

# Commentary

## A View From Paris — March 2010

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### Introduction\*

The French courts have recently handed down so many noteworthy international arbitration decisions that we had difficulty deciding which one to SPOTLIGHT for this issue of *A View From Paris*. Ultimately, however, we settled on the Paris Court of Appeal decision in *Linde AG v. Halyvourgiki AE*,<sup>1</sup> which highlights the practical difficulties parties face in challenging awards in France based on alleged violations of European competition law, particularly where no competition issues were raised during the arbitration. In short: don't bother.

The cases in our SEE ALSO section suggest that parties do better challenging awards on the grounds that the arbitral tribunal acted outside the scope of its mission (*Globale Re*, *Riverstone* and *Gothaer*) or denied due process (*Engel* and *Fichtner*). Indeed, with so many awards set aside (at least in part) this issue, one could be forgiven for wondering whether the French courts are becoming less arbitration friendly. The *Benladen* case suggests otherwise, however. There, the Paris courts decline jurisdiction in light of an alleged arbitration agreement that the Swiss courts found did not

exist. Finally, our issue closes with the *Merial* case, where the French Supreme Court seizes the opportunity to clarify the distinction between estoppel and waiver under French law.

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

### Spotlight: **Linde AG v. Halyvourgiki AE**

The Greek company Halyvourgiki AE (Halyvourgiki) operates one of the largest steel mills in Greece (Eleusis) and uses substantial quantities of oxygen gas in its production. The German company Linde AG and its Greek subsidiary, Linde Hellas Ltd. (together, Linde), are liquid gas producers. In April 2002, the parties entered into a contract for Linde to supply liquid gas to Halyvourgiki's steel mill. In this regard, Linde built facilities on Halyvourgiki's site and began producing and selling gas to Halyvourgiki in 2004. According to the contract, the facilities Linde built on Halyvourgiki's site were to remain the property of Linde for fifteen years.<sup>2</sup>

The amount of gas Linde produced exceeded Halyvourgiki's needs, and Linde sold the excess gas to third parties. Halyvourgiki disputed Linde's right to sell the excess gas to third parties and filed for arbitration with the International Court of Arbitration of the International Chamber of Commerce (ICC) pursuant to the arbitration agreement in the contract. In June 2007, the arbitral tribunal (Jacques Salès (chair), Agissilaos

Bakopoulos and Ioannis Vassardanis) rendered a majority award deciding, among other things, that (1) Linde Hellas Ltd. had breached the contract by selling gas to third parties, (2) Linde Hellas Ltd. (and, to the extent necessary, Linde AG) should stop selling gas to third parties, and (3) Linde Hellas Ltd. should stop using the weighbridge for sales intended for third parties.<sup>3</sup>

In 2008, Linde applied to the Paris Court of Appeal to set aside these decisions pursuant to article 1502-5 of the French Code of Civil Procedure (CPC) on the grounds that they violated French international public policy. Specifically, Linde contended these three decisions — which required Linde to use the gas production facilities solely to make gas for Halyvourgiki, and barred Linde from using those facilities for producing gas for sale to third parties — interpreted the contract in a way that established a production limitation that is anticompetitive in object and therefore violated article 81 of the European Treaty in a blatant, real and concrete manner.<sup>4</sup>

In response, Halyvourgiki argued that Linde's application should be considered inadmissible because Linde never raised any competition issues before the arbitral tribunal and the Court of Appeal is, in any event, prohibited from reviewing the tribunal's award on the merits. Halyvourgiki also argued that Linde's application should be dismissed on the merits because an award may only be set aside on public policy grounds where the violation is blatant, something which was not the case here.<sup>5</sup>

As to admissibility, the Court explained that, as far as alleged violations of substantive international public policy are concerned, the Court does not consider the proceedings, but rather only the award itself. The question is whether or not recognition and enforcement of the award would violate substantive international public policy, and it is irrelevant whether the issue was raised before the arbitral tribunal. The Court's power to check that an award abides by substantive international public policy is independent of the parties' behavior during the arbitration. Accordingly, the Court found admissible Linde's application to set aside the award for a blatant, real and concrete breach of substantive international public policy.<sup>6</sup>

The Court went on to reject Linde's application on the merits, however. The Court explained that, in

order to determine whether the contractual restrictions at issue have for an object or effect to adversely affect competition — an issue that was not raised before the arbitral tribunal — it is necessary, among other things, “to [1] define the market, [2] analyse the parties' positions on the market, [3] search for the existence of potential competitors, [4] examine [A] the particular terms of the contract, [B] prohibited restrictions under block exemption regulations, and [C] whether the restriction in the contract may be considered necessary and proportional, and finally [5] verify whether the contract may affect the prices, production, innovation, diversity or quality of the products.”<sup>7</sup> But that is not all. To prevail on its application to set aside the award, Linde must show that the violation of European competition law is blatant, real and concrete.<sup>8</sup>

The Court noted that, in attempting to demonstrate that the alleged competition law violation was blatant, Linde made submissions of “no less than thirty pages, offering the Court what is certainly a brilliant intellectual construct that is nevertheless devoid of concrete and reliable facts (in particular market delineation, position of LINDE, production capacities outside the Eleusis site).”<sup>9</sup> For its part, Halyvourgiki essentially did the same, “relying on an opinion from a professor of law . . . [that] presents a contradictory demonstration that is equally brilliant although identically devoid of concrete facts.”<sup>10</sup> The Court indicated that it did not find this helpful. While the Court may, in performing its public policy review, take into account the legal and factual findings in the award, it “may not rule on the merits of a complex dispute that has not been decided by the arbitrators and that would require a much more complete investigation than that which results from [the] exchange of submissions before [the Court of Appeal].”<sup>11</sup>

The Court further noted that, during the arbitration, Linde could have argued that reading the contract as Halyvourgiki advocated — that is, to prohibit Linde from selling gas to third parties — would violate European competition law. It did not do so, however, much less contend that such a violation would be blatant. Nor did the ICC International Court of Arbitration (ICC Court) make any observations in this regard when scrutinizing the award.<sup>12</sup> Under these circumstances, the Court concluded that Linde had failed to demonstrate that the alleged violation of Eu-

European competition law was blatant, real or concrete. And the Court “cannot, without otherwise affecting the finality of the arbitrators’ decision on the merits of the dispute, conduct a re-examination of contractual provisions or their compliance with competition law in the absence of a manifest violation.”<sup>13</sup> The Court accordingly dismissed Linde’s application to set aside the award.<sup>14</sup>

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Under French international arbitration law, the French courts may set aside an arbitral award rendered in France (or deny enforcement of a foreign award) where its recognition or enforcement would be contrary to French international public policy.<sup>15</sup> This may at first sound like an oxymoron: How can public policy be both *French* and *international* at the same time? French international public policy is both French and international because it encompasses the set of values the French courts cannot accept to be disregarded, even in international cases.<sup>16</sup> This set of values is far narrower than those covered by French domestic public policy — hence its being international<sup>17</sup> — but is defined by the French courts and is therefore not necessarily synonymous with “truly international public policy”<sup>18</sup> — hence its being French. As a consequence, the fact that an international award may violate French domestic public policy does not in and of itself provide any basis for the French courts to set it aside or deny its enforcement. Rather, the award must violate “fundamental convictions of French law applicable in an international context,”<sup>19</sup> and that violation must be blatant, real and concrete — a tough standard to meet. French court decisions refusing to enforce awards as violative of international public policy are accordingly rare.

French international public policy comes in two varieties: procedural and substantive. French *procedural* international public policy is principally concerned with issues of due process.<sup>20</sup> Where arbitral proceedings compromise due process, the French courts may set aside or refuse to enforce the award on public policy grounds. However, a party may waive its right to challenge the award on this basis if the party had an opportunity to raise procedural objections during the course of the arbitration and failed to do so. By contrast, challenges to awards based on French *substantive* international public

policy — of which European competition law forms part<sup>21</sup> — go to the merits of the arbitral tribunal’s decision and cannot be waived. At the time of enforcement, a party can always contend that a decision reached in an award violates European competition law in a blatant, real and concrete way, even if the party did not raise the issue before the arbitral tribunal, and the Court of Appeal has the power to consider *de novo* all issues of fact and law that may be relevant to its decision.<sup>22</sup> As *Linde* makes clear, however, the fact that a party can do this, does not necessarily mean that it should.

