnimont's parent company with a matter that is terminated to date." The chairman further stated that he had never worked on any matter for Tecnimont. The chairman never updated his disclosure statement on his own initiative. Beginning in July 2007, however, J&P Avax began raising questions about connections between the chairman's law firm and Tecnimont. In response to these questions, the chairman (over a series of several months) eventually disclosed, among other things, that his firm (1) had represented the parent company of Tecnimont from 2002 to 2005, (2) had also advised a subsidiary of Tecnimont between 2005 and 2007, and (3) was currently representing another Tecnimont subsidiary and had been doing so since 2004.

In September 2007, J&P Avax challenged the chairman and the ICC Court rejected the challenge. J&P

Avax continued to participate in the arbitration under protest. The arbitral tribunal issued its partial award on liability in December 2007. Thereafter, the chairman resigned saying, "I do not deny that a party may see from [the] situation an incompatibility with the requirement of independence."

J&P Avax asked the Court of Appeal to set aside the partial award on the grounds that the chairman lacked independence. Tecnimont resisted the challenge arguing, among other things, that J&P Avax's challenge of the chairman before the ICC Court had been untimely. In setting aside the award, the Court of Appeal noted that, under French arbitration law, arbitrators are under a duty to disclose any fact and circumstance that may affect their judgment or create in the mind of a party a reasonable doubt as to their independence or impartiality. In this regard, the relationship of trust between an arbitrator and the parties must be continuously preserved, and the parties must be informed all along the arbitration of relationships that may, in the eyes of the parties, affect an arbitrator's judgment or independence. The Court of Appeal found that the chairman had failed to do this, that even his original disclosure in 2002 had been incomplete at the time it was made and that J&P Avax did not waive its right to complain. The challenge was therefore admissible. The Court further noted that the chairman's lack of disclosure was not excused by the fact that his firm has 2200 lawyers across the globe. In light of his firm's relationship with Tecnimont's corporate group, the chairman lacked independence.

#### **Enforcement Of Agreements To Arbitrate • Competence-Competence**

In *Laviosa Chimica Mineraria* [Italy] *v. Afitex* [France],<sup>27</sup> the French Supreme Court overruled a Bordeaux Court of Appeal decision declining to enforce an arbitration agreement on the ground that the Court of Appeal's decision violated the principle of competence-competence. In 1997, Laviosa and Afitex entered into a one-year exclusive distribution contract for the sale in France of products manufactured by Laviosa. That contract contained an arbitration clause. Afitex was later sued by one of its clients before the Commercial Court of Cognac on the grounds that the products were allegedly defective. Afitex filed a claim against Laviosa in the same proceedings. Laviosa objected to the jurisdiction of the French court on the basis of the arbitration clause in the distribution agreement. The

lower court rejected Laviosa's position and the Court of Appeal affirmed on the grounds that (1) there was no evidence that the relationship at issue between Afitec and Laviosa arose from the distribution contract and (2) both the distribution contract and the arbitration agreement had expired. The French Supreme Court reversed on the grounds that the arbitration agreement was not manifestly void or manifestly inapplicable, the only basis upon which a French court can deny an arbitral tribunal the opportunity to decide on its own jurisdiction in accordance with the principle of competence-competence.<sup>28</sup>

#### **Enforcement Of Agreements To Arbitrate • International Versus Domestic Arbitration**

Two cases this quarter deal with the distinction between domestic and international arbitration agreements under French law.

The first is *Pacific Elysees* [France] *v. Yemen Airways Co.* [Yemen].<sup>29</sup> There, the Paris Court of Appeal reversed a lower court decision taking jurisdiction over a dispute arising out of a contract containing an arbitration clause. Specifically, Pacific Elysées and Yemen Airways had entered into a contract for the transportation by air of passengers from Paris to Moroni (Comoros) that contained an arbitration clause providing simply that, in case of a dispute, the parties would appoint an arbitrator to render an award that would be binding upon the parties. Pacific Elysées sued Yemen Airways in the French courts for breach of that contract. Yemen Airways objected that the French courts lacked jurisdiction in light of the arbitration clause. Pacific Elysées contended the arbitration agreement was null and void under French domestic arbitration law.<sup>30</sup> The lower court found that it had jurisdiction over the case and dismissed Pacific Elysées's claims on the merits. Pacific Elysées appealed on the grounds that the French court had misapplied the law. In response, Yemen Airways reiterated its jurisdictional objections.

The Paris Court of Appeal noted that the contract — which was drafted in English and signed in Yemen — concerned the transportation of passengers from Paris to Moroni (Comoros) via Sanaa (Yemen). Payments under that contract were made in France, but immediately credited in Yemen. The Court of Appeal accordingly considered that the contract was international as it involved cross-border services and payments. The arbitration agreement in the contract

was therefore not subject to French domestic arbitration law. The Court of Appeal explained that the existence, validity and scope of international arbitration agreements is to be determined solely with regard to the common intent of the parties — subject only to the limits of French international public policy — without reference to any national law. As the parties' arbitration agreement was not contrary to public policy, the Court of Appeal reversed the lower court and referred the parties to arbitration.

The second case is *Georges E.* [France] *v. Nest* [Denmark].<sup>31</sup> There, the Paris Court of Appeal upheld a lower court decision declining jurisdiction over Georges E.'s action to void certain contracts he had with Nest — contracts that contained arbitration clauses referring to the Danish Arbitration Institute. In doing so, the Court of Appeal declined Georges E.'s invitation to find the arbitration clauses void under French domestic arbitration law.<sup>32</sup> The Court found the contracts at issue — which concerned the movement of goods and payments across borders — to be international in character in light of the economic relationships between the parties. The arbitration clauses contained therein therefore concerned international arbitration and the requirements for the validity of domestic arbitration agreements did not apply. The Court found the arbitration agreements valid under the more permissive law applicable in the international context, which upholds agreements to arbitrate subject only to the limits of French international public policy.

