
THE
INTERNATIONAL
ARBITRATION
REVIEW

EDITOR
JAMES H CARTER

LAW BUSINESS RESEARCH

THE INTERNATIONAL ARBITRATION REVIEW

Reproduced with permission from Law Business Research Ltd.

This article was first published in *The International Arbitration Review*,
1st edition (published in July 2010 – editor James H Carter).

For further information please email Adam.Sargent@lbresearch.com

THE
INTERNATIONAL
ARBITRATION
REVIEW

Editor
JAMES H CARTER

LAW BUSINESS RESEARCH LTD

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING ASSISTANT
Hannah Thwaites

EDITORIAL ASSISTANT
Nina Nowak

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Joanne Morley

SUBEDITOR
Charlotte Stretch

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2010 Law Business Research Ltd

© Copyright in individual chapters vests with the contributors
No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2010, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-07-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ABASCAL, SEGOVIA & ASOCIADOS

ALLEN & OVERY LLP

ANWALTSBÜRO WIEBECKE

BURNET, DUCKWORTH & PALMER LLP

COŞAR AVUKATLIK BÜROSU

DEACONS

FRANK ADVOKATBYRÅ AB

GÓMEZ-ACEBO & POMBO ABOGADOS

HARASIĆ Y LÓPEZ

HERBERT SMITH

JSA

KAMILAH & CHONG

L.O. BAPTISTA ADVOGADOS

MACLEOD DIXON

MARVAL, O' FARRELL & MAIRAL

MOTIEKA & AUDZEVICIUS

MULLA & MULLA & CRAIGIE BLUNT & CAROEO

PROFESSOR HILMAR RAESCHKE-KESSLER

RAJAH & TANN LLP

RUDOLPH, BERNSTEIN & ASSOCIATES

SALANS LLP

SHIN & KIM

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SULLIVAN & CROMWELL LLP

SZECSKAY ATTORNEYS AT LAW

WHITE & CASE W DANIŁOWICZ, W JURCEWICZ I WSPÓLNICY
– KANCELARIA PRAWNA SPK

CONTENTS

Editor's Preface	vii
	<i>James H Carter</i>	
Chapter 1	ARGENTINA	1
	<i>Alberto DQ Molinario and Maria Laura Velazco</i>	
Chapter 2	BRAZIL	13
	<i>Luiz Olavo Baptista and Mariana Cattel Gomes Alves</i>	
Chapter 3	CANADA	31
	<i>David R Haigh QC, Louise Novinger Grant, Sonya Morgan and Romeo Rojas</i>	
Chapter 4	CHILE	48
	<i>Davor Harasic and Karina Cherro</i>	
Chapter 5	CHINA	58
	<i>Brenda Horrigan, Felix Hess and Siew Lin Mok</i>	
Chapter 6	CZECH REPUBLIC	70
	<i>Juraj Alexander</i>	
Chapter 7	ENGLAND & WALES	79
	<i>Stephen Jagusch and Andrew Pullen</i>	
Chapter 8	FRANCE	98
	<i>Jean-Christophe Honlet, Barton Legum and Anne-Sophie Dufêtre</i>	
Chapter 9	GERMANY	106
	<i>Hilmar Raeschke-Kessler</i>	
Chapter 10	HONG KONG	117
	<i>Joseph Kwan and Kwok Kit Cheung</i>	
Chapter 11	HUNGARY	127
	<i>András Szecskay and György Wellmann Jr</i>	
Chapter 12	INDIA	136
	<i>Shardul Thacker and Siddharth Thacker</i>	