The French courts will not set aside or refuse to enforce an arbitral award as violative of European competition law unless that violation is blatant, real and concrete. However, as the Court of Appeal points out in *Linde*, if a decision a party seeks would blatantly violate European competition law, it is likely that the other side would point this out to the arbitral tribunal or that the arbitral tribunal would notice the issue on its own.<sup>23</sup> And in the case of ICC awards — such as that at issue in *Linde* — the Court notes that the ICC Court would likely flag a blatant violation of European competition law for the arbitral tribunal during scrutiny. When all of the parties, the members of the arbitral tribunal and the members of the ICC Court have failed to see the alleged violation, it suggests that the alleged violation is not blatant, real and concrete.

Moreover, as *Linde* highlights, competition law violations are, by their very nature, rarely blatant. Rather than turning exclusively on questions of law, alleged competition violations often throw up complex factual issues about the relevant market that require expert analysis. (In light of this, it is perhaps not surprising that the Court in *Linde* is underwhelmed by the parties’ “brilliant” papers from law professors that are “devoid of concrete facts.”)<sup>24</sup> Where parties raise no competition issue before the arbitral tribunal, the reviewing court — like the Court in *Linde* — may well consider that it does not have sufficient facts to determine whether the award violates competition law at all, much less in a blatant, real and concrete way.

In this connection, it is worthwhile considering the way the Paris Court of Appeal works. The section of the Court specialized in arbitration matters usu-

ally convenes to hear cases twice a week. It holds its proceedings in the afternoon in the *Palais de Justice* on Ile de la Cité in the middle of the Seine river and hears approximately five cases per session. Its proceedings are generally for oral argument only. Although parties can request an opportunity to put on witness testimony before the Court of Appeal, they rarely (if ever) do so. In other words, the Court of Appeal is simply not organized or intended to be a forum for examining complex competition issues from scratch. By contrast, arbitral proceedings — which the parties and tribunal can craft to allow for fulsome written and oral submissions on the knotty legal and factual questions that can arise in certain competition matters, such as those raised in *Linde* — are well suited to serve just such a function.

In short, *Linde* suggests that parties with competition issues should raise them during the arbitration so that the record may be fully developed, rather than rely on their right to raise them for the first time before the Court of Appeal. Even if a party does so, however, it should not expect to substantially improve its odds of success when attacking the award. This is because, if an arbitral tribunal has heard the parties on the details of an alleged violation of European competition law and rendered a reasoned award finding that there is none, it will be rare that the Court of Appeal will find that there is in fact one and it is blatant. In part this is because arbitral tribunals rarely miss the boat so completely, but it is also because the Court of Appeal often defers to the factual findings of the arbitral tribunal when considering public policy challenges to awards, even though (as the Court in *Linde* emphasizes) it has the power to consider *de novo* all factual and legal issues that may be material to its decision.<sup>25</sup>

In closing, it bears noting that nothing in *Linde* undermines the power of competent authorities (e.g., the European Commission) from bringing actions to pursue competition law violations, nor does it compromise the rights of third-parties to bring claims for injury resulting from anti-competitive conduct. International arbitration cannot be used to evade competition law. Rather, *Linde* marginally encourages parties to raise competition law issues before the arbitral tribunal so that the Court of Appeal will have a detailed factual record when considering whether the award violates European competition law in a blatant, real and concrete way.

## See Also

In this issue's SEE ALSO section, we have grouped together at the beginning three insurance-related cases that concern a series of arbitrations involving *Compagnie Internationale de Caution pour le Développement (ICD)*. The same arbitral tribunal presided in all of the arbitrations. Thereafter, the rest of the SEE ALSO summaries follow in chronological order.

**Enforcement Of Awards • Consolidation • Addenda • Scope Of Arbitral Tribunal's Mission • Irregular Constitution Of Arbitral Tribunal • International Public Policy • Due Process • Estoppel**

In *Globale Re AG [Germany] v. Liquidators of ICD [France]* (22 October 2009),<sup>26</sup> the Paris Court of Appeal set aside part of an award rendered in Paris in April 2008 on the grounds that the tribunal exceeded its mission. The award at issue ordered *Globale Re*, a reinsurer, to pay *ICD*, an insurer, certain amounts claimed in three arbitrations filed under three distinct reinsurance contracts between the parties. The three arbitrations were ultimately consolidated and the award was rendered in the consolidated case. In September 2009, the award was amended by way of an addendum that reduced amounts awarded under one of the contracts. In seeking to have the Court of Appeal set aside the award, *Globale Re* argued, among other things, that the tribunal failed to comply with its mission when it awarded *ICD* sums that exceeded the amounts sought under that contract (*ultra petita*) and improperly consolidated the three arbitrations into one. *Globale Re* also contended that the award breached international public policy because *ICD* did not provide evidence of the amounts claimed under each of the three reinsurance contracts,<sup>27</sup> and granted certain claims on the basis of documents the tribunal should not have admitted into evidence. Finally, *Globale Re* argued that the addendum was rendered in breach of due process and international public policy because the tribunal was irregularly constituted when the addendum was issued, was not impartial and breached the secrecy of deliberations.<sup>28</sup>

The Court of Appeal first rejected *Globale Re*'s public policy arguments concerning the evidence supporting the award. The Court considered that, in connection with an application to set aside an award, it could not verify whether a document should or should not have been admitted into evidence in the arbitration, and

that Globale Re's arguments on this score effectively went to the merits of the tribunal's decision, which the Court cannot review. Further, the Court found that while it was clear from the award that ICD had provided only limited evidence with respect to certain claims, it did submit numerous documents, and the award did not specifically state that there had been a complete lack of evidence to support awarding the claims. The Court of Appeal also rejected Globale Re's contention that the three arbitrations had been improperly consolidated. The Court found Globale Re estopped from raising these arguments as it had not opposed ICD's request for consolidation during the arbitration and filed consolidated submissions throughout the arbitration. The Court also rejected Globale Re's contentions relating to the addendum on the grounds that the application before the Court was directed at the award rather than at the addendum. Moreover, the Court considered that Globale Re had failed to explain how its allegations concerning the tribunal's alleged misconduct with respect to the issuance of the addendum could have any relevance to the Court's evaluation of the enforceability of the award.

The Court found, however, that in issuing the addendum which purported to amend the awarded cash amounts to bring them within the amounts ICD had actually claimed, the tribunal had effectively purported to change one of its decisions in the award — something it is not allowed to do once *functus officio*. Accordingly, the Court found that the addendum would be unenforceable in France and set aside that part of the award which was *ultra petita*.

**Enforcement Of Awards • Consolidation •  
Amiable Composition • Scope Of Arbitral  
Tribunal's Mission • Estoppel**

In *Riverstone Ins. Ltd. [United Kingdom] v. Liquidators of ICD [France]* (5 November 2009),<sup>29</sup> the Paris Court of Appeal set aside part of an award rendered in Paris in April 2008 on the grounds that the arbitral tribunal failed to comply with its mission. ICD filed several arbitrations before the same tribunal against Riverstone, a reinsurer, under several distinct reinsurance contracts between the parties. All but one of the arbitration clauses contained in these contracts provided that the tribunal was to decide the parties' dispute as *amiable compositeur*.<sup>30</sup> In the course of the proceedings, the tribunal invited the parties to make consolidated submissions — drawing distinctions

between the contracts where necessary — and, upon ICD's request, ultimately consolidated the proceedings and rendered a single award. That award ordered Riverstone to pay ICD various amounts that were allocated among the contracts. In seeking to have the Court of Appeal set aside the award, Riverstone argued, among other things, that the tribunal improperly consolidated the proceedings and failed to comply with its mission. Specifically, Riverstone argued that, in making its award, the tribunal had overlooked the fact that one of the arbitration agreements did not grant the tribunal powers of *amiable compositeur*, and failed to specify whether it rendered the award in *amiable composition* or not. As a consequence, the award either violated the arbitration agreement that did not call for *amiable composition* or the arbitration agreements that did.

