RECENT DEVELOPMENTS

National Iranian Oil Co. v. Israel: France Reinterprets Its Code to Prevent "Denial of Justice," Leaving Israel Between Iran and a Hard Place

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I. OVERVIEW

The National Iranian Oil Company (NIOC) and the State of Israel (Israel) entered into an agreement in 1968 for the construction and maintenance of an oil pipeline going from the Mediterranean city of Ashquelon to the Red Sea port city, Eilat.[1] The agreement included an arbitration clause stipulating that any problems arising under the agreement shall be submitted to a three-judge arbitration panel, governed by the International Chamber of Commerce (ICC); however, the clause did not state a specific site for the arbitration.[2] Under the agreement, each party must nominate a judge, and both parties must agree on a third judge.[3] If the parties are not able to agree, the president of the ICC will nominate the third judge.[4] The arbitration clause further declared the decision of the arbitral panel to be final and binding upon the parties.[5]

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1. Nat'l Iranian Oil Co. (NIOC) v. Etat d'Israël, CA Paris, 1e ch., Mar. 29, 2001, Revue de l'Arbitrage 2002, 427, 430, note Fouchard.

2. *Id.* The arbitration clause stated in its entirety:

> If at any moment in the duration of the current agreement, a doubt or litigious act arising between the parties concerning the interpretation or execution of this agreement or any other relating area or concerning rights and obligations of the parties arises out of this agreement, such will be submitted to arbitration, and each party will nominate one judge. ICC will be the governing body for the arbitration. If the parties cannot agree on the choice of a third arbitrator, the President of the ICC of Paris will nominate the third arbitrator. The decision of the arbitral tribunal is final and binding for the parties.

Id. (author's translation).

3. *Id.*

4. *Id.*

5. *Id.*

NIOC notified Israel of a request to nominate an arbitrator on October 14, 1994, and gave Israel thirty days to comply.[6] Israel refused this request, arguing that the substance of NIOC's request questioned the actions of a government, a nonarbitrable matter.[7] In response, NIOC brought suit in the *Tribunal de grande instance* (TGI) of Paris, to enforce the arbitration clause.[8] NIOC relied on provisions of imputed jurisdiction through France's *nouveau code de procédure civile* (new code of civil procedure or N.C.P.C.) to effectuate relief.[9] The TGI found it had no jurisdiction to hear this case, reasoning that the contract provided no connection to France, and subsequently denied NIOC's claim.[10]

Negotiations began between NIOC and Israel but came to a halt in June 1998 when the Tel Aviv District Court decided the *Manbar* case, which, *inter alia*, declared Iran an enemy of the state of Israel.[11] After negotiations ceased in February 2000, NIOC brought its suit back to Paris, this time asserting jurisdiction on the grounds of denial of access to justice.[12] The TGI found it lacked jurisdiction to hear the claim, stating there was no "denial of justice" since NIOC had failed to show that no other court could hear this claim.[13] The TGI further found that the *Manbar* judgment was a legitimate justification for Israel's refusal to submit to arbitration.[14]

NIOC appealed the decision to the Court of Appeals of Paris, reasserting its contention that the laws of France provided a remedy for "denial of justice."[15] The Court of Appeals agreed with NIOC and held the claim was admissible under a new third condition of "denial of justice," interpreted into N.C.P.C. article 1493.[16] The Paris Court of

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6. *Id.*
7. *Id.* at 431.
8. *Id.* The TGI is a French court of original jurisdiction.
9. *Id.* (NIOC asked the court to grant relief through application of article 1493 of the N.C.P.C.).
10. *Id.* at 431-33.
11. *Id.* at 433. Nahum Manbar was an Israeli businessman convicted by an Israeli district court of assisting an enemy state by selling 150 million tons of poison gas material and chemical weapons to Iran. Gil Hoffman, *Court Rejects Manbar's Appeal for Treason*, JERUSALEM POST, Dec. 6, 2000, at 03, *available at* 2000 WL 8268165. Manbar received sixteen million dollars in return for the materials and expertise. *Id.* Manbar attempted to raise the defense that he had a license to sell to Iran. *Id.* However, Devora Chen, head of security at Israel's State Attorney's office stated, "Manbar never received a license to sell to an enemy of the state and he could not prove any of his claims in court." *Id.*
12. *NIOC*, Revue de l'Arbitrage at 433-34.
13. *Id.* at 435-36.
14. *Id.*
15. *Id.* at 437.
16. *Id.* at 440-41. Article 1493 provides:

Appeal *held*: (1) the arguments of NIOC constituted an appealable issue; (2) the decisions of the TGI were annulled; (3) the parties were to start anew; (4) Israel had one month to nominate a judge; (5) the parties should let each other know what arbitrator would be nominated by September 2001; (6) if either party failed to comply by October 2001, the court would select default arbitrators; (7) all other demands were rejected; and (8) Israel was liable for the legal costs of all three matters before the French courts. *National Iranian Oil Co. v. Israel*, CA Paris, 1e ch., Mar. 29, 2001, Revue de l'Arbitrage 2002, 436, 442, note Fouchard.

