Arbitration and the Brussels Convention

Legal Department du Ministère de la Justice de la République d'Irak c./ Stés Fincantieri, Finmeccanica et Armamenti E Aerospazio is the first French case to address the issue of whether the 1968 Brussels Convention applies to the enforcement of a foreign judgement declaring an arbitration clause void. The judgement was rendered by the Paris Court of Appeal on June 15th, 2006, and I understand that an appeal is now pending before the French Supreme court for civil, commercial and criminal matters (*Cour de cassation*). The dispute had arisen between the State of Iraq and three Italian companies. Of course, as any proper French judgement, not much is said on the facts. It is only stated that Iraq concluded a contract with each of the companies, and that each contract contained an ICC arbitration clause. At the beginning of the 1990s, arbitration proceedings were initiated pursuant to the clauses, while the Italian companies initiated proceedings in Italy to have the arbitration clauses declared void. In 1994, the Genoa Court of Appeal did declare the clause void as being contrary to the embargo established by the U.N. 661 Resolution of 1990, but did not go on to rule on the merits. For the following decade, the arbitration went on. In 2004, the Italian companies sought a declaration of enforceability of the 1994 Genoa judgement in France. The Paris Court of appeal noticed in its judgement that, interestingly enough, that was precisely at the time when the arbitral tribunal was getting close to make its award. The case before the Paris Court of appeal was whether the Italian judgement could be declared enforceable in France. The Court held that it could not. The first reason was that the Brussels Convention did not apply, because the case fell within the exclusion of article 1, d) of the Convention. One could maybe have expected the Court to rule that the Italian judgement was clearly dealing with an issue of arbitration, as it had only held that the arbitration clauses were void, and had not ruled on the merits. Instead, the Court held that the rationale behind the exclusion was to allow the contracting states to comply freely with their international undertakings under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and that one of such undertaking was the obligation for courts of Contracting states to decline jurisdiction in presence of an arbitration clause, pursuant to article II of the New York Convention. The Court then went on to examine

whether the 1930 Franco-Italian Convention applied, and found that it did not either. Finally, and most interestingly, the Court held that the Genoa Court did not have jurisdiction from the French perspective. The reason why it lacked jurisdiction was that it had accepted to examine whether the arbitration clause was valid and applicable when, under French law, courts do not have such power unless the clause can be found prima facie void or inapplicable.

In order to fully appreciate the meaning of this judgement, it is important to appreciate how French law of arbitration differs from the law of arbitration of most jurisdictions. Under French law, arbitrators have a priority to rule on their own jurisdiction. The competence-competence principle entails not only that arbitrators may rule on their own jurisdiction, but also that they have a priority to do so over national (French) courts, and that such courts ought to decline jurisdiction to do so unless they find that the clause is prima facie void or inapplicable ("*manifestement nulle ou inapplicable*"). The French judgement projects this peculiar perception of the strength of the jurisdiction of arbitrators internationally. The Italian Court is found as lacking jurisdiction because it declared the arbitration clause void without finding that it was prima facie so, although Italian law may well have provided that (Italian) Courts do have the power to examine whether arbitration clauses are valid and applicable before declining jurisdiction.