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Monthly Arbitration Newsletter – English version
JANUARY 2021, N° 41

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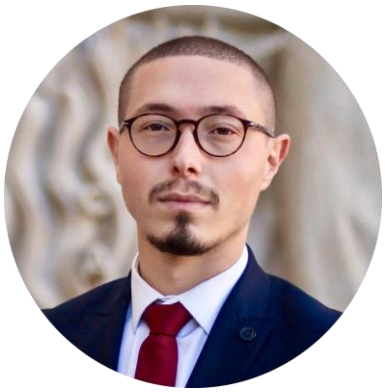

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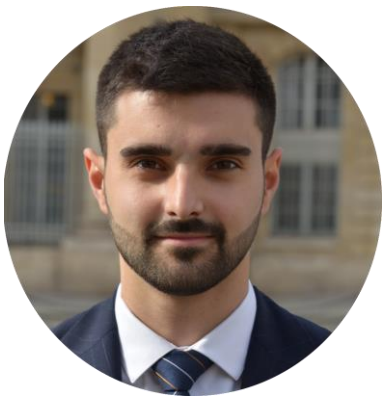

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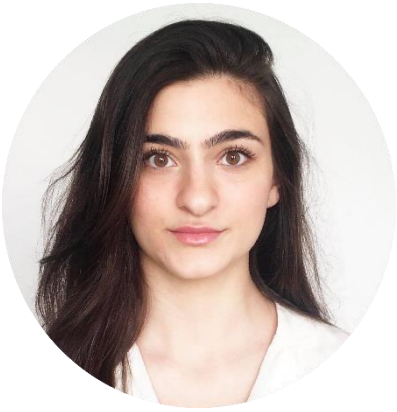

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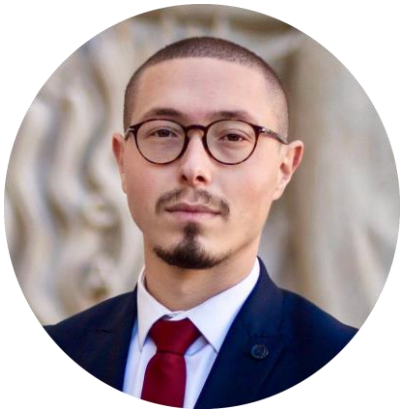

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FOREWORD

Paris Baby Arbitration is a Parisian association and an international forum aiming the promotion of young arbitration practice, as well as the accessibility and the popularizing of this field of law, still little known.

Each month, its team has the pleasure to present you the Biberon, an English and French newsletter, intended to facilitate the lecture of the latest and the most prominent decisions given by states and international jurisdictions, and the arbitral awards.

For this purpose, Paris Baby Arbitration encourages the collaboration and the contribution of the younger actors in arbitration.

Paris Baby Arbitration believes in work, goodwill and openness values, which explain its willingness to permit younger jurists and students, to express themselves and to communicate their passion for the arbitration.

Finally, you can find all the previously published editions of the Biberon and subscribe to receive a new issue each month on our website: babyarbitration.com.
We also kindly invite you to follow us in our Linkedin and Facebook pages and to become a new member of our Facebook group.

Have a pleasant reading!

FRENCH COURT

COUR DE CASSATION

Court de Cassation, 1st Civil Chamber, 13 January 2021, n° 19-22.932

Contributed by Bowon CHOI

In a decision of 13 January 2021, the First Civil Chamber of the Court of Cassation rejected an appeal against a decision enforcing an arbitral award in France.

The National Gas Company ("NATGAS"), an Egyptian company, concluded a contract for the supply of natural gas with the Egyptian General Petroleum Corporation ("EGPC"), an Egyptian public institution. Following the increase of its financial expenses due to the modification of the parity of the Egyptian pound, NATGAS attempted to negotiate an agreement with its co-contractor. When its co-contractor refused, NATGAS resorted to the arbitration clause in the contract.

In an award of 12 September 2009 rendered in Cairo, the arbitral tribunal ordered EGPC to pay various sums to NATGAS. Then, in a decision of 21 May 2019, referred back after an appeal in cassation (1st Civ. 1 June 2017, appeal n°16-13.729), the Paris Court of Appeal ordered the enforcement of the award. EGPC appealed the decision.

First, the Court of Cassation holds that, applying article 1014, paragraph 2 of the Civil Procedure Code, it does not have to rule with a specifically reasoned decision on the first ground of appeal, which manifestly would not lead to the cassation of the judgment.