II. BACKGROUND

International commercial arbitration has become the preferred method for settling disputes arising from international business ventures.[17] One of the preeminent organizations for coordinating arbitral tribunals is the ICC's International Court of Arbitration (ICA), established in Paris in 1923.[18] The Rules of Arbitration (Rules) created by the ICC involve its membership extensively in both requests for, and the actual administration of, arbitrations.[19] However, ICA members do not have substantive decision-making power nor can they serve on arbitral tribunals.[20] The members of the ICA function in an administrative role and only have the power to appoint arbitrators, not the power to arbitrate the disputes.[21]

> The arbitration agreement may, directly or by reference to arbitration rules, appoint the arbitrator or arbitrators or provide a mechanism for their appointment. If a difficulty arises in the constitution of the arbitral tribunal in an arbitration which takes place in France or which the parties have agreed shall be governed by French Procedural law, the most diligent party may, in the absence of a clause to the contrary, apply to the president of the Tribunal de Grande Instance of Paris in accordance with procedures of Article 1457.

N.C.P.C. art. 1493 (Dalloz 1997) (Fr.) (author's translation).

17. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 7 & n.30 (Transnational Publishers 2d ed. 2001).

18. *Id.* at 13. The ICC was founded in 1919. Jan Paulsson, *Arbitration Under the Rules of the International Chamber of Commerce*, *in* RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 235, 240 (Thomas E. Carbonneau ed., Univ. Press of Va., 1984). It consists of internationally oriented enterprises and organizations with National Committees acting as liaisons and representatives between the organizations and ICC headquarters. *Id.*

19. BORN, *supra* note 17, at 13-14.

20 INTERNAL RULES OF THE INTERNATIONAL COURT OF ARBITRATION OF THE ICC art. 2(1) (1998), *reprinted in* W. LAURENCE CRAIG ET AL., ANNOTATED GUIDE TO THE 1998 ICC ARBITRATION RULES WITH COMMENTARY 215 (Oceana Publications, Inc. 1998) [hereinafter ICC RULES]. Article 2(1) states: "The Chairman and the members of the Secretariat of the Court may not act as arbitrators or as counsel in cases submitted to ICC arbitration." *Id.*

21. *See id.*; BORN, *supra* note 17, at 14.

The Rules provide that the ICA has the power to appoint and confirm arbitrators to the tribunals,[22] and requires the arbitrators selected must be independent of the parties involved in the arbitration.[23] However, the Rules are silent in regard to a party refusing to submit to arbitration, and do not provide a means to compel enforcement of an arbitral award.[24] As a result, courts play a role in this stage of the arbitral process.[25] Without court intervention, a party's denial of an agreement or default on an award could go unrecognized and unresolved.[26] A decision by a court to compel arbitration or to enforce an award provides the needed recourse for an aggrieved party.[27] Significantly, when a court is requested to settle a dispute, the domestic procedural and substantive law governs.[28]

The courts of France are popular jurisdictions to bring disputes arising from arbitration agreements, due in part to France's codification of international commercial arbitration rules in the N.C.P.C.[29] The N.C.P.C. provides a test to establish whether the arbitration will be governed by the rules of domestic or international arbitration.[30] Arbitrations deemed to be international are those involving *"intérêts du commerce international"* (international commercial interests).[31] This includes not only disputes between two private commercial entities, but also disputes between a State and a commercial entity.[32]

Article 1493 of the N.C.P.C. provides a mechanism for a French court to facilitate the appointment of an arbitrator or arbitrators when the parties cannot agree.[33] The two conditions that permit the TGI to hear a

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22. *See* ICC RULES, *supra* note 20, art. 7(4).
23. *Id.* art. 7(1).
24. *See generally id.*
25. *See* ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, U.S. AND WEST GERMAN LAW 18 (Schulthess Polygraphischer 1989).
26. *Id.* ("If court sanctions cannot be used to ensure compliance with the arbitrator's decision, his award becomes, as against a defaulting party, little more than a failed conciliation attempt.").
27. *See id.* at 18-19. "First, when an adverse party attempts to commence arbitration, a party may refuse by inaction to honor the arbitration clause . . . . If this occurs, the meaning or enforceability of the clause may be raised by the party pursuing arbitration in a judicial action seeking an order to compel arbitration." BORN, *supra* note 17, at 75 (citation omitted).
28. *See* BORN, *supra* note 17, at 75.
29. *See* Bernard Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981*, *in* RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION, *supra* note 18, at 117-18. The codified enactments on arbitration constitute Book IV of the N.C.P.C. *Id.* at 117-18. Titles V and VI are dedicated to international arbitration. *Id.* at 118.
30. *See* N.C.P.C. art. 1492 (Dalloz 1997) (Fr.).
31. *Id.* (author's translation).
32. Audit, *supra* note 29, at 124.
33. N.C.P.C. art. 1493.