Chapter 13	JAPAN.....	147
	<i>Peter Godwin and Raelene Leonard</i>	
Chapter 14	KAZAKHSTAN.....	157
	<i>Aigoul Kenjebayeva and Yuliya Mitrofanskaya</i>	
Chapter 15	KOREA.....	165
	<i>Benjamin Hughes and Beomsu Kim</i>	
Chapter 16	LITHUANIA.....	175
	<i>Ramunas Audzevicius, Tomas Samulevicius and Mantas Juozaitis</i>	
Chapter 17	MALAYSIA.....	183
	<i>Chong Yee Leong</i>	
Chapter 18	MEXICO.....	194
	<i>Jose Maria Abascal</i>	
Chapter 19	NIGERIA.....	205
	<i>Babajide Ogundipe and Lateef Omoyemi Akangbe</i>	
Chapter 20	POLAND.....	208
	<i>Witold Jurczenicz and Arkadiusz Korzeniewski</i>	
Chapter 21	ROMANIA.....	218
	<i>Tiberiu Csaki</i>	
Chapter 22	RUSSIA.....	226
	<i>Mikhail Ivanov and Anna Zbukova</i>	
Chapter 23	SINGAPORE.....	236
	<i>Chong Yee Leong</i>	
Chapter 24	SOUTH AFRICA.....	249
	<i>Gerhard Rudolph, Darryl Bernstein and Michelle Wright</i>	
Chapter 25	SPAIN.....	260
	<i>Diego Saavedra and Guillermo Bayas</i>	
Chapter 26	SWEDEN.....	271
	<i>Hans Bagner</i>	
Chapter 27	SWITZERLAND.....	282
	<i>Martin Wiebecke</i>	
Chapter 28	TURKEY.....	294
	<i>Gulay Aydin, Margaret Ryan and Simge Ugur</i>	

Chapter 29	UNITED ARAB EMIRATES 303 <i>Kaashif Basit</i>
Chapter 30	UNITED STATES 312 <i>James H Carter and Joseph E Neuhaus</i>
Chapter 31	VENEZUELA 331 <i>Ramón J Alvins, Elisabeth Eljuri and Clovis Treviño</i>
Appendix 1	ABOUT THE AUTHORS 346
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS 365

EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. But there is a niche to be filled for analytic review of what has occurred in each of the important arbitration jurisdictions over the past 18 months, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter

Sullivan & Cromwell LLP

New York

June 2010

Chapter 8

FRANCE

*Jean-Christophe Honlet, Barton Legum and Anne-Sophie Dufêtre**

I INTRODUCTION

France has long been recognised as one of the most arbitration-friendly jurisdictions in the world. Over the years, French courts have developed a strong body of experience in relation to international arbitration.

Two separate court systems operate in parallel in France. In a nutshell, cases between private parties are heard by judicial courts, with the Court of Cassation being France's highest court in civil and commercial matters. Cases involving a public act or a public party are generally heard by administrative courts, with the Council of State acting as the highest court in that respect. To the extent there are inevitably borderline situations, the *Tribunal des Conflits* may be called to decide which among the judicial or administrative courts have jurisdiction to hear any given case. As will be seen in an important case described *infra*, this is relevant to arbitration law as well. Most French case law regarding international arbitration is rendered by (1) the Paris Court of Appeal, particularly with respect to all challenges against International Court of Arbitration of the International Chamber of Commerce ('ICC') awards when Paris is the designated place of arbitration,¹ and (2) when a challenge is made before the Court of Cassation, by the first chamber of that court.

France distinguishes between domestic and international arbitration. Pursuant to Article 1492 of the Code of Civil Procedure ('CCP'), an arbitration is deemed international when it involves the interests of international trade. It is necessary and sufficient in that regard that the economic operation concerned involves movements of goods or funds beyond borders, without regard to the nationality of the parties, the applicable law or the place of arbitration. Title V of the CCP (Article 1492 *et seq.*) deals with international

* Jean-Christophe Honlet and Barton Legum are partners and Anne-Sophie Dufêtre is an associate at Salans LLP.

1 According to the official statistics of the ICC, Paris is the most frequently chosen place for ICC arbitrations.

arbitration. Not all the law of international arbitration is contained in the CCP; case law plays an important part in the development of French law of international arbitration.

