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Introduction

1. The decisions of the French courts which we have selected for this first review of French case law on arbitration have been issued in the context of the review of awards under Article 1502 of the French Code of Civil Procedure. The grounds for reviewing/setting aside awards are the same as those for refusing to enforce an award rendered outside France. Such grounds are limited and may not be varied by agreement of the parties. [1] The grounds for reviewing an award are a) the absence of an arbitration agreement or where the arbitration agreement is void or has expired, b) the irregular composition of the arbitral tribunal, c) failure by the arbitrators to comply with their reference, or "*mission*" (which includes *ultra petita*, failure to act in accordance with the powers conferred on them by the parties, or to apply the relevant institutional rules), d) breach of due process, e) where recognition or enforcement of the award would be contrary to international public policy.

2. An arbitral award under French law is a legally enforceable title in respect of which protective measures can be sought. The binding character of an award is not contingent upon the completion of prior judicial proceedings. [2] However, to obtain enforcement of the award, several steps must be taken before the courts. The procedure is simple: an enforcement order is requested by way of an *ex parte* application to the Court. The Court may only conduct a formal review of the award, verifying that the existence of the award has been proven by the party relying on the award, and that enforcement is not, according to Article 1498 of the Code of Civil Procedure, *"manifestly contrary to international public policy"*. Discussion of the validity of the award takes place subsequently, before the Court of Appeal in *inter partes* proceedings, if the award debtor challenges recognition or enforcement. Setting aside proceedings also take place before the Court of Appeal and are *inter partes*.

3. The decisions commented below have been rendered by the Court of Appeal of Paris and, because judgments of the Court of Appeal can be attacked before the *Cour*

1. Cass. civ. 1re, 13 March 2007, *Chefaro*, Rev. arb. 2007.499, note L. Jaeger.
2. TGI Paris, 15 May 1970, *Saint-Gobain v. The Fertilizer Corporation of India*, YB I (1976), p. 184-185.

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de cassation, which is the highest court in France for civil and commercial matters, decisions of the *Cour de cassation* are also reported. We have grouped them into six subject matters, including estoppel, arbitrators jurisdiction to decide issues of jurisdiction (*competence-compétence*), arbitrators as *amiables compositeurs,* substantive international public policy, procedural international public policy and public law entities in the context of international arbitration.

I. Estoppel

4. One of the characteristic traits of the review of awards in France is the application of an *"estoppel rule"* which was carved out by the *Cour de cassation* in its *Golshani v. Iran* judgment of 6 July 2005. [3] Under the estoppel rule as applied in France even though a ground of review, may be open under Article 1502 of the Code of Civil Procedure, it cannot be raised if no objection has previously been made, whenever possible, before the arbitrators. This is a particular example, in the context of the review of awards, of the waiver of the right to object ,which is well known in arbitration law and practice. [4] Participation of the party in the proceedings is of course a prerequisite. Should that not be the case, there can be no waiver and the rule does not apply, as specified by the Court of Appeal of Paris in *Inversiones Errazuriz Limitada v. Kreditanstalt fur Wiederaufbau*. [5]

5. Application of the *estoppel rule* was illustrated once again this year in a number of decisions handed down by the Court of Appeal of Paris. In *Riverstone Insurance UK Ltd. v. SCP Brouard & Daude-Brouard en sa qualité de mandataire liquidateur de ICD* decided on 5 november 2009, and in *Gothaer Finanzholding v. SCP Brouard & Daude-Brouard en sa qualité de mandataire liquidateur de ICD* decided on 17 December 2009, the Court held that the Applicants, who had not objected to the consolidation of several arbitration proceedings, could no longer challenge the award on the ground that the Arbitral Tribunal had failed to comply with its *mission*. The Court added that the Applicant had had every opportunity to object to consolidation prior to and after the hearing in the arbitration but that it had not done so. Instead, it had filed joint submissions in the consolidated proceedings. In its *OAO NPO SATURN c. Unimpex,* judgment of 14 january 2010, the Court decided that an objection based on the scope of the arbitration agreement could no longer be raised by the Applicant, which had failed, before the arbitrators, to raise its argument that the amendment to the contract was not covered by the arbitration clause. *Sté Chaudronnerie Mecanique Ariegeoise v. Adjor Sofal Nemoneh Pars* rendered on 3 June 2010 by the Court of Appeal applied the rule in a context where the Applicant had failed to object, at the

3. Rev. arb. 2005.993, note Ph. Pinsolle; D. 2006.1424, note E. Agostini, D. 200?, pan. 3050, obs. Th. Clay, RTD com. 2006.309, obs. E. Loquin, *JCP* E 2005.1684, chron. Arbitrage, nº 6, obs. J. Ortscheidt, Gaz. Pal. 24-25 février 2006, p. 18, note F.-X. Train, Rev. crit. DIP 2006.602, note H. Muir-Watt, JDI 2006.608, note M. Béhar-Touchais.

