

Existence and Validity of an Arbitration Agreement: The French Supreme Court Confirms that the Validity of an Arbitration Agreement Depends Primarily on the Common Intent of the Parties

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[Christophe von Krause \(White & Case LLP\)](#)

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On 8 July 2009, the French Supreme Court rendered a decision confirming its position that the existence and the validity of an arbitration agreement should be determined primarily in light of the common intent of the parties (*Société d'études et représentations navales et industrielles (SOERNI) et autres vs. Société Air Sea Broker limited (ASB)*, July 8, 2009, Case no. 08-16025).

The case concerned a transportation agreement entered into by SOERNI and ASB for the transport by ASB of a motorboat from Libreville to Pointe Noire. The agreement between the parties did not contain any arbitration clause. However the parties also entered into a hold harmless letter, which made reference to an arbitration clause contained in a bill of lading. ASB initiated arbitration proceedings, arising out of the sinking of the motorboat, on the basis of the arbitration clause contained in the bill of lading. Ultimately the arbitral tribunal would rule in favour of ASB and order SOERNI to pay damages to ASB.

The arbitral award was enforced by the Paris First Instance Court in August 2006. However, on 20 December 2006, SOERNI filed an action before the Paris Court of Appeal to set aside the enforcement order. After the Paris Court of Appeal confirmed the enforcement order, on 15 May 2008 SOERNI appealed that decision to the French Supreme Court. SOERNI argued that it had not seen the arbitration clause before entering into the transportation agreement and that under French law an arbitration agreement incorporated by reference is not binding if a party is not aware of its contents when entering into a contract referring to it. SOERNI also argued that it had been represented by an employee who had no binding authority.

In its decision dated 8 July 2009, the French Supreme Court confirmed the validity of the arbitration agreement. The French Supreme Court declared that the question of whether a party is or is not validly bound by an arbitration agreement should be examined in light of the parties' common intent, the requirement of good faith, and the belief that the person who signed the clause had the power to bind the company. In doing so, the Supreme Court did not discuss the law governing the arbitration

agreement, but considered only the following relevant facts: (a) the hold harmless letter made a clear reference to the arbitration agreement, (b) the employee was ASB's only contact during the negotiations, and (c) ASB had never been informed by SOERNI that the employee lacked the authority to bind SOERNI.

Thus, the French Supreme Court confirmed its position in the *Dalico* case (*see Municipalité de Khoms El Mergeb v. Société Dalico*, December 20, 1993, Case no. 91-16828) according to which the validity of the arbitration agreement depends primarily on the parties' common intent, without reference to the law governing the contract or other national law. As in the *SOERNI v. ASB* case, the French Supreme Court chose not to apply a conflicts of law analysis when considering the validity of an arbitration agreement, but to turn to the relevant facts and examine the common intent of the parties, i.e., to apply the French substantive rules of international arbitration to the arbitration agreement. The French Supreme Court has adopted this position on a number of occasions previously (*see L'Entreprise Tunisienne d'Activités Pétrolières (ETAP) v. Bomal Oil*, November 9, 1993, Case no. 91-15194; *Société anonyme Française Entrepose GTM pour les Travaux Pétroliers Maritimes (ETPM) v. Société anonyme Empresa Constructoria Financiera (ECOFISA)*, December 4, 1990, Case no. 88-13336).

This recent decision confirms, once again, the pro-arbitration approach of French courts.

By Christophe von Krause and Marily Paralika