Its most salient features are the following. First, French law recognises international arbitration clauses as valid in principle, without having regard to conflicts of law principles.² Second, French law accords great importance to the principle of *Kompetenz-Kompetenz*. Based on Article 1458 of the CCP, a French court will grant priority to an arbitral tribunal to decide whether it has jurisdiction to hear a particular case, unless the arbitration clause is manifestly null or inapplicable to the case, an exception that is construed narrowly. Third, French law is premised on the fact that international arbitral awards are ‘not linked to any national legal order’, being viewed as ‘international decisions of justice’.³ Among other consequences, French courts have repeatedly agreed to enforce arbitral awards in France that had been annulled at the place of arbitration in other countries. The only test in this respect is whether the criteria set out by French law for enforcement of foreign arbitral awards (Article 1502 of the CCP) are met. These criteria are more favourable to enforcement than those set out in the 1958 New York Convention, which therefore plays a residual role in France. Fourth, and more generally, French courts have adopted a non-interventionist approach, according great deference to the arbitral process both during the arbitration itself, avoiding interfering, but also at the review stage of the award. No review of the merits of the award will take place before French courts, which will also construe narrowly the ‘public policy’ exception that, in most countries, permits to set aside awards at the place of arbitration.

France hosts several important arbitral institutions. First and foremost, it is the home of the ICC, the world’s pre-eminent institution for international commercial arbitration. The French Arbitration Association (‘AFA’) and the Centre of Mediation and Arbitration of Paris (‘CMAP’) are also active. A number of ICSID (‘International Centre for the Settlement of Investment Disputes’) cases are also heard in Paris each year. According to information communicated by the ICSID Secretariat, Paris was used in 2009 as a venue for ICSID hearings and sessions in 37 per cent of the cases. It is the preferred venue for ICSID hearings and sessions, on an equal footing with Washington, DC, where the ICSID Secretariat is based.

II THE YEAR IN REVIEW

Developments affecting international arbitration

The French Ministry of Justice is presently undertaking a review of the sections applicable to arbitration in the CCP. A reform, aimed at further improving, but not fundamentally altering, arbitration law is expected in the near future; it is, however, too early to report about it. Two other developments can be mentioned here. First, there has been much

2 Civ. 1, 4 July 1972, Case No. 70-14163; Civ. 1, 20 December 1993, Case No. 91-16828; Civ. 1, 5 January 1999, Case No. 96-21430; Civ. 1, 7 June 2006, Case No. 03-12034; Civ. 1, 11 July 2006, Case No. 04-14950; Civ. 1, 8 July 2009, Case No. 08-16025; Civ. 1; 30 September 2009, Case No. 08-15708.

3 Civ. 1, 29 June 2007, Case No. 05-18053.

debate throughout Europe, but particularly in France, about the European Commission Green Paper on the amendments to the European Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('the Brussels I Regulation'). Second, the ICC has been undertaking several reforms.

i EC Green Paper

Pursuant to its Article 1.2, the Brussels I Regulation does not apply to arbitration.⁴ A recent Green Paper of the European Commission has suggested partially deleting such 'arbitration exception'.⁵ Such an inclusion in the scope of the Regulation, if implemented, may have profound implications and might undermine the efficiency of international arbitration in Europe. In particular, the Green Paper has proposed to give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. Under French and other laws, such priority clearly belongs to the arbitral tribunal. The Commission's proposal may therefore be viewed by certain parties as an invitation to start court proceedings to frustrate the arbitration process. Many international arbitration specialists noted that, in practice, parties agreeing to arbitration may, in many cases, be forced to resort to state courts prior to starting their arbitration. However, parties enter into arbitration agreements precisely to avoid litigating before state courts.⁶ It remains unclear at this stage whether the Green Paper will have any future, but because of its potential far-ranging implications, the European Commission's initiative will remain closely watched by arbitration specialists.

ii ICC developments

ICC arbitration has undergone certain changes in 2009. A new chairman of the ICC Court of Arbitration has been appointed effective 1 January 2009: John Beechey. Since August 2009, arbitrators agreeing to serve in ICC proceedings are required to disclose details confirming their availability and independence through the 'ICC Arbitrator Statement of Acceptance, Availability and Independence'. In particular, arbitrators have to disclose the number of cases in which they are involved, and any foreseeable competing demands on their time in the upcoming 18 months. The long-awaited revision of the ICC Rules of Arbitration is also still under way and is expected to finally bear fruit at the beginning of 2011.