4. See Article 4 Uncitral Model Law on International Commercial Arbitration, Article 33 ICC Arbitration Rules, Article 30 Uncitral Arbitration Rules.

5. CA Paris, 21 Jan. 2010, Rev. arb. 2010.339, note by F.-X. Train.

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end of the witness hearing, regarding the interpreter's skills (or lack of them) and the use of an audio-conference device instead of a video-conference due to technical problems. The arbitrator had asked the parties if they had objections, but the Applicant's counsel had answered that they would only be raised after the award. The practical interest of the *estoppel rule* also appears in *L'esprit du vélo v. M. Astier*, a judgment concerning a domestic arbitration case, rendered on 17 June 2010 by the Court of Appeal of Paris. The judgment holds that continuing participation in the arbitration proceedings after the time limit for the award has expired is tantamount to a tacit acceptance of a time extension. It should be inferred from theses cases that the *estoppel rule* applied by French courts in the arbitration context has a significance of its own, quite distinct from the rule as applied in Common Law jurisdictions. The rule is founded on procedural fairness as well as on waiver, either because the "guilty" party remained silent or because the "victim" relied on prior inconsistent conduct.

6. The *Cour de cassation* clarified the conditions in which the *estoppel rule* can be applied in *Merial c. Klocke Verspackung – Service GMBH* rendered on 3 February 2010. [6] *Merial* contended before the Paris Court of Appeal that it had not been in a position to respond to the reply statement filed by *Klocke* two months before the hearing, in which new claims had been stated by *Klocke*. The Court of Appeal refused to consider the matter, stating that *Merial* had filed a rejoinder and had had ample opportunity before the oral hearing in the arbitration to argue that the new claims fell outside the limits of the Terms of Reference. The Court of Appeal also observed that *Merial* had not objected to a procedural order in which the arbitral tribunal noted that the parties had discussed the admissibility of the new claims in the rejoinder, and added that *Merial* had signed without reservations the minutes of the hearing with the closing of the proceedings. The decision was quashed by the *Cour de cassation*. In its judgment, the *Cour de cassation* explains that, because *Merial* had already discussed the admissibility of the new claims as the procedural order acknowledges, *Merial*'s procedural attitude until the signing of the minutes of the hearing could not be considered as a waiver of its right to object to admissibility. This holding must be approved. *Merial* had not accepted, even tacitly, the admissibility of the new claims and had not changed its position to the detriment of *Klocke*. The rule therefore has an important practical aspect: which is the efficient administration of justice in preventing a party from untimely raising a ground of review. It would run against this goal to force a party to renew its objection at every subsequent stage of the proceedings, once it has effectively objected. The waiver of an objection must therefore be unequivocal.

II. Competence-Competence

7. Provided that an arbitration agreement is not manifestly invalid or unenforceable, the existence, validity and scope of an arbitration agreement must, according to Article 1458 of the Code of Civil Procedure, be decided by the arbitrator.

6. Cass. 1re civ., 3 Feb. 2010, Rev. arb. 2010.93, note by L. Weiller. E. Kleiman, *JCP* 2010.564.

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The manifest invalidity or unenforceability of an arbitration agreement is only subject to a *"prima facie"* examination by the State courts as the *Cour de cassation* has explained. [7] It must therefore be self-evident. The civil nature of an agency contract under French law although described as a commercial contract by the parties and the reference in the arbitration clause to the ICC Conciliation and Arbitration Rules, including for the constitution of the arbitral tribunal, cannot clearly the clause manifestly invalid. This was decided by the Paris Court of Appeal on 17 June 2010 (*Signori v. Sté. Comercial Salgar*). The *Cour de cassation* in *Pacific Auto v. KAP and KAL* [8] *ruled that the indivisibility of claims arising out of several contracts signed between different parties and providing for different fora* was no obstacle to the applicability of the arbitration agreement in one of the contracts Because arbitration is, however, based on the parties' agreement, a defendant which participates in court proceedings on the merits without challenging the court's jurisdiction waives the benefit of the arbitration agreement. [9]

8. As seen above, in French arbitration law, arbitrators have priority over State courts to rule on their own jurisdiction. As a result, the courts' review of the existence, validity or scope of an arbitration agreement is postponed until after the award has been made. The decision of an arbitrator on jurisdiction is therefore final: it may be challenged under Article 1502 of the Code of Civil Procedure. It is the arbitrators' jurisdiction that is subject to review, and not the reasons for the award on jurisdiction. The reviewing court may thus come to a completely different conclusion from that of the arbitral tribunal. This has been clear since the decision of the *Cour de cassation* in the *Pyramids* case heard in 1987 that there is *"no restriction upon the power of the court to examine as a matter of law and in consideration of the circumstances of the case, elements pertinent to the grounds*" listed in Article 1502 of the Code of Civil Procedure. [10]

