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The Recognition and Enforcement of International Arbitral Awards in French Law

Introduction

Legal commentators increasingly have regarded international arbitration[1] as a particularly suitable method of resolving private international commercial disputes. They applaud its basic purpose[2] the resolution of commercial controversies in a setting which gives primacy to commercial flexibility and

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[1]For purposes of this paper, the legal effect of arbitration clauses should be described and a distinction should be drawn between foreign and international arbitration.

A contract clause which provides that the parties will submit all future disputes which arise under the contract to arbitration is a private contractual agreement. It has two principal legal consequences: (1) it removes the dispute from the jurisdiction of an otherwise competent court of law, and (2) it gives the arbitrators named in the agreement or to be named subsequently in the event of a dispute the authority to rule upon the dispute.

The distinction between foreign and international arbitrations is crucial to the litigation of arbitral awards. Depending upon the character of the arbitration different rules apply to the arbitral procedure and different standards of scrutiny are used to assess the enforceability of the arbitral decision.

A foreign arbitration is characterized by the fact that its procedure and subject matter are tied to the law of a foreign country. It requires the intervention of French private international law only when its recognition and enforcement are sought in France. An international arbitration either involves an international subject matter or its procedure is governed by the provisions of an international arbitral convention or the regulations of an international arbitral institution.

The test to determine the foreign or international character of an arbitration involves the consideration of five factors:

(1) the nationality of the arbitrators;
(2) the nationality or domicile of the parties;
(3) the place of arbitration;
(4) the law which governs the arbitral procedure;
(5) the nature of the subject matter to be submitted to arbitration.

Of these factors, the last unquestionably is the most important. As a general rule, if the subject matter of the arbitration is international in scope, it will be deemed to be an international arbitration. The other four factors are of minimal importance in the assessment of the character of an arbitration.

For a detailed discussion of this distinction, see Goldman, *Arbitrage (Droit International Privé)* §§ 17-21 in ENCYCLOPEDIE DALLOZ (1967) [hereinafter cited as Goldman]. *See also* Société Cofrapar c. Société Schiaffino (Cr. de Cass., 11 Jan. 1972), *noted in* 99 CLUNET 621 (1972).

[2]Henri Motulsky explains the evolution of international arbitration in these terms:

minimizes the applicability of national legal rules. The viability of international arbitration as a method of resolving commercial disputes has been assessed by the courts of national legal systems in cases seeking the enforcement of arbitral awards.[3]

The purpose of this paper is to provide an outline of the basic principles of French law concerning international arbitration. A description of the current status of the law is supplemented by an analysis of its evolution and speculation as to its future developments. The paper is divided into three parts: Part 1 contains a description of a hypothetical case involving an international arbitral award; Part 2 provides an outline of the general criteria for the recognition and enforcement of such awards; and, in Part 3, the hypothetical case is analyzed from the perspective of an attorney seeking to advise a party seeking to contest the enforceability of the award. The novelty of the hypothetical case accentuates the limitations of the existing law and points to its probable development.

[T]rois courants d'idees . . . expliquent . . . [la fortune véritablement progieuse [sic]] . . . de l'arbitrage dans le domaine international. La complexité et la rigidité de l'agencement des concepts, des lois et des organes juridictionnels internes permettent difficilement au droit international privé de répondre aux attentes du commerce international. . . . La réticence s'accroît-deuxième considération—lorsque des relations se nouent entre des parties évoluant dans l'orbite d'*ideologies* différentes; les sont alors hantées par law crainte de voir, en cas de différend porte devant les tribunaux, la balance pencher à *priori* en faveur du national. Cette appréhension—et ceci fait apparaître la troisième idée à mettre en avant—n'existe pas, ou du moins est facilement écartée en présence de la jurisdiction arbitrale; il faut croire que les milieux économiques d'un pays donné font plus volontiers confiance à leurs pairs qu'aux magistrats étrangers. Le phénomène . . . prouve que l'économique prend le pas sur la politique et que le commerce international tend vers la formation d'une communauté interétatique à laquelle l'arbitrage offre un régime juridique aisé à manier. . . .

H. MOTULSKY, ECRITS: ETUDES ET NOTES SUR L'ARBITRAGE 295-96 (1974) [hereinafter cited as MOTULSKY].

[3]For purposes of this paper, there are three sources of arbitration law: (1) French domestic law; (2) international arbitral conventions; and (3) private law sources. The French code provisions which apply to the hypothetical problem are outlined at the beginning of Part 2 of the text. The critical provisions include Article 1028 of the Code of Civil Procedure and Title XVI of the Law of 5 July 1972. The hypothetical problem does not fall under the provisions of either international or bilateral arbitral conventions. There are four international conventions: (1) the Geneva Protocol of 24 September 1923; (2) the Geneva Convention of 26 September 1927; (3) the New York Convention of 10 June 1958; and (4) the European Convention of 21 April 1961. In his article, Goldman gives extensive coverage to the provisions of these various international conventions. Compagnie de St-Gobain c. Fertilizer Corporation of India Ltd. (Trib. G. I. Paris, 15 May 1970), *noted in* 98 CLUNET 312 (1971) was the first case to interpret the 1958 New York Convention. For a list of the bilateral conventions, see Goldman § 37. For a statistical breakdown of the various conventions, see Goldman 139-142. The private law sources relating to arbitration have a greater bearing on this paper. They include:

(1) arbitral-like conventions of private corporations;
(2) arbitral clauses in the statutes of international organizations;
(3) the regulations of international arbitral institutions; and
(4) arbitral decisions.

