

Case Law Overview: Corruption in Arbitration

KIEV Arbitration Days 2015: THINK BIG!

Kiev, 06 November 2015

Vladimir Khvalei

Partner at Baker & McKenzie,

Vice president of the ICC International Court of Arbitration (Russia)

“Бейкер и Макензи - Си-Ай-Эс, Лимитед” входит в состав Baker & McKenzie International, организации, созданной в форме швейцарского объединения (Swiss Verein), состоящего из юридических фирм - участников объединения в разных странах мира. В соответствии с общепринятой терминологией, используемой компаниями в сфере профессиональных услуг, термин “партнер” означает лицо, имеющее статус партнера в такой юридической фирме или занимающее аналогичную должность. Термин “офис” или “представительство” означает, соответственно, офис такой юридической фирмы.

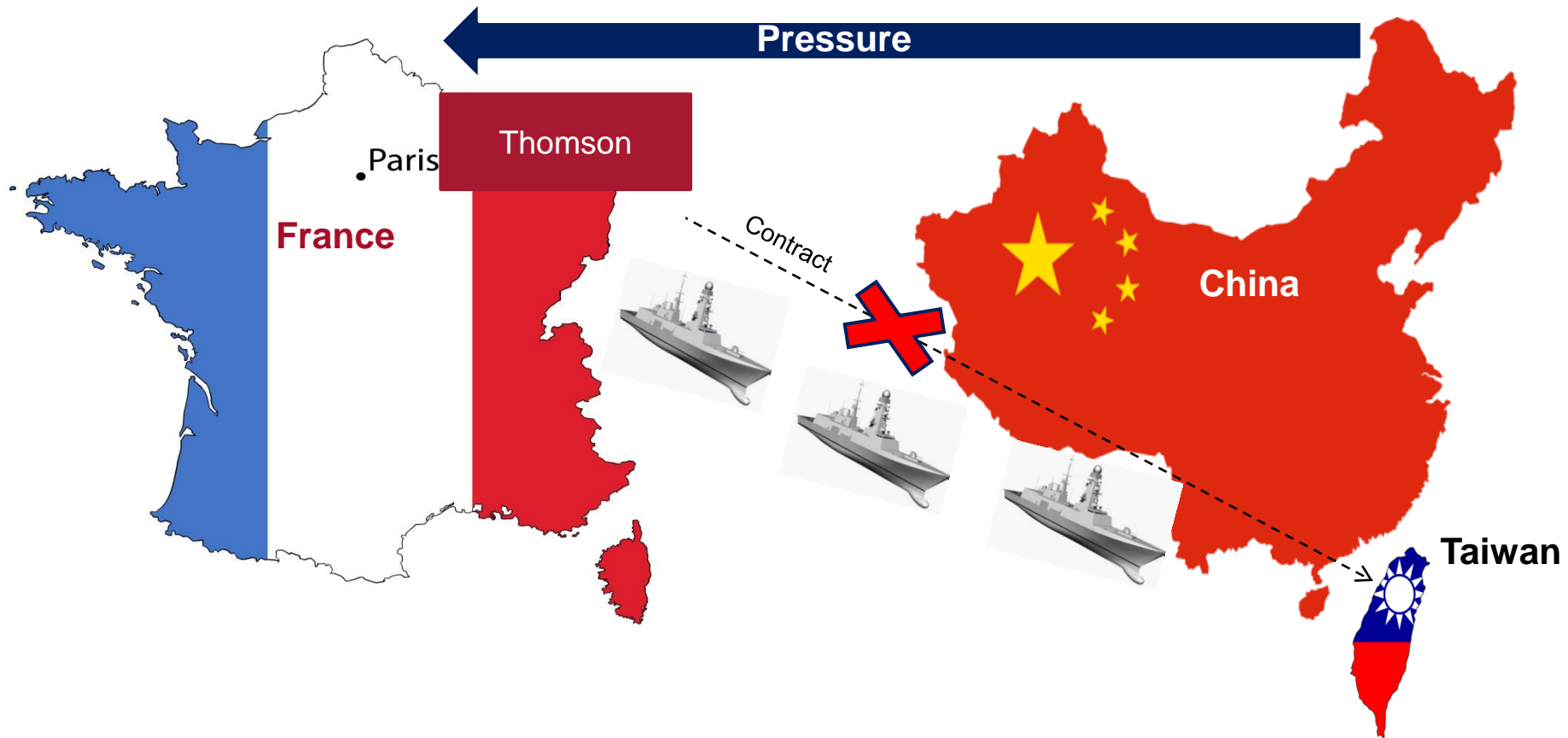
© 2015 Бейкер и Макензи – Си-Ай-Эс, Лимитед