9. The so-called negative effect in French law of the competence-competence principle, which, as seen above, prohibits courts from deciding on the arbitral tribunal's jurisdiction before the arbitrators, is regarded as a corollary to the arbitrators' jurisdictional powers to decide on their own jurisdiction without suspending the proceeding. [11] This is illustrated in the decision of the *Cour de cassation* of 12 May 2010, *Nest v. X*. The judgment is exemplary of the Court's reasoning in such cases: *"In accordance with the competence-competence principle, it behooves on the arbitrator, first, to make a decision on his own jurisdiction, subject to the court's evaluation; as part of its review of the validity of the award in the context of setting aside proceedings, because State judges do not have jurisdiction to make such decision in the first place instead of the arbitrator, unless there is a showing of the*

7. Cass. 1re civ., 7 June 2006, *ABS*, YB Com. Arb. Vol. nº 39.
8. Cass. 1re civ., 17 March 2010, Rev. arb. 2010.386.
9. Cass. 1re civ., 14 April 2010, *TECA*, Rev. arb. 2010.391.
10. Cass. 1re civ., Jan. 6, 1987, *Southern Pacific Properties Ltd. v. République Arabe d'Egypte*, XIII Y.B. Com. Arb. 152 (1988); 2 (1) Int'l Arb. Rep. 17 (1987), English translation at 26 I.L.M. 1004 (1987).
11. Fouchard, Gaillard, Goldman, On International Commercial Arbitration, Kluwer, 1999, nº 671 *et seq.*

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manifest nullity or inapplicability of the arbitration agreement". The negative effect of the competence-competence principle must be read in conjunction with the so called validity principle of an arbitration agreement laid down by the *Cour de cassation* in the *Dalico* case in 1999 [12] which validates an arbitration agreement even when it would be held invalid under the otherwise applicable national law. The validity principle is in turn based on the assumption that an international agreement to arbitrate is not governed by national law but is autonomous from the various national laws which might otherwise apply to it. In *Nest v. X,* the *Cour de cassation* therefore stresses the irrelevance, in the context of international arbitration, of the commercial nature of the contract which would condition the validity of an arbitration clause in the French domestic context . [13]

III. Amiable Compositeur

10. French Arbitration Law enables the parties to grant on arbitrators the power to act as *amiable compositeur* in Articles 1474 (for domestic arbitration) and 1497 (for international arbitration) of the Code of Civil Procedure. Article 1497 more specifically provides that the arbitrator shall rule as *amiable compositeur* if the agreement of the parties confers this power upon him/her. The arbitrator's failure to rule in compliance with his/her *mission* is one of the grounds contemplated by Articles 1484 and 1502 of the Code of Civil Procedure for setting aside or refusing to enforce an award in domestic or international arbitration. It is settled case law that an arbitrator who rules as an *amiable compositeur* without having been empowered to do so by the parties does not comply with his/her *mission* and the award is thus a nullity. [14] *Amiable composition* must be authorized by the parties and those parts of the awards in which the arbitrators had exercised such power without authority powers were as a consequence annulled by the Court of Appeal of Paris in *Riverstone v. Brouard & Daude-Brouard* on 5 November 2009 and *Gothaer Finanzholding v. Brouard & Daude – Brouard and ICD* on 17 December 2009. In these two cases, the arbitral tribunal, following the consolidation of several arbitration cases, had decided the disputes as *amiable compositeur* pursuant to the arbitration clauses in the majority of the reinsurance contracts in issue, with the exception of one, however, where the arbitration clause conferred no power of *amiable composition*.

11. It must be made clear that the above mentioned situation is wholly different from the one where the arbitrators have made a decision *infra petita*, in which case French courts consider that the award may always be completed by the parties and in this way avoids the nullity otherwise provided by Articles 1484 (3)/1502 (3) . [15] *Infra petita* is concerned with the scope of what has been decided by the arbitrators, not with how the arbitrators have decided the dispute which is the concern with *amiable*

12. Cass. 1re civ., 5 jan.1999, Rev. arb. 1999.260.
13. See Articles 2059-2061 of the Code Civil.
14. Cass. 2e civ., 30 sept. 1982, Rev. arb. 1982.341, note by E. Loquin.
15. CA Paris, 26 jan. 1988, Rev. arb. 1988.307, note by Ch. Jarrosson.

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composition. Here, the situation of an arbitrator who has decided without regard to the powers conferred by the parties cannot be remedied as is the case where the arbitrator has merely omitted to decide a head of claim.