For a more detailed discussion, see Goldman §§ 40 & 41. For a discussion of the application of these sources, see *id.* §§ 42-49. *See also* J. Rubellin-Devichi, L'ARBITRAGE §§ 179-185 (1965) [hereinafter cited as Rubellin-Devichi].

Part I. The Hypothetical Case

On 19 November 1976 D & B Ltd., a nationalized British concern which manufactures rocket parts, entered into a contract with T & F S.A., a nationalized Spanish concern which supplies rocket parts to U.S. military installations on Spanish soil.

The contract provided that D & B Ltd. would sell and T & F S.A. would buy 45,000 BTF21-2 components. The price of the merchandise was set at £200,000,000 or its equivalent in another European currency. The components were to be manufactured at D & B Ltd.'s factories in Pecq, France, and to be shipped directly from France to Spain.

The contract also contained an arbitration clause which provided as follows:

1. Future disputes arising under this private commercial transaction will be resolved through arbitration;
2. The arbitration will take place in Paris under the aegis of the International Chamber of Commerce (ICC);
3. The regulations of the ICC will govern the arbitral proceeding;
4. The substantive principles of French law will govern the contract;
5. Each party will name one arbitrator; these two will, in turn, designate a third arbitrator;
6. At least one arbitrator will be of French nationality, but none of them will be of either English or Spanish nationality.

On 19 December 1976, D & B Ltd. unilaterally rescinded the contract. It alleged that:

1. The decline of the English pound had rendered its performance impossible.
2. The recission of the principal contract rendered the arbitration clause void;
3. In any case, the arbitration clause had never been valid since D & B Ltd. lacked the capacity to make such an agreement because of its status as a public entity.

D & B Ltd. also indicated that it refused to name an arbitrator and to honor T & F S.A.'s request that the dispute be submitted to the ICC arbitral tribunal in Paris.

T & F S.A. unilaterally submitted the dispute to the ICC. The ICC named three arbitrators according to its regulations; all of the arbitrators were of French nationality. Notice of the ensuing arbitral proceeding was sent to D & B Ltd., which failed to make an appearance. After considering the terms of the contract and other relevant evidence, the arbitral tribunal issued its decision. Its decision read as follows:

1. Citing the well-established principle of the legal autonomy of the arbitration clause, the arbitrators ruled that D & B Ltd.'s unilateral recission of

the contract did not invalidate the arbitration clause;

2. D & B Ltd., regardless of its status as a public entity, could and did enter into the agreement in its private commercial capacity;
3. As a consequence, the arbitration clause was valid and gave the arbitral tribunal jurisdiction to rule upon the dispute;
4. The allegation that the decline of the pound rendered its performance impossible was not a sufficient ground upon which to justify D & B Ltd.'s unilateral recission of the contract;
5. Citing international arbitration practice concerning the measure of damages, the tribunal held that, as a general rule, the injured party was entitled to damages which amounted to the contract price less a reasonable amount for mitigation of damages;
6. In this case, the special nature of the product had prevented the injured party from selling it to another party. Therefore, T & F S.A. was entitled to the full contract price;
7. Citing the language of the contract, the tribunal held that the contract price was to be paid in French francs. Noting that equitable considerations influenced the decisions of international arbitral tribunals, it held further that the parity rate between the French franc and the English pound should reflect an accommodation between the official parity rate at the time of the signing of the contract and the date of delivery. The tribunal determined that for the purposes of this transaction one English pound would be worth 6.5 French francs. The amount of damages would be fixed at that rate.

Two days later, a copy of the arbitral was sent to the *President du Tribunal de Grande Instance* in Paris. An *ordonnance d'exequatur* was issued the next day giving executory effect to the decision. D & B Ltd. subsequently sent a telex to its Paris counsel in which it stated that it wanted to contest the enforcement of the arbitral award.

Part II. General Criteria for the Recognition and Enforcement of International Arbitral Awards

The Relevant Provisions of French Law

Three articles of the Code of Civil Procedure[4] apply to the recognition and enforcement of international arbitral awards. Article 1020[5] requires that one member of the arbitral tribunal submit a copy of the award to the *President du*

[4]NOUVEAU CODE DE PROCEDURE CIVILE ET CODE DE PROCEDURE CIVILE (Dalloz, 62nd ed. 1976) [hereinafter cited as C. PR. CIV.].