The Court of Appeal first noted that Riverstone filed consolidated submissions without complaining before the tribunal, and provided no evidence before the Court that it strongly objected to ICD's request for consolidation. The Court considered that Riverstone's failure to raise objections as soon as possible during the arbitral proceedings estopped it from complaining that consolidation was improper. Then, the Court noted that the award allocated the various amounts granted among all of the contracts, and that the tribunal had decided on all claims as *amiable compositeur*. The tribunal had thus failed to comply with its mission in respect of the one arbitration agreement that did not provide for *amiable composition*, and the Court accordingly set aside that part of the award ordering payment pursuant to the contract containing that arbitration clause. Finally, the Court rejected all of Riverstone's other arguments on the grounds that they were designed to have the Court review the merits of the award, which the Court is not permitted to do.

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

In *Gothaer Finanzholding AG [Germany] v. Liquidators of ICD [France]* (17 December 2009),<sup>31</sup> the Paris Court of Appeal set aside part of an award rendered in Paris in April 2008 on the grounds that the arbitral tribunal failed to comply with its mission. ICD filed a

series of arbitrations before the same arbitral tribunal against Gothaer Re, a reinsurer — one arbitration under each contract between the parties. All but one of the arbitration clauses provided that the tribunal was to decide the parties' dispute as *amiable compositeur*. The tribunal, which (as noted above) was identical to the tribunal at issue in the *Globale Re* and *Riverstone* cases, ultimately invited the parties to make consolidated submissions for all of the Gothaer Re arbitrations and rendered a single award ordering Gothaer Re to pay certain amounts to ICD.

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

The Court of Appeal first rejected Gothaer's contention that the tribunal had been irregularly constituted. The Court reasoned that Gothaer could not rely on issues arising out of an arbitration to which it was not a party (namely, the arbitration at issue in *Globale Re*) and had failed to explain how facts occurring one year after the award was rendered in the Gothaer arbitration could have affected that award. Further, the Court rejected Gothaer's international public policy arguments because (1) Gothaer had failed to demonstrate the violation was actual, blatant and concrete, and (2) the arbitral tribunal had acted within the scope of its mission when determining the amounts due and had not

decided on the basis of a complete lack of evidence. In this respect, the Court found that Gothaer's allegations were actually designed to have the Court review the merits of the award, which the Court cannot do. Finally, the Court of Appeal considered Gothaer estopped from complaining that the proceedings had been improperly consolidated because Gothaer (1) spontaneously filed consolidated submissions and (2) failed to provide admissible evidence before the Court of Appeal that it objected to consolidation during the arbitration proceedings.<sup>32</sup> However, the Court noted that the tribunal had decided on all claims as *amiable compositeur*. The tribunal had accordingly failed to comply with its mission in respect of the one arbitration agreement that did not provide for *amiable composition*. The Court accordingly set aside that part of the award that ordered payment under the contract containing this arbitration agreement.

#### **Enforcement Of Awards • Definition Of Award • Award v. Procedural Order • Provisional Measures**

In *Groupe Antoine Tabet* [France] v. *Republic of Congo* [Congo] (29 October 2009),<sup>33</sup> the Paris Court of Appeal declared inadmissible the application of Groupe Antoine Tabet (GAT) to set aside a procedural order issued in an ICC arbitration. That procedural order followed a partial award on provisional measures rendered on 8 December 2003. The partial award ordered GAT, among other things, to instruct Total-FinaElf E&P Congo (TEP Congo, a third party to the arbitration) to deposit in an escrow account some of the monies TEP Congo was to pay GAT pursuant to a Swiss court decision of 2002 that ordered TEP Congo to pay GAT CHF 72 million on behalf of the Republic of Congo.<sup>34</sup> The partial award also ordered that the parties jointly open the escrow account in accordance with the terms of a forthcoming procedural order. The procedural order, rendered on 11 December 2003, directed the parties to sign within 10 days an escrow agreement in the form attached to the order. The order also provided that GAT alone was to open an escrow account with the Paris Bar and, pending signature of the parties' escrow agreement, deposit there any monies GAT might in the meantime receive from TEP Congo that were to be placed in joint escrow under the terms of the partial award.

Before the Court of Appeal, GAT argued that the procedural order was in fact an award because it imposed

duties on GAT beyond those foreseen in the partial award. As the procedural order was in fact an award, it should have been submitted to the ICC Court for scrutiny and approval pursuant to article 27 of the ICC Rules.<sup>35</sup> As it was not, GAT argued it should be set aside on the grounds that the arbitral tribunal failed to comply with its mission.

The Court of Appeal found that the procedural order was not an award and therefore dismissed GAT's application. Specifically, the Court of Appeal noted that, under French international arbitration law, an award is a decision rendered by an arbitral tribunal that finally settles all or part of the parties' dispute and that addresses either jurisdiction, the merits of the dispute or a procedural issue that leads the tribunal to terminate the arbitration. The Court found that the procedural order was foreseen in the partial award and was merely designed to ensure the efficacy of the award, particularly during the period before signature of the parties' escrow agreement. Moreover, the Court found that the arbitral tribunal had rendered the procedural order in accordance with article 23(1) of the ICC Rules,<sup>36</sup> and that the order neither added anything to the partial award nor settled all or part of the parties' dispute.

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

In *Sainte Germaine* [France] v. *Trioplast SMS* [France] (12 November 2009),<sup>37</sup> the French Supreme Court vacated a decision of the Angers Court of Appeal of 25 November 2008. That decision had affirmed a decision of the Angers Commercial Court taking jurisdiction over a dispute relating to a 1994 distribution contract between Sainte Germaine and Trioplast AB — the Swedish parent company of Trioplast SMS — that provided for disputes to be resolved through ad hoc arbitration in Stockholm. In 1999, Trioplast SMS substituted for Trioplast AB in the performance of the contract, and in 2007 Trioplast SMS sent Sainte Germaine a notice of termination. Sainte Germaine filed a complaint before the Angers Commercial Court and Trioplast SMS objected to that Court's jurisdiction on the basis of the arbitration agreement. The Angers Commercial Court nevertheless accepted jurisdiction, and the Angers Court of Appeal affirmed this decision. The Court of Appeal reasoned that the arbitration agreement did not apply to the dispute because the termination notice did

not expressly refer to the contract and Trioplast AB had not validly transferred the contract to Trioplast SMS under French law.

The Supreme Court vacated the Court of Appeal decision for violation of the competence-competence principle. Specifically, the Supreme Court noted that the Court of Appeal's decision did not amount to a finding that the arbitration agreement was manifestly void or manifestly inapplicable — the only two grounds under French arbitration law upon which a court may deny an arbitral tribunal its priority to decide on its own jurisdiction.<sup>38</sup>

#### **Enforcement Of Awards • Existence Of An Arbitration Agreement • Separability**

In *M.Z. Films* [France] v. *News Films Int'l LLC* [United States] (26 November 2009),<sup>39</sup> the Paris Court of Appeal rejected the appeal of M.Z. Films against an enforcement order of 14 May 2008 of the Paris First Instance Court (*Tribunal de Grande Instance* (TGI)). The order was granted on an award of 18 June 2007 rendered by a sole arbitrator in an Independent Films and Television Alliance (IFTA) arbitration held in Los Angeles. The award ordered M.Z. Films to pay certain sums to News Films. News Films brought the arbitration on the basis of an arbitration clause in a memorandum of agreement between the parties that provided that all disputes arising out of the memorandum were to be settled by arbitration in accordance with the IFTA international arbitration rules.

M.Z. Films complained before the Court of Appeal that the award was rendered in the absence of an arbitration agreement because the arbitrator found the memorandum was a distribution contract when it was, in fact, only an agreement to agree to a distribution contract, which the parties never did. In rejecting M.Z. Films' appeal, the Court noted that the parties' dispute arose out of the implementation of the memorandum and related to the distribution of films. The Court then observed that, pending the signing of a more formal agreement, the memorandum provided that it constituted a binding contract. Therefore, the Court found that the arbitration clause in the memorandum constituted an agreement to arbitrate between the parties. Relying upon the principle of separability, the Court found the arbitrator's interpretation of the memorandum — and the issue

of whether the memorandum gave rise to a distribution contract — irrelevant to the issue of whether there was an arbitration agreement. In the Court's view, the appeal was designed to have the Court review the merits of the award, which the Court is not permitted to do.