#### **Enforcement Of Agreements To Arbitrate • Competence-Competence • Waiver Of Agreements To Arbitrate**

In *Carbon Impact* [USA] *v. Structil* [France],<sup>33</sup> the Paris Court of Appeal reversed a lower court decision taking jurisdiction over a dispute arising out of a contract containing a dispute resolution clause that referred to arbitration. Specifically, in 1995, the parties entered into a contract under which Structil agreed to deliver various products to Carbon Impact. The contract contained a dispute resolution clause providing that “any dispute arising from the interpretation or performance of this contract and which the parties cannot settle amicably shall be settled in Paris by way of arbitration of the International Chamber of Commerce in accordance with said rules,” but also that, “[i]n the absence of an agreement these disputes

shall be submitted to the commercial court of EVRY, to which the parties grant exclusive jurisdiction.”

Ultimately, disputes arose between the parties regarding the quality of the products Structil delivered and Carbon Impact's reluctance to pay for them. In 2001, the parties entered into a further agreement resolving these disputes. Nevertheless, in 2004, Structil filed a claim for payment against Carbon Impact before the Evry Commercial Court. That court took jurisdiction on the grounds that, by entering into the 2001 contract, the parties had amicably settled their dispute concerning the performance of the 1995 contract and had shown their intent to cut off recourse to arbitration.

Before the Paris Court of Appeal, Carbon Impact contended that the Evry court had had no jurisdiction to interpret the clause in light of the competence-competence principle. For its part, Structil claimed that such clause was not an arbitration agreement since it required the parties' prior agreement to arbitrate. Notwithstanding the parties' arguments, the Paris Court of Appeal considered that the 2001 contract merely amended certain terms of the 1995 contract without affecting the arbitration agreement. As the 2001 contract was silent with respect to the arbitration agreement — and silence cannot amount to a waiver of an arbitration agreement — the Evry court had wrongfully decided that the parties had waived their right to arbitrate.

**Liability Of Arbitral Institutions •  
Enforceability Of Awards Set Aside At  
The Seat • Applicable Arbitral Rules**

In *SNF [France] v. International Chamber of Commerce [France]*,<sup>34</sup> the Paris Court of Appeal upheld a lower court decision dismissing SNF's claim for damages against the ICC. SNF's suit against the ICC related to an arbitral award issued against SNF in 2004 in an ICC arbitration. The award required SNF to pay damages for breach of a contract concluded in 1993. The courts in Belgium (the seat of the arbitration) set the award aside on the grounds that it violated EU competition law, which constitutes international public policy in EU countries. The French courts, however, later enforced the award against SNF because they found no evidence that enforcing the award would result in a blatant, actual and concrete breach of EU competition law.<sup>35</sup>

SNF sued the ICC for breach of contract and international public policy. Perhaps most importantly, SNF claimed that the liability of the ICC should be assessed in light of the ICC's 1988 Rules of Arbitration, as these were the Rules in effect when the contract containing the arbitration clause was concluded. The 1988 Rules do not contain a waiver of liability provision designed to protect the ICC from claims arising from its administration of arbitration cases. Such a provision was added to the current version of the Rules, which came into effect in 1998. Specifically, article 34 of the 1998 Rules provides that, “[n] either the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration.” SNF further argued that, even if the 1998 Rules applied, the waiver provision in article 34 should be considered null and void under French law.

In terms of alleged wrongdoing, SNF contended that the ICC Court had failed to properly scrutinize the award and therefore failed to prevent issuance of an award that violated Belgian international public policy. The ICC Court also allegedly failed to review an addendum to the award that SNF alleged was not signed by the chairman of the arbitral tribunal. SNF further complained that the ICC had failed to answer its requests for advice with respect to time limits under Belgian law to apply to have the award set aside. SNF also contended that the ICC Court had breached its contractual obligations by granting unreasoned extensions of time for the rendering of the final award and by fixing the costs of the arbitration pursuant to the 1998 (rather than the 1988) Rules.

The lower court dismissed all of SNF's claims and the Paris Court of Appeal affirmed. The Court first found that there existed an “arbitration contract” between SNF and the ICC that was subject to French law. The Court went on to explain that the rules applicable to an arbitration are those in effect at the time the arbitration agreement between the parties is concluded, unless the parties agree otherwise. Here, the Court found the parties had agreed through the terms of reference that the 1998 Rules would apply, making those the applicable Rules. However, the Court of Appeal considered the waiver of liability provision in article 34 of the 1998 Rules void *ab initio* on the grounds that such clause would effectively allow the ICC to

fail to perform its core obligations as a provider of arbitration services and therefore contradicted the essence of the arbitration contract.

The Court nevertheless went on to find SNF's claims meritless. As to scrutiny, the Court of Appeal considered the ICC Court had properly performed its scrutiny functions in drawing the arbitral tribunal's attention to the issue of public policy without affecting the tribunal's liberty of decision. Contrary to SNF's allegations, the Court likewise found that the addendum at issue had in fact been signed by the chairman of the arbitral tribunal. As to the ICC's failure to answer SNF's requests for legal advice, the Court noted that SNF's application before the Belgian courts to set aside the award had not been time-barred. Moreover, the ICC is under no duty to give legal advice to a party, as doing so would violate its obligation to remain neutral as between the parties. As to the extensions of time, the Court noted that the parties had agreed to bifurcate the proceedings and thereafter exchanged over thirty written submissions. For its part, the arbitral tribunal had held two procedural hearings, three hearings on the merits and issued fifteen procedural orders. The extensions were therefore warranted. Moreover, SNF did not object during the arbitration to the ICC Court's extending the time limit for the final award. Finally, with respect to costs, the Court of Appeal found that the ICC Court had properly fixed the costs of arbitration in accordance with the applicable fee schedule and had no responsibility for the magnitude of SNF's attorney's fees, which SNF freely chose to spend for its defense.

## 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 Simon Vandeweeeghe, an intern at Herbert Smith, for his research in connection with the first two issues of *A View From Paris*. Thanks are also due to Katherine Barry, Simon Chapman, Emily Fox, Laurence Fanc-Manget and Jonathan Mattout, all associates at Herbert Smith, for their assistance and insights.