claim and appoint an arbitrator are found in N.C.P.C. article 1493 line 2: (1) when France was the seat of the arbitration from which the dispute arose or (2) when the parties have agreed that the arbitration should be governed by French procedural law.[34] Additionally, article 1457 makes the decision of the TGI binding on the parties.[35]

The early decisions of French courts involving international commercial arbitration demonstrate France's support for the international arbitral process.[36] In the famous *Roses v. Moller et Cie* case, the French Supreme Court held foreign arbitration awards analogous to domestic arbitral awards rather than to foreign judgments.[37] While foreign judgments are subject to a full review on the merits by French courts, domestic arbitral awards are not and only an *exequatur* (leave of enforcement) is permitted.[38] Thus, arbitral tribunal awards are not reviewable by a French court.

This predilection for arbitration in French courts is not limited to decisions to enforce awards, but extends to the interpretation of the French *Code civil*, "exempt[ing] the process of international commercial arbitration from the reach of . . . exorbitant jurisdictional rules."[39] The jurisdictional requirements under articles 14 and 15 of the *Code civil* required a party seeking enforcement of a judgment against a French national to bring the action in a French court; however, a French national who agreed to international arbitration of a commercial matter implicitly waives this requirement.[40] These examples demonstrate the French judiciary's willingness to remove domestic law barriers to international commercial arbitration, "thereby encouraging recourse to arbitration as a means of resolving disputes."[41]

Contemporary decisions by French courts continue to favor international arbitration as a means of resolving commercial disputes.[42]

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34. *Id.*

35. *Id.* art. 1457 [[T]he president of the tribunal . . . shall rule by way of an order against which no recourse is available.] (author's translation).

36. Thomas E. Carbonneau, *The French* Jurisprudence *on International Commercial Arbitration*, *in* RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION, *supra* note 18, at 146, 149.

37. *Id.* at 150 (citing Cass. req., July 27, 1937, Gaz. Pal. 1937, 2, pan. jurispr. 618 (Fr.)).

38. *Id.*

39. *Id.* at 149.

40. *Id.* This liberal reading did not extend to foreign judgments, enforceable in their own jurisdictions, that parties were attempting to enforce in France; if the judgment was not rendered pursuant to an arbitration agreement, the jurisdiction would be determined under a strict interpretation of the *Code civil*. *See id.*

41. *Id.* at 150-51.

42. *Id.* at 151.

In *Société Supra-Penn v. Société Swan Finch Oil Corp.*,[43] the French Supreme Court both reaffirmed and expanded the exemptions provided by the strict language of the *Code civil* for international arbitration clauses.[44] French courts have also taken measures to recognize the parties' intent when examining contractual relationships.[45] This recognition is seen in *Société Italiban*, where the lower French courts refused to grant an *exequatur* because the arbitration clause clearly required a Luxembourg commercial court to hear the dispute.[46]

French courts' application of a widely applied tenet of international commercial arbitration, the separability doctrine, has further solidified the enforcement of arbitration clauses.[47] This doctrine treats the arbitration clause of a contract as separate from the contract itself.[48] Through the application of the separability doctrine, the arbitration clause became a procedural agreement separate and apart from the substantive contract.[49] This severance makes it possible for a court to examine and enforce an arbitration agreement even when the substantive contract has been nullified.[50]

The French Supreme Court adopted the separability doctrine in *Société Gosset v. Société Carapelli*.[51] The Court held the arbitration clause in an international commercial agreement was separable from the contract, overruling previous determinations where the arbitration clause had been deemed a part of the contract.[52] As a result, an arbitration clause in an otherwise nullified contract can be judicially reviewed.[53]

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43. Cass. com., June 21, 1965, 55 R.C.D.I.P. 1966, 477, 478 (Fr.).

44. *See* Carbonneau, *supra* note 36, at 151.

> [T]he French Supreme Court upheld the view that an arbitration clause constitutes a waiver of the French exorbitant jurisdictional rules. . . . [W]hen a French national enters into an agreement providing for disputes to be brought before an arbitral tribunal, he waives his jurisdictional prerogatives under Article 14 of the *Code civil*.

Id.

45. *Id.* at 154.

46. *Id.* (citing CA Paris, 1e ch., Nov. 14, 1975, D. 1976, 251-52).

47. *See* SAMUEL, *supra* note 25, at 155.

48. *Id.*

49. *See id.* This doctrine applies when the arbitration clause has been incorporated into the substantive contract. *Id.* at 156.

50. *See id.* at 155.