In its second ground of appeal, EGPC argues that it is impossible to apply to the control of an award rendered abroad in an internal arbitration, the French substantive rule according to which a foreign public institution cannot use provisions of its own law that affect the validity of the arbitration clause that it concluded, to subsequently

opt out of the arbitration. Then, EGPC argues that the arbitration was internal to Egypt.

However, the Court of Cassation holds that EGPC's argument regarding the invalidity of the arbitration clause is irrelevant in that it is founded on the internal character of the arbitration. Indeed, according to the Court, the Court of Appeal correctly stated that the provisions of articles 1514 and following of the Civil Procedure Code on the recognition and enforcement of arbitral awards are applicable to international arbitral awards and to awards rendered abroad, whether they be internal or international.

Thus, the Court of Appeal's decision correctly holds that regardless of whether the award rendered in Egypt is internal or international, the fact that Egyptian law subjects the conclusion of a contract including an arbitration clause by a public institution to ministerial authorization, is indifferent to the appreciation of the validity of the arbitration clause by a French judge.

In addition, EGPC states that in accordance with the principle that both sides must be heard, both parties should have been able to discuss the entirety of the evidence that was brought before the arbitral tribunal. However, according to EGPC, it did not have enough time to discuss its arguments and evidence.

However, the Court of Cassation holds that the Court of Appeal correctly deduced from its observations that the parties were able to discuss the entirety of the arguments and evidence produced before the tribunal. Namely, the Court of Appeal notes that on the first day of the hearing, NATGAS handed in promissory notes with regard to which its expert had presented its report on the evidence.

Furthermore, the Court of Appeal observes that the parties declared that they did not have any objections to the procedure, and that they examined their experts and debated on their reports. Finally, the Court of Appeal notes that EGPC's request for additional time to examine the newly submitted evidence was approved, and that EGPC was allowed to submit an additional report on this point.

Thus, the Court of Cassation rejects the appeal.

COURTS OF APPEAL

Nîmes Court of Appeal, 6 January 2021, Mr. Mathieu C. v. Mr. Franck D., n° 20/02583

Contributed by Virgine BRIZON

Mr. Mathieu C. and Mr. Franck D. initiated an arbitration proceeding in accordance with the company's bylaws, company in which they are both partners. An award was issued. Considering that evidence has been communicated after the deadline, Mr. Franck D. brought an action to overturn the award (Appel-nullité).

Mr. Mathieu C filed a brief to contest the admissibility of this Appel-nullité. The Pre-trial judge of the Court of Appeal yet stated that this action was admissible. According to the judge, it was clear that Mr. Franck D. wished to bring an action for annulment and not an action to overturn the award. Besides, the access to justice human right would be infringed if the submission was to be considered irregular since there are no pre-established computerized means on the lawyers network (RPVA) allowing to avoid this type of situation.

Mr. Mathieu C. appealed the order. He actually demonstrated that the lawyers network allows such avoidance.

According to the Court of Appeal, the brief filed by Mr. Franck D. does not enable to support that he intended to bring an action for annulment as this brief is part of an Appel-nullité proceeding. The Court refuses to requalify this intended procedure, mentioning that such refusal does not infringe the access to justice human right, with respect to the pursued goal in domestic arbitration, namely to ensure the effectivity of the award by requiring the parties to only use foreseen remedies. The order is overturned.

Rouen Court of Appeal, 7 January 2021, SARL 2I.D. v. SA Entreprise Générale Léon Grosse, n° 20/01665

Contributed by Virignie BRIZON

Two companies concluded a construction contract. During the contract performance, their relationship deteriorated.

SA Léon Gosse initiated an arbitration proceeding in accordance with the special administrative clauses and specifications (SACS). The arbitral tribunal ruled an interim award ordering SARL 2I.D. to pay damages to SA Léon Gross. This award was declared enforceable on January 20th, 2020 and SA Léon Gross carried out 2 attachments on bank accounts, released these attachments and then notified a new attachment on another bank account.

SARL 2I.D. brought an action against SA Léon Grosse before the enforcement judge to declare the attachments null and void. The enforcement judge ruled that this action was not admissible due specially to the lack of legal interest since the creditor already released the attachments. SARL 2I.D. appealed this decision and brought alongside an action for annulment of the interim award and two other awards issued afterwards.