Frigates - to - Taiwan Case

La Fayette Frigates

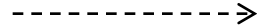


Late 80's



1991

Mr Mitterrand



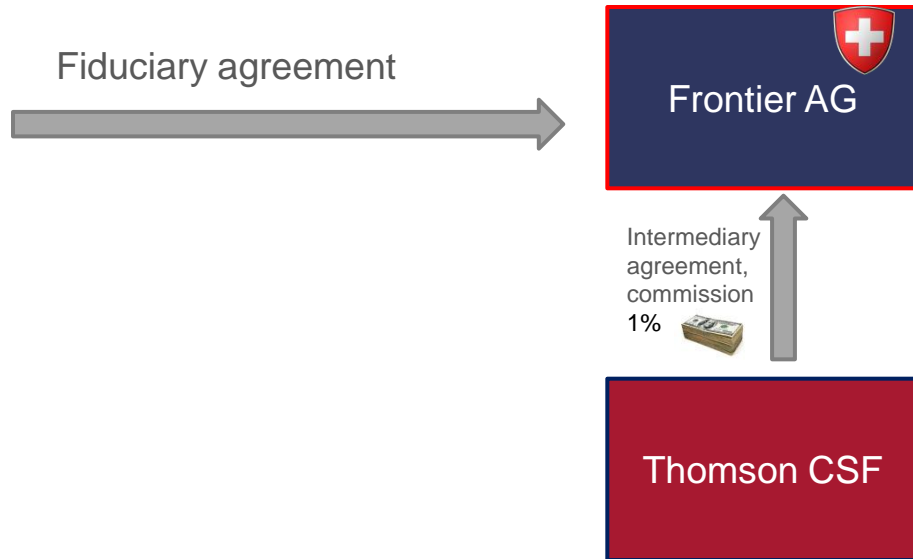
Authorised \$500 mln to be spent to ensure that Thomson CSF got the frigates' contract