51. Cass. 1e civ., May 7, 1963, D. Jur. 1963, 545 (Fr.). In this case, a French businessman agreed to purchase grain from an Italian company. *Id.* Aware of problems that might arise, the businessman had the Italian company agree to collect payment upon delivery of the grain. *Id.* When the shipment failed to make it through customs, the businessman refused to pay. *Id.*

52. *See* Carbonneau, *supra* note 36, at 158 ("In a word, when a valid arbitration clause is inserted in an international contract, the arbitration will take place notwithstanding the legal fate of the principal agreement.").

53. *Id.*

Moreover, this decision demonstrates the judiciary's policy of upholding the "parties' intention to have their disputes resolved through arbitration."[54]

However, the *Gosset* decision did not make application of the separability doctrine in international arbitration absolute; the Court made a reservation for exceptional cases where the doctrine is inapplicable.[55] It was not until the 1971 decision, *Société Impex v. Sociétés P.A.Z. Malteria Adriatica, Malteria Tirena*, that the French Supreme Court implicitly did away with the reservation enunciated in *Gosset*.[56] The *Impex* decision made the application of the separability doctrine to international arbitral disputes predictable and absolute in French domestic courts.[57]

France has made it clear that *international* public policy, not *domestic* public policy, guides its arbitration decision-making.[58] This policy is expressed in N.C.P.C. article 1498; the N.C.P.C. states an arbitral award will be enforced in France if the party seeking enforcement can prove the existence of the award, and that recognizing the award is not contrary to *international* public policy.[59] The tenets of freedom to contract and intent of the parties, are both concepts of international public policy.[60] The Paris Court of Appeal further defined

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54. *Id.*

55. *See* SAMUEL, *supra* note 25, at 163 (citing *Gosset*, D. Jur. 1963, at 545). The text of *Gosset* states in pertinent part:

> In international arbitration, the agreement to arbitrate, whether concluded separately or included in the contract to which it relates, is always, save in exceptional circumstances, which are not alleged to exist in this case, completely autonomous in law, which excludes the possibility of it being affected by the possible invalidity of the main contract.

Id. (citation omitted) (author's translation).

56. Cass. 1e civ., May 18, 1971, D. 1972, 37 (Fr.).

57. SAMUEL, *supra* note 25, at 163 ("The silence of the subsequent caselaw, on this point, supports the view that the phrase, 'sauf circonstances exceptionnelles' [save in exceptional circumstances (author's translation)] was included in the *Gosset* judgment out of an abundance of caution and can now be disregarded.").

58. *See id.* at 163-64.

59. N.C.P.C. art. 1498 (Dalloz 1997) (Fr.). Article 1498 states: [Arbitral awards are recognized in France if their existence has been established by the one relying thereon and if such recognition is not clearly contrary to international public policy.] *Id.* (author's translation).

60. *See* Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 260 (Pieter Sanders ed., Kluwer Law & Taxation Publishers, 1987).

> [I]n domestic private law, the so-called principle of 'autonomy of the will' or contractual freedom is limited by the obligation to respect mandatory rules whereas, in private international law, it is well-known to have a totally different meaning (allowing the parties by their choice of law to dismiss the rules, mandatory or not, of the law which, in the absence of choice, would have been applicable).

the notion of a common supranational policy in *Comité de défense des actionnaires de la Banque ottomane v. Banque ottomane*.[61] The court held, in international financial ventures, there must be a policy common to the legal systems that offers protection so as to provide comparable protection to those with vested financial interests.[62]

In *Société Jean Tardits v. Cie* the Court of Appeals of Orleans addressed the issue of countervailing public policies within the separability doctrine framework.[63] The court nullified a contract because it violated domestic public policy.[64] However, the court also applied the separability doctrine, and held the arbitration clause should still be enforced.[65] This case established the limited application of domestic policy in international commercial arbitration, and reinforced the *Gosset* decision in the application of international public policy when examining international arbitration.[66]

A more contemporary examination of international public policy by the French courts occurred in *Sociétés BKMI et Siemens v. Société Dutco*, where a dispute arose between parties to an agreement to build a cement plant and a single arbitrator was nominated.[67] The court of appeals upheld the award, despite the fact that the parties had made reservations under the agreement and that the arbitration was under protest.[68] The French Supreme Court reversed, holding the will of the parties was not represented due to lack of fair representation because of the appointment of a single arbitrator.[69] The *international* public policy of

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Id.

61. Nat'l Iranian Oil Co. (NIOC) v. Etat d'Israël, CA Paris, 1e ch., Oct. 3, 1984, D. Jur. 1985, 526, note Synvet.

62. Lalive, *supra* note 60, at 277-78 (discussing the *Banque ottomane* holding which supports the idea of a common international public policy).