1. Cour de cassation [Cass. 1e civ.] [supreme court], 11 Feb. 2009, case no. A 06-18.746 ("*Thalès* (SC)"). An English translation of both the Supreme Court's decision in *Thalès* and the underlying Court of Appeal decision in the same case (Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 29 Jun. 2006, case no. 04/23550 ("*Thalès* (CA)")) are annexed. In these notes, page citations to these decisions are to the translations.
2. *Thalès* (CA) at 2.
3. *Id.*
4. *Id.*
5. *Thalès* (CA) at 1.
6. *Id.* at 2-3.
7. The Paris Court of Appeal (*Cour d'appel de Paris*) has jurisdiction over all applications to set aside international arbitration awards rendered in France. Moreover, the judges in section C of the First Chamber of the Court, which issued the decision in *Thalès*, specialize in international arbitration and private international law matters and hear, among other things, nearly all applications made to the Court to set aside international arbitral awards rendered in France, as well as challenges to the enforcement in France of foreign arbitral awards.
8. *Id.* at 3. See French Code of Civil Procedure (CPC), art. 1502. Together, articles 1502 and 1504 of the CPC set forth the grounds on which an international arbitration award rendered in France may be set aside. Specifically, such an award may be set aside where (1) there is no agreement to arbitrate (art. 1502-1), (2) the arbitral tribunal was irregularly constituted (art. 1502-2), (3) the arbitral tribunal failed to abide by its mission (art. 1502-3), (4) there was a breach of due process in the course of the arbitration (art. 1502-4), and (5) where enforcement of the award would violate international public policy (art. 1502-5). On its application, *Thalès* invoked grounds (1), (4) and (5), all of which the Court of Appeal rejected.
9. *Thalès* (CA) at 5.

10. The civil division of the public prosecutor's office spoke in support of Thalès's application, mainly because of the alleged constraints imposed by the need to protect national security secrets. As a general matter, the civil division of the public prosecutor's office tracks cases coming before section C of the First Chamber of the Court of Appeal. This is because, in addition to international arbitration, section C deals frequently with issues of international law concerning the rights of individuals (e.g., questions of nationality, international divorce, international adoption), and the role of the civil division of the public prosecutor's office in France is to protect society's interest in upholding the rights of individuals, and particularly children. As international arbitration typically concerns commercial disputes (most commonly between companies), it rarely implicates the types of rights with which the civil division of the public prosecutor's office is principally concerned. Nevertheless, the public prosecutor has the right to make submissions in all section C cases, and did so in the *Thalès* case.
11. *Thalès* (CA) at 5.
12. In the French system, parties may appeal decisions of the Court of Appeal to the Supreme Court as a matter of right. There is no need to be granted certiorari. The Supreme Court comprises over a hundred judges organized by subject matter into six different chambers, five civil (each specialized in a particular area of law) and one criminal. Cases are generally decided on the papers without oral argument by three, five or seven judges. The Supreme Court reviews questions of law de novo; in principle, it does not review questions of fact.
13. Article 455 provides, among other things, that decisions of the Court of Appeal "must be reasoned."
14. *Thalès* (SC) at 3.
15. *Id.* at 2.
16. In France, as in other civil law jurisdictions, the courts are said to interpret and apply the law, not make the law. Strictly speaking, only the legislature can make the law. In practice, this probably overstates the case, however. While it is true that the decisions of French courts do not have the same precedential value as decisions handed down in common law jurisdictions, prior court decisions do provide guidance as to how particular laws are to be interpreted and applied. This is especially so with respect to decisions of courts with expertise in the area of law at issue.
17. Thalès's grounds for appeal, which are attached to the Supreme Court's decision, touch on some of the allegations at issue in the scandal. See *Thalès* (SC) at 3-5. For further detail in French on the Taiwan frigate scandal, see THIERRY JEAN-PIERRE, *TAÏWAN CONNECTION. SCANDALES ET MEURTRES AU CŒUR DE LA RÉPUBLIQUE* (Robert Laffont 2003). For further detail in English, see Hugh Schofield, *Book Delves into Frigate Scandal*, BBC News, 1 Dec. 2003 (<http://news.bbc.co.uk/1/hi/world/europe/3244148.stm>); Craig R. Whitney, *French Official Investigated in Military Contract Scandal*, N.Y. Times, 30 Apr. 1998, at 6.
18. In this regard, article 9(2)(f) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) ("IBA Rules") provides that an arbitral tribunal may exclude from evidence or production any document, statement or oral testimony on "grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution)". Nothing in the IBA Rules, however, suggests that the fact that material information is classified necessarily means that the arbitration cannot proceed. To the contrary, article 9(2)(f) contemplates that such cases may well proceed with the classified information excluded.
19. In light of the hard line the French authorities have taken to date (see *Thales* (SC) at 3-5), it seems unlikely they will cooperate in this case. See Philippe Fouchard, et al., *On Commercial Arbitration* ¶ 1266 (Emmanuel Gaillard & John Savage eds., Kluwer 1999) (explaining the delicate position of an arbitral tribunal sitting in a country whose national security secrets are at issue, as does the arbitral tribunal in the *Thalès* arbitration). Indeed, in recent years, the French government has taken an ever more expansive view of the types of information that constitute national security secrets. The *Thalès* scandal — where the government is invoking the rules governing national security secrets to block investigation of alleged corruption at the highest levels of government — arguably represents the