[5]"*Art. 1020.* Le jugement arbitral sera rendu exécutoire par une ordonnance du président du tribunal de grande instance dans le ressort duquel il a été rendu: à cet effet, la minute du jugement sera déposée dans les trois jours, par l'un des arbitres, au greffe du tribunal." C. PR. CIV. at 447.

Tribunal de Grande Instance in whose jurisdiction the tribunal sat. This article provides further that the copy must be submitted no more than three days after the award was rendered. Article 1021[6] provides that the award will be executory once the *President du Tribunal de Grande Instance* has issued an *ordonnance d'exequatur* to that effect. Article 1028[7] contains five grounds upon which the *ordonnance d'exequatur* will be denied. The award will not be executory:

1. if it was not based upon an arbitration clause or if it went beyond the provisions of the relevant arbitration clause;
2. if it was based upon an expired or invalid arbitration clause;
3. if it was rendered by a group of arbitrators who did not have jurisdiction to rule upon the dispute in the absence of other arbitrators;
4. if it was rendered by a third arbitrator who did not consult with the other arbitrators who had reached conflicting opinions;
5. if it was rendered on a matter other than the one in dispute.

A party can contest the validity of the *ordonnance d'exequatur* on these grounds only before the court which rendered the award executory.[8] If the contesting party is successful, the executory effect of the award will be suspended.[9] A party is allowed to challenge the jurisdiction of the arbitral tribunal and raise public policy concerns only in an appeal proceeding in which the validity of the arbitral award is called into question directly.[10] The relevant provisions of the law of 5 July 1972 define the public policy concerns; they prohibit the State from entering into arbitration agreements and prohibit arbitration agreements on all matters which are part of *l'ordre public.*[11]

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[6]"*Art. 1021.* Les jugements arbitraux, même ceux préparatoires, ne pourront être exécutés qu'après l'ordonnance qui sera accordée, à cet effet, par le président du tribunal, au bas ou en marge de la minute, sans qu'il soit besoin d'en communiquer au ministère public; et sera ladite ordonnance expédiée en suite de l'expédition de la décision.

"La connaissance de l'exécution du jugement appartient au tribunal qui a rendu l'ordonnance." C. PR. CIV. at 448.

For a discussion of the authority and role of the French judge in an *exequatur* proceeding, see, *e.g.*, Rubellin-Devichi, §§ 455-474.

[7]"*Art. 1028.* (Decr. N° 75-1122 du 5 déc. 1975, art. 19) 'Il ne sera besoin de se pourvoir par appel ni recours en revision dans les cas suivants':

"1° Si le jugement a été rendu sans compromis, ou hors des termes du compromis;

"2° S'il l'a été sur compromis nul ou expiré;

"3° S'il n'a été rendu que par quelques arbitres non autorisés à juger en l'absence des autres;

"4° S'il l'a été par un tiers sans en avoir conféré avec les arbitres partagés;

"5° Enfin, s'il a été prononcé sur choses non demandées.

"Dans tous ces cas, les parties ne pourvoiront par opposition à l'ordonnance d'exécution, devant le tribunal qui l'aura rendue, et demanderont la nullité de l'acte qualifié jugement arbitral." C. PR. CIV. at 450.

[8]*Id.* n.n. 1 & 2. For a dated but useful discussion of the appeals procedure, see, *e.g.*, Rubellin-Devichi §§ 484-515.

[9]C. PR. CIV. n.3 at 450-51.

[10]*Id.* n.12 at 451.

[11]Previously, the general prohibition was contained in Articles 1003 and 1004 of the *Code of*

Issues Critical to Litigation

An international arbitral award will be contested only rarely on the grounds provided for in Article 1028.[12] These grounds permit a party to contest the award only if the arbitrators have committed an obvious fault. In the great majority of cases, parties contest the award on appeal where they have an opportunity to raise more critical legal questions:

1. the *ab initio* validity of the arbitration clause, i.e., whether the parties had the capacity to enter into an arbitration agreement and whether the subject matter of the contract was "arbitrable";
2. whether the arbitration clause was valid once the principal contract had been rescinded;
3. whether the arbitrators had jurisdiction to rule upon the dispute;
4. whether the law which governed the arbitral procedure and the substance of the contract was determined correctly;
5. whether the arbitrators were under an obligation to render a reasoned decision, and whether the decision as rendered was violative of public policy concerns.[13]

1. "AB INITIO" VALIDITY OF THE ARBITRATION CLAUSE

International arbitrators have considerable discretion in ruling upon the *ab initio* validity of the arbitration clause. It is a well-settled rule that they have exclusive jurisdiction to rule upon the general validity of the arbitration clause and upon the extent of their own jurisdiction.[14] As a corollary to their exclusive jurisdiction, they also have the authority to decide whether or not the dispute in question constitutes an "arbitrable" subject matter.[15] As a general rule, disputes which arise under contracts dealing with purely private commer-

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Civil Procedure (*see* 1971 ed.). These articles were abrogated by Law N° 72-626 of 5 July 1972. The relevant provisions of Title XVI "Du Compromis" of that law reads as follows:

"*Art. 2059.*—Toutes personnes peuvent compromettre sur les droits dont elles ont la libre disposition.