#### **Enforcement Of Awards • International Public Policy • Equal Treatment • Due Process**

In *Sarah A. [Spain] v. Moussa R. [Lebanon]* (26 November 2009),<sup>40</sup> the Paris Court of Appeal rejected Sarah A.'s application to set aside a May 2008 final award rendered by a sole arbitrator in an ICC arbitration in Paris. Moussa R. was the lawyer to Sarah A.'s late father and the custodian of his assets. After the father's death, on 1 June 2003, Sarah A. and Moussa R., among others, entered into an agreement providing that any disputes between them would be resolved through arbitration. In a second agreement of 20 June 2003, the same parties agreed with Moussa R. to waive any and all claims they might have against him for his management of the father's affairs and determined how the father's assets should be allocated among the father's children, including Sarah A. (The agreements of 1 June and 20 June are together referred to as the June Agreements.)

Thereafter, Sarah A. brought actions against Moussa R., who filed for arbitration with the ICC to enforce the terms of the 20 June agreement. Sarah A. contended during the arbitration that the 20 June agreement was a fraud because it had been signed on her behalf by someone who did not have authority to do so. In his award, the sole arbitrator found the June Agreements valid and binding, found that Sarah A. was entitled only to those assets allocated to her in the 20 June agreement and ordered Sarah A. to cease all actions against Moussa R. that were contrary to the 20 June agreement.

Sarah A. asked the Paris Court of Appeal, among other things, to set aside the award on the grounds that it violated French procedural and substantive international public policy and that the sole arbitrator had failed to treat the parties equally. Specifically, Sarah A. contended that the award was tainted by fraud because it enforced the 20 June agreement which had been signed on her behalf by someone who did not have authority to do so. Sarah A. also contended that the sole arbitrator violated due process and equal

treatment in denying her request for production of certain documents related to her late father's estate — documents she claimed would have allowed her to "reveal the true version of events." Sarah A. also, however, asked the Court of Appeal to stay its proceedings pending decisions in criminal proceedings in Beirut and Geneva that Sarah A. contended bore on the issues before the Court of Appeal.

The Court of Appeal rejected Sarah A.'s application in its entirety. As a preliminary matter, the Court of Appeal declined to stay its proceedings. In this regard, the Court noted that, under the French Code of Criminal Procedure, it is not obliged to suspend its proceedings even where there is a related criminal matter that might have a direct influence on the outcome of its proceedings. Moreover, the Court found that Sarah A. had failed to demonstrate that the criminal proceedings at issue would have any impact on the issues before the Court of Appeal. To the contrary, the investigating magistrate in Beirut had issued an order stating that the issues he was investigating had no impact on the 20 June agreement, and Sarah A. had failed to provide the Court of Appeal with any information concerning the alleged criminal proceedings in Geneva.

The Court also declined to set aside the award. With respect to French substantive international public policy, the Court found that the sole arbitrator, who received four sets of submissions on the issue, examined in detail Sarah A.'s contentions that the 20 June agreement was a fraud and found that it was not. In effect, Sarah A. was merely reiterating in front of the Court of Appeal the accusations of fraud she made before the sole arbitrator. Under these circumstances, the Court found that Sarah A. had failed to demonstrate that the decision reached in the award violated French substantive international public policy in a blatant, real and concrete way.

With respect to due process and equal treatment, the Court found that the parties had filed submissions and had oral argument on Sarah A.'s request for documents regarding her late father's estate — documents the sole arbitrator considered irrelevant to the issue of whether the 20 June agreement was valid. After having heard all the parties, the sole arbitrator considered the validity of the 20 June agreement before ruling on the production request. The sole



arbitrator found the 20 June agreement valid. As that agreement was a settlement agreement that barred Sarah A. from bringing actions against Moussa R., the sole arbitrator denied Sarah A.'s request for production and considered that doing otherwise would run counter to the 20 June agreement by which Sarah A. was bound. Under these circumstances, the Court of Appeal found the sole arbitrator did not violate equal treatment — because all parties had had an opportunity to be heard — and did not violate due process in considering that the requested document production was neither relevant nor useful. In this regard, the Court emphasized that its role is not to second guess the judgment of the sole arbitrator, and that Sarah A.'s application amounted to a request that the Court review the merits of the award, something the Court has no power to do.

#### **Enforcement Of Awards • Due Process**

In *Engel Austria GmbH* [Austria] v. *Don Trade* [Serbia] (3 December 2009),<sup>41</sup> the Paris Court of Appeal set aside part of an award rendered in an ICC arbitration in Paris in January 2008, on the grounds that the arbitral tribunal failed to comply with due process. The award rejected most of Don Trade's claims for over EUR 3 million in decisions 1, 2, 6 and 7 of the dispositive section. However, decision 3 of the dispositive section of the award partially annulled the parties' contract and, as a consequence, ordered Engel to pay Don Trade EUR 270,000. This decision was made on the basis of the Austrian principle of *Wegfall der Geschäftsgrundlage* (commercial impracticability) and, according to the Court of Appeal, the award specifically stated that the *Wegfall der Geschäftsgrundlage* principle had neither been raised by Don Trade nor argued by the parties. In decisions 4 and 5 of the dispositive section the tribunal awarded Don Trade pre- and post-award interest on the EUR 270,000 awarded to Don Trade. Finally, in decisions 8 and 9 of the dispositive section the arbitral tribunal made an award on costs that appears to have taken into account each party's partial success on its claims and defenses in the arbitration.

In seeking to have the Court of Appeal set aside decisions 3, 4, 5, 8 and 9 of the dispositive section of the award, Engel submitted that the tribunal breached due process because the parties had not had an opportunity to be heard on the *Wegfall der Geschäftsgrundlage* principle. Don Trade submitted in response that

the parties had made submissions on the *Wegfall der Geschäftsgrundlage* principle in the arbitration.

Relying solely on the statements in the award, the Court of Appeal annulled decisions 3, 4 and 5 because they were based on the *Wegfall der Geschäftsgrundlage* principle, upon which neither party had had an opportunity to be heard. The Court considered these decisions had been taken in breach of due process because the principle of *Wegfall der Geschäftsgrundlage* had been raised *sua sponte* by the arbitral tribunal, which did not invite the parties' comments on the principle before taking its decisions. However, the Court of Appeal rejected Engel's application to set aside decisions 8 and 9 on the costs of arbitration because the Court considered Engel's arguments on this issue to invite the Court to review the merits of the tribunal's cost decisions, which the Court cannot do.

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

In *Benladen* [Lebanon] v. *SARL Mohammad Benladen* [Saudi Arabia] (8 December 2009),<sup>42</sup> the Paris Court of Appeal upheld a decision of the Paris TGI declining jurisdiction. Following the death in 1967 of Cheik Mohammad Benladen, a Saudi entrepreneur, a Saudi royal decree of 1985 (1) ordered that the Cheik's construction company be transformed into SARL Mohammad Benladen (Benladen Inc.) to manage the Cheik's estate, and (2) appointed three people to a supervisory council of Benladen Inc. Later, another royal decree vested the supervisory council with the power to give each of the Cheik's heirs two options: an heir could either (1) decline to be a shareholder in Benladen Inc. and be paid out his share of the Cheik's estate, or (2) be a shareholder in Benladen Inc. and the supervisory board would represent all such heirs in drafting and signing the bylaws of Benladen Inc. Once prepared, the bylaws provided that disputes concerning the implementation of the bylaws of Benladen Inc. were to be settled by arbitration before the members of the supervisory council.

In 2001, E. Benladen, one of the Cheik's 58 heirs, filed claims, before (1) the Swiss courts in Geneva against one of her brothers who was a shareholder in Benladen Inc., and (2) the TGI in Paris against another Benladen Inc. shareholder, as well as members of the board of directors of Benladen Inc. and the

members of its supervisory board. All parties in both cases were Saudi nationals. In 2005, the Swiss courts decided to retain jurisdiction on the basis of Saudi law, considering that there was no evidence that Ms. Benladen had ever agreed to be bound by the arbitration clause in the bylaws.<sup>43</sup> For its part, the Paris TGI declined jurisdiction against all defendants in January 2009.