- most extreme example of this trend to date. Some commentators have raised concerns that using the rules governing national security secrets in this way creates “no-law zones” where certain high-ranking politicians and business people can operate with impunity. *See, e.g.*, Juris-Classeurs Pénal Code, Fasc. art. 413-1 to 413-12, ¶ 69.
20. *See, e.g.*, article 9(3) of the IBA Rules (providing that the arbitral tribunal “may, where appropriate, make necessary arrangements to permit evidence to be considered subject to suitable confidentiality protection”). Having said this, it cannot be taken for granted that parties will comply with confidentiality agreements and confidentiality orders issued by arbitral tribunals. In the event of breach, damages are generally the only potential sanction an arbitral tribunal can impose. Depending on the circumstances, the threat of damages — which are often difficult to prove — may not be sufficient to deter a party from disclosing confidential information. By contrast, confidentiality orders issued by courts — which in some jurisdictions carry the threat of fines or jail time for contempt of court, as well as damages — may go further in encouraging compliance with confidentiality obligations. In any event, in the *Thalès* case, it is not clear that the arbitral tribunal could use confidentiality agreements and orders to avoid all of the national security concerns at issue. For instance, were the award to disclose national security secrets, *Thalès* contends that the arbitral tribunal itself could be exposed to criminal sanctions. *See Thalès SC* at 4. However, even if this is true — a point on which we take no position — the arbitral tribunal might well be able to draft its award so as to avoid disclosing national security secrets.
  21. For more ideas on the subject, see Jean-Georges Betto, *International Arbitration and Defence Secrets: The Viewpoint of Practitioners*, 6 Int'l Bus. L. J. 827 (2004).
  22. *Thalès (SC)* at 3-4.
  23. Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section C), 26 Mar. 2009, case no. 08/01578.
  24. Indeed, at various points in its decision, the Court of Appeal refused to consider certain pieces of evidence the arbitral tribunal had, in Papillon's view, wrongfully excluded. Even though the Court has the power to review de novo an arbitral tribunal's decision on jurisdiction, the Court reasoned that to consider the excluded material would amount to improperly reviewing the merits of the award.
  25. Cour de cassation [Cass. 1e civ.] [supreme court], 11 Mar. 2009, case no. 08-12.149.
  26. Cour d'appel [CA] [regional court of appeal], Paris 1e ch. (section C), 12 Feb. 2009, case no. 07/22164.
  27. Cour de cassation [Cass. 1e civ.] [supreme court], 11 Feb. 2009, case no. F 08-10.341.
  28. Pursuant to the competence-competence principle embodied in articles 1458 and 1466 of the CPC, where a dispute has not yet been submitted to an arbitral tribunal, a French court must decline jurisdiction if asked by a party to do so, unless the arbitration agreement is manifestly void or manifestly inapplicable. Having said this, an arbitral tribunal that decides on its own jurisdiction does not have the final say on the matter. This is because the Court of Appeal may consider the question of jurisdiction de novo in the context of enforcement proceedings with respect to the tribunal's award (*see* articles 1502 and 1504 of the CPC).
  29. Cour d'appel [CA] [regional court of appeal], Paris 25e ch. (section A), 28 Jan. 2009, case no. 07/19762.
  30. In that regard, Pacific Elysées invoked article 1443 of the CPC, which provides in pertinent part, that to be valid an “arbitration clause must either name the arbitrator(s), or provide for the terms and conditions of his (their) appointment.”
  31. Cour d'appel [CA] [regional court of appeal], Paris, 1e ch. (section D), 21 Jan. 2009, case no. 08/18859.
  32. Specifically, Georges E. contended that the arbitration agreements at issue were void under article 2061 of the CPC, which provides in pertinent part that arbitration clauses are generally valid in the domestic context in contracts concluded in connection with a professional activity. Georges E. contended that he had not been acting in a professional capacity when he entered into the arbitration agreements at issue and that as a consequence the arbitration clause was null and void.

33. Cour d'appel [CA] [regional court of appeal], Paris 25e ch. (section B), 23 Jan. 2009, case no. 06/09031.
34. Cour d'appel [CA] [regional court of appeal], Paris 1e ch. (section C), 22 Jan. 2009, case no. 07/19492.
35. *See supra* note 25 and accompanying text (discussing the *Aimery de P. v. Trioplast* case and the standards in France for setting aside an arbitral award

that allegedly violates EU competition law). France is one of a handful of jurisdictions that will enforce foreign arbitral awards that have been set aside at the place of arbitration. The fact that a foreign award has been set aside at the place of arbitration is not a ground under French law for the French courts to deny enforcement. *See supra* note 8. In this respect, French law is more favourable to the enforcement of foreign arbitral awards than the New York Convention. ■

Civ. 1

M.F

**SUPREME COURT**<sup>[i]</sup>Public hearing of **11 February 2009**

Overruled

Mr. BARGUE, President

Decision No. 128 FS-P+B+I<sup>[ii]</sup>

Appeal No. A 06-18.746

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

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

Deciding on the appeal<sup>[iii]</sup> filed by:

1. Thalès, a [French] company, with its registered office at 45 rue de Villiers, 92200 Neuilly-sur-Seine,
2. Thalès Naval, a [French] company, with its registered office at 7-9 rue des Mathurins, 92220 Bagneux,

against the decision rendered on 29 June 2006 by the Paris Court of Appeal (1st Chamber, Section C), in the dispute against:

1. The Republic of China Navy, with its registered office at P.O. Box 90151-7 Taipei, Taiwan Republic of China, The Republic of China,
2. Taiwan Republic of China, represented by the Republic of China Navy, with registered office at P.O. Box 90151-7 Taipei, Taiwan Republic of China, The Republic of China,
3. The public prosecutor attached to the Paris Court of Appeal, domiciled at 4 boulevard du Palais, 75001 Paris,<sup>[iv]</sup>

Defendants on the appeal;

The Claimants rely upon the three grounds for appeal appended to this decision;

Considering the communication [of the file] to the public prosecutor;

THE COURT, constituted in accordance with article R. 431-5 of the Code of Judicial Organisation, in the public hearing of 13 January 2009, where were present: Mr. Bague, President, Ms. Pascal, Reporting Judge, Mr. Pluyette, Senior Judge, Messrs. Rivière and Falcone, Ms. Monéger, Ms. Bignon and Ms. Chaillou, Judges, Ms. Auroy, Mr. Chauvin, Ms. Chardonnet, Ms. Trapero, Ms. Ingall-Montagnier, Ms. Vassallo, Ms. Gorce, Assistant Judges, Mr. Domingo, Advocate General, and Ms. Aydalot, Chamber Clerk;

Based on the report from Ms. Pascal, Judge, the observations submitted by SCP Célice, Blancpain &amp; Soltner, counsel for Thalès and Thalès Naval, and by Mr. Foussard, counsel for the Republic of China (Taiwan) Navy

and the Republic of China (Taiwan), and the written submissions of Mr. Domingo, General Advocate, and after deliberating in accordance with the law;