63. Carbonneau, *supra* note 36, at 159 (citing CA Orleans, Feb. 15, 1966, D.S. Jur. 1966, 340).

64. *Id.*

65. *Id.* Domestic public policy provisions addressing the will of the parties or contractual freedom are limited by compulsory rules and statutes that have no application to international agreements. Lalive, *supra* note 60, at 260-61.

66. *See* Carbonneau, *supra* note 36, at 159-60 ("This holding lends invaluable support to the separability doctrine elaborated in *Gosset*, demonstrating that the separability doctrine has been integrated into the mainstream of French *jurisprudence*.").

67. Cass. 1e civ., Jan. 7, 1992, Revue de l'Arbitrage 1992, 470, note Bellet (Fr.).

68. *Id.*

69. *See id.* at 471 [[T]he arbitral clause contained in the agreement binding the three companies unambiguously expressed the common will of the parties to such a contract to submit differences arising from their agreement to three arbitrators.] (author's translation).

deferring to the will of the parties governed the decision-making.[70] This decision reaffirmed the foundation laid by *Gosset* and *Tardits* of courts ardently considering international public policy in decisions concerning international arbitration.[71]

III. THE COURT'S DECISION

In the noted case, the Paris Court of Appeals expanded its interpretation of article 1493 of the N.C.P.C.[72] Article 1493 enumerates instances where the TGI can compel selection of the arbitral panel in an international arbitration. The court liberally interpreted this provision to include "denial of justice," deemed a tenet of international public policy, as a condition that would compel this selection.[73] Upon deciding NIOC had an appealable issue on its "denial of justice" claim, the court vacated the TGI's February 2000 and January 1996 decisions denying NIOC's claim.[74] The court then required each party to nominate an arbitrator on its behalf and inform the other party of its designation by September 6, 2001.[75] If a party failed to designate an arbitrator, the court would select one on the party's behalf by October 2001.[76] The court rejected all other claims and demands, and assessed the court costs to Israel for all three proceedings.[77]

The court first assessed whether the situation could be redressed, and whether it could be done through the application of N.C.P.C. article 1457.[78] Article 1457 grants the president of the arbitration society the power to enforce arbitration,[79] except where no arbitration clause exists or the clause is void.[80] Although article 1457 did not provide recourse, the court determined a general principle of civil procedure existed, which

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70. *See id.* [Considering that the principle of equality in the appointment of arbitrators is a matter of public policy which can be waived only after a dispute has arisen] (author's translation).

71. *See id.* at 470-71.

72. Nat'l Iranian Oil Co. (NIOC) v. Etat d'Israël, CA Paris, 1e ch., Mar. 29, 2001, Revue de l'Arbitrage 2002, 427, 442, note Fouchard.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 440.

79. N.C.P.C. art. 1457 (Dalloz 1997) (Fr.) [[T]he president of the tribunal, seized as in expedited proceedings by a party or by the arbitral tribunal, shall rule by way of an order against which no recourse is available.] (author's translation).

80. *Id.* (referring to article 1444, which states [[i]f the arbitration clause is either manifestly void or inadequate for the purpose of constituting the arbitral panel, the president shall so state and declare that no appointment need be made] (author's translation) *Id.* art. 1444.).

allowed an appeal of any decision stemming from a violation of a fundamental principle of public policy.[81] The court found "denial of justice" violated the public policy of providing parties access to justice.[82] Therefore, on the grounds of "denial of justice," the Paris Court of Appeals determined the appeal admissible.[83]

The court then addressed whether article 1493, the provision governing selection of arbitrators in international arbitration, was applicable.[84] Article 1493 provides two instances where the president of the arbitration society can compel arbitration through selection of an arbitrator for a defaulting party.[85] Compulsion under article 1493 is possible either when France is the seat of the arbitration, or when French procedural law is applicable.[86] In the noted case, neither of these conditions existed.[87] Thus, article 1493 on its face provided no recourse for NIOC's request to compel arbitration.[88]

The court then explained why it had jurisdiction to hear the claim anyway.[89] It began by examining the impossibility of the arbitration clause being enforced by either party's domestic courts.[90] While the Israeli courts possessed the capability to nominate an arbitrator for the State, no redressability was possible due to the *Manbar* decision.[91] Following *Manbar*, domestic courts in Israel would not answer any claim by NIOC because NIOC, as an entity of Iran, was an enemy of the state.[92] The court determined, even if NIOC attempted to bring the claim in an

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81. *NIOC*, Revue de l'Arbitrage at 440.

82. *Id.* at 441.

83. *Id.*

84. *Id.*

85. N.C.P.C. art. 1493. While the court redefined article 1493 to apply to the noted case, the court refused to accept NIOC's contention that their claim was redressable through the application of N.C.P.C. article 91, which addresses issues of nullity based upon abuse of discretion. *NIOC*, Revue de l'Arbitrage at 441.