Mr Sirven,
ELF's
Top Manager



**Mr Sirven, ELF's
Top Manager**



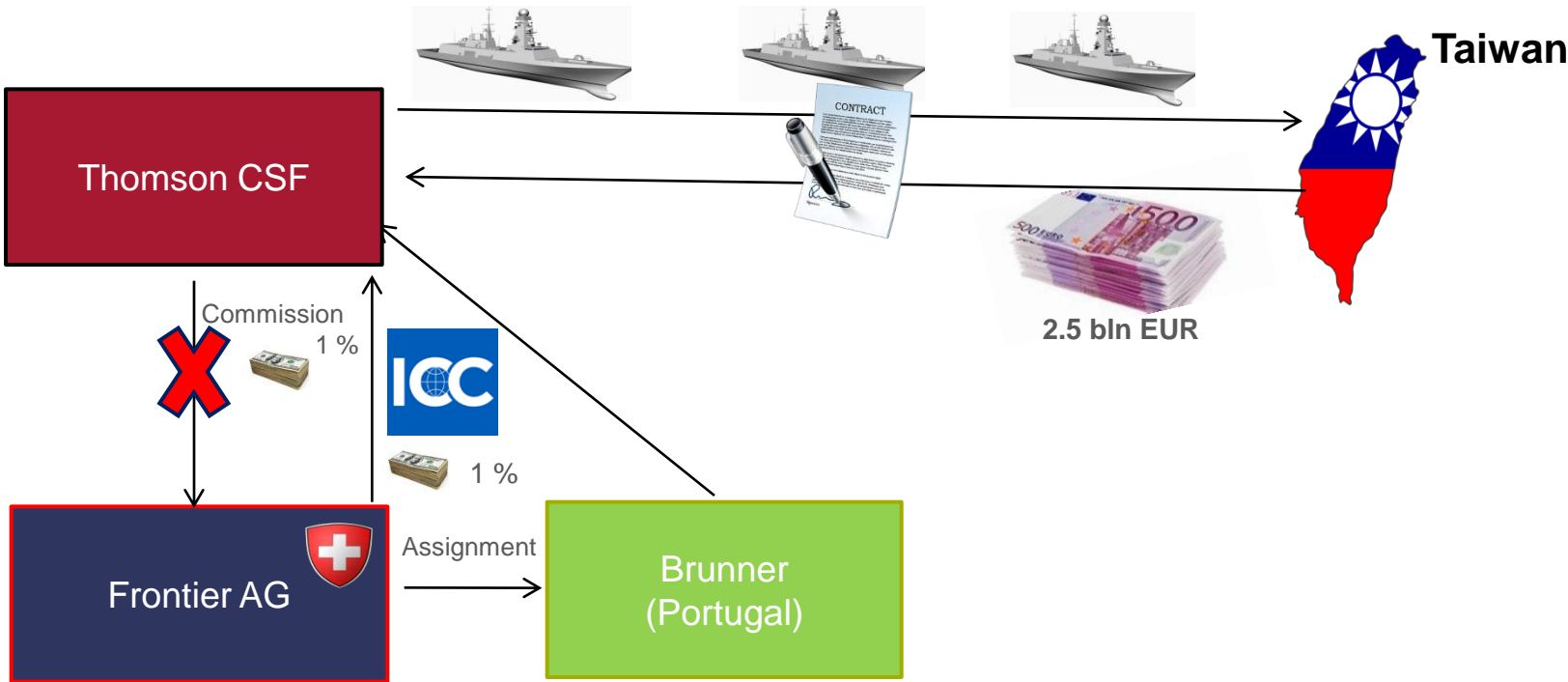


Mr.Kwan



“ \$100 mln went to the central leadership of the Chinese Communist Party. “

1991



ICC Arbitration in Geneva



- 1992 – Frontier (Brunner) filed for recovery of the commission
- 31 July 1996 – claims granted, USD 25 million and FF 12.6 million to be paid to claimants for legitimate services
 - findings based on witness testimony by Edmond Kwan and Alfred Sirven, and a letter from the Thomson's then Chairman that no bribes were paid
 - Mr.Kwan (ELF's consultant in China) legitimate lobbying of Chinese officials
 - the evidence established "*beyond any possible dispute the reality of the services expected from Mr.Kwan and performed by him.*"

1997 Set-aside proceedings



- Respondent alleged the ICC tribunal incorrectly applied Article 178 of the French Penal Code (all contracts for influence on public officials are illegal)
- Swiss Federal Tribunal upheld the award
 - the ICC tribunal correctly applied the law
 - had it not been the case, this would not justify the setting aside of the award

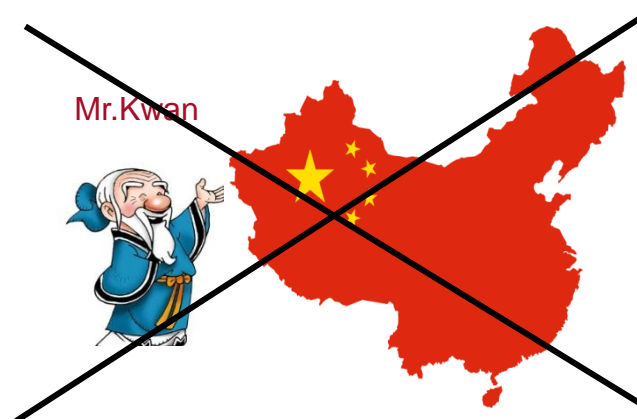
1996 Enforcement in France



- 1996 - enforcement of the award granted by Paris Court of 1st instance
- 1997 – Thomson-CSF filed a criminal complaint
 - Mr. Sirven committed fraud in arbitration proceedings by fabricating Mr. Kwan's involvement
- 1998 – Paris Court of Appeal accepted criminal case materials
- 1999 - enforcement stayed pending the decision in the criminal case

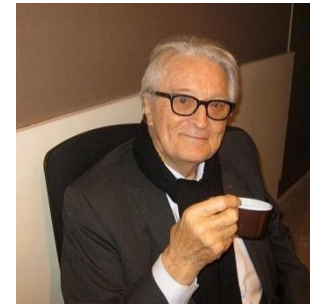
1997 – 2008 Criminal Investigation

- 2005 – death of Mr. Sirven (heart attack)
- October 2008 – criminal case closed
 - the object of the Intermediary Agreement was an illegal commission scheme
 - work to be performed by Mr. Kwan was a fabrication by Sirven to mislead the tribunal about the true nature of services