In addition to the joinder of the procedures, the SARL 2I.D. asks that the attachment carried out on the other account be declared null and void and order its release. In this respect, it considers that:

Only the exequatur order was notified, not the interim award, although it was expressly mentioned in the arbitration clause;

The arbitral tribunal procedural order providing a notification between counsels could not break with this condition;

According to Article 1496 of the French Code of Civil Proceeding (FCCP), an interim award is not enforceable either provisionally or by operation of law. To request such enforcement, SA Léon Grosse had to wait the action for annulment to be definitively settled; and

In accordance with Articles 1496 to 1498 of the FCCP, only an award with provisional enforcement may be subject to exequatur. However, SA Léon Grosse requested it in application of Article 1487 (exequatur order) although it was already notified the action for annulment.

First of all, the Court of Appeal denied the junction of procedures request.

Secondly, on the release of the attachment, the Court of Appeal reminds the arbitration clause provided for in the SACS states that the arbitrators are not bound to rules of law and procedure. Furthermore, this clause provided for the arbitrators to hand over a copy of their decision that will be compulsorily enforceable by provision. This clause yet does not provide for any condition in relation to the notification of the arbitral tribunal's decisions.

In this respect, the arbitral tribunal can rely on the parties' intent and set additional procedural rules, particularly since the arbitration clause states that the arbitrators are not bound to rules of procedure. The arbitral tribunal could therefore rule using procedural orders. Besides, the use of procedural orders has not been contested by the parties during the arbitration proceeding. Hence, it appears that the parties agreed on the fact that the awards will be notified by the arbitral tribunal directly to the parties' counsels by electronic means.

Moreover, the fact that the arbitration clause refers to the "conclusion" of the arbitral tribunal did not prevent the latter to issue interim decisions, particularly since Article 1496 of the FCCP allows it Finally, it appears that the interim award is consistent with the proper conduct of the arbitration, which in this case concerns a contract of successive performance concerning a large-scale construction project.

Thus, the parties did agree to waive Article 1484 of the FCCP by replacing the formality of notification by bailiff by a notification to lawyers. Finally, the awards are indeed provisionally enforceable and the notification of the interim award has indeed taken place. The latter was subject to an exequatur order which was duly notified. The filing of an action for annulment of an interim enforceable award does not suspend the enforcement of the award, so SA Léon Grosse could validly initiate enforcement proceedings.

The decision is upheld.

Paris Court of Appeal, 12 January 2021, n° 17/0729

Contributed by Adam MALEK

On April 1, 2011, Carlson Wagonlits Travel Holdings (hereafter CWT or RESPONDENT) entered into a partnership agreement with Seitur to enable Seitur to sell travel under the CWT brand in Ecuador. Seitur (CLAIMANT) considered merging with Polimundo in order to become a partner of CWT; however, as the project failed, Seitur informed CWT on February 19, 2012 that it intended to continue the April 2011's partnership agreement. On March 15, 2012 CWT terminated the contractual relationship because of Seitur's loss of its accreditation by the International Air Transport Association (IATA).

Then, on 6 November 2012, CWT filed applications with the International Court of Arbitration of the International Chamber of Commerce, including requests that the termination of the contract with Seitur be deemed justified and that Seitur be ordered to cease using CWT's name and trademarks. At the same time, Seitur brought an action for unfair competition against Polimundo before the Ecuadorian courts. The ICC, which was seized of the dispute between CWT and Seitur, subsequently issued an award on 7 April 2015 granting CWT's claims.

On April 3, 2017, Seitur brought an action for annulment of the arbitral award before the Paris Court of Appeals. The company contested the validity of the award on the basis of Article 1520 2°, 4° and 5° of the French Code of Civil Procedure and considered that the arbitral tribunal had been improperly constituted. Seitur considered that the dispute with CWT also concerned Polimundo, the company it had been replaced by in the context of its partnership with CWT. First, Seitur justified the involvement of Polimundo by the action it had brought against the latter in unfair competition before the Ecuadorian courts.

Seitur confirmed this same involvement by the fact that the acts of the arbitration proceedings mention this second dispute. CLAIMANT then recalled that one of the arbitrators at the origin of the criticized award was a relative of the manager of the Polimundo company; information that he had not specified in his declaration of independence and impartiality. Seitur also argued that the same arbitrator had asked Polimundo to organize a trip for him while the arbitration proceedings were still ongoing and that it was not established that these services had been paid.