12. According to a generally accepted definition, an *amiable composition* clause dispenses the arbitrators from applying the rule of law if a fairer solution so requires . [16] There is however no obligation on the arbitrator to disregard the rule of law if that leads to the fairer result . [17] The *Cour de cassation* has decided, during the last decade, that arbitrators with *amiable compositeurs* powers have an obligation to explain why or how the application of the rule of law comports with fairness . [18] In sum, *amiable composition* is an additional power given to the arbitrator to decide the case, but French courts have subjected *amiable compositeurs* to additional control.

13. The above mentioned case law of the *Cour de cassation* which considers the *amiable composition* clause as an obligation and not as an option for arbitrators is illustrated in the judgment of the Court of Appeal of Paris in a domestic arbitration case, *Cabinet Roux Rhone Alpes Auvergne v. Reverdy, Naterme and Cabinet Roux Mediterranée* of 3 December 2009. The award, it was claimed, should have been annulled because the arbitrators had made no use of their powers of *amiable compositeurs* in resolving the case. The judgment confirms that the reviewing court will not perform a perfunctory examination of whether the arbitrators have or have not decided as *amiable compositeurs*. The Applicant complained that the indication in the award that the arbitrators based their decisions for each claim on law and fairness was not evidence that they had actually decided as *amiable compositeurs*. The Court replied that a careful reading of the award showed that the arbitral tribunal had indeed acted as *amiable compositeur*. It must be stressed that the Court does not review the result of the arbitrators' comparison of the outcome they have adopted with an "equitable" outcome. This would amount to the Court engaging in a review of the merits of the dispute and substituting its own idea of fairness and justice to that of the arbitrators. Instead, the Court verifies that there are reasons in the award which evidence that the arbitrators have decided as *amiable compositeurs*. The presence or absence of a reference in the award to the *amiable composition* clause is not enough. [19] In so doing, the Court does not go further, for instance to determine the appropriateness of the reasoning of the award. This is consonant with the *Cour de cassation*'s ruling that the relevance, the consistency or inconsistency of reasons falls outside the court's control because this would otherwise amount to reviewing the merits of the case. [20]

16. E. Loquin, *L'amiable composition en droit comparé et international*, Litec, 1980.
17. CA Paris, 6 mai 1988, Rev. arb. 1989.83, note by E. Loquin.
18. Cass. 2e civ., 15 Feb. 2000, Rev. arb. 2001.135, note by E. Loquin.
19. Articles 1471 (2) and 1480 of the Code of Civil Procedure.
20. Cass. 1re civ., 14 June 2000, IAIGC v. BAII, Rev. arb. 2001.729, note by H. Lécuyer.

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IV. International Public Policy (Substance)

14. International public policy concerning matters of substance is a popular ground in support of applications to set aside the award. In the seminal case of *Thalès v. Euromissile* of 18 November 2004 [21], the Court of Appeal of Paris, drawing on prior case law of the *Cour de cassation*? [22] held that the extent of its review with respect to alleged violations of international public policy is limited to a showing by the Applicant of a "flagrant, real and concrete" breach of a rule of public policy. In the wake of *Thalès*, the same solution was adopted by the *Cour de cassation* in the *SNF v. Cytec Industries BV* judgment of 4 June 2008: *"since this is a violation of international public policy, the annulment court considers only the compatibility of the effect of the award's recognition and enforcement with international public policy; the examination is limited to the flagrant, effective and concrete nature of the alleged violation"*. [23]

15. The limited review by the court set out above has now been enshrined by the Court of Appeal of Paris in its judgments rendered on similar matters, such as *M. Schneider Schaltgeratebau und Elektroinstallationen v. CPL Industries Ltd.* rendered on 10 September 2009, *Linde Aktiengesellschaft and Linde Hellas v. Halyvourgiki* of 22 october 2009 and *SMEG v. La Poupardine* of 17 December 2009, *Air Namibia v. Transnamib Holdings Ltd.* of 8 April 2010, *Thalès and Thalès Underwater System v. Marine de la République de Chine (Taiwan)* of 11 May 2010 or *Inforad Ltd. v. TES Electronic Solutions* of 24 June 2010.

16. In *Linde,* which already has attracted the attention of commentators, [24] the Applicant sought annulment of an ICC award on the ground that the arbitrators had interpreted the contractual clauses of the supply contract in a manner contrary to Article 81 of the EC Treaty in deciding that *Linde Hellas* was obliged to sell all of its oxygen gas production to *Halyvourgiki*. As in the *Thalès v. Euromissile* case, the Applicant had not raised an issue of EC competition law during the arbitration proceedings. It nonetheless argued before the Court that the violation of international public policy was manifest, effective and concrete and in this regarded presented a thirty page submission which the Court described as a "brilliant intellectual construction". The same expression was used to characterize the expert opinion submitted in rebuttal by the Defendant. However a showing of a violation of public policy requires a concrete analysis of the litigious situation, as was underlined in *Thalès* and other cases of the Cour de cassation, rather than an abstract construction of the kind put forward by the parties in *Linde*.