Before the Paris Court of Appeal, Ms. Benladen argued, among other things, that defendants had waived their right to object to the jurisdiction of the French courts on appeal because they did not raise any such objection in their first submission before the Court of Appeal. Ms. Benladen also submitted that the Swiss court's decision on jurisdiction was *res judicata* in France, pursuant to the terms of the Lugano Convention.<sup>44</sup> Finally, Ms. Benladen submitted that the arbitration clause was manifestly void because (1) she did not personally adhere to or sign the bylaws, nor did she validly consent to the arbitration clause under Saudi law, (2) the dispute at issue was not arbitrable under Saudi law, and (3) the arbitral tribunal — which was to be composed of specified members of the supervisory council of Benladen Inc., some of whom were deceased — would necessarily be irregularly constituted.

In affirming the decision of the TGI, the Court of Appeal found, among other things, that defendants had not waived their right to object to jurisdiction before the Court of Appeal because they raised their objection at the outset of the TGI proceedings and maintained it in their final written submissions before the Court of Appeal. The Court also rejected Ms. Benladen's *res judicata* argument based on the Lugano Convention because Ms. Benladen was Saudi and domiciled outside France. Moreover, the Court considered that she had failed to show that the parties and claims in the Swiss action had been identical to those in the French action. Further, the Court considered that the arbitration clause at issue was not an "international arbitration clause," but rather a domestic Saudi clause that covered all disputes relating to the implementation of the bylaws of Benladen Inc. Pursuant to CPC articles 1458 and 1466, a French court must decline jurisdiction unless the arbitration clause is either manifestly void or manifestly inapplicable. The Court considered that Ms. Benladen could have refused to become a shareholder in Benladen Inc.

and been paid out for her part of the estate, but she did not do so. Under these circumstances, the Court found that she should therefore be considered to have chosen to become a shareholder in the company, and thereby implicitly adhered to its bylaws. As a consequence, the Court rejected Ms. Benladen's arguments that the arbitration agreement was manifestly void because no such agreement existed or was invalid under Saudi law. Finally, the Court also rejected Ms. Benladen's argument that the arbitration agreement was manifestly void or inapplicable because the constitution of the arbitral tribunal was necessarily irregular. The Court stated that it is for the arbitrators to decide on their own jurisdiction (including on the validity of the arbitration agreement under Saudi law) and found that Ms. Benladen had failed to show that the terms and conditions of the arbitrators' appointment, which "conformed to the monarchic system in Saudi Arabia," prevented the replacement of deceased arbitrators by the royal authority.

#### Enforcement Of Awards • Due Process

In *Fichtner GmbH & Co. KG [Germany] v. Lksur SA [Uruguay]* (17 December 2009),<sup>45</sup> the Paris Court of Appeal set aside a final award rendered in March 2008 in Paris by a sole arbitrator in an ICC arbitration, as well as the award's two addenda. Fichtner and Lksur are both engineering companies. In 2003, the parties entered into two related contracts to work together to develop a waste management project for the city of Montevideo. Disputes arose between the parties and Lksur filed for arbitration with the ICC in October 2006, in accordance with the parties' arbitration agreement. In March 2008, the sole arbitrator rendered a final award that, among other things, ordered Fichtner to pay certain sums to Lksur.

In August 2008, Fichtner filed an application asking the Paris Court of Appeal to set the award aside because the proceedings violated due process. (Thereafter, the sole arbitrator issued two addenda to the final award (one in September 2008 and one in May 2009), both of which also became subject to Fichtner's set aside action.) Specifically, Fichtner contended that Lksur made a number of submissions to the sole arbitrator without providing copies of those submissions to Fichtner until after the arbitrator closed the proceedings. When Fichtner asked the sole arbitrator to reopen the proceedings to allow it to respond, the sole arbitrator refused. Fichtner also complained that

the sole arbitrator had refused to hear one of three witnesses it wished to call, and only agreed to hear the other two as party representatives, rather than as witnesses. Further, Fichtner contended that statements made in the award that certain witnesses had been heard were false because one of them had not been heard at all and the two others were not heard as witnesses but as party representatives.

The Court of Appeal declined to find that the award contained false statements. The Court noted that no national rules of procedure applied in the arbitration between the parties, which was governed by the ICC Rules. Those Rules draw no distinction between testimony from party representatives and testimony from witnesses, leaving it to the arbitral tribunal to weigh all testimony as it sees fit. In light of this, the Court found that it was not false to say in the award that the two party representatives had testified at the hearing. With respect to the one witness that Fichtner alleged had not testified at all, the Court noted that the witness statements the parties provided on the issue before the Court were in conflict as to what role exactly this witness had played at the hearing and there was no hearing transcript. Under these circumstances, the Court found the parties' witness statements, which were prepared two years after the hearing in question, insufficient to establish that the statements in the award were false.

With respect to the annulment of the award, the Court found that Lksur had sent to the sole arbitrator submissions raising new matters on 9 November 2007, one day before the close of proceedings. Before the Court of Appeal, Lksur contended that the arbitrator had faxed a copy of Lksur's submissions to Fichtner's counsel the same day. The Court noted, however, that the number of pages mentioned on the fax confirmation Lksur submitted to support its contention did not match the number of pages in the submissions. Moreover, the fax report from the fax machine at the offices of Fichtner's counsel showed no record of having received a fax from the sole arbitrator on 9 November (though it did properly show other fax communications Fichtner sent that day in the same case). Under these circumstances, the Court considered that Lksur had failed to prove that Fichtner actually received copies of the submissions before the proceedings closed. As Fichtner had not had an opportunity to respond to the submissions, the Court

concluded that the proceedings had violated due process and set the award and its addenda aside.

**Enforcement Of Awards • Existence Of An Arbitration Agreement • Scope Of Arbitral Tribunal's Mission • International Public Policy**

In *Czech Republic v. Nreka* [Croatia] (17 December 2009),<sup>46</sup> the Paris Court of Appeal rejected the Czech Republic's application to set aside a final award rendered in July 2008 in Paris by a three-member arbitral tribunal in an investment arbitration under the UNCITRAL Rules brought pursuant to a BIT between the Czech Republic and Croatia. The case concerned a lease and work agreement between ZIPimex, a Czech company solely owned by Mr. Nreka, and the Prague Pedagogical Center, a public institution under the authority of the Czech Ministry of Youth, Schools and Physical Education. Pursuant to these agreements, ZIPimex renovated part of the building occupied by the Center (and owned by the Czech Republic) and the Center leased ZIPimex approximately 300 square meters of the renovated space for a period of fifteen years to operate a pizzeria. In January 2002, the Ministry wished to centralize its offices and decided to retake possession of the entire building, including the space leased to ZIPimex. When ZIPimex refused to vacate the premises, the Czech Republic brought a series of actions that ultimately drove Mr. Nreka to vacate the premises in July 2004. In its final award, the arbitral tribunal ordered the Czech Republic, among other things, to pay Mr. Nreka damages and cease all actions against Mr. Nreka or ZIPimex related to the use of the property at issue.

The Czech Republic asked the Paris Court of Appeal to set aside the final award on several grounds. First, the Czech Republic noted that ZIPimex was not a party to the arbitration, that there was no arbitration agreement between the Czech Republic and ZIPimex, and that neither the relevant BIT nor the UNCITRAL Rules would permit ZIPimex (a Czech company) to be a party to the arbitration and assert claims against the Czech Republic for losses ZIPimex suffered. Accordingly, the Czech Republic argued that the arbitral tribunal lacked jurisdiction to order the Czech Republic to cease all actions against ZIPimex. Relatedly, the Czech Republic contended that the tribunal's order forbidding the Czech Re-

public from bringing actions against Mr. Nreka and ZIPimex violated French international public policy because it forced the Czech Republic to violate its own public policy. Specifically, the Czech Republic contended that the rent ZIPimex was paying was only a fraction of the fair market price. Under these circumstances, the Czech Republic contended that its own public policy required it to bring actions against Mr. Nreka and ZIPimex to protect its rights, and that the “French judicial order” should not let stand an award prohibiting the Czech Republic from doing so. Moreover, the Czech Republic contended that the arbitral tribunal acted beyond its mission (*ultra petita*) because it found that the Czech Republic had indirectly expropriated Mr. Nreka’s investment, even though Mr. Nreka had abandoned his expropriation claim. Relatedly, the Czech Republic argued that the tribunal’s decision in this regard was also contrary to French international public policy because it ignored the *res judicata* effect of an earlier partial award of the tribunal finding that there was no expropriation claim for it to decide.