4 In a recent decision, the European Court of Justice clarified that the exclusion spelled out in Article 1.2 is limited to arbitration proceedings *per se*, but does not include actions before national courts relating to arbitration. See *Allianz SpA, Generali Assicurazioni Generali SpA v. West Tankers Inc.*, European Court of Justice, Grand Chamber, Case C-185-07, Judgment of 9 February 2009.

5 Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 21 April 2009, COM(2009) 175 final, item 7, pp8-9.

6 French Committee on Arbitration, Re: EC Green Paper on proposed modifications of Regulation 44/2001, 15 June 2009.

Arbitration developments in local courts

A number of decisions relevant to international arbitration were rendered recently by French courts. Many of them have reaffirmed well-established principles, such as the absence of review of the merits of arbitral awards by domestic courts. We rather focus below on four decisions which are innovative or constitute important developments.

i Independence of arbitrators

On 12 February 2009, the Paris Court of Appeal set aside an ICC partial award on the grounds that the tribunal had not been properly constituted.⁷ This is one of the infrequent instances in which a French court has set aside an ICC award. In that case, the chairman disclosed that during the year prior to his appointment as chairman, two foreign offices of the international law firm where he worked as counsel had represented the parent company of the claimant in the arbitration. The chairman further stated that this representation was terminated at the time of his appointment and that he had never personally worked for that client. The respondent filed a challenge against the chairman for an alleged lack of independence before the ICC. That challenge was rejected as time-barred under Article 11(2) of the ICC Rules. The respondent apparently learned several years later – the arbitration was still pending – and fortuitously that the relationship between the claimant and the chairman’s law firm was ongoing, although the chairman may have been unaware of it. The respondent raised the point in the arbitration and, after some verifications, a series of additional disclosures was made by the chairman, revealing certain ties between the law firm and certain companies of the claimant’s group, including in a pending litigation. The respondent continued to participate in the arbitral proceedings but expressly reserved its rights.

Faced with the question of the chairman’s independence and impartiality and with the proper constitution of the tribunal in the course of a challenge against the award, the Paris Court of Appeal stated that ‘the arbitrator must reveal to the parties any circumstance of such a nature as to affect his judgment and raise in the eyes of the parties a reasonable doubt as to his qualities of impartiality and independence, which are the very essence of the arbitral function’. The court added that ‘the trust relationship between the arbitrator and the parties must continuously be preserved and, thus, the parties must be kept informed throughout the entire arbitral proceeding of any relationships which could in their opinion influence the arbitrator’s judgment and impair his or her independence’. The court observed in particular that the fact that the chairman’s law firm employed over 2,200 lawyers across the world was no excuse for his failure to disclose.

ii Estoppel

Estoppel was introduced as a concept of French law of international arbitration in 2005. The Court of Cassation ruled that a party who had participated as a claimant in proceedings before the Iran–US Claims Tribunal for more than nine years was estopped from raising before French courts the inexistence or invalidity of the arbitration

7 CA Paris, 12 February 2009, Case No. 07/22164.

agreement.⁸ This case followed an earlier line of international cases, going back to *Amco Asia Corporation and others v. Republic of Indonesia*.⁹ Although not framed in terms of estoppel, French case law also holds that a party who has failed to contest the validity of an arbitration clause, or to raise any other procedural defence before the arbitral tribunal which could be raised at that time, is prevented from raising such a defence in a subsequent challenge against the award.¹⁰ Other decisions citing estoppel as a ground for refusing to hear a party's argument were rendered by French courts in 2009,¹¹ but estoppel remained a somewhat vaguely defined concept under French law.