86. N.C.P.C. art. 1493.

87. *NIOC*, Revue de l'Arbitrage at 441.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* The Tel Aviv District Court found Manbar guilty of "giving assistance to an enemy in war, conspiracy, attempting to assist an enemy in war, and delivering information to the enemy." Dan Izenberg, *Court Releases Ruling on 'Murky' Manbar Dealings*, JERUSALEM POST, Jan. 10, 2001, at 01, *available at* 2001 WL 6600948.

92. *NIOC*, Revue de l'Arbitrage at 441. Israel's basis for refusing to recognize or enforce an award to Iran is supported by article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, to which France and Israel are signatories. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V (2)(b), 330 U.N.T.S. 38, 21 U.S.T. 2517 [hereinafter New York Convention]. This provision provides for an exception to enforcement of an arbitral award if "recognition or enforcement of the award would be contrary to the public policy of that country." *Id.*

Iranian court, there would continue to be a problem of redressability since Israel would not recognize a judgment from Iran.[93]

Because neither party's domestic court system could provide an arena to enforce the claim, the court determined France was the next best place for the parties to gain jurisdiction.[94] The court reasoned, while the text of the arbitration clause failed to designate a forum for arbitration, it did specify the ICC in Paris had jurisdiction to nominate the third arbitrator to the panel if the parties failed to agree.[95] The court determined this grant of power to the ICC, which is headquartered in Paris and has been closely linked with French domestic law since its founding, constituted constructive submission by the parties to the jurisdiction of French courts.[96]

Having found jurisdiction, the court proceeded to determine the merits of NIOC's claim.[97] Troubled by the overarching policy concerns, the court decided to add another situation that would grant the TGI jurisdiction to enforce arbitral provisions.[98] The court determined that "denial of justice" abroad would permit the TGI to enforce the agreement to arbitrate.[99] The "denial of justice" in this case was Israel's inability to determine if and when the *Manbar* decision would be overturned; should such an event occur, Iran would no longer be an enemy of the state and thus would be permitted to bring suit in an Israeli court.[100] The court added "denial of justice" as the third exception found in N.C.P.C. article 1493 and granted a judgment to compel arbitration.[101] The court

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93. *NIOC*, Revue de l'Arbitrage at 441. Iran is not a signatory to the New York Convention, which limits its recourse in reciprocity for enforcing an award from Iran. The New York Convention states that: "A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention." New York Convention, *supra* note 92, art. XIV.

94. *NIOC*, Revue de l'Arbitrage at 441.

95. *Id.* Article 6(1) of the ICC Rules of Arbitration states:

> Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration proceedings unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

ICC RULES, *supra* note 20, art. 6(1).

96. *NIOC*, Revue de l'Arbitrage at 442. Article 6(3) of the ICC Rules of Arbitration supports the court's reasoning, stating, "If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure." ICC RULES, *supra* note 20, art. 6(3).

97. *NIOC*, Revue de l'Arbitrage at 442.

98. *Id.*

99. *Id.* at 441.

100. *Id.* The Israeli Supreme Court affirmed the *Manbar* decision. *See* Izenberg, *supra* note 91.

101. *NIOC*, Revue de l'Arbitrage at 441-42.

specified that Israel had one month to nominate an arbitrator, or the TGI would nominate one on Israel's behalf.[102]

IV. ANALYSIS

The implications of the decision in the noted case are both far reaching and problematic. The Paris Court of Appeals looked to the French N.C.P.C. to create an international remedy.[103] The court established "denial of justice" as grounds to grant a court jurisdiction, when jurisdiction would otherwise have been denied, to enforce an arbitration clause.[104] However, the court cautioned that this remedy should be applied on a case-by-case inquiry,[105] or France might be deluged with cases where parties submitted to arbitration under ICC Rules and later found themselves without a forum that would provide a remedy.[106] Additionally, a party who has not availed itself of French jurisdiction could find itself bound by French substantive and procedural law during the course of arbitration.[107]

By creating the "denial of justice" exception, France seems to have carved out an affirmation of international public policy through domestic jurisprudence.[108] The court asserts that the French public policy of preventing "denial of justice" can and should be recognized by a judge in properly fulfilling his role to assist arbitration.[109] Moreover, France has been at the forefront of creating the rules and policies that govern arbitration since arbitration began as an alternative means for dispute resolution.[110] The ICC Rules derived much of their substance from French legal scholars, and as a result have developed in accordance with

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102. *Id.*

103. *Id.*

104. Philippe Pinsolle, *Court Appointed Arbitrator: French Courts Expand Jurisdiction to Avoid Denial of Justice*, 17:6 MEALEY'S INT'L ARB. (2002) (citing and translating the noted case: "Whereas, however, this judge can nonetheless intervene, as both parties have agreed, if a denial of justice abroad is established; indeed, the right for a party to an arbitration agreement to have its claims submitted to an arbitral tribunal is a rule of public policy, which the French judge, as any other, must enforce when exercising its role of assisting judge to the arbitration. Nevertheless, his intervention must be justified by a link of the case with France.").