The Court of Appeal rejected the Czech Republic’s application in its entirety. First, the Court of Appeal found it irrelevant that there was no arbitration agreement between the Czech Republic and ZIPimex. In ordering the Czech Republic to cease all actions against ZIPimex, the arbitral tribunal was not righting wrongs suffered by ZIPimex, but rather upholding the rights of Mr. Nreka under the BIT with respect to his investment in the Czech Republic through an injunction designed to protect Mr. Nreka’s rights as a shareholder in ZIPimex. The Court found this decision was not contrary to French international public policy, particularly as the Czech Republic cannot rely on its alleged obligation to bring actions against Mr. Nreka and ZIPimex in light of the tribunal’s finding that these actions violate the relevant BIT. (The Court also noted that, despite its alleged obligation to bring such actions, the Czech Republic had in fact ceased its actions against ZIPimex in June 2009.) With respect to *ultra petita*, the Court found that the tribunal had in fact taken no decision on any claim that the Czech Republic had expropriated Mr. Nreka’s investment. At most, the arbitral tribunal had made reference to expropriation by way of analogy, and this did not render the award *ultra petita*. The Court accordingly also rejected the Czech Republic’s related public policy arguments, as there was no conflict

between the tribunal’s decisions in its partial and final awards.

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

In *Smeg NV* [Belgium] *v. EARL Poupardine* [France] (17 December 2009),<sup>47</sup> the Paris Court of Appeal denied Smeg’s application to set aside a final award rendered in France in January 2005 in an arbitration administered by the Arbitration Chamber of Paris (*Chambre Arbitrale de Paris* (CAP)). By contract of August 2003, Poupardine sold Smeg 247 tons of wheat for delivery in Belgium. In November 2003, Poupardine cancelled the contract on the grounds that a French authority called ONIC — otherwise known as the Office National Interprofessionnel des Céréales, an authority established and acting under French regulations relating to the accreditation of wheat collectors in France — removed Smeg from the list of accredited wheat collectors in June 2003.<sup>48</sup> In December 2003, Smeg filed for arbitration before the CAP pursuant to the arbitration agreement in the contract. Poupardine did not participate in the arbitration, and in January 2005 the arbitral tribunal dismissed Smeg’s claims for lack of jurisdiction. Specifically, the tribunal considered that Smeg was really complaining about ONIC’s decision — which Smeg contended before the tribunal was contrary to European law — rather than about Poupardine’s refusal to perform. The tribunal found it had no jurisdiction to decide whether French regulations on accreditation of wheat collectors in France conformed to European law.

On 15 March 2005, Smeg filed an application asking the Court of Appeal to set the award aside, based on French domestic arbitration provisions. In December 2006, upon the invitation of the Court of Appeal,<sup>49</sup> Smeg changed the basis of its request to French international arbitration law and argued that, in refusing to decide whether the ONIC decision and French agriculture regulations complied with European law, the tribunal violated its mission.<sup>50</sup> Smeg also submitted that because of the tribunal’s refusal to decide whether the French regulation at issue conformed to European law, Smeg had been deprived of its rights in violation of the freedom of movement of goods, services and establishment guaranteed by the European Treaty. As a consequence, Smeg contended that enforcement of the award would be contrary to French international public policy.

The Court of Appeal rejected Smeg's application in its entirety. The Court of Appeal noted that the claim before the tribunal was limited to the contractual relationship between the parties, but called into question both the legitimacy of ONIC's decision, as well as whether French law conformed to European law. The Court found that the tribunal did not violate its mission in finding it had no jurisdiction to decide on the validity of ONIC's decision (and, relatedly, on the conformity of French law to European law) because examination of the validity of ONIC's decision was outside the scope the tribunal's mission. Regarding French international public policy, the Court found that Smeg failed to show how enforcement of the award would violate French international public policy in a blatant, real and concrete manner, and considered that Smeg's public policy argument was designed to have the Court decide on the legitimacy of ONIC's decision, which the Court considered was outside the scope of its jurisdiction.

**Enforcement Of Awards • Scope Of Arbitral  
Tribunal's Mission • Estoppel • Waiver**

In *Merial [France] v. Klocke Verpackungs Service GmbH [Germany]* (3 February 2010),<sup>51</sup> the French Supreme Court vacated a decision of the Paris Court of Appeal of 9 October 2008<sup>52</sup> that rejected Merial's application to set aside an award rendered in France in February 2007 in an ICC arbitration. The award had granted both Merial and Klocke's claims, including a tort-based counterclaim Klocke raised in its last written submission of 15 March 2006. On 7 April 2006, Merial objected to the admissibility of that counterclaim on the basis that the terms of reference limited the mission of the tribunal to deciding contract-based claims. On 12 April 2006, the arbitral tribunal rejected Merial's objection and, on 12 May 2006, held a final hearing at the end of which the parties signed the minutes. The Court of Appeal considered that Merial was estopped from complaining that the tribunal had gone beyond the scope of its mission (*ultra petita*) because, even though Klocke's counterclaim was not included in the terms of reference as originally signed, the tribunal had later decided to hear it, as permitted by the ICC Rules. Moreover, Merial had signed the minutes of the hearing that closed the proceedings without objection, thereby waiving its right to complain.

The Supreme Court found that the Court of Appeal misapplied French international arbitration law in

rejecting Merial's application to set aside the award. Specifically, the Supreme Court found that Merial was not estopped from challenging the award as *ultra petita* because Merial had not changed its legal position with respect to the admissibility of the counterclaim so as to mislead Klocke as to its intentions. Similarly, the Supreme Court found that Merial could not be said to have waived its right to challenge the award as *ultra petita* merely because it did not object yet again to the admissibility of the counterclaim between the tribunal's order of 12 April 2006 and the signing of the minutes of the hearing.

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**Endnotes**

- \* This article represents the personal views of the authors and should not be interpreted to represent the views of HERBERT SMITH LLP. Thanks are due to Annaïg Combe, an intern at BENSUADE, for her assistance and insights.
1. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 22 Oct. 2009, case no. 08/21022. An English translation of *Linde* is annexed. In these notes, page citations to the decision are to the translation.
  2. *Linde* at 2.
  3. *See id.* at 2-3.
  4. *See id.* at 3-4.
  5. *See id.* at 3.
  6. *See id.*
  7. *Id.* at 4.
  8. *See id.*
  9. *Id.*
  10. *Id.*
  11. *Id.*

12. *See id.* at 4-5. Pursuant to article 27 of the ICC Rules, the ICC Court must review and approve all draft awards before they may be notified to the parties. As part of this process, the ICC Court may make comments on a draft award. However, as these comments are not communicated to the parties and are for the tribunal's eyes only, it is not clear how the Court of Appeal can know whether or not the ICC Court raised any competition issues with the arbitral tribunal during scrutiny. Moreover, nothing in article 27 requires the ICC Court to verify that awards submitted to it for scrutiny are valid.
13. *Linde* at 5.
14. *See id.* The Court also ordered Linde to pay Halyvourgiki EUR 80,000 in legal costs pursuant to CPC article 700.
15. *See* CPC articles 1502-5 and 1504.
16. *See* FOUCHARD, GAILLARD & GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1648 (Emmanuel Gaillard & John Savage eds., Kluwer 1999).
17. *See id.* ¶ 1647 (explaining the difference between French domestic and international public policy).
18. *See id.* ¶ 1648 (explaining that "truly international public policy" is "public policy derived from the comparison of the fundamental requirements of national laws and of public international law in particular"), citing Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, ICCA CONGRESS SERIES NO. 3, COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257 (P. Saunders ed., 1987).
19. *See* FOUCHARD, GAILLARD & GOLDMAN ¶ 1661.
20. In practice, as a ground for setting aside, procedural international public policy frequently ends up being duplicative of other grounds — e.g., most notably, the ground that the arbitral tribunal failed to comply with due process (CPC article 1502-4) or was irregularly constituted (CPC article 1502-2).
21. *Eco Swiss China Time Ltd. v. Benetton Int'l*, case no. C-126/97, 1999 ECR I-3055 (holding that European competition law is part of the international public policy of all European Union member States, such as France). Other sources of French substantive international public policy include, e.g., stock exchange regulations, bankruptcy rules, criminal law and European consumer protection regulations. *See also* FOUCHARD, GAILLARD & GOLDMAN ¶¶ 1661-1662 (giving examples of matters that fall within French substantive international public policy).
22. When considering challenges to arbitral awards, the French courts are usually prohibited from considering the merits of the award. Challenges based on substantive international public policy are an exception to this general rule, however, as are challenges based on allegations that the arbitral tribunal lacked jurisdiction.
23. At one point, certain commentators suggested that an arbitral award should be set aside if an arbitral tribunal fails to raise *sua sponte* potential violations of European competition law. The French courts, however, have rejected this position. *See Thalès Air Defence SA v. GIE Euromissile*, Cour d'appel [CA] [regional court of appeal], Paris, 1e ch., sec. C, 18 Nov. 2004, case no. 02/19606. *See also* Denis Bensaude, *Thalès Air Defence BV v. GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law*, 22 J. INT'L ARB. 239 (2005) (pointing out many of the practical limitations on challenging awards on competition grounds that the Court of Appeal highlights in *Linde*).
24. *Linde* at 4.
25. The Paris Court of Appeal decision in the *Sarah A.* case, summarized in this issue's SEE ALSO section, is typical of how the Court usually defers to the findings of the arbitral tribunal in evaluating challenges to awards based on alleged violations of French substantive international public policy.
26. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 22 Oct. 2009, case no. 08/13030.
27. *Globale Re* argued in particular that the award breached CPC article 9, which provides that "each party must prove, according to the law, the facts necessary for the success of its claim."