"*Art. 2060.—On ne peut compromettre sur les questions d'état* et de capacité des personnes, sur celles relatives au divorce et à la separation de corps ou sur les contestations intéressant les collectivités publiques et les établissements publics *et plus généralement dans toutes les matières qui interessent l'ordre public.* (emphasis added)

"*Art. 2061.*—La clause compromissoire est nulle s'il n'est disposé autrement par la loi.

[1972] J. O. 7181, 7182; [1973] D.S.L. 10, 11.

[12]No case has been found in which an international arbitral award was contested on these grounds. The sources that were consulted are the following: CLUNET 1970-76; R.C.D.I.P. 1970-76; Goldman, *Les Conflits De Lois Dans L'Arbitrage International De Droit Privé,* RECUEIL DES COURS 351 (1963-II); MOTULSKY; Rubellin-Devichi.

[13]*See* Goldman § 251; MOTULSKY §§ 32-35; Rubellin-Devichi §§ 137-176.

[14]*See* Derains, *Chronique des sentences arbitrales* (Case N° 2321), 102 CLUNET 916 (1975); Goldman §§ 121-142; MOTULSKY §§ 32, 34; Rubellin-Devichi §§ 312-357.

[15]*See, e.g.,* Goldman §§ 125-128.

cial interests and parties will be deemed to be "arbitrable."[16] As between private parties to an international contract, the issue of the capacity to contract at best constitutes only a theoretical ground for challenging the *ab initio* validity of the arbitration clause.[17] In practice, parties usually will be cognizant of their legal capacity or incapacity to agree to an arbitration clause.

These two grounds are invoked most successfully by national governments under their sovereign immunity privileges. At least in theory, a State, when it rescinds a contract which it has entered into with a private party, can refuse to be bound by its promise to arbitrate the dispute.[18] French law does prohibit the State from arbitrating on all matters of State interest.[19] Under French law, a government, then, can allege that it lacked the capacity to contract or that the subject matter of the contract was not "arbitrable."[20] Special rules, however, have been created by the French courts for the application of this general prohibition to matters of private international commerce. The *Cours de Cassation,* recognizing the disadvantageous position in which this general prohibition placed private parties, limited its application to French domestic matters.

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[16]*Id.* at §§ 118-128. As a matter of general information, it should be pointed out that a valid arbitration clause need not name the arbitrators specifically. In fact, it is a common practice for the parties to authorize an arbitral institution to name the arbitrators. If, however, the parties specifically name the arbitrators, the law governing the arbitration clause is applied to disputes concerning their qualifications. If the arbitrators are named pursuant to the provisions of the arbitration clause, the law governing the procedure of the arbitration then would be applied to controversies concerning their qualifications to preside. Finally, the terms of the arbitration clause usually will give the arbitrators jurisdiction to rule upon the dispute as defined by the arbitration agreement.

The arbitral tribunal's decision concerning the validity of the arbitration clause must be based upon the law which either it or the parties have designated as governing the arbitration clause. When the arbitrator is empowered to choose the governing law, his choice will be arbitrary, *i.e.,* it will be calculated to have the award enforced in the future.

For a general discussion of these points, see *id.* at §§ 118-128. *See also* MOTULSKY § 34.

It also should be noted that the issues of the capacity to contract and the "arbitrability" of the subject matter take on special legal significance when a State is involved in the litigation (see discussion immediately below in text).

[17]The sources consulted reveal no such cases. For a list of the sources consulted, see note 12 *supra.*

[18]There is no question but that the doctrine is applicable to State-to-State relations where the parties to the contract are on an equal footing. As the French courts have recognized, there is an obvious injustice when the doctrine is applied to a situation in which the State is engaging in a purely private international commercial venture and is dealing with a private party. In such a situation, the protection that the doctrine affords the State is not necessary, nor can it be presumed that the private party assumed this risk in dealing with a State. *See* Derains, *supra* note 11 (Case No. 2321); Goldman at §§ 72-82; MOTULSKY at § 33; Rubellini-Devichi §§ 83-100. For a more detailed discussion of this issue, see the discussion in the text immediately below.

[19]*See* substance of note 11 *supra.*

[20]*See, e.g.,* Yougoslavie c. Société Europèene d' Etudes d'Enterprises (Trib. G. I. Paris, 6July 1970 (Ct. d'Appel Paris, 29 Jan. 1975), noted in 98 CLUNET 131 (1971), 103 CLUNET 137 (1976). In this case, the court held that the arbitrators could not call into question an intergovernmental transactional agreement; an arbitral decision which did so violate *l'ordre public.* For a discussion of the distinction between an arbitral decision which touches directly and one which touches only indirectly upon *l'ordre public,* see Goldman §§ 254-263.