On 3 February 2010, the Court of Cassation clarified the conditions of estoppel in relation to international arbitration, highlighting the concept familiar to lawyers raised in the common law tradition of 'detrimental reliance'.¹² In that case, an award was challenged on the ground that a party to the arbitration did not have the opportunity to respond to an additional brief filed by the other side. The Paris Court of Appeal dismissed the challenge, finding that the party complaining that it had not had an opportunity to reply had in fact filed a brief in reply and was presented with an opportunity to address any new arguments at the arbitral hearing. In addition, none of the parties objected to a procedural order rendered by the arbitral tribunal stating that both parties had fully addressed the claims raised in the additional brief. Finally, the parties signed without reservation the transcript of the arbitral hearing which closed the record. The Court of Appeal thus concluded that the complaining party was estopped from claiming that it had been prevented from fully responding to the other side's additional brief during the arbitral proceedings.¹³ However, the Court of Cassation overturned this decision and did not see a case for estoppel. France's highest judicial court found that the party's procedural conduct did not amount, in law, to a change in position that could have led the other side to erroneously believe that that party's intentions had changed. As a result, there had been no detrimental reliance of a party on the other party's position and, thus, no possibility to apply the theory of estoppel.

8 Civ. 1, 6 July 2005, Case No. 01-15912.

9 ICSID Case No. ARB/81/1.

10 Civ. 1, 31 January 2006, Case No. 03-19054; CA Paris, 15 October 2009, Case No. 07/17049. Similarly, in a series of recent decisions, the Paris Court of Appeal refused to set aside awards rendered in consolidated arbitrations, ruling that the arbitral tribunal was not improperly constituted where the parties had filed consolidated submissions and failed to object to consolidation during the arbitral proceedings. See CA Paris, 22 October 2009, Case No. 08/13030; 5 November 2009, Case No. 2008/23600; 17 December 2009, Case No. 08/15208.

11 Civ. 1, 6 May 2009, Case No. 08-10281. The report of Mr Boval, Conseiller Rapporteur, Cass. Plen. Ass. 27 February 2009, Case No. 07-19841, notes in that regard the complexity and various elements of the concept of *estoppel*, which was created for a legal system very different from the French system. It is also well-known that, under common law systems, the concept of estoppel is itself made of many different subcategories, each having different conditions of application.

12 Civ. 1, 3 February 2010, Case No. 08-21288.

13 CA Paris, 9 October 2008, Case No. 07/06619.

iii ICC

On 22 January 2009, the Paris Court of Appeal held that the exclusion of liability included in Article 34 of the 1998 ICC Rules of Arbitration¹⁴ was unenforceable as a matter of French law – which the Court held to be applicable because the ICC’s services are performed in Paris – because it would allow the ICC to avoid performing its essential duties as a non-judicial service provider.¹⁵ Thus, the Court established that the ICC could be found liable under French law for breach of its obligations arising out of its contractual relationship with the parties to the arbitration. However, it concluded that the ICC had breached none of its obligations in that case.

iv International arbitration and French public entities

On 17 May 2010, the *Tribunal des Conflits*, which, as previously explained, resolves jurisdictional difficulties between the French judicial and administrative court systems, rendered a much-awaited decision regarding international arbitration and French public entities.¹⁶

The case involved a contract for the construction of public works between a French public institution for medical research (‘INSERM’) and a Norwegian foundation, containing an arbitration clause. Arbitral proceedings were initiated and an award was rendered against INSERM. INSERM then attempted to set aside the award, before both the French judicial and administrative courts. Before the latter, INSERM invoked the administrative nature of the contract and the prohibition against arbitration for public entities. In the meantime, the Court of Appeal – a judicial as opposed to administrative court – considered that it was competent to hear the challenge against the award and refused to stay the proceedings pending a decision of administrative courts.¹⁷ The Council of State, the highest French court in administrative matters, decided to refer to the *Tribunal des Conflits* the question of which among judicial or administrative courts had jurisdiction to hear the challenge against the award.¹⁸

The general rule under French law is that public entities or corporations cannot have recourse to arbitration.¹⁹ There is, however, a series of important exceptions to this rule. In particular, the Court of Cassation has long held that prohibition to be inapplicable

14 ‘Neither 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.’

15 CA Paris Case No. 07-19492.

16 *Tribunal des Conflits*, Case No. 3754.