Ms Christine
Deviers-Jancour,
Elf's PR
Representative



Mr. Roland Dumas,
French Foreign
Minister

French prosecutor: *“French veto was overcome by using the charms of Ms Christine Deviers-Jancour to influence the French Foreign Minister”.*

2009 – Revision proceedings



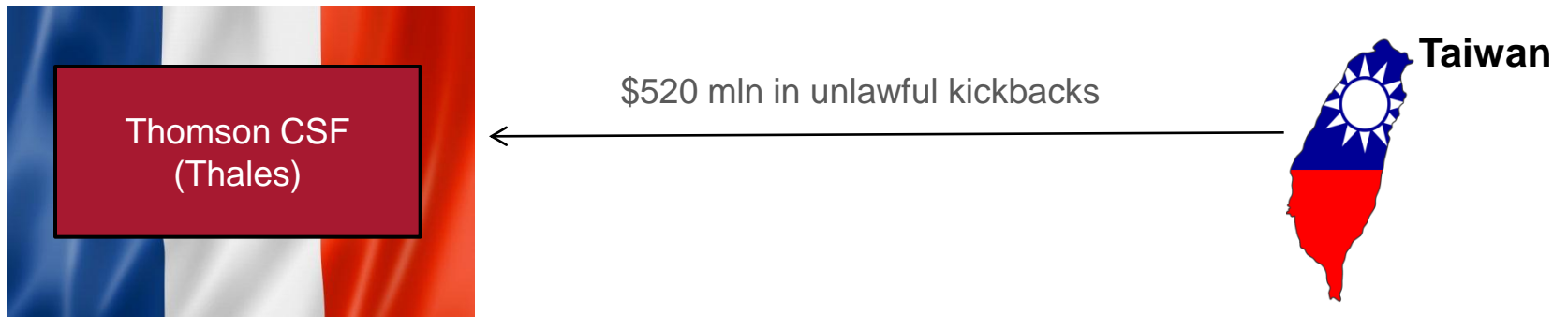
- Swiss Federal Tribunal vacated the 1996 ICC award and remitted the case to arbitration for a new decision
 - Procedural fraud committed by Mr. Sirven
 - Arbitrators deceived by untrue testimonies

1996 – 2010 Enforcement in France



2010 – Paris Court of Appeal refused enforcement of the 1996 ICC award as obtained through procedural fraud

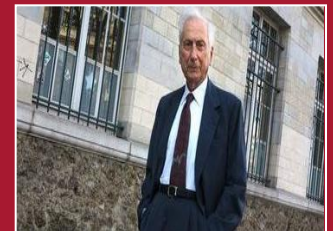
2001 – Arbitration



Art. 18 of the Frigates Contract

- ban on payment of commissions
- restitution of any commissions
- On May, 2010 ICC granted Taiwan's claims, awarding \$861 mln

Affaire le'Tapie



1992



Loan agreement

BTF GmbH



Mr Tapie





Agent agreement to discharge Tapie's debt via sale of BTF not lower than at min set price



EUR 315 mln

! To non-affiliated parties



Mr Tapie



BTF GmBH

1993



Claim for damages
to Paris courts



Mr Tapie



EUR 701 mln

Purchaser

- 1996 - Tapie sues Credit Lyonnais for a breach of the duty of loyalty
- Crédit Lyonnais' bankruptcy - CDR companies (state-owned)
- September 2005 – Paris Court of Appeal awarded to Tapie EUR 135 million in damages
- October 2006 - Cour de Cassation reversed the decision

Affaire le'Tapie – arbitration

- October 2007 – Christine Lagarde (then French Finance Minister) asked CDR to submit to arbitration (Sarkozy government acting on behalf of CDR)



Mr Nicolas Sarkozy



Ms Christine Lagarde

- 2008 – arbitral tribunal granted Tapie's claims, awarding €285 million in damages (incl. €45 million of moral damages to Tapie), amounting with interest to € 403 million in damages

Affaire le'Tapie - conflict of interest

- The links between Estoup (arbitrator appointed by Tapie), Tapie and Lantourne (Tapie's counsel)



Mr Estoup, formerly presided over the Versailles appeals court

- 3 prior arbitration appointments of Estoup by Lantourne
 - Estoup's relationship with Tapie
- The French government refused to challenge the award

2012



“France’s socialist party blamed Sarkozy’s government for acting in Tapie’s favour in disputes in exchange for Tapie’s support to Sarkozy in the 2007 presidential election”.

