

American Bar Association

**Section of International Law and Practice**

International Legal Exchange Committee

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**REPORT OF THE DELEGATION TO  
INTERNATIONAL ARBITRATION CENTERS**

**May 8–15, 1993**

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### 3. HEARING BEFORE THE PREMIERE CHAMBRE C DE LA COUR D'APPEL DE PARIS (FIRST SECTION C OF THE PARIS COURT OF APPEALS)

**Judges:** Monsieur le President Brissier, Mesdames les Conseillers Garban and Pascal

**Counsel:** Bertrand Moreau and Philippe Lette

**Date:** May 13, 1993

**Reporter:** T. Elizabeth Fields

IN THE MATTER OF WESTMAN  
INTERNATIONAL LTD./ EUROPEAN GAZ  
TURBINES SA

PETITION FOR ANNULMENT OF AN  
ARBITRATION AWARD MADE BY THE COURT  
OF ARBITRATION OF THE INTERNATIONAL  
CHAMBER OF COMMERCE

In France there are 33 Courts of Appeal,<sup>1</sup> of which the Premiere Chambre is the most important. Each Court is composed exclusively of magistrates called *conseillers*. The decisions rendered by the Courts of Appeal carry the name *arrets*.<sup>2</sup> As of the date of this report's preparation, the *arret* of the proceeding described below was not yet available.

The ILEX Delegation attended a hearing of a challenge to an arbitral award on an international commercial matter. Jurisdiction was based upon

the French Code of Civil Procedure.

Arbitration in France has become modified and modernized in the past decade as a result of two decrees published in 1980 and 1981. These decrees have amplified an implicit rule according to which French arbitration procedures are to be conducted in a more flexible way than procedures in state courts. Today, the articles of the two decrees have been implemented into Articles 1502 and 1504 of the new Code of Civil Procedure.<sup>3</sup> These laws provide the minimum principle of "*contradictoire*," which assures that an adversarial process be followed prior to judgment.

M. le President Brissier welcomed the ILEX invitees to the Court. He announced that the forthcoming case was a *deuxieme affaire*, a second proceeding that would be argued.

Maitre Bertrand Moreau argued on behalf of European Gaz Turbines SA (EGT), a department of what was formally Alsthom. EGT is a company of exporters. The other party, Westman, is a small company headquartered in London and composed of Iranian shareholders. In the summer of 1985, Alsthom learned that National Petrochemical Company (NPC), an Iranian corporation, was going to construct a factory in Arak, Iran, and needed a turbine. In that year, relations between France and Iran were not good, as France was supplying aid to Iraq's military efforts against Iran. Westman solicited Alsthom, claiming to have an office in Iran, and proposed to assist the latter in obtaining prequalification for the project.

There is one danger when dealing with a company that claims to be an agent, the risk of not knowing if it truly possesses what is needed to open a market. Westman played a role to assure Alsthom of its intentions to communicate with the necessary Iranian parties, in the best of all possible conditions, and to bring great assistance.

A commercial contract was entered into between Alsthom and Westman in December 1985. It contained an arbitration clause and provided for the payment of a commission by Alsthom to Westman, in an amount to be set at a later stage, if Westman could successfully help Alsthom in procuring the desired contract.

Over the course of more than a year that followed, Alsthom received no information from Westman concerning the prequalification. Through its Tehran office, Alsthom was able to launch its own preselection campaign.

Through the Summer of 1989, Alsthom received only three letters from Westman. One announced that Alsthom was on the list of offers to be selected, whereas Alsthom had already learned this information from another source. The second ensued after Alsthom's prequalification, requesting a 6 percent commission. The third letter was sent once Alsthom had concluded the turbine contract. It demanded a 3 percent commission for Westman to be deposited in a Swiss account.

Believing that Westman had made no efforts on its behalf, Alsthom informed Westman that it did not intend to pay a commission. Westman then began arbitration. Before the arbitrators, Westman claimed payment of a 3 percent commission. Alsthom claimed that its contract with Westman was illegal because its purpose was, in effect, to provide bribes. Alsthom further claimed that since the commission was undetermined, the contract was void.

On March 21, 1992 before the International Court of Arbitration of the International Chamber of Commerce, EGT, formally Alsthom, was ordered to pay to Westman a commission of 6,712,240 Swiss francs. This amount represented a 4 percent commission on the contract awarded EGT by the NPC to purchase gas turbines intended for its petrochemical plant. In addition, EGT was ordered to pay Westman \$146,000 for arbitration fees and 450,000 French francs for legal expenses.

EGT refused to pay the award. Instead, it asked the Paris Court of Appeals for review based on Article 1502 of the French Code of Civil Procedure, which closely incorporates the provisions of Article 5 of the New York Convention. Article 1502 permits appellate review where either its recognition or execution is contrary to international public policy.