In the *Galakis* case,[21] the court, in fact, created *règle matérielle* which provided that the government would be bound by its promise to arbitrate in matters of private international commerce. This holding reflected an enlightened view of the doctrine of sovereign immunity and a perceptive understanding of the needs of international arbitration. It reflected the view that the State's immunity from suit had no place in private international commercial arbitration since the doctrine was designed to apply only to State-to-State relations. A doctrine which applies to the relations between sovereign States is particularly unsuitable to arbitration, since the latter is totally without the framework of any national legal system. The arbitrator renders justice neither according to the laws nor in the name of the State. He fulfills a function that has been invested in him by the private agreement of the parties.[22]

2. THE AUTONOMY OF THE ARBITRATION CLAUSE

In international arbitration, it is common for a party to allege that its recission of the principal contract also invalidated the arbitration clause. As a consequence, the arbitral tribunal, it is argued, is deprived of jurisdiction to hear the dispute. The French courts have been unwilling to allow such contentions to prevail. Since the landmark decision in *Gosset,*[23] it is well-settled law in France that, in an international contract,[24] the arbitration clause is legally autonomous and will not be invalidated by the recission or nullity of the principal contract.[25] Moreover, the decisions which have refined the *Gosset* doc-

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[21]Trésor Public co. Galakis (Cr. de Cass., 2 May 1966), *noted in* 93 CLUNET 648 (1966); 56 R.C.D.I.P. 553 (1967). *See also* Goldman at §§ 76-79; MOTULSKY at § 34.

[22]*See* Derains, *supra* note 11 (Case No. 2321). For a discussion of the legal effect of private arbitration agreements, see note 1 *supra*. It should be noted that this doctrine has been upheld, but it applies only to private international commercial transactions.

[23]Etablissements Gosset c. Carapelli (Cr. de Cas. 7 May 1963), *noted in* 52 R.C.D.I.P. 615 (1963); Goldman at §§ 51-53. *See* cases cited in note 21 *supra* for a discussion of the evolution of the law between *Gosset* and *Hecht & Menicucci.*

[24]The courts have provided a new method by which to define international contracts. The international character of a contract is no longer determined from its formal extrinsic elements, but rather from its subject matter. All contracts which "[mettent] in jeu les intérês du commerce international" ("bring into play the interests of international commerce" [Editor's translation]) are international in character. *See* Société Impex c. Sociétés P.A.Z., Malteria Adriatica, Malteria Tirrena (Cr. de Cass., 18 May 1971) (Cr. d'Appel Paris, 20 Jun. 1964), *noted in* 99 CLUNET 62 (1972), 98 CLUNET 119 (1971); Hecht c. Société Buisman's (Cr. de Cass., 4 July 1972), *noted in* 63 R.C.D.I.P. 82 (1974); S.O.C.E.A. c. C.A.P.A.G. (Cr. d'Appel Paris, 30 Nov. 1972), *noted in* 100 CLUNET 390 (1973); Menicucci c. Mahieux (Cr. d'Appel Paris, 13 Dec. 1975), *noted in* 65 R.C.D.I.P. 507 (1976).

[25]The *Gosset* doctrine is not a conflicts rule, but *une règle matérielle* of private international law. It applies exclusively to international arbitration, *i.e.*, an arbitration which is international either by its procedure or its subject matter. It, in effect, prohibits the French judge in an *exequatur* proceeding from applying a foreign law which would render the arbitration clause dependent upon the validity of the principal contract. The doctrine, therefore, allows the arbitration clause to be governed by a law other than the one which applies to the principal contract. For a more detailed discussion, see, *e.q.*, Goldman at §§ 50-85.

trine[26] have established that, in view of its autonomy, the arbitration clause will be considered valid independent of any reference to national law or to the intention of the parties. Its legality is predicated upon its stipulation in an international contract.[27]

3. THE ARBITRATORS' JURISDICTION

The courts will construe the terms of the arbitration clause strictly when questions arise as to the parties' intent to arbitrate and to submit certain disputes to arbitration.[28] Consequently, although international arbitrators are authorized to rule upon their own jurisdiction,[29] they also are placed under the constraint of construing the extent of their jurisdiction strictly. Their interpretation can be challenged both in an action contesting the validity of the *ordonnance d'exequatur* or on appeal.[30]

4. THE GOVERNING LAW

The conflicts of law system applied by most international arbitrators is founded upon a principle which is recognized by most national legal systems and international arbitral conventions.[31] This principle provides that the parties' intent is the decisive factor in the determination of the law that is to govern the procedure of the arbitration and the substance of the contract. In French private international law, it is well established that the law designated by the parties takes precedence over the law of the place of arbitration.[32] The law of the place of arbitration becomes relevant to the procedure of the arbitration and the substance of the contract only if the parties have failed clearly to designate the governing law.[33]

In practice, the parties often designate the regulations of an international arbitral institution as the law governing the procedure of the arbitration. In such instances, the national law may be applied to the arbitral procedure if the regulations of the institution so provide or if they have no regulations concerning the applicable procedural law.[34] It is, however, more common for the regulations to exclude completely the applicability of all national laws. In the event that a conflicts of law problem should arise, the regulations typically authorize the arbitrators to choose the applicable law.[35] In making their