CLAIMANT therefore concluded that the arbitral tribunal had been improperly constituted, infringing the right to a fair trial and public order and justifying its action for annulment. The Court of Appeal seized by the Seitur company had to deal with the question whether the arbitrator in question should have declared his links with the Polimundo company, which a third party to the arbitration.

The judges first refer to article 1456 § 2 of the French Code of Civil Procedure, applicable to international arbitration pursuant to article1506 of the same Code, to recall the classic solution according to which the arbitrator must reveal "any circumstance likely to affect his independence" and deduce that "The arbitrator must thus reveal to the parties any circumstance likely to affect his judgment and to provoke in the minds of the parties a reasonable doubt as to his qualities of impartiality and independence". To decide the issue of the dispute, the Court of Appeal first sought to determine whether Polimundo was an interested party in the arbitral proceedings or not. If so, the arbitrator should have declared his relationship with the manager of Polimundo.

The judges then recalled that the partnership agreement between Polimundo and CWT was concluded several months before CWT seized Arbitration Court; that Polimundo is not a party to the arbitration proceedings despite the fact that the company appears in "other entities concerned" in the arbitration proceedings document entitled "Information Box"; that Seitur did not present any claims against Polimundo before the arbitral tribunal; that the outcome of the arbitration proceedings had no financial or commercial impact on Polimundo; and that the unfair competition claim brought by Seitur before the Ecuadorian courts against Polimundo is in no way related to the arbitration proceedings since CWT is not a party thereto.

Thus, the Court of Appeal concluded, complying with CWT's arguments, that Polimundo had no interest, direct or indirect, in the resolution of the arbitral dispute. Consequently, s the arbitrator whose impartiality was criticized did not have to reveal his alleged family ties with the manager of Polimundo and his recourse to the company for the organization of a personal trip. Thus, the Court rejected all of the Seitur's claims.

Paris Court of Appeal, 12 January 2021, Ukravtodor v. Todini Costruzioni General S.P.A., n° 19/18618

Contributed by Virginie BRIZON

As part of an arbitral procedure, which has not yet been completed, Ukravtodor brought a claim for lack of jurisdiction before the arbitral tribunal on the grounds that Todini had since transferred its rights and obligations to a third party. Todini, for its part, raised its inadmissibility due to the late nature of the application. The arbitral tribunal issued a decision entitled "Procedural Order N° 11", granting the inadmissibility raised by Todini. Ukravtodor brought an action for annulment against this decision. Todini raised the inadmissibility of the action.

In this respect, the Paris Court of Appeal begins by pointing out that "only true arbitral awards, i.e. the acts of the arbitrators who rule definitively, in whole or in part, on the dispute submitted to them, whether on the merits, on jurisdiction or on a procedural means that leads them to terminate the proceedings, may be the subject of an action for annulment".

On the basis of the facts, the Court concludes that the decision taken by the tribunal did not terminate the proceedings, so that the decision is a procedural order which does not have to be requalified. The Court thus declares the action inadmissible.

Versailles Court of Appeal, 14 January 2021, n° 19/06572

Contributed by Fanny VIGIER

On 14 January 2021, the Versailles Court of Appeal clarified the notion of "emanation" of the State and admitted that the creditor's right over the property of its debtor shall be extended in presence of such emanation.

A Congolese public limited company registered as Commissions import-export (the "SA Commisimpex") and the Republic of Congo entered into a protocol on 14 October 1992 (the "Protocol"). Subsequently, the Republic of Congo failed to comply with its commitments and the SA Commisimpex initiated an arbitration before the International Chamber of Commerce ("ICC") pursuant to an arbitration clause contained within the said protocol. This arbitration proceedings resulted in two arbitral awards issued on 3 December 2000 and 21 January 2013.

In the first award, the ICC ordered jointly the Republic of Congo and the Caisse Congolaise d'Amortissement to pay the SA Commisimpex a sum of approximately EUR 232 million in respect of its failure to comply with the Protocol. This sentence was coated with the exequatur by the Paris Court of Appeal on 23 May 2002.

In the second arbitration award, the Arbitral Tribunal ordered the Republic of Congo to pay the SA Commisimpex the sum of EUR 222,749,598.82 as separate claims. This second award became irrevocable and enforceable by a decision issued by the French Supreme Court on 25 May 2016.

Pursuant to these two enforceable arbitral awards, the SA Commisimpex delivered an attachment order to several companies, including the Société Nationale des Pétroles du Congo (the "SNPC") in its quality of "emanation" of the State and personally liable to the Republic of Congo.