THE WALL STREET JOURNAL.

June 28, 2013

Affaire le'Tapie – criminal investigations

- 2013 – two criminal investigations
 - 2013 France’s Court of Justice of the Republic (into the role of Christine Lagarde (Finance Minister in 2007))
 - 2013 Paris Prosecutor’s office (P.Estoup, B.Tapie, M.Lantourne, Stéphane Richard (Lagarde's former chief-of-staff))
- Searches of homes, questioning
- P.Estoup and M.Launtourne charged with fraud, C.Lagarde made “assisted witness”

Affaire le'Tapie – Paris Court of Appeal

- 2013 CDR filed *i.a.* an application for the revision of the award
- Links between Estoup, Tapie and Lantourne prior to arbitration, fraudulently concealed by Estoup from the other party:
 - a fee agreement between Lantourne and Estoup
 - the relationship between Estoup and an advisor of Tapie (other related disputes, regular provision of information on the arbitration)
 - the personal relationship between Estoup and Tapie
 - the January 2013 raid uncovered a book dedicated to Estoup by Tapie in 1998, in which Tapie expressed his “infinite gratitude” to Estoup
- Collusion of Estoup, Tapie and Tapie’s counsel to promote interests of Tapie – behaviour of Estoup, who had “*deliberately and systematically directed the reflection of the tribunal in favour of the interests of the party that he intended to promote*”

Affaire le'Tapie – award retracted

- In February 2015 the Paris Court of Appeal ruled that
 - the arbitration was domestic
 - the award was tainted by fraud (as revealed by the criminal inquiry and based on further information)
- Proceedings on the merits are pending, B.Tapie represented by E.Gaillard
- Claims for damages now total €1 billion

ICC Arbitration Case



ICC Unpublished Case – (1/3)

- Consultant (Middle East) v Principal (Europe)
- Consultancy services to assist Principal in winning a bid for construction works
- Commission under Consultancy Agreement equals USD 1.9 million (2 % of the main contract)
- Principal won the bid but refused to pay the commission
- Consultant filed for arbitration to recover the commission
- Respondent disputed the authenticity of the signature of its representative
- Authenticity challenge dropped after findings of parties' experts and the Geneva Prosecutor

ICC Unpublished Case – (2/3)

- Claimant's witness testimony on the use of commercial agents in the Middle East
- Claimant argued the services included
 - Recommending the Respondent to the client (bid owner)
 - Providing post-tender clarifications sent to other bidders
 - Providing a tender evaluation report
 - Providing an unsigned copy of a letter award for the tender (identical to the final letter of award)
- ICC tribunal awarded the USD1.9 million claimed

ICC Unpublished Case – (3/3)

- Issue of illegal nature of the services was raised during the scrutiny process due to
 - Influence over public officials being the only input by the Claimant
 - Use of consultants in Middle East in procurement issues
 - Principal had acted in previous projects of the same client
 - Nature of the client's internal documents provided by the Claimant
 - Principal's employee who signed the consultancy agreement refused to testify
 - His successor was unaware of the consultancy agreement

Case Law Overview: Corruption in Arbitration

KIEV Arbitration Days 2015: THINK BIG!

Kiev, 06 November 2015

Vladimir Khvalei

Partner at Baker & McKenzie,

Vice president of the ICC International Court of Arbitration (Russia)

“Бейкер и Макензи - Си-Ай-Эс, Лимитед” входит в состав Baker & McKenzie International, организации, созданной в форме швейцарского объединения (Swiss Verein), состоящего из юридических фирм - участников объединения в разных странах мира. В соответствии с общепринятой терминологией, используемой компаниями в сфере профессиональных услуг, термин “партнер” означает лицо, имеющее статус партнера в такой юридической фирме или занимающее аналогичную должность. Термин “офис” или “представительство” означает, соответственно, офис такой юридической фирмы.

© 2015 Бейкер и Макензи – Си-Ай-Эс, Лимитед