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[26]*See* cases cited in note 24 *supra*.
[27]*See* Menicucci v. Mahieux, *supra* note 24.
[28]*See* Derains, *supra* note 14 (Case No. 2321).
[29]*Id.*
[30]*See* discussion in text at page 607 *supra*.
[31]*See, e.g.*, Goldman §§ 187-197.
[32]*Id.*
[33]*Id.*
[34]*Id.*
[35]*Id.*

choice, the arbitrators usually look to the most characteristic clauses of the contract to determine in which country the contract was "localized" or choose the laws of the country in which they sit.[36] If it is clear that the parties intended to bind themselves to an international contract (a strong indication of which is the "localization" of the proceeding under the aegis of an international arbitral institution), the arbitrators may decide that national law will not apply and, instead, will look to the general principles of commercial custom and practice to reach a decision in the case.[37] The only restriction upon the arbitrators' discretion is that they not violate international public policy concerns, *e.g., les droits de la défense.*[38]

Given the frequency of the practice of designating both the law which governs the arbitration procedure and the merits of the dispute, challenges on this ground are rare.[39]

5. THE REQUIREMENT OF A REASONED DECISION AND PUBLIC POLICY CONCERNS

Since the decision in the *Gerstle* case,[40] it is a well-established rule that an unreasoned decision of an international arbitral tribunal will not be violative *per se* of French private international law.[41] If the governing law dispenses with the requirement, the decision will be upheld. If, however, the governing law requires that the arbitral decision be reasoned, it will be upheld only if it complies with that requirement.[42] In any event, a valid unreasoned decision still can be challenged on the grounds of violation of public policy concerns, e.g., *droits de la défense.*[43] The French courts are adamant in providing guarantees for these rights and also actively scrutinize arbitral decisions for matters which are deemed to be within the unique concern of the French public authorities.

Summary and Conclusion

The survey of the rules of French law which relate to international arbitration reveals an unmistakable trend favoring the resolution of commercial disputes through arbitration. The doctrine proclaiming the legal autonomy of

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[36]*Id.*
[37]*Id.*
[38]*Id.*
[39]At least in theory, it is possible that the parties could designate one national law to govern the substance of the contract and another to govern the arbitration clause. This would create difficulties in characterizing the arbitration if, for example, the procedural law to be applied were German and the substantive law French.
[40]Gerstlé c. Sté Merry Hall et Cie. (Cr. de Cass., 22 Nov. 1966), *noted in* 11 *Semaine Juridique* 15318 (1968).
[41]*Id.*
[42]*Id.*
[43]*Id.*

the arbitration clause and the policy of the courts to review arbitral decisions primarily for violations of public policy concerns are clear testimonials to the strength of that trend.

However vigorous the support of international arbitration may be in French courts, key issues to the enforcement of international arbitral awards have yet to be presented in their strongest posture. Although the general doctrine of the courts concerning the sovereign immunity defense is clear, they have not considered a case in which that defense was linked simultaneously to a governmental activity and to a private commercial venture. Nor have the factual circumstances of the cases permitted the courts to define fully and precisely the extent of the arbitrators' discretion to fashion remedies in individual cases. The facts of the hypothetical case would allow the court to confront those issues and to sharpen the general rules of the existing law.

Part III. Evaluation of the Legal Issues Presented by the Hypothetical Case

Under facts of the present case, the arbitral decision can be contested on all of the traditional grounds of appeal. The client, however, should be advised that the success or failure of his case ultimately will turn upon its public entity defense and the argument that the arbitrators' decision violates French public policy concerns.[44]

Statement of the Corollary Arguments

The international scope of the contract[45] and the "localization" of the dispute which arose under it in an international arbitral institution makes the arbitration international in character. As a consequence, the court will apply a limited and flexible standard of scrutiny.[46]

The arbitral tribunal's ruling that the recission of the principal contract did not affect the validity of the arbitration clause will be upheld without question. The legal autonomy of the arbitration clause in an international contract is a well-settled principle and the facts of the present case cannot be distinguished profitably from those of the cases which established that principle.[47] The arbitral tribunal's jurisdiction to rule upon the dispute and the law that was applied to the procedure and substance of the contract are in strict conformity with the requirements set out by the parties. The ICC's nomination of the arbitrators, however, constitutes a deviation from clauses (5) and (6) of the ar-

[44]*See* discussion of these issues at page 616, *infra.*

[45]*See* discussion of distinction between foreign and international arbitrations in note 1 *supra.*

[46]*See* discussion of the present state of French law concerning international arbitrations on pages 608-613 and discussion at note 1 *supra.*