The issue before the Court of Appeal is the unlawfulness of the Westman-Alsthom contract as being contrary to *l'ordre public international*, or international public policy. The execution of the award in France gives effect to the practice of *le trafic d'influence*, trading on one's influence, to which the French legislature has accorded penal sanctions. To give effect to the arbitral award would be illicit, illegal and immoral. A remuneration that constitutes a kick-back or bribe would be reprehensible.

The arbitrators fixed a commission sum of 4 percent, which was superior to that claimed by

Westman at the commencement of arbitration. The arbitrators relied on files provided by Westman containing unsubstantiated information. By endorsing the convention of bribery, the arbitrators accepted this illicit practice.

The arbitrators qualified the contract as being one providing a beneficial service. However, the true desire of Westman was to conduct a *trafic d'influence*.

The internal documents that Westman provided to the ICC court cannot justify Westman's activities. These signed documents showed the amount of expenses incurred as justification of Westman's activities and costs.

After the arbitral award, EGT's attorneys in England applied to the Commercial Court in London to verify Westman's balance sheets. They discovered that Westman did not spend as much as it had claimed; this constitutes a fraud which cannot remain unpunished. Westman has acknowledged the fraud, and its explanation is unacceptable.

There are two consequences of the fraud perpetrated by Westman. First is the absence of any activity on the part of Westman. There have been no justifiable expenses, since they are contrary to international public policy. Second, there has been an absence of proof of expenses that correlate to those claimed by Westman.

EGT requests the Court to pronounce the arbitral award *annulled* (canceled).

Maitre Philippe Lette argued in support of the arbitral award. On behalf of M. Chirazi, President of Westman who was present in the court room, Maitre Lette expressed his disappointment that the day's proceedings derived from a delayed judgment.

The ICC arbitration proceedings lasted six hours. The tribunal awarded Westman a very important remuneration. Even when a contract of the type sought by Alsthom is not obtained, the intermediary's position is very significant. Westman, as intermediary, obtained Alsthom's prequalification for the turbine contract negotiated with NPC.

As for Alsthom's claim that its contract with Westman involved bribes and illicit commissions, how can Westman pay bribes without having received any money from Alsthom? At the time of the Westman-Alsthom agreement, times were difficult. The Iran-Iraq war was in full force, and French companies had little welcome in Iran. Westman negotiated with Alsthom in good faith.

In return, Westman was received by Alstom with silence. Finally, after years of efforts to procure Alstom's sought-after contract, Alstom put an end to the parties' professional relationship with a letter refusing to pay any commission to Westman.

Presents or "*pots-de-vin*" exist in France. They are not known as bribes, but rather as commissions; a commission may be linked to an obtained result. Westman had a valid agreement with Alstom. EGT has been unable to prove that the enforcement of the ICC arbitration award in France would contradict international public policy.

EGT claims that the documents submitted by Westman are false because the expenses listed in them were not included in Westman's accounts. Westman replies that these expenses were incurred by Westman's promoters. In addition, Westman has at all times acted in compliance with the United Kingdom's Companies Act.

The arbitral court awarded a sum representing a commission of right to Westman. This sum has actually been due for eight years. The petition should be dismissed with costs and the arbitral award should be fully recognized as enforceable.

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M. le President Brissier asked Maitre Moreau if he considers the disputed contract to be contrary to international public policy. Maitre Moreau responded that the contract is against concrete international policy because *le pot de vin* is a means of facilitating *le trafic d'influence*.

Mme. le Substitut de Procureur (the Deputy Attorney General) Bernard-Catat stated that upon consideration of contracts that are contrary to social morals, when a contract is judged illicit it must be voided as against public policy. The courts are often faced with the dilemma of analyzing contracts involving international transactions, with international rules that are misunderstood. The substantially applicable international rule involved in this dispute is international public policy. As for French civil law, there is an ambiguity. In France, there exists a duality in internal laws and international laws that govern public policy.

The Cour d'Appel has more power than the Cour de Cassation. The Cour d'Appel can review everything, which is to say, can reexamine the facts. On the contrary, the Cour de Cassation can only judge the judgments ren-

dered by the lower courts.

What has transpired between the two parties to this dispute involves a pact. However, we are not obliged today to give this pact a label. The Court today must review the arbitration judgment rendered. True, the Cour d'Appel is better situated than the common arbitrator. It exercises a superior morality to arbitration, with its own presumptions and indicia. Nonetheless, the arbitration process is one which is well established in France. It serves a useful purpose. It is an efficient means of resolving disputes. Absent a finding of disproportionate ruling by the arbitral courts, the Courts of Appeal should not disrupt the freedom found within commercial contracts.

M. le President Brissier stated that the matter would be placed into deliberation.

#### Endnotes

1. The 33 courts comprise the departmental and TOM-DOM extraterritorial regions of France. *La documentation Francaise* No 251, *La Justice*. Paris, 1991: p. 41.
2. *La documentation Francaise*, Les cahiers francais No 251, *La Justice*. Paris, 1991: p.41.
3. Le Nouveau Code de Procedure Civil (Edition du 1 janvier 1983).