105. *NIOC*, Revue de l'Arbitrage at 440.

106. *See* BORN, *supra* note 17, at 744-47 (explaining forum selection issues in confirmation of awards).

107. *See id.* (asserting that generally there are no international limits on forums where judgments for enforcement can be sought).

108. *See NIOC*, Revue de l'Arbitrage at 440 (emphasizing that the right of a party to have its claims submitted to a tribunal should lead the French judge to assist in that right).

109. *Id.*

110. *See* BORN, *supra* note 17, at 13-14.

the evolution of French jurisprudence.[111] France's expansion of a law to accommodate international public policy considerations is neither surprising nor inappropriate.

If "denial of justice" was an *absolute* public policy governing international commercial arbitration, it would not be a stretch for French courts to enunciate such a policy.[112] *Pacta sunt servanda* is an internationally recognized principle of contracts.[113] However, such a principle should not be absolute.[114] The new exception found in N.C.P.C. article 1493 does not have any such limits.[115]

In cases where courts have examined international public policy concerns and found them to outweigh domestic rules, the parties involved have not been situated like the parties in the noted case.[116] The relationship between Israel and Iran has deteriorated steadily since the 1979 Islamic Revolution in Iran.[117] The *Manbar* decision was the final straw in their tenuous relationship.[118] Prior to the revolution, Iran and Israel entered into numerous international business ventures together.[119] However, since the revolution, Iran has verbally condemned and physically taken action against Israel.[120] Despite this condemnation, even as tensions increased in the 1990s, Israel never declared a state of war. Instead, when President Khatemi came to power in Iran in 1997, Israel

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111. *See* Lalive, *supra* note 60, at 310 ("*There exists a notion of transnational, or really international, public policy*. This has sometimes been denied or questioned, at least until recent times. One should recall here the evolution of French court practice.").

112. *See* Pinsolle, *supra* note 104. France has endorsed an expansion of public policy to affirm the validity of an arbitration agreement in a recent decision: *Zanzi v. Coninch*, Cass. 1e civ., Jan. 5, 1999, Revue de l'Arbitrage 1999, 260, note Fouchard. *Id.*

113. *See id.*

114. The list of exceptions to the New York Convention in article V of that convention supports this principle. New York Convention, *supra* note 92, art. V.

115. NIOC v. Israel, CA Paris, 1e ch., Mar. 29, 2001, Revue de l'Arbitrage 2002, 427, 442, note Fouchard.

116. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636-37 (1985) (affirming the arbitrability of antitrust disputes in the United States).

117. *See* Rachelle Marshall, *The U.S.-Israeli "War on Terrorism" Could Breed More Violence*, WASH. REP. ON MIDDLE E. AFF., Oct. 1996, at 6 ("Because the Iranian government that took over in 1979 ended the close alliance that Israel had enjoyed under the Shah, and supports Hezbollah forces fighting to end Israel's occupation of southern Lebanon, Israel has worked unceasingly to convince the world that Iran is a threat to Middle East security.").

118. *See id.*

119. *See id.*

120. Louis Rene Beres, *Israel, Iran and the Diversion of Death*, 1:3 B'TZEDEK (Fall/Winter 1997/98), *available at* http://www.btzedek.co.il/comm62.htm (last visited Mar. 14, 2003). Immediately after the bombing of the Israeli Embassy in Buenos Aires in 1992, Islamic Jihad, the Iranian-backed terrorist group, released this statement: "The war is open until Israel ceases to exist and until the last JEW in the world is eliminated. . . . Israel is all evil and should be wiped out of existence." *Id.*

stated they had never deemed Iran an enemy and called on Iran to join regional efforts to "lessen tension" and "stop terrorism."[121] However, by 1998, upon discovery that Iran stockpiled chemical weapons and openly sponsored terrorist groups which target Israel, a Tel Aviv court declared Iran an "enemy in war."[122] One of the repercussions of this decision was the two nations ceased to recognize agreements into which they had entered with each other.[123] Such a decision should be given weight in determining when a "denial of justice" claim can compel arbitration.