[47]*See* text at page 616 *supra.*

bitration clause.[48] It could be argued that the nomination procedures used by ICC effectively invalidate the entire arbitration since they did not reflect the precise intent of the parties. This argument is unlikely to persuade the court for four reasons. First, the general practice in international contracts is to allow the ICC considerable discretion in naming arbitrators so long as it follows its regulations.[49] Secondly, the client may have waived its right to insist upon the strict adherence to the terms of the arbitration clause by its initial refusal to name an arbitrator.[50] Thirdly, a recent case,[51] the legal posture of which is parallel to the present case, has reaffirmed the well-established principle of international commercial arbitration that arbitrators have the authority to rule upon their own jurisdiction. That case also made clear that the arbitration clause is construed strictly only when questions arise as to the intent of the parties to arbitrate and the type of disputes they wanted to submit to arbitration. Otherwise, a looser "consensualist" method of interpretation is applied.[52] Fourthly, the court would not give a minor deviation of this sort decisive importance in evaluating the enforceability of the arbitral award.

The fact that the award in question is a default judgment gives rise to another, but highly speculative, argument for the client. Although there are no explicit violations of defense rights in the case, i.e., the procedure was perfectly regular,[53] it could be argued that special rules which require more than adequate notice of the proceedings to the losing party should apply to default awards. For example, the party seeking the enforcement of the award could be required to submit evidence to the appeals court that the arbitral tribunal was presented with at least some of the opposing party's arguments, or that the defaulting party's reason for not appearing was not due to a financial or similar hardship. Possibly, a more stringent notice requirement could be applied to these cases. Such arguments, however, have not surfaced in the opinions or commentaries of previous cases, and the facts of the present case are ill-disposed to supporting the burden of the innovation they propose.

Although it would represent a rather exaggerated interpretation of the facts of the present case, it also could be argued that the client's recission of the contract constituted a case of *force majeure.* In order to be successful on this legal theory, the rescinding party must show that a completely unforeseeable in-

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[48] *See* text at page 605 *supra.*

[49] *See* Derains, *supra* note 14 (Case No. 2321).

[50] T & F S.A. was, then, the only party in a position to object to the ICC's deviation from the specific terms of the arbitration clause. The record discloses that no such opposition was made by T & F S.A.

[51] *See* Derains, *supra* note 14 (Case No. 2321).

[52] *Id. see also* Sté Italiban e. Sté Lux Air (Cr. d'Appel Paris, 14 Nov. 1975), *noted in* 103 CLUNET 429 (1976).

[53] *See* text at page 612 *supra* for requirements regarding the regularity of the arbitral procedure.

tervening act rendered its performance impossible.[54] The series of recent cases[55] dealing with this defense, however, demonstrates that its application is limited by a strict and classical concept of *pacta sunt servanda.*[56] As a general rule, it is the parties' responsibility to make provisions for circumstances which would render the execution of the contract impossible. If such provisions are absent, it is presumed that the parties have decided to assume the risk of such future events.[57] In a recent case,[58] which involved an international contract for the sale of oil, some of the parties rescinded the contract alleging that its performance had been rendered impossible because of (1) the fluctuation of oil prices after the signing of the contract, and (2) the opposition of its national officials due to the loss of currency that the transaction would entail. The tribunal, however, held that an informed party should have provided for the contingency of price fluctuations, and that the purpose of arbitration was not to create insecurity in business transactions but rather to assure the respect of contract arguments.[59] However burdensome the national legislative provisions may be to the performance of one party, the parties are presumed to have taken into account the effect of such legislation when drafting the contract.[60] Other cases[61] have upheld this restrictive view of the applicability of *force majeure,* demonstrating the hesitancy of the tribunals to apply it to any set of circumstances.[62] In the present case, there is indeed little to justify the application of this legal theory. The client's allegation that its performance was impossible is based upon the fluctuation of the pound on the world monetary market. Although the decline of the pound places a substantial financial burden upon the client, it does not render its performance completely impossible. Nor, given the recent history of the pound, was it an unforeseeable event.[63]

Statement of the Critical Arguments

The client's status as a public entity and the fact that the nature of its pro-

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[54]*See* Derains, *supra* note 14 (Cases No. 2216, 1782, 2139).

[55]*Id.*

[56]*Id.* (Case No. 2139).

[57]*Id.*

[58]*Id.* (Case No. 2216).

[59]*Id.* The tribunal added that there was a presumption that the parties would protect themselves explicitly against the risk of their activities. If such protective provisions were absent from the contract, it was presumed further that the parties excluded them with full knowledge and intent.

[60]*Id.* This case involved legislation which had been passed prior to the signing of the contract. Obviously, then, the impediment to the performance was not due to *force majeure,* but rather to the negligence of the breaching party. As a general rule, legislation concerning currency will not be considered as constituting a case of *force majeure* since the courts deem such legislation to be reasonably foreseeable.

[61]*See* Derains, *supra* note 14 (Cases No. 1782, 2478, 2139).

[62]*See* Derains, *supra* note 14 (Case No. 2478).