On the first ground, first branch:

Considering article 455 of the Code of Civil Procedure;<sup>[v]</sup>

Whereas under a contract, known as "Bravo", dated 31 August 1991, the company China Shipbuilding Corporation – to which, after a series of transfers, the Republic of China Navy (ROCN) is now successor-in-interest – undertook to purchase six frigates from Thomson CSF – to which Thalès and Thalès Naval SA (Thales) are successors-in-interest; the contract contained an arbitration clause; ROCN went to arbitration to ask for damages on the grounds that Thalès paid commissions despite being barred from doing so under article 18 of the contract; Thalès contended that the dispute was not arbitrable because it is covered by the rules governing national security secrets;

Whereas, in dismissing the application to set aside, the decision [of the Court of Appeal] states that the arbitral tribunal rightfully found that the subject matter of the claims was arbitrable and could be settled by means of a fair trial;

In so deciding, by way of a standard formula, devoid of any specific reasoning or any express reference to the grounds for the arbitrators' reasoning – reasoning the Court of Appeal considered pertinent – the Court of Appeal did not put the Supreme Court in a position to carry out its review [of the Court of Appeal's decision] and therefore did not satisfy the requirements of the above-mentioned article.

FOR THESE REASONS and without it being necessary to decide on the other grounds:

OVERRULES AND VACATES in its entirety the decision rendered on 29 June 2006 among the parties by the Paris Court of Appeal; thus puts the matter and the parties back in the state they were prior to said decision and, so that law is observed, refers them to the Paris Court of Appeal differently composed;

Leaves costs to the State Treasury;<sup>[vi]</sup>

Considering article 700 of the Code of Civil Procedure, rejects all claims;

Says that upon the initiative of the public prosecutor attached to the Supreme Court, this decision will be transmitted so that it may be transcribed in the margin of, or following, the overruled decision;

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

GROUNDS APPENDED to the decision

Grounds submitted by SCP Célice, Blancpain & Soltner, *avocat aux Conseils*<sup>[vii]</sup> for Thalès and Thalès Naval.

FIRST GROUND FOR APPEAL:

The decision [of the Court of Appeal] is criticised for having dismissed the application to set aside filed by the companies THALES and THALES NAVAL on the basis that: "THALES argues that the dispute is not arbitrable because the classification of its subject matter, or its evidence, as national security secrets – a classification that is binding on Thalès – is not compatible, absent a violation of international public policy, with due process, and therefore deprives Thalès of the right to a fair trial and renders the arbitration agreement without effect; that the arbitral tribunal rightfully considered that, in terms of their subject matter, the claims were arbitrable and could be settled by means of a fair trial; that the arbitral tribunal decided nothing further; therefore, these grounds for setting aside are rejected, and therefore, so is the application itself";

DESPITE THE FACT THAT, ON THE ONE HAND, any decision must be reasoned; in the case at hand, in answering the THALES companies' arguments regarding both the inarbitrability of the dispute and the failure to meet the requirements of a fair trial with merely a conclusory affirmation that "the claims were arbitrable and could be settled by means of a fair trial", the Court [of Appeal] violated article 455 of the New Code of Civil Procedure as well as article 6 of the European Convention on Human Rights;

AND THAT, ON THE OTHER HAND, proceedings for the setting aside of an award do not have the same purpose as arbitral proceedings[; accordingly], the Court before which such an application is made may not, without misapplying its powers, make a decision by mere reference to the reasons in the award; in the case at hand, by dismissing the application to set aside by merely stating "that the arbitral tribunal rightfully considered that the subject matter of the claims was arbitrable and could be settled by means of a fair trial", the Court not only violated article 455 of the New Code of Civil Procedure but also article 1502 of the same code.

SECOND GROUND FOR APPEAL:

(in the alternative)

The decision [of the Court of Appeal] is criticised for having dismissed the application to set aside filed by the companies THALES and THALES NAVAL on the basis that: "THALES argues that the dispute is not arbitrable because the classification of its subject matter, or its evidence, as national security secrets – a classification that is binding on Thalès – is not compatible, absent a violation of international public policy, with due process, and therefore deprives Thalès of the right to a fair trial and renders the arbitration agreement without effect; that the arbitral tribunal rightfully considered that, in terms of their subject matter, the claims were arbitrable and could be settled by means of a fair trial; that the arbitral tribunal decided nothing further; therefore, these grounds for setting aside are rejected, and therefore, so is the application itself";

DESPITE THE FACT THAT the Advisory Commission on National Security Secrets justified the refusal to declassify the information relating to the performance of the contract at issue and the possible payment of commissions on the grounds that such declassification would "be of such a nature as to cause grievous harm to the fundamental interests of the nation and its [ability to] abide by its external commitments"; the Public Prosecutor underlined that the only alleged commissions at issue that have been disclosed had been intended to "remunerate the efforts made vis-à-vis the authorities of the People's Republic of China to get those authorities to lift the political objections they made to the French government regarding the sale of weapons to TAIWAN"; the Public Prosecutor and the THALES companies concluded that the dispute was therefore inarbitrable due to its subject matter, which concerned diplomatic relations between countries; the Court of

Appeal's decision did not comply with article 1502-1 of the Code of Civil Procedure and article 2060 of the Civil Code because it [A] referred to the reasons in the award and limited itself to examining the argument for inarbitrability solely in terms of the evidentiary issues resulting from the classification of information concerning the contract's performance as "national security secrets", and [B] failed to respond to the argument that it is impossible for the arbitrators to decide on issues related to possible commissions, the payment of which may concern diplomatic relations between countries such that disclosure of information concerning the payment of commissions could undermine both the interests of the nation and France's commitments.