17 CA Paris, 13 November 2008, Case No. 08/00760.

18 Council of State, joint decision of the 7th and 2nd subsections, 31 July 2009, Case No. 309277.

19 Article 2060 of the French Civil Code: ‘One may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public entities and institutions and more generally in all matters in which public policy is concerned.’

where the interests of international trade are at stake.²⁰ Yet, the Council of State traditionally considered that there could be no recourse to arbitration if the contract is of an administrative nature, irrespective of its international character. This was set out with particular force in a *Euro Disney* opinion in 1986.²¹ Certain types of administrative contracts, such as public–private partnerships (‘PPPs’) can also include arbitration clauses.

In the 17 May 2010 *INSERM* decision, the *Tribunal des Conflits* retained the principle that when a contract is administrative in nature and at the same time ‘involves the interests of international trade’, any challenge against an award made under such a contract will normally fall within the jurisdiction of judicial courts (i.e., ultimately, the Court of Cassation). This was the practical outcome in this case; yet, the *Tribunal des Conflits* reserved a certain number of exceptions, when the case raises a question of conformity of the award with certain imperative rules of French public law: (1) when rules dealing with the occupancy of the public domain are involved; (2) as regards public procurement in the context of public contracts; (3) and (4), when partnership agreements (such as PPPs) and contracts for the delegation of a public service, respectively, are involved. When these – fairly broad – exceptions apply, any challenge against the award will have to be brought before administrative courts, and ultimately before the Council of State, regardless of whether the contract involves the interests of international trade.

Investor–state disputes

Two cases deserve mention here. First, the Paris Court of Appeal ruled for the first time in 2008 on a challenge against an award which had been rendered on the basis of a bilateral investment treaty.²² The challenge, brought by the Czech Republic, was denied.

The dispute arose out of a 1996 construction and lease contract concluded between a Czech company, ZIPimex (owned by Mr Pren Nreka, a Croatian national) and a branch of the Czech Ministry for Youth, whereby ZIPimex undertook to renovate a floor in a building owned by the Ministry and to enter into a commercial lease agreement for 15 years. In 2002, the Ministry decided to use the building for itself as office space and asked ZIPimex to vacate the premises. ZIPimex refused and the Ministry obtained from the local courts an order declaring the 1996 contract null and void on various technical grounds. ZIPimex eventually had to leave the premises in 2004.

The arbitration was based on the bilateral investment treaty of 5 March 1996 concluded between Croatia and the Czech Republic and was conducted under the UNCITRAL Arbitration Rules. The tribunal had fixed Paris as the place of arbitration. The Czech Republic raised jurisdictional objections, arguing that the claimant had failed to make an investment in the Czech Republic within the meaning of the bilateral investment treaty. The arbitral tribunal rejected the objections and, on the merits, found that the Czech Republic had breached its obligations to accord fair and equitable treatment to the investor under the treaty.

20 Civ. 1, 2 May 1966, Bull. Civ. No. 256.

21 Opinion of 6 March 1986, Case No. 339710.

22 CA Paris, 25 September 2008, Case No. 07/04675.

The Czech Republic challenged the award before the Paris Court of Appeal on three grounds: the absence of an arbitration agreement, the violation by the arbitrators of their mission and the violation of international public policy. None of these grounds succeeded. First, the Court of Appeal found that the parties had consented to arbitrate their dispute (the Czech Republic by signing the bilateral investment treaty and Mr Pren Nreka by filing a request for arbitration) and that there was an investment within the meaning of the bilateral investment treaty, which defines ‘investment’ in broad and non-exhaustive terms and includes ‘any contractual rights.’ Second, the court refused to re-examine the merits of the award, noting that it was for the arbitrators to decide whether or not the judgment rendered by the Czech courts violated the provisions of the bilateral investment treaty and that French judges did not have the power to review the arbitral tribunal’s decision and reasoning in that respect. Third, the court ruled that there was no violation of international public policy since the award did not impair the Czech Republic’s right to initiate actions before the local courts, provided such actions were not abusive. This decision sends a strong signal to investors and states that non-ICSID arbitral awards rendered pursuant to a bilateral investment treaty will not be easier to overturn in France than traditional commercial arbitral awards.