[63]It is surprising that the parties in the present case did not provide more explicitly than they actually did for an almost inevitable contingency. The provisions concerning the contract price were indeed ambiguous. This language, however, probably was the result of negotiations and probably was necessary to effectuate the signing of the contract.

duct creates a link between it and the British national defense effort is strong support for the contention that, because of the doctrine of sovereign immunity, it lacked the capacity to enter into an arbitration agreement and to be sued on the contract. As discussed above,[64] the applicability of the provisions of French law which prohibited the State from entering into arbitration agreements has been limited to domestic affairs.[65] The facts of the cases which established and upheld this doctrine[66] pointed to situations in which the State was acting clearly in a private commercial capacity.[67] They allowed the courts to discriminate easily between the purely commercial and the purely political, and to draw general limitations upon the privileges that flow from the doctrine of sovereign immunity. The facts of the present case point to a private commercial interest as well as to a strong link to a State's national defense. It is evident that the present case will force the courts either to draw more specific guidelines as to what constitutes private commercial activity on the part of a State or to hold that the sovereign immunity defense is controlling in the present case. Regardless of the apparent disclaimer in clause (1) of the arbitration agreement,[68] the client's commercial activity, the manufacture of rocket parts, is a direct link between it and the British national defense effort. In fact, the entire setting of the transaction suggests that it touched upon the NATO defense effort as well, i.e., both Britain and Spain are part of the alliance[69] and the apparent ultimate purpose of the contract was to supply rocket parts to American military installations on Spanish soil. Moreover, the client was dealing with a public entity of another country. Opposing counsel will make much of the language of clause (1) and will contend that it reflected the parties' intent to divest themselves of their alleged sovereign immunity status and to contract in their private capacities. He also will argue that if the client's sale and manufacture of rocket parts affects the national defense effort of any country, it is that of the United States,[70] a State which is not a party to the suit. Moreover, if the transaction had been for the NATO defense effort, it would have been concluded directly between sovereign powers and not in a private

[64]*See* text at page 609 *supra.*

[65]*See* discussion of *Galakis* case in text at note 20 *supra.*

[66]*See* cases cited in notes 20 & 21 *supra.*

[67]The cases involved purely private commercial activity which had no relation to the activity of the State as a political entity.

[68]*See* text at page 605 *supra.*

[69]To strengthen the NATO nexus argument, it should be emphasized that the component parts were to be shipped from France, a former member of the alliance. Also, the U.S. defense effort involved in this case appears to be more than national and to touch upon the alliance effort directly.

[70]*See* substance of note 68 *supra.* Although the issue of the requirement for a reasoned decision does not arise in this case, Krebs dite Grès c. Milton Stern (Cr. de Cass., 22 Jan. 1975), *noted in* 102 CLUNET 548 (1975) contains a useful discussion of the problems to which that issue gives rise. That opinion elucidates the role of the court in assessing an arbitral decision; it also makes a clear distinction between an interpretation which denatures a contract clause and one which simply misinterprets it.

commercial setting. Moreover, the British government's sole interest in the transaction is a general and remote economic interest, i.e., promoting the private international commercial transactions of its companies. French case law has deemed that to be an insufficient State interest to invoke the sovereign immunity defense. Ultimately, the court will have to assess the facts of the case in the light of these arguments and provide a definition of sovereign as opposed to commercial State activity.

The section of the arbitral tribunal's decision dealing with the measure of damages clearly is the most vulnerable part of the decision. It is evident that some parts of it are violative of French public policy concerns. It presents a more certain ground for attack since, unlike the sovereign immunity argument, it does not involve competing policy arguments or an interpretation of the facts of the case. It will not result, however, in the complete invalidation of the arbitral award. At best, the courts will sever what is technically unacceptable and retain the part of the measure of damages decision which is reasonable.

Clauses (5) and (6)[71] regardless of their substantive status in French law, will be upheld by the court since they constitute a measure of damages that has been consecrated by the past practice of international arbitrators.[72] However unacceptable the court may find the remainder of the damages decision to be, the client, if the sovereign immunity defense is not allowed by the court, will be obliged to pay something near the contract price in damages. Clause (7)[73] in some part, will probably be severed from the rest of the decision. The French court will scrutinize the decision closely because the arbitrators decided, as the contract language permitted, that the damages are to be paid in French francs. The other sections of clause (7) clearly violate the public policy concerns. Regardless of the arbitrators' equitable motivations, their setting of parity rates violates public policy in that such activity is within the sole domain of French public authorities.[74]

The outcome of the case cannot be predicted with any certainty. The decisive factor, of course, is the sovereign immunity defense. The courts have provided only the most general guidelines in assessing the viability of that defense. Given the initial private commercial setting of the transaction and its arguable link to national and international defense efforts, the present case will oblige the courts to clarify their definition of a State's private commercial activity. The facts of the case cut both ways on the issue and the court will have to draw the final line.

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[71] *See* text at page 606 *supra*.
[72] *See* Derains, *supra* note 14 (Case No. 2216) (re damages Holding).
[73] *See* text at page 606 *supra*.
[74] *See* relevant provisions of Law No. 72-626 of 5 July 1972 cited in note 11 *supra*.