THIRD GROUND FOR APPEAL:

(in the alternative)

The decision [of the Court of Appeal] is criticised for having dismissed the application to set aside filed by the companies THALES and THALES NAVAL on the basis that: "THALES argues that the dispute is not arbitrable because the classification of its subject matter, or its evidence, as national security secrets – a classification that is binding on Thalès – is not compatible, absent a violation of international public policy, with due process, and therefore deprives Thalès of the right to a fair trial and renders the arbitration agreement without effect; that the arbitral tribunal rightfully considered that, in terms of their subject matter, the claims were arbitrable and could be settled by means of a fair trial; that the arbitral tribunal decided nothing further; therefore, these grounds for setting aside are rejected, and therefore, so is the application itself";

1. DESPITE THE FACT THAT, FIRSTLY, the inability of the parties to dispose of the subject matter of the dispute renders the arbitration agreement without effect; this is the case when the claims submitted to arbitrators raise issues that concern national security secrets; in the case at hand, ROCN invoked article 18 of the contract entered into with THOMSON, which permitted [ROCN] to ask [THOMSON] for partial reimbursement of that part of the price paid to third parties in the form of hidden commissions; the payment of these commissions was the subject of criminal proceedings where it appeared that all information concerning both the terms and conditions of the sale of the frigates and the possible payment of hidden commissions, was classified as national security secrets; in response to the investigating criminal judge's repeated requests to have access to the classified information, the relevant Ministry has systematically refused in light of the opinion of the [Advisory] Commission [on National Security Secrets] that the requested declassification would cause serious harm to the fundamental interests of the nation, and its ability to abide by its external commitments; as ROCN's claims and the investigating criminal judge's requests had the same purpose, the Court [of Appeal] could not find the dispute arbitrable without misapplying article 413-9 of the Criminal Code and article 1502-1 of the New Code of Civil Procedure;

2. AND THAT, SECONDLY, the rules governing national security secrets are binding on the arbitrators and expose them to criminal sanctions if national security secrets are disclosed; in the case at hand, assuming the parties were allowed to put on evidence of either the payment of commissions, or the circumstances of such payments, or the identities of the beneficiaries, the award – which would necessarily disclose, in whole or in part, facts that everybody knows are classified as national security secrets – would violate the rules governing national security secrets. As a result, in deciding that the arbitration proceedings should continue notwithstanding the rules governing national security secrets, the Court of Appeal breached articles 413-9 et seq. of the Criminal Code;

3. AND THAT, THIRDLY, the rules governing national security secrets apply to the protected information regardless of the means by which that information circulates; it was therefore not possible to consider the dispute arbitrable on the basis that evidence concerning disputed issues could be provided by means of documents that had not been marked as "national security secrets"; in deciding the contrary, the Court [of Appeal] has once again violated articles 413-9 of the Criminal Code and 1502-1 of the New Code of Civil Procedure;

4. AND THAT, FOURTHLY, the award, which ignores the principle that the parties must have an equal opportunity to put on their case, violates international public policy; assuming ROCN had been in a position to prove that hidden commissions had been paid, THALES would not have been in a position to defend itself by producing classified documents; in nevertheless considering the arbitral award valid, the Court of Appeal breached article 6.1 of the European Convention on Human Rights and article 1502-5 of the New Code of Civil Procedure;

5. AND THAT, MOREOVER AND FIFTHLY, in light of the rejection by the relevant authority of all requests for declassification [of information] regarding "commissions paid abroad in connection with the (BRAVO) contract, in particular to foreign intermediaries who have to date disappeared", all information of any kind that might establish either the payment of commissions, or the circumstances of such payment, or even reveal the beneficiary, was deemed classified as national security secrets; as a result, the decision of the Court of Appeal, which adopted the award's findings that THALES did not show that all information and documents necessary to the organisation of its defence were classified as national security secrets, breaches article 413-9 of the Criminal Code;

6. AND THAT, SIXTHLY, in any event, the only evidence necessary to establish the existence of information constituting national security secrets is the refusal of the relevant authority to declassify the documents containing such information; any other evidence of classification would necessarily entail the disclosure of the secrets at issue; accordingly, by requiring the THALES companies to provide evidence, other than the decisions denying declassification, that the information upon which it intended to rely concerned national security secrets, the Court not only breached article L. 413-9 of the Criminal Code, but also article 9 of the New Code of Civil Procedure;

7. AND THAT, FINALLY, one cannot not invoke denial of justice in order to prevent the THALES companies from relying on the rules governing national security secrets; actually, if because of the application of such rules, ROCN considered it was denied justice, ROCN could bring an action against the State for failure of the justice system; in preventing the THALES companies from relying on the rules governing national security secrets, the Court of Appeal breached article L. 141-1 of the Code of Judicial Organisation.

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## TRANSLATORS' NOTES

<sup>i</sup> *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 *Thalès*, 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

<sup>ii</sup> The letters FS indicate that it was the section of the Supreme Court (*formation section*) specialized in arbitration and international private law that heard the *Thalès* case. The letters P+B+I indicate the places the Supreme Court has decided its decision in *Thalès* should be published. As a practical matter, the more important the decision, the more places the Supreme Court will decide to have it published. The *Thalès* case is quite important, as indicated by its being published in the Supreme Court Bulletin (*Bulletin des arrêts de la Cour de cassation*) and on the Internet. It will not, however, be published in the Annual Report of the Supreme Court (*Rapport annuel*), which is reserved for the few cases that are considered by the Supreme Court to be of the highest importance.

<sup>iii</sup> 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.

<sup>iv</sup> Looking at the grounds for appeal attached to the Supreme Court's decision, as well as the Court of Appeal's decision in *Thalès*, it appears that Thalès and Thalès Naval were not, in fact, acting adverse to the Public Prosecutor. To the contrary, it appears that the Public Prosecutor shared Thalès's concerns with respect to the rules governing national security secrets.

<sup>v</sup> The French Code of Civil Procedure was revised in the 1970s. It was known as the New Code of Civil Procedure from 1975 until 2008, when its name officially changed to the Code of Civil Procedure. In this decision, there are references to both the Code of Civil Procedure and the New Code of Civil Procedure – they are, in fact, one and the same.