Second, a partial award was rendered against France and the United Kingdom in 2007 in the arbitration launched by the companies exploiting the Channel tunnel, concerning the question of clandestine immigrants.²³ The arbitral tribunal determined it had jurisdiction to hear the case and found that the French and British governments were liable for their failure to maintain conditions of normal security and public order in and around the relevant terminal. This case is quite unique since it was brought under the Canterbury Treaty and involves two states as respondents.

III OUTLOOK AND CONCLUSIONS

French international arbitration law has been a major reason for the success of France as a place of arbitration. The great deference accorded by courts to the arbitral process is unlikely to change and there is every reason to believe that France, and in particular, Paris, will continue to remain an attractive venue for international arbitration; this can already be seen with the increasing number of ICSID cases that are being heard in Paris. The developments coming from the European Commission highlighted above should be closely monitored, however, as they could present particular challenges not only for international arbitration in France, but throughout the EU.

23 *The Channel Tunnel Group Limited, France-Manche SA v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland, Le Ministre de l’Équipement, des Transports, de l’Aménagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République française*, PCA, partial award of 30 January 2007.

JEAN-CHRISTOPHE HONLET

Salans LLP

Jean-Christophe Honlet is a partner in the Paris office of Salans and the co-head of its international arbitration practice. He has over 16 years' experience in representing multinational companies and States in international commercial and investment treaty arbitrations conducted before most leading arbitral institutions, under a variety of laws. He was educated at Ecole Supérieure des Sciences Economiques et Commerciales (ESSEC), the University of Paris I Pantheon Sorbonne and the University of Oxford. He is a member of the Paris Bar.

BARTON LEGUM

Salans LLP

Barton Legum is a partner in the Paris office of Salans and the head of its investment treaty arbitration practice. He has over 20 years' experience in litigating complex cases and has argued before numerous international arbitration tribunals, the International Court of Justice and a range of trial and appeals courts in the United States. His practice focuses on international arbitration and litigation in general and arbitration under investment treaties in particular. From 2000 to 2004, he served as chief of the NAFTA Arbitration Division in the Office of the Legal Adviser, United States Department of State. In that capacity, he acted as lead counsel for the United States government defending over \$2 billion in claims submitted to arbitration under the investment chapter of the North American Free Trade Agreement ('NAFTA'). The United States won every case decided under his tenure. Bart was educated at Rice University, the University of Georgia School of Law and the University of Paris II Pantheon Assas. He is a member of the Paris and New York Bars.

ANNE-SOPHIE DUFÊTRE

Salans LLP

Anne-Sophie Dufêtre is an associate in the Paris office of Salans and concentrates on international arbitration and litigation. She graduated from McGill University (Canada) and the Graduate Institute of International Studies in Geneva. She is a member of the Paris and New York Bars.

SALANS LLP

22/F, Park Place Office Tower
1601 Nanjing West Rd
Shanghai 200040
PR China
Tel: +86 21 6103 6000
Fax: +86 21 6103 6011
bhorrigan@salans.com

Platněřská 4
110 00 Prague 1
Czech Republic
Tel: +420 236 082 111
Fax: +420 236 082 999
prague@salans.com

5 boulevard Malesherbes
75008 Paris
France
Tel: +33 1 42 68 48 00
Fax: +33 1 42 68 15 45
jhonlet@salans.com
blegum@salans.com
135 Abylai Khan Ave
050000 Almaty
Kazakhstan
Tel: +7 727 258 23 80
Fax: +7 727 258 23 81
akenjebayeva@salans.com
ymitrofanskaya@salans.com

General C Budisteanu 28-C
010775 Bucharest
Romania
Tel: +40 21 312 4950
Fax: +40 21 312 4951
tcsaki@salans.com

36 Moika Embankment
St Petersburg 191186
Russia
Tel: +7 812 325 84 44
Fax: +7 812 325 84 54
mivanov@salans.com

www.salans.com