17. The terminology of *Thalès* and *SNF* (the "manifest, effective and concrete" nature of the public policy violation) deserves a word of explanation. It has just been

21. Rev. arb. 2005.751.
22. Cass. 1re civ., Grands Moulins de Strasbourg, 19 nov.. 1991, Rev. arb. 1992.76, note by L. Idot. See Ch. Jarrosson & L. Idot, Arbitrage, Rép. Communautaire Dalloz, Jan.
23. YB XXXIII (2008), France nº 47, p. 489.
24. Rev. arb. 2010.114, note by F.-X. Train, CAPJIA 2010.181, note by L. Radicati di Brozzolo.

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underlined that an effective violation requires more than a hypothetical demonstration of a conflict with public policy. The concrete (i.e. substantial) nature of the violation is also required in order to avoid the setting aside of an award for an entirely perfunctory violation. [25] More importantly, the manifest or flagrant nature of the violation is required as an indication that the alleged violation must be obvious, as opposed to a questionable or debatable violation in case of a merely possible error of the arbitral tribunal. In *Thalès*, as in *Linde*, it is important to point out that there could not possibly have been a manifest violation since no competition law issue had been discussed before the arbitrators. As it had done in the *Thalès* case, the Court noted in its judgment that no one, be it *Linde* itself, the arbitrators nor the ICC International Court of Arbitration, had previously been aware of the violation which *Linde* considered, in the annulment proceeding, to be obvious. In both cases, the Court underlined that an argument which has never been made before the arbitrators cannot be discussed for the first time before the reviewing court. Otherwise, the court would be thrown into an examination of the merits of new claims, a situation that is beyond its powers.

18. In *Linde*, a showing of a restriction of competition in contrary to Article 81 of the EC Treaty would have required, in the Court's view, an analysis of the relevant market, of the partie's position on that market, of the potential competitors involved, of the allegedly restrictive provisions of the contract between *Linde* and *Halyvourgiki*, of the existing restrictions under the block exemption regulations, of the necessary and proportionate nature of the restrictions in the contract, of the consequences of the contract on prices, production, innovation, as well as on the diversity and quality of the products concerned. In line with its prior consistent case law, including *Thalès*, the Court of Appeal stressed that, even if it were allowed to examine the points of fact and law which are in the award, it could not rule on the merits of a dispute which has never been decided by the arbitrators before and which would require a fully fledged trial to establish the facts as distinct from the legal submissions exchanged in the setting aside proceeding. The task of the reviewing court is to take the award as its is not to rewrite it. A review of the award on the basis of new evidence, which would be required if the court were to examine the merits of the case, is impossible.

19. The *Cour de cassation* in the 2008 *SNF* case also reaffirmed that the court, which can exercise only a limited review, may only consider the compatibility of the effect of the recognition and enforcement of the award with public policy. This holding is based on well established case law according to which the scrutiny of the court excludes any power to conduct a substantive review of the award but should only bear on the outcome given to the dispute. [26] This is of course not to say that the operative part of the award alone stands scrutiny. It is the entire award, with its reasons, which is considered for compliance with public policy. However, the convincing or correct nature, the relevance, of the reasons of the award is irrelevant. [27] Further, in *Inter-Arab*

25. Cass. 1re civ., Grands Moulins de Strasbourg, 19 nov.. 1991, Rev. arb. 1992.76, note by L. Idot.
26. Cass. 2e civ., *Sté SICA Veradour*, 20 Feb. 1991, Rev. arb. 1991.447, note by L. Idot.
27. CA Paris, 12 Dec.1978, *Grands Moulins Prodhomme*, Rev. arb. 1979.372, note by M. Boitard; Cass. 1re civ., *André v. Multitrade*, 23 Feb. 1994, Rev. arb. 1994.683.

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Investment Guarantee v. Banque arabe et internationale d'investissements, [28] *the Cour de cassation* decided on 14 June 2000 that, save where due process and international public policy have been violated, the reasons of an award are beyond the scope of control of the court. This holding acknowledges that there are situations where the absurdity of the reasoning can be an indication of the violation of due process and public policy.