<sup>vi</sup> Normally, it is the loser that bears the court costs associated with an appeal before the Supreme Court. Here, however, the Supreme Court decided that neither party would bear the court costs; rather the State is to bear them. Such a decision is unusual and may stem from the fact that the Supreme Court concluded that the Court of Appeal decision was insufficiently reasoned for it to be able to perform its review.

<sup>vii</sup> 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.

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

**PARIS COURT OF APPEAL  
1st Chamber – Section C  
Decision of 29 June 2006**

Docket number: **04/23550**

APPLICATION TO SET ASIDE an arbitral award (ICC no. 11730/MS) rendered in Paris on 6 September 2004 by the arbitral tribunal made up of Mr. [Andrea] Giardina, Chairman, Mr. Laurent Lévy and Professor Albert [Jan] van den Berg, arbitrators<sup>[1]</sup>

**APPLICANTS ON THE APPLICATION TO SET ASIDE:**

**THALES**

with its registered office [at] 45 rue de Villiers  
92200 NEUILLY SUR SEINE  
acting through its legal representatives, located for service of process at such office

**THALES NAVAL**

with its registered office [at] 7/9 rue des Mathurins  
92220 BAGNEUX  
acting through its legal representatives, located for service of process at such office

represented by SCP DUBOSQ – PELLERIN, *avoués à la Cour*  
assisted by Emmanuel GAILLARD and Philippe PINSOLLE,  
members of the Paris Bar, for SHEARMAN & [STERLING]  
Cloakroom: J 006

**DEFENDANT ON THE APPLICATION TO SET ASIDE:**

**REPUBLIC OF CHINA NAVY (TAIWAN)**

P.O. BOX 90151-7-TAIPEI  
TAIWAN REPUBLIC OF CHINA  
THE REPUBLIC OF CHINA  
acting through its Plans Office, in its own name, on its own behalf  
and on that of the REPUBLIC OF CHINA (TAIWAN)

represented by SCP FISSELIER – CHILOUX – BOULAY, *avoués à la Cour*  
assisted by [Xavier] NYSSSEN and [Jacques] SIVIGNON,  
members of the Paris Bar, for DECHERT  
Cloakroom: J 096

**THE COURT:**

In accordance with the provisions of articles 786 and 910 of the New Code of Civil Procedure [NCPC], the case was heard in a public session on 30 May 2006, the report was read out before

Mr. PÉRIÉ, President, and Mr. HASCHER, judge, who were responsible for the report, without any objection from the lawyers,<sup>[iii]</sup>

During deliberations, these judges [i.e., Messrs. Périé and Hascher] informed the Court of the parties' pleadings[; the Court] comprised:

Mr. PÉRIÉ, President  
Mr. MATET, judge  
Mr. HASCHER, judge

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

**Public Prosecutor:**

represented during the hearing by Ms. ROUCHEREAU, Advocate General, who orally developed upon her written submissions

**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 decision was made.

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\* \*

Pursuant to a contract of 31 August 1991, Thomson-CSF delivered six frigates to the Republic of China.

Following various transfers, the sellers are THALES, successor-in-interest to Thomson-CSF, and THALES NAVAL, successor-in-interest to Thomson-CSF NSC (sellers, hereinafter referred to as THALES) and the buyer is the Plans Office of the Republic of China Navy (ROCN), acting for the Republic of China Navy and for the Republic of China (buyer, hereinafter referred to as ROCN).

Further to difficulties concerning performance of the contract, and in accordance with the arbitration clause, ROCN brought an action before an arbitral tribunal established under the aegis of the ICC and made up of Messrs. Giardina, chairman, van den Berg and Lévy, arbitrators, who, by way of a partial award of 6 September 2004 made in Paris:

- rejected the respondents' claims on issues 1 to 4 of the terms of reference [1 – jurisdiction in light of the civil action brought by claimant before the French criminal judge, 2 – jurisdiction in light of the arbitrable or inarbitrable nature of the dispute, due to the classification of its subject matter as a national security secret and the possibility or impossibility, in view of such classification, of settling the dispute in accordance with the standards for a fair trial, 3 – jurisdiction over Thales Naval SA, 4 – admissibility of claimant's claims with regard to article 29-1 of the contract]<sup>[iii]</sup> and found in favour of the claimant on these issues and thereby:
- accepted jurisdiction to rule on the dispute,
- declared that the claimant's claims are arbitrable and may be settled by means of a fair trial,

- accepted jurisdiction over respondent no. 2, Thales Naval SA,
- declared that the claimant's claims are admissible with regard to article 29-1 of the contract,
- reserved on the issue of costs.

THALES filed an application to set aside this award.

[THALES] raises three grounds: [1] lack of an arbitration agreement due to ROCN's waiver of arbitration and to the non-arbitrable nature of the dispute (article 1502-1 NCPC), violation of [2] international public policy and [3] due process (article 1502-5 and 1502-4 NCPC, [respectively]) for having violated or induced the violation of the rules governing national security secrets.

[THALES] therefore asks the Court to set aside the arbitral award and to order the Republic of China and the Republic of China Navy to jointly and severally pay EUR 50,000 [in attorneys' fees] under article 700 NCPC.

Citing articles 1502-1 and 1502-5 NCPC, the law of 8 July 1998 establishing the Advisory Committee on National Security Secrets and the general inter-ministerial directions of 25 August 2003 on the protection of national security secrets, ROCN requests that the arguments put forward by THALES and by the public prosecutor be rejected and that THALES and THALES NAVAL SA be jointly and severally ordered to pay EUR 50,000 [in attorneys' fees] under article 700 NCPC.

The public prosecutor, a joined party, requests that the award be set aside principally because of the constraints arising from the rules governing national security secrets.

#### **HAVING SAID THIS, THE COURT,**

##### **On the ground for setting aside the award due to the lack of an arbitration agreement (article 1502-1 NCPC)**

Referring to case law, which it says is consistent, pursuant to which a party to an arbitration clause that brings before a national court a claim on the merits that should have been submitted to arbitration waives the right to rely on such clause, thereby depriving the arbitral tribunal of jurisdiction, where the other party accepted such waiver, THALES argues: that, ten months before filing its request for arbitration, ROCN intervened as a claimant in criminal proceedings based upon facts and injuries identical to those raised before the arbitrators; that ROCN subsequently again raised the same facts before another French criminal judge and that, in the criminal proceedings created by the joinder of these two criminal actions, ROCN again attempted to intervene as a claimant despite the fact that the arbitral proceedings had commenced and that ROCN was fully aware of the objection raised by THALES based on waiver of the arbitration agreement.