The 1987 U.S. decision *NIOC v. Ashland Oil* better illustrates NIOC's real agenda in attempting to compel arbitration.[124] In *Ashland*, NIOC attempted to compel the appointment of an arbitrator in a U.S. court, based upon an agreement made by the Shah of Iran prior to 1979.[125] Iran brought the action in the United States because the forum selection clause in the arbitration agreement specified Iran as the arbitral site, yet NIOC could not obtain an enforceable award in Iran.[126] Further, since Iran is not a signatory to the New York Convention, no U.S. court could compel arbitration in Iran, nor would an arbitral award from Iran be enforceable in a U.S. court.[127] NIOC asserted a claim similar to its "denial of justice" claim in the noted case: U.S. courts vitiate the forum selection clause from the arbitral agreement on the basis of impossibility.[128] The United States Court of Appeals for the Fifth Circuit denied NIOC's argument and affirmed the district court's decision that it could not compel the arbitration.[129] The inability to obtain enforcement

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121. Ministry of Foreign Affairs, Foreign Ministry Spokesperson, *Swearing in of New President of Iran Mohammed Khatemi* (Aug. 4, 1997), *at* http://www.mfa.gov.il/mfa/go.asp?MFAH011j0 (last visited Nov. 17, 2002). The Israeli Minister of Foreign Affairs, David Levy, was quoted as saying: "Israel has never determined that Iran is our enemy. We would be very happy to see Iran joining the regional efforts to lesson tension, stop terrorism, and search for ways of cooperation and peace." *Id.*

122. *See* Izenberg, *supra* note 91.

123. *See id.* (citing portions of *Manbar* where the Israeli Supreme Court endorsed all of the findings and conclusions of the Tel Aviv District Court, which made giving any assistance, or attempting to give any assistance, to an enemy of war a crime).

124. 817 F.2d 326 (5th Cir. 1987).

125. *Id.* at 328.

126. *Id.*

127. *Id.* at 331.

128. *Id.* at 332-33. The analysis hinged on a two-pronged test to determine whether the impossibility argument could be used: (1) the affected party had no reason to know at the time the contract was made of the facts on which he relies and (2) a party may not rely on impossibility if the event is caused by that party's actions. *Id.*

129. *Id.* at 335. Judge Goldberg of the Fifth Circuit expressed his decision in this case in the form of a poem:

> There was an oil company from Iran
> whose lawyers devised a neat plan:

elsewhere did not compel arbitration in *Ashland*, because the "international public policy" concept was not persuasive.[130]

However, in denying the *Manbar* decision constituted grounds for Israel's refusal to arbitrate, the Paris Court of Appeals entered territory into which it should not have tread. In the noted decision, the court gives almost no weight to the domestic precedent that prohibits Israel from having arbitral relations with Iran because of its status as an enemy state.[131] These two nations were not merely involved in a contractual dispute, but a dispute where one party brought loss of human life upon another.[132] Surely this is not the "international public policy" the court seeks to promote.

V. CONCLUSION

While the separability doctrine may separate an arbitration clause from the substantive contract, it cannot and should not separate the clause from reality. The Paris Court of Appeals, by adding the claim of "denial of justice" to article 1493 to provide jurisdiction, illustrates its preference for arbitration and the importance of the application of public policy to achieve this goal. However, the assertion of "denial of justice" needs to be viewed in context in order to assure that no misapplication occurs and that no countervailing domestic issue supercedes the court's policy concerns. A "denial of justice" claim should not have been permitted in the noted case, as it ignored the circumstances and reasoning underlying the Israeli court's decision in *Manbar*. It is not

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To arbitrate a dispute
that Ashland's contract might refute,
the Iranians to the land of cotton ran.
But their clever arbitration plan was spoiled;
by an Act of Congress, the district court said,
it was foiled.
So they take this appeal
to rewrite their first deal.
But their theories are only half-boiled.
To arbitrate in Ole Miss is their prayer.
Inconvenience or waiver makes it fair.
But the contract is clear;
we can't order arbitration here.
Unless agreed, it's Iran or nowhere.

Id. at 327-28.

130. *See id.* at 335.

131. NIOC v. Israel, CA Paris, 1e ch., Mar. 29, 2001, Revue de l'Arbitrage 2002, 427, 441, note Fouchard (mentioning *Manbar* in one paragraph of the opinion). The lower court's decision turned on the fact that the holding in *Manbar* precluded jurisdiction. *Id.* at 436.

132. *See* Beres, *supra* note 120.

international public policy to reward governments who are not parties to the New York Convention. Nor is it international public policy to reward governments who sponsor terrorist acts and then seek to collect from nations they target.[133]

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133. An epilogue: Israel did not designate an arbitrator by the designated date. *NIOC*, Revue de l'Arbitrage at 453. Instead, Israel filed an appeal to the Court of Cassation to stop enforcement of the March 29 decision on the grounds of reasonable administration of justice. *Id.* Israel then asked the Paris Court of Appeals to intervene and postpone enforcement while the decision was on appeal. *Id.* On November 8, 2001, the court refused, stating that an appeal was not suspensive, and the authority to determine whether to continue with the arbitration belonged to the arbitral tribunal. *Id.* The court of appeals confirmed that the role of the judge was supportive, and that he/she did not have the authority to determine an appeal of the jurisdiction in the arbitration. *Id.* The court of appeals then designated an arbitrator on behalf of Israel, one whom the court found to be an eminent personality in the French Jewish community and extremely experienced in matters of international arbitration. *Id.* Based upon these events, this dispute is far from resolved.

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