20. The judgment of the Court of Appeal in *Linde* is closely patterned after the 2004 *Thalès* decision. The decision in *Linde* underlines the consistency of approach to the scope of review by the court on matters of substantive public policy. This ground of challenge is entirely different from the other grounds enumerated at Article 1502 of Code of Civil Procedure in terms of the review by the court. The holding of the *Cour de cassation* in the *Pyramids* case of 1987 [29] which, in the context of the review of the existence of a valid arbitration agreement, described the power of the court to examine as a matter of law and in consideration of the circumstances of the case the elements pertinent to establishing the grounds for challenge of an award is interpreted, in the context of substantial public policy, as meaning that the court can only assess the existence of a violation in light of the factual and legal elements upon which the arbitrators founded their award and no other. The focus of the court's scrutiny is the award as issued by the arbitrator and not an award revisited by the court in light of the parties' expectations. The court's task is not to begin revising the award in order to review it, it is more modestly to compare the contents of the award with the requirements of public policy.

V. International Procedural Public Policy

A. Due Process And International Procedural Public Policy

21. The Court of Appeal of Paris stressed in its judgment in *Engel Austria v. Don Trade* of 3 December 2009 [30] that due process implies that each party must be given an opportunity to discuss in an adversarial process all elements of the case and recalled that the grounds on which an award is made have must have been submitted to prior discussion by the parties. [31] In that case, the rule of law on which the arbitral tribunal based its decision to annul the contract had not been discussed by the parties. This was candidly acknowledged by the Arbitral Tribunal itself in its award although the Defendant in the annulment proceedings argued that the rule had been implicitly discussed as a principle of Austrian Law regarding impossibility of performance. The

28. Cass. 1re civ., 14 June 2000, Rev. arb. 2001.729, note by H. Lécuyer.
29. XIII YB Comm. Arb. 152 (1988).
30. CA Paris, 3 Dec. 2009, Rev. arb. 2010.105.
31. CA Paris, 2 March 2006, *Fashion Group v. Heelstone,* Rev. arb. 2006.733, G. Bolard, « Les principes directeurs du procès arbitral », Rev. arb. 2004.530; M. de Boisséson, « L'arbitre international et la qualification », *Études Cl. Reymond,* Litec, 2004, p. 29.

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Court consequently annulled the parts of the award relating to the annulment of the contract which it considered separable from the remainder of the decision.

22. In *Fichtner GMBH et CO.KG v. Lksur* decided on 17 December 2009, *Lksur*, just before the closing of the proceedings, had sent the arbitrator further written submissions which contained new allegations. As evidence of this, it provided the Court with a fax copy of the submissions sent to counsel of *Fichtner* as well as with an acknowledgment of receipt of the documents. The receipt showed that not all pages had been sent. The fax machine of *Fichtner*'s counsel showed no receipt of these documents, however, it showed the sending of materials to the arbitrator and to *Lksur*. The Court of Appeal of Paris interpreted Article 3 para. 2 of the ICC Rules according to which *"notification or communication may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof"*. In the Court's view, production of the faxed documents and of a receipt only provided evidence of the sending, of the contents of the documents sent and of their receipt when the integrity of the communication was beyond doubt. The Court deduced from the above surrounding facts that there was no proof that *Lksur*'s submissions had been discussed by the parties and it annulled the award accordingly.

23. In *Commercial Caribean Niquel v. Overseas Mining Investments Ltd.,* [32] *the Court of Appeal of Paris also decided to annul the award because the Arbitral Tribunal had substituted for the loss of profit approach, which had been pleaded by the parties, its own reasoning which referred to loss of chance. The Court of Appeal concluded that there had been a violation of due process requirements because the Arbitral Tribunal had deprived the parties of their right to be heard in an adversarial process, and because the arbitrators' approach of had not merely affected the calculation of damages but had more importantly changed the basis for compensation. The award held: "The Arbitral Tribunal considers that instead of the compensation standard referred to by the plaintiff, the later should be compensated for loosing the chance to continue the joint venture agreement which had been wrongfully terminated by the defendant. The compensation standard based on the loss of chance implies a much more uncertain economic calculation of damages but the Arbitral Tribunal is satisfied in opting for a less restrictive and conservative approach than the one supported by the plaintiff. Compensation for the loss of chance is not similar to compensation for the loss of profit, because its rests on the assumption that the plaintiff will be compensated for the economic value of the lost chance and not for the loss of profit which it claims".* Absent such legal niceties in the Tribunal's reasoning on compensation, it is quite likely that the Court would have agreed that loss of chance relates to how damages should be measured and does not entail a change in the basis for compensation.

24. Just alike any court judgment, awards are deemed to be an authentic record of the arbitrators' report of the proceedings. [33] This is until a party files a plea of forgery as

32. GAR 26 April 2010, French Court takes interventionist approach.
33. Cass. 2e civ. 12 Dec. 1990, Rev. arb. 1991.317, note by P. Théry.