[THALES] highlights [1] the instructions given by ROCN to Me. Holleaux<sup>iv</sup> for filing a civil claim for damages, [2] the suggestion of opening a criminal investigation of Thomson-CSF, [3] the name given to the second action for damages brought [by ROCN] in criminal proceedings – "case ROC Navy v. Thales (Taiwanese frigates)", [4] the multiple references to the alleged increase of the price and [5] the terms of an internal report compiled by the Taiwan Control Yuan, to demonstrate that ROCN and the Taiwanese authorities fully intended to claim damages from THALES before the criminal judge.

[THALES] underlines that the arguments put forward by ROCN to support its intervention as a claimant in the criminal proceedings precisely match the issues the arbitrators must decide; that these arguments were reiterated after [THALES] raised an objection to jurisdiction in the arbitral proceedings based on waiver of the arbitration clause; that it is irrelevant that the criminal proceedings in which ROCN intervened were against X [(an unknown person or entity)] since the criminal judge is sitting *in rem*;<sup>v</sup> and that, finally, THALES, which never relied upon the existence of the arbitration clause, accepted the waiver.

Answering ROCN's counter-arguments, [THALES] says that [1] a criminal investigation is not merely a way to request information comparable to a request under article 145 NCPC to produce information in anticipation of filing a lawsuit; that [2] the rule "criminal matters suspend civil matters" applies as from the criminal investigation stage and that [3] intervening as a claimant in criminal proceedings is, with exceptions, a legal action. [THALES] also points out that [ROCN's] argument that it would be a denial of justice to refuse ROCN access to arbitration when its request to intervene in the criminal proceedings was denied is unjustified, since [ROCN] could still bring a civil action in state court.

[THALES] criticises the arbitral tribunal for having accepted jurisdiction on the basis that ROCN merely intended to have the criminal judge investigate and make rulings upon certain key facts that support its claim; the effect of the arbitral tribunal's decision is to allow a party, without waiving the arbitration agreement, to [A] request a criminal judge to give an opinion as to the facts that caused the injury by way of a decision that is *res judicata* and will be binding on the arbitrators, while [B] retaining the opportunity to submit the same questions to the arbitrators. [THALES] considers that it would be unfortunate to allow a party to benefit from the advantages of both criminal proceedings and arbitration by allowing that party to have a national court investigate all or part of the disputed issues, even though the national court may not hear the issues submitted to arbitration.

However, given that in both sets of criminal proceedings where ROCN intervened as a claimant against party X, THALES (Thomson-CSF) also intervened as a claimant;

That these interventions – which, incidentally, did not articulate any specific claim – were not allowed by the investigatory chamber of the Paris Court of Appeal, which said (in two decisions on 14 November 2001 and 7 April 2004 that were subsequently appealed and upheld before the Supreme Court) that [A] the alleged loss did not directly result from the facts submitted to the investigating judge and [B] assuming ROCN's status as a creditor of Thomson-CSF could be established, ROCN could only have alleged an indirect loss resulting either from an alleged misuse of corporate assets within Thomson-CSF or from the illegal proceeds derived from such misuse;

That, in an effort to preserve its rights, ROCN could have intervened in criminal proceedings involving entities other than THALES (Thomson-CSF) that related indirectly to the contract of sale without waiving its right to arbitrate contained in the contract of 31 August 1991, as [ROCN] would not have been able to ask the arbitrators to decide any claim concerning such third parties;

That, moreover, ROCN's submission of 26 April 2003 to intervene in the second criminal proceeding expressly mentions the ongoing arbitral proceedings it filed as early as 22 August 2001;

That, in these circumstances, ROCN's interventions in the criminal proceedings – despite referring to the increase in the sale price of the frigates and the dispute with THALES – are not indisputable evidence that ROCN waived the arbitration agreement.

That the first ground regarding an alleged waiver of the arbitration agreement is therefore dismissed.

**On the grounds for setting aside the award based on the non-arbitrable nature of the dispute and the violation of international public policy and due process (articles 1502-1, 1502-5 and 1502-4 NCPC):**

THALES argues that the dispute is not arbitrable because the classification of its subject matter, or its evidence, as national security secrets – a classification that is binding on [THALES] – is not compatible, absent a violation of international public policy, with due process, and therefore deprives [THALES] of the right to a fair trial and renders the arbitration agreement without effect.

However, since the arbitral tribunal rightfully considered that, in terms of their subject matter, the claims were arbitrable and could be settled by means of a fair trial; [and] that the arbitral tribunal decided nothing further;

Therefore, these grounds for setting aside are rejected, and therefore, so is the application itself;

**On the claims under article 700 NCPC:**

Considering that fairness dictates that THALES and THALES NAVAL, as the unsuccessful parties, must be jointly and severally ordered to pay ROCN EUR 50,000.

**FOR THESE REASONS:**

**DISMISSES** the application;

**ORDERS** THALES and THALES NAVAL to jointly and severally pay the Republic of China Navy (ROCN) EUR 50 000 under article 700 NCPC;

**DISMISSES** all other claims;

**ORDERS** THALES and THALES NAVAL to bear the costs for the application and grants SCP Fisselier Chiloux Boulay, *avoué*, the benefits of article 699 NCPC.

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**TRANSLATORS' NOTES**

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

<sup>ii</sup> Hearings before the Court of Appeal are normally to be held with an odd number of judges. Here, only two judges were present, but no party objected.

<sup>iii</sup> The bracketed text in this paragraph is original.

<sup>iv</sup> Me. is the abbreviation for *Maitre*, which is the title used by French lawyers.

<sup>v</sup> The investigating criminal judge sits *in rem*, as he is charged with investigating the facts the prosecutor contends constitute a crime under French law.