Challenging arbitral jurisdiction and anti-suit injunctions in France

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This Practice Note sets out the procedure for challenging the jurisdiction of arbitral tribunals in French courts and the French perspective on anti-suit injunctions.

Due to France's pro-arbitration bias, the grounds for challenging the jurisdiction of arbitral tribunals before French courts are limited. Under French law, it is the arbitrators who have the power to determine whether they have jurisdiction over a given dispute, although their determination may later be subject to review by a state judge in the context of a request for recognition and enforcement of the award or a petition to set aside the award.

Anti-suit injunctions are orders issued by a court or an arbitral tribunal preventing a party from commencing or continuing a proceeding in another jurisdiction or forum. Anti-suit injunctions are traditionally used in common law jurisdictions and are rarely used in civil law jurisdictions such as France.

While anti-suit injunctions have been enforced by French courts under specific circumstances, French courts tend not to interfere with pending arbitrations once the arbitral tribunal has been constituted.

Challenging arbitral jurisdiction under French law

Under French law, to challenge the jurisdiction of an arbitral tribunal, practitioners will have to consider when they want to raise such challenge before French courts, ie before or after an award is rendered.

Before an award is rendered, the principle of competence-competence will give priority to the arbitral tribunals to rule on their jurisdiction. Pursuant to Article 1465 of the French Code of Civil Procedure (CCP), arbitral tribunals seated in France have exclusive jurisdiction to rule on objections to their jurisdiction. This is often described as the positive component of the competence-competence principle.

The complement to CCP, Art 1465 is CCP, Art 1448. It specifies that French courts must decline their jurisdiction in favour of arbitration, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. This declining of jurisdiction on the part of French courts is often referred to as the negative component of the competence-competence principle.

The contents of CCP, Arts 1448 and 1465, applicable to domestic arbitrations, are also applicable to international arbitrations seated in France by virtue of CCP, Art 1506.

Accordingly, before an award is rendered, French courts will rule on the jurisdiction of an arbitral tribunal, only in limited circumstances:

- before the constitution of the arbitral tribunal—pursuant to CCP, Art 1456, the arbitral tribunal is constituted upon the arbitrators' acceptance of their mandate
- when the arbitration agreement is manifestly void or manifestly not applicable—the *Cour de cassation* confirmed that the standards contained in CCP, Art 1448 shall be applied in a restrictive manner. See for example:
  - in *Jules Vernes*, the *Cour de Cassation* held that the language 'manifestly void' precludes French courts from carrying out an in-depth examination of the arbitration agreement's validity (*Jules Vernes v ABS*, Cass. 1st Civ., 7 June 2006)
  - an arbitration agreement in a share transfer agreement is manifestly inapplicable to the dispute arising out of the partnership agreement, which contains a dispute resolution dispute clause providing for the jurisdiction of a national court (*Edenred France v Kering, Conforama Holding and Conforama France*, Cass. 1st Civ., 12 February 2014)

- by contrast, the *Cour de cassation* held that the arbitration agreement contained in a share transfer agreement executed between the company *Financière d'Azur* and three shareholders was not manifestly inapplicable to the dispute arising out of said agreement between the liquidator of the company *Financière d'Azur* and these shareholders (*Financière d'Azur v Spouses X*, Cass. 1st Civ., 29 January 2014)

Although, under French law, it is the arbitrators who have the priority to determine their jurisdiction over a given dispute, it is important to note, that after an award is rendered, national courts will have the last word in reviewing thoroughly the award on jurisdiction rendered by arbitral tribunals in the context of a request for recognition or enforcement. According to the *Cour de Cassation*, French judges may examine all elements of fact and law which would allow them to determine the scope of the arbitration agreement and to determine the consequences on the respect of the arbitrators' mandate, whether the arbitral tribunal declined or upheld jurisdiction (*Roundhill Trust and Rosehill Foundation v JAFF*, Cass. 1st Civ., 6 October 2010, AAFF, AAC). If the national courts believe that the arbitral tribunal wrongly declined or upheld jurisdiction, the awards will be denied recognition and/or enforcement, or set aside.

French law does not specify when a jurisdictional challenge might be brought before the arbitral tribunal. Nonetheless, it must be noted that CCP, Art 1466 may encourage procedural good faith, as it provides that a party, which knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity.

In the event that the arbitral tribunal renders a partial award on jurisdiction, the party challenging the arbitral tribunal's jurisdiction may either:

- petition to set aside the partial award made in France or to refuse the recognition of a partial award made abroad immediately, after its notification (*SA Ess Food v Société Caviartrade*, Paris Court of Appeal, 22 May 2003), or
- await the notification of the final award provided that it had raised jurisdictional pleas before the arbitral tribunal (*Société Nihon Plast Co. v Société Takata-Petri Aktiengesellschaft*, Paris Court of Appeal, 4 March 2004)

In the event that the arbitral tribunal renders its decision on jurisdiction at the same time as its decision on the merits, the party challenging the arbitral tribunal's jurisdiction will petition either to set aside or to refuse the recognition of the final award.