28. The Court of Appeal decision in *Globale Re* does not explain the basis for these allegations, but an explanation can be found in the related *Gothaer* case, also summarized in this issue's SEE ALSO section.
29. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 5 Nov. 2009, case no. 08/12816.
30. An arbitrator is empowered to rule as *amiable compositeur* when vested with the powers to decide the parties' dispute in *amiable composition, ex-aequo et bono* or *équité*. French courts generally understand these concepts to have similar meanings in the context of international arbitration.
31. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 17 Dec. 2009, case no. 08/15208.
32. The Court of Appeal did not consider admissible statements by Gothaer's lawyers that Gothaer had objected to consolidation during the arbitration proceedings. This is because CPC article 199 requires that witness statements submitted to a French court be from third parties.
33. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 29 Oct. 2009, case no. 08/18544.
34. The parties' dispute regarding the enforcement of the partial award and procedural order gave rise to several other decisions of the Paris Court of Appeal on 10 March 2005, 11 May 2006 and 22 November 2007, as well as decisions of the French Supreme Court on 4 July 2007 and 4 June 2009.
35. As explained above (see *supra* note 12), article 27 of the ICC Rules requires that the ICC Court scrutinize and approve all awards before they may be notified to the parties. In a 1999 decision, the Paris Court of Appeal set aside a "procedural order" rendered in an ICC arbitration for failure of the arbitrators to comply with their mission. There, the Court found the procedural order in question was in fact an award that should have been submitted to the ICC Court for scrutiny before notification to the parties. See *Brasoil v. GMRA*, Cour d'appel [CA] [regional court of appeal], Paris, ch. 1, sec. 2, 1 Jul. 1999, case no. 98/24637 (Rev. Arb., 1999.834, note Jarrosson (in French)).
36. Unless the parties have agreed otherwise, article 23(1) of the ICC Rules allows an arbitral tribunal to order at the request of a party any interim or conservatory measure in the form of an order or an award, as the tribunal considers appropriate.
37. Cour de cassation, [Cass. 1e civ.] [supreme court], 12 Nov. 2009, case no. 09-10575.
38. Although French arbitration law empowers arbitral tribunals to rule on their own jurisdiction, this is not to say that they have the last word on the matter. The Court of Appeal retains the power to later deny enforcement of an award if it concludes that in fact the arbitral tribunal lacked jurisdiction — an issue the Court of Appeal reviews *de novo*. The competence-competence principle under French law thus gives the arbitral tribunal a priority to decide on its own jurisdiction, but not the final say.
39. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 26 Nov. 2009, case no. 08/14161.
40. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 26 Nov. 2009, case no. 08/11583.
41. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 3 Dec. 2009, case no. 08/13618.
42. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 3, 8 Dec. 2009, case no. 09/14087.
43. The scope of the arbitration clause set forth in the bylaws (which is not reproduced in the Court of Appeal decision) is unclear. The Swiss courts read it to cover only disputes between shareholders in Benladen Inc., whereas the Paris Court of Appeal reads it to cover all disputes concerning Benladen Inc.
44. Article 26 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, concluded in Lugano on 16 September 1988 (now Council Regulation (EC) No. 44/2001 of 22 December 2000, Article 33.1), provides that a "judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required."
45. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 17 Dec. 2009, case no. 08/16276.

46. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 17 Dec. 2009, case no. 08/15877. In September 2008, the Paris Court of Appeal rejected the Czech Republic's application to set aside the arbitral tribunal's partial award on jurisdiction in the same arbitration. *See* Cour d'appel [CA] [regional court of appeal], Paris, 1e ch., sec. C, 25 Sept. 2008, case no. 07/04675. That decision — which effectively invites investors to resolve through ad hoc arbitration in Paris investment disputes that might well be dismissed for lack of jurisdiction if brought to the International Centre for the Settlement of Investment Disputes (ICSID) — is the SPOTLIGHT in our February 2009 inaugural issue of *A View From Paris*.
47. Cour d'appel [CA] [regional court of appeal], Paris, pôle 1, ch. 1, 17 Dec. 2009, case no. 05/06012.
48. Smeg's removal from that list followed its complaint of April 2003 before European authorities that France's regulations on accreditation of wheat collectors by ONIC violated European laws and regulations. In April 2006, the European authorities opened infringement proceedings (2004/4422) against France in this respect, and in December 2006 invited France to modify its regulations. France complied in May 2007 and the European authorities terminated the proceedings against France in October 2007. On 20 December 2007, the Paris Court of Appeal decided to stay the setting aside proceedings filed by Smeg until Smeg provided evidence that the infringement proceeding had been closed (*see* Cour d'appel [CA] [regional court of appeal], Paris, ch. 1, sec. C, 20 Dec. 2007, case no. 05/06012).
49. *See* Cour d'appel [CA] [regional court of appeal], Paris, ch. 1, sec. C, 7 Dec. 2006, case no. 05/06012.
50. Requests for the setting aside of awards dismissing jurisdiction must be brought under CPC article 1502-3 (violation of the arbitral tribunal's mission) because an arbitral tribunal that has wrongfully declined jurisdiction fails to fulfill its mission to decide the merits of the parties' dispute as agreed by the parties in their arbitration agreement.
51. Cour de cassation, [Cass. 1e civ.] [supreme court], 3 Feb. 2010, case no. 08-21288.
52. For a summary of the Court of Appeal decision, see the SEE ALSO section of the February 2009 inaugural issue of *A View From Paris*. ■



**FRENCH REPUBLIC**

IN THE NAME OF THE FRENCH PEOPLE

**PARIS COURT OF APPEAL<sup>[i]</sup>****Division 1 — Chamber 1****Decision of 22 October 2009**Docket number: **08/21022**

APPLICATION TO SET ASIDE an arbitration award (ICC No. 14023/AVH)

Handed down in Paris on 25 June 2007 by the International Court of Arbitration of the International Chamber of Commerce. The arbitral tribunal was made up of Chairman Jacques SALÈS and Messrs. Agissilaos BAKOPOULOS and Ioannis VASSARDANIS, co-arbitrators.

**APPLICANT:****LINDE AKTIENGESELLSCHAFT**

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*avoués à la Cour*  
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**THE COURT:**

The case was heard in a public session on 24 September 2009 and the report was read out before the Court, comprising:

Mr. PÉRIÉ, President  
Ms. BOZZI, judge  
Ms. GUIHAL, judge  
Who deliberated thereupon.

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

**Public prosecutor:** represented at the hearing by Ms. ROUCHEREAU, Advocate General

**DECISION:**

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

The Greek company HALYVOURGIKI, which operates one of the largest Greek steel mills, uses considerable quantities [of raw materials] in its production, including gaseous oxygen.

The German company LINDE AKTIENGESELLSCHAFT and its subsidiary, the Greek company LINDE HELLAS LTD (hereinafter the LINDE companies) are a powerful group of liquid gas producers.