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in *Fichtner GMBH et CO.KG v. Lksur*. The Applicant contended that the statements in the award regarding the hearing of a witness were untrue. The Court of Appeal of Paris decided that the affidavits of the Applicant's representatives, counsel and interpreter made in support of the Applicant's contention two years after the disputed facts regarding the presence and role of the witness were not conclusive evidence. However, in order to make sure that due process rights have not been violated, the court cannot limit itself to the arbitrator's statements in the award. The court's review cannot be limited to the award itself as opposed to the situation of an alleged violation of public policy on substance. The court's review of the award is made in conjunction with the briefs and exhibits submitted by the parties, the arbitration documents and even with extrinsic evidence as the *Fichtner GMBH et CO.KG v. Lksur* decision illustrates. However, in *Gothaer Finanzholding v. SCP Brouard & Daude – Brouard en sa qualité de mandataire liquidateur de ICD* on 17 December 2009, the Paris Court of Appeal added that the alleged violation must be "flagrant, effective and real". This assertion, made with respect to compliance of the award with procedural public policy, was in any case superfluous as the argument raised by the Applicant to challenge the award related more properly, as the Court acknowledged, to a disagreement with the arbitrators as to the probative value of the evidence in support of the outcome of the case. This amounted to a review of the merits of the dispute, which lay outside the scope of review by the Court.

B. Fraud And International Procedural Public Policy

25. The *Thalès v. Euromissile* judgment of 18 November 2004 noted fraud as an exception to the limited review by the court. The decision of the Court of Appeal of Paris in *Thalès v. Brunner Sociedade Civil de Administracao, Frontier AG Bern* of 1 July 2010 confirms that a procedural fraud is a valid ground to set aside or refuse enforcement of an award under the public policy exception. *Frontier* was the beneficiary of an ICC award made in Switzerland for the payment of a commission relating to the sale of warships to the Taiwanese Navy. [34] Thalès raised the invalidity of the contract, alleging corruption, and contended that the arbitrators had been misled by false evidence given by a witness. Relying on prior judgments of the Court of Appeal of Paris, [35] the defendants argued that review by the court regarding a violation of international public policy was limited to the factual elements upon which the arbitrators founded their award and they pointed to the Arbitral Tribunal's conclusion that there had been no trading of influence. As a consequence, the defendants

34. When it sought enforcement of the award in France, the Court of Appeal of Paris first suspended the proceedings pending criminal investigations, CA Paris, 10 Sept. 1998, *Thomson c/ Brunner Sociedade Civil de Administracao* and *Frontier AG Bern,* Rev. arb. 2001.583, obs. J.-B. Racine.

35. CA Paris, 20 June 2002, *Ordatech v. W. Management,* 2002 (4) Rev. arb. 971 (2d decision) (note by J.-B. Racine); CA Paris, 20 Apr. 2000, *Barbot Construction Métallique v. SA J. Ricard Ducros,* 2001 (4) Rev. arb. 806 (6th decision) (obs. by Y. Derains). See also CA Paris, 18 nov. 2004, *Thalès, supra* note 17, according to which the reviewing court can "assess the factual and legal elements contained in the award."

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contended, there could be no review of the merits of the dispute as decided by the arbitrators.

26. The judgment of the Court drew a distinction between the scope of review concerning alleged violation of international public policy concerning substance and alleged procedural violation. It held that the general prohibition against substantive reviews of awards is not a valid defense in the context of a procedural fraud. This must of course be limited to verifying whether there has been a fraud which has been influential on the arbitrator's decision. If such proof is not submitted, as in the *Chantiers de l'Atlantique v. Gaztransport et Technigaz,* judgment of 1 April 2010, the Court of Appeal reverts to applying the rule according to which it cannot conduct a substantive review of the award. It is inescapable that, by accepting fraud as a violation of procedural public policy, the Court will be led into a reexamination of the facts of the case after the award has been rendered. Setting aside or enforcement procedures are not designed for this kind of in depth review. However, notwithstanding the absence, in French international arbitration law, of an independent remedy of reconsideration of an award in case of fraud, [36] the *Cour de cassation* held in its judgment of 25 May 1992 in *Fougerolle v. Procofrance* that an award may be reconsidered by the arbitral tribunal in case of fraud. [37] But the judgment of the *Cour de cassation* leaves open the possibility of challenging an award for fraud as exemplified in *Thalès v. Brunner Sociedade Civil de Administracao, Frontier AG Bern* because fraud comes within the ambit of international procedural public policy which the court cannot close its eyes on. The case must then of course be reheard after annulment of the award.