Anti-suit injunctions—the French perspective

French courts have been reluctant to issue anti-suit injunctions. Traditionally, French courts have considered that such injunctions go against states' sovereignty and deprive them of their ability to determine their jurisdiction. In 2002, however, the *Cour de Cassation* rendered a unique decision in which it upheld an injunction issued by a French judge against a creditor to stop a proceeding introduced before Spanish courts (*Banque Worms v Spouses Brachot*, Cass. Civ., 1st, 19 November 2002). Subsequently, the Court of Justice of the European Union (ECJ) rejected the use of anti-suit injunctions within the EU in 2004 on the basis that it was inconsistent with Regulation n° 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). But the door is still open for French courts to order a party to halt its proceedings in another non-EU jurisdiction.

Can French courts enforce an anti-suit injunction issued by an EU Member State?

In the landmark 2004 case *Turner v Grovit*, the ECJ held that no anti-suit injunction can be issued by any EU Member State (including France) against another EU Member State. Anti-suit injunctions were considered as interfering with the judicial process of a foreign sovereign state and in conflict with the concept of 'mutual trust' among the EU jurisdictions.

In 2009, in the *Allianz SpA v West Tankers Inc* case, the ECJ applied this solution to arbitration related matters. It held that anti-suit injunctions issued by courts of an EU Member State prohibiting an action

before the courts of another Member State, even where such measures were meant to support the enforcement of an arbitration agreement, were incompatible with EU law:

> 'It is incompatible with Regulation n° 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to the arbitration agreement.'

The decision further stated that EU national courts shall assess the validity of arbitration agreements under their own laws. Therefore, the prevailing trend in ECJ case law seems to reject anti-suit injunctions issued among member states, even when they are issued in support of arbitration.

Can French courts enforce an anti-suit injunction issued by non-EU Member States?

French courts have indeed enforced anti-suit injunctions issued by non-EU Member States.

In the 2009 *Zone Brands* case (*In Zone Brands*, Cass. 1st Civ., 14 October 2009, n°08-16.369), the *Cour de Cassation* recognised an anti-suit injunction issued by an American court stating that:

> 'Anti-suit injunctions, outside of the field of application of international conventions or European Community law, have the sole purpose to provide a sanction for the breach of a preexisting contractual obligation and are not contrary to international public policy.'

A contrario, one could conclude that an anti-suit injunction falling within 'the field of application of international conventions or European Community law' could be deemed contrary to international public policy and therefore, not enforced.

The *Cour de Cassation* went on to discuss three requirements for the enforcement of a foreign antisuit injunction, which are in fact the requirements to recognise and enforce a foreign judgment (*exequatur*):

- there should not be a fraudulent avoidance of the normally applicable law
- evidence of a sufficient link must be established between the dispute and the foreign court having rendered the judgment subject to recognition and enforcement proceedings
- the enforcement of the judgment must not be contrary to international public policy

Can French courts enforce an anti-suit injunction issued by an arbitral tribunal?

On 13 May 2015, the ECJ handed down a much-awaited judgment in the *Gazprom* case. In that matter, the ECJ considered whether an EU Member State could refuse to enforce an arbitral award containing an anti-suit injunction, on the basis that it was inconsistent with the Brussels I Regulation.

References:
Gazprom, C-536/13

The court held that proceedings for the recognition and enforcement of arbitral awards are covered by the national and international law in the Member States and not by the Brussels I Regulation. In doing so, the ECJ specified that the Brussels I Regulation 'must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State'.

Notably, the *Gazprom* judgment did not revisit the *West Tankers* decision since it did not concern an injunction issued by a court of a Member State. *Gazprom* did, however, provide much needed clarification on a number of issues related to anti-suit injunctions issued by an arbitral tribunal seated in the EU.

First, it confirmed that where an anti-suit injunction is issued by an arbitral tribunal seated in the EU, the Brussels I Regulation does not apply. Enforcement of an arbitral award prohibiting a party from bringing

certain claims before an EU Member State court is a matter for that Member State's national law and applicable international law—not the Brussels I Regulation. This specific situation has not been raised before French courts, and it remains to be seen how French courts would decide. What is clear is that French law and its conditions regarding recognition and enforcement would apply. Finally, the *Gazprom* case suggests that arbitral tribunals may now have greater anti-suit injunction powers than EU national courts.