By contract of 24 April 2002, HALYVOURGIKI signed with LINDE an agreement for supply [of liquid gas] to its industrial site. The facilities were built by LINDE which began producing and selling gaseous oxygen to the steel mill in April 2004. It was agreed that the facilities built on HALYVOURGIKI's site in Eleusis and operated by LINDE would remain LINDE's property for 15 years.

The liquid gas production exceeded HALYVOURGIKI's needs and LINDE sold the surplus gas to third parties.

These sales to third parties are the source of the dispute. In keeping with the arbitration clause stipulated in Article 21 of the agreement of 24 April 2002, HALYVOURGIKI referred the matter to the arbitral tribunal.

In an award rendered in Paris on 25 June 2007, the arbitral tribunal, composed under the aegis of the ICC International Court of Arbitration of Jacques Salès, Chairman, and Agissilaos Bakopoulos and Ioannis Vassardanis, arbitrators, decided by majority, among other things:

"2. that the Second Respondent [LINDE HELLAS LTD] breached the contract by selling gas to third parties;

3. that the Second Respondent [LINDE HELLAS LTD] must cease and desist, within five business days of service of the award, from making any gas sales to third parties. This

award barring gas sales to third parties shall also apply, as necessary, to the First Respondent [LINDE AKTIENGESELLSCHAFT];

7. that the Second Respondent [LINDE HELLAS LTD] must stop using the weighbridge for sales intended for the market."

The LINDE companies filed an application for setting aside focused on these three points from the arbitral award. The LINDE companies argue that these points infringe international public policy (Article 1502-5 CPC) in a blatant, real and concrete manner because, in establishing a production limitation that is anticompetitive by object, they violate Article 81 of the EC Treaty. The LINDE companies are therefore asking the Court to set aside points 2, 3, and 7 of the arbitral award and to order HALYVOURGIKI to pay them EUR 50,000 pursuant to Article 700 CPC.

HALYVOURGIKI relies upon, among other things, the principle that arbitral awards cannot be reviewed on the merits and [the rule] that the review of alleged [substantive] public policy violations is limited to blatant violations only, and requests that the application be declared inadmissible or, in the alternative, dismissed. HALYVOURGIKI requests that the LINDE companies be ordered to jointly and severally pay it EUR 80,000 pursuant to Article 700 CPC.

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

##### **Regarding the admissibility of the application to set aside:**

HALYVOURGIKI claims that the application is inadmissible because the grounds for setting aside are being raised for the first time before the [court] in charge of the setting aside [application], which is not empowered to review arbitral awards on the merits and must confine its [substantive public policy] review to examining the solution reached by the arbitrators. In this case, the Applicants are attempting to draw the Court towards a complex economic analysis which it cannot conduct.

Of course, so far as violations of [substantive] international public policy are concerned, the Court is not judge of the proceedings but of the award itself. Only the recognition or enforcement of the arbitral decision is examined in light of its compatibility with international public policy. It makes no difference that the issue was not raised before the arbitrators. The concentration of claims principle (which requires the parties to make their arguments known before the arbitrators, failing which such arguments are inadmissible before the [court] in charge of the setting aside), is not applicable here. The scope of the court's power to check that an award abides by [substantive] international public policy – which includes mandatory rules of EU law – is not conditioned upon the parties' behavior.

In this case, since the LINDE companies are basing their application upon the provisions of Article 1502-5 CPC and are attempting to show that the alleged breach of public policy is blatant, real and concrete, the application is admissible, and it is for the court to examine the parties' arguments in order to determine whether such application is founded or not.

**Regarding the sole ground of the application to set aside: that recognition or enforcement violates international public policy (article 1502-5 CPC):**

The LINDE companies argue that in deciding (with reference to the Greek Civil Code applicable to the dispute, and in light of the principles of good faith and trade usages) that [1] clauses 3.2 and 20.2 of the 24 April 2002 contract obligated them to use the gas production facilities for the sole requirements of HALYVOURGIKI and that [2] they had no right to use such facilities for any other purpose, including for producing gas for sale to third parties, the arbitral tribunal gave these clauses (by virtue of this interpretation) an anticompetitive object and effect within the meaning of Article 81-1 of the EC Treaty.

[The LINDE companies] endeavor to demonstrate that this interpretation, which entails a limitation of liquid oxygen production representing up to 31.3% of the Greek market, is anticompetitive by object in view of the very wording of the Treaty, and affects trade between Member States. [The LINDE companies] say that [1] the disputed clauses cannot be considered as restrictions that are ancillary to the contract, [2] the Regulation on vertical exemptions does not apply to [these restrictions], and [3] the contract cannot be individually exempt since the purpose of the contract is to restrict competition.

[The LINDE companies] infer from the above the existence of a blatant, real and concrete violation of Article 81 of the Treaty which is an integral part of [French] international public policy.

In order to be able to determine whether the criticized restriction has for object or effect to affect competition – an issue that was not argued before the arbitrators – it is necessary, among other things, to [1] define the market, [2] analyze the parties' positions on the market, [3] search for the existence of potential competitors, [4] examine [A] the particular terms of the contract, [B] prohibited restrictions under block exemption regulations, and [C] whether the restriction in the contract may be considered necessary and proportional, and finally [5] verify whether the contract may affect the prices, production, innovation, diversity or quality of the products.

A violation of international public policy within the meaning of Article 1502-5 CPC must be blatant, real and concrete.

In this case, in its attempt to demonstrate the [violation's] blatant nature, the LINDE companies argue for no less than thirty pages, offering the Court what is certainly a brilliant intellectual construct that is nevertheless devoid of concrete and reliable facts (in particular market delineation, position of LINDE, production capacities outside the Eleusis site). For its part, HALYVOURGIKI, relying on an opinion from a professor of law, Ms. Laurence Idot, presents a contrary demonstration that is equally brilliant although identically devoid of concrete facts.

Although the [court] in charge of the setting aside [application] may review *de novo* the [legal and factual findings] in the award that is submitted to it, that court may not rule on the merits of a complex dispute that has not been decided by the arbitrators and that would require a much more complete investigation than that which results from an exchange of submissions before that court.

The LINDE companies, which are today arguing that the international public policy violation they invoke is blatant because [the arbitral tribunal] disregarded European competition law, never raised this argument before the arbitrators, and [this argument] similarly escaped the notice of the arbitral tribunal, despite the alleged blatant [nature of the violation]. Moreover, the ICC International Court of Arbitration which verifies, in keeping with its rules, that awards submitted to it in draft form are valid, did not make any observations in this regard.

In addition, the [LINDE companies] may not in good faith explain their silence on this issue during the arbitration proceedings on the grounds that it would have been contradictory to argue before the arbitrators that, on one hand, the contract did not contain any exclusivity clause and, on the other hand, that the contract was contrary to EU competition law. Actually, it comes out of the arbitral award in paragraph 82(b) that the tribunal was invited to find whether LINDE HELLAS could sell gas produced at the Eleusis facilities to third parties when no clause in the contract allowed it to do so. Therefore, since the issue of the prohibition to sell to third parties was debated [before the arbitral tribunal], the LINDE companies could have argued, without contradicting themselves, that the contract was not exclusive and, in the alternative, that in case [the arbitral tribunal were to find the contract] exclusive, the contract would then have an anticompetitive object or effect.

It must therefore be noted that there has been no demonstration that the alleged violation of EU competition rules is blatant, real or concrete. The court in charge of the setting aside [application] cannot, without otherwise affecting the finality of the arbitrators' decision on the merits of the dispute, conduct a re-examination of contractual provisions or their compliance with competition law in the absence of a manifest violation.

It follows that the application and grounds therefore are dismissed.

#### **Regarding claims under Article 700 CPC:**

As the LINDE companies are unsuccessful and their claims are being dismissed, they are ordered to pay HALYVOURGIKI EUR 80,000 pursuant to Article 700 CPC.

#### **FOR THESE REASONS**

Declares the application to set aside admissible;

Dismisses said application;

Orders LINDE AKTIENGESELLSCHAFT and LINDE HELLAS LTD to pay HALYVOURGIKI EUR 80,000 pursuant to Article 700 CPC;

Dismisses all other claims;

Orders LINDE AKTIENGESELLSCHAFT and LINDE HELLAS LTD to pay the costs and grants the benefit of Article 699 CPC to SCP Bernabé, Chardin, Chevillier, *avoués*.

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