VI. Public Entities And International Arbitration

27. OMore than forty years after the landmark judgment of the *Cour de cassation* in *Galakis* on 2 May 1966, holding that the prohibition in French statute law, according to which disputes concerning public entities cannot be referred to arbitration did not apply to a charter party entered into for the purposes and in accordance with the usages of maritime commerce, [38], the French courts have had another occasion to look at the resistance to arbitration on the part of French public entities. INSERM, a French public entity, entered into a contract with Letten F. Saugstad, a Norwegian Foundation, for the construction of a neurological research facility in Southern France. INSERM applied to the Court of Appeal of Paris to set aside the award made in favor of the Norwegian Foundation, which rejected it on 13 November 2008. [39]. In addition, INSERM also appealed against the award before the administrative courts. The *Conseil d'État* (the highest court for administrative

36. Contrary to domestic arbitration law, see Article 1491 CPC.
37. Rev. arb. 1993.91, Rev. crit. DIP 1992.699, note by Oppetit, JDI 1992.974, note by Loquin.
38. Fouchard, Gaillard, Goldman, On International Commercial Arbitration, Kluwer, 1999, nº 541 *et seq.*
39. CA Paris, 13 nov. 2008, Rev. arb. 2009.389, note M. Audit.

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claims) suspended the proceedings on the award and referred the question of whether the administrative courts or the ordinary courts had jurisdiction to review the award to the *Tribunal des conflits*. [40] The decision of the *Tribunal des conflits,* delivered on 17 May 2010 has already caused a great turmoil. [41].

28. The decision acknowledges that an international award concerning a dispute arising out of a contract concluded between a French public entity and a foreign party, performed in France and involving the interests of international trade, may be set aside by the ordinary courts. The *Tribunal des conflits* nonetheless decided that review of an award must take place before the administrative courts whenever compliance of the award with mandatory rules of French administrative law is in issue, regarding the occupation of the public domain, procurement procedures for public contracts, public-private partnerships, delegations of public services. The rationale for this exception in favor of French public entities who have lost their case before the arbitrators is the impossibility to review the merits of the award or to conduct a thorough examination of the merits under the setting aside mechanism of Article 1502 of the Code of Civil Procedure. [42] Administrative tribunals should also offer French public entities a second go where the contract is not governed by French law because of the overriding nature of the above mentioned mandatory rules regardless of the normal rules of conflict of laws. The scope of the decision is, by all counts, very limited It can only apply to the review of an award involving a French public entity and French mandatory rules of administrative law in some well-defined and restricted areas. It must be recognized otherwise that the holding of the *Tribunal des conflits* could provide a unique opportunity *"to throw the result of arbitration in the waste basket"* as one US Federal Court pointed out [43] and to permit litigation of the merits of the case to blossom.

29. It is also important to note that the *Tribunal des conflits,* which, upon the government's exclusive right of action, has the task of protecting the specialized jurisdiction of administrative tribunals from encroachments by the ordinary courts, is only a quasi-judicial body (as its is partly composed of judges of the *Cour de cassation.* It is presided over by the Minister of Justice, or in his absence, by the Minister of Education. [44] Such an historical institution cannot in any way square nowadays with the prerequisites of an independent tribunal according to contemporary accepted international standards laid out, for example, in the European Convention on Human Rights. The authoritative value of the decisions of the *Tribunal des conflits* as precedents is therefore questionable. Its latest pronouncement on French arbitration

40. CE, 31 July 2009, Rev. arb. 2009.539, note M. Audit.

41. Tribunal des conflits, 17 May 2010, *Inserm v. Fondation Letten F. Saugstad,* Rev. arb. 2010.253; M. Audit, « Le nouveau régime des contrats administratifs internationaux (à la suite de l'arrêt rendu par le Tribunal des conflits dans l'affaire *Inserm*) », Rev. arb. 2010.253 ; Th. Clay, « Les contorsions byzantines du Tribunal des conflits en matière d'arbitrage », *JCP* 2010.552; E. Gaillard, « Le Tribunal des conflits torpille le droit français de l'arbitrage », *JCP* 2010.1096.

42. Ch. Seraglini, « Le contrôle de la sentence au regard de l'ordre public international par le juge étatique : mythes et réalités », GP 20-21 mars 2009, p. 5.

43. *Baxter Int'l v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003).

44. R. Odent, *Contentieux administratif,* Les Cours du droit, 1971-1972, fasc. II, p. 531.

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law will most likely be dealt with by way a legislative or regulatory amendment and is therefore already doomed, but we feel sorry for those, who in other countries, have put their confidence in the French model of government with its administrative court system. [45] The *Inserm* decision of the *Tribunal des conflits* is more likely to affect the development of arbitration law in their countries than in France.

45. See for example, H. Slim, « Les contrats d'État et les spécificités des régimes juridiques dualistes », Rev. arb. 2003.691.

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