The SNPC immediately contested this order before the enforcement judge of Nanterre. First of all, the SNPC denied its status of "emanation" of the State and claimed that the order should be null and void since it has not been notified to the SNPC itself but only to the Republic of Congo. In the alternative, the SNPC claimed

that no attachment order can be made against the State of Congo on the grounds of its immunity from execution.

The execution judge dismissed all of SNPC's claims. On 12 September 2019, the SNPC appealed this decision and argued on the merits that the conditions required to define an emanation of the State were not met.

On 14 January 2021, the Versailles Court of Appeal recalls that under Article L. 211-1 of the Enforcement Procedure Code, "*the creditor's right over the assets of his debtor shall be extended in the event of confusion of assets, particularly to public bodies with strong dependence to a State to the point of being merely an emanation thereof*". In this decision, the Court takes the opportunity to clarify the qualification of an 'emanation' of the State which must be based on a body of consistent evidence allowing to establish a situation of dependence with a State.

The Court also states that in the event of a lack of legal, organic and decision-making autonomy as well as a confusion of assets, the emanation ultimately becomes an instrument for the exercise of State sovereignty. In this occasion, it is then possible to extend the pledge of the State's creditors over the assets of the bodies which are its emanation per se.

Among the consistent evidence to be taken into account to establish the qualification of emanation of the State: the structure and functioning of the company in light of its statutes and the laws are very important elements, but also and above all, the way in which the company is considered by the State itself in the management of its own functioning.

In other words, to be determined as an emanation, the State must be in a position to implement a control at all levels and ensure that the company fulfils all the interests of the State but only those interests. As regards the State's supervision, the control over the capital or the performance of a public utility mission: these are only elements of appreciation.

In the present case, the Court notes in particular: the fact that the Republic of Congo owned 100% of the SNPC share capital; the direct supervision of the Minister of Hydrocarbons over the SNPC; the permanent power of control over SNPC by the supervising Minister; the lack of room for manoeuvre in the development of its own

activity and last but not least, the confusion of political and economic interests and assets resulting from legal and economic arrangements.

Finally, the Court also notes that its own commercial activities do not enable the SNPC to be financially self-sufficient.

In light of the above, after the reunion of this body of consistent evidence, the Versailles Court of Appeal confirms the decision of the first judges and dismisses the SNPC of its entire claim. Furthermore, since the Republic of Congo had expressly and without reservation waived its immunity from execution, the SA Commisimpex is therefore entitled to enforce an attachment order against the SNPC's assets pursuant to the arbitral awards dated 3 December 2000 and 21 January 2013.

Grenoble Court of Appeal, 14 January 2021, Wistar Enterprises Ltd. v. SAS Top baggage International, n° 18/04332

Contributed by Alexander MIRONOV

This case before the Grenoble Court of Appeal is the culmination of many years of litigation between the parties.

The company under Hong Kong law Wistar Enterprises Ltd. ("Wistar") is active in the production of bags. Wistar had two contracts with SAS Top baggage International ("TBI"). In 2007 TBI initiated arbitration proceedings, claiming that it had been the victim of breaches of contractual obligations, unfair competition and parasitism on the part of its contracting partner.

On 16 July 2008, the arbitral tribunal ruled in favour of TBI and admitted the provisional enforcement of the decision. After Wistar's action for annulment, the Rennes Court of Appeal annulled the arbitral award. Then in 2010 the appeal initiated by Wistar was dismissed by the Court de cassation.

In 2013 Wistar filed a motion before the enforcement judge of the Lyon High Court in order to obtain compensation for the damage, it claimed to have suffered as a result of the implementation of the provisional enforcement. The judge found that Wistar was not subject to any enforcement action and thus dismissed his application as outside the jurisdiction of the enforcement judge. This decision was confirmed on 25 June 2015 by the Lyon Court of Appeal. The Cour de cassation dismissed the Wistar's appeal on 26 January 2017.

As a result of this poor choice of remedies, Wistar brought an action before the Vienna Commercial Court (Isère), in order to find that TBI was automatically liable for pursuing the award enforcement on the basis of the provisional enforcement in an abusive way, that TBI violated the arbitral award confidentiality, and that TBI committed acts of unfair competition, including denigration. On 20 September 2018, the Vienna Commercial Court ruled the claims inadmissible and dismissed TBI's counterclaim for damages.

On 18 October 2018 Wistar appealed the decision in all its provisions before the Court of Appeal of Grenoble.
Wistar forms the application on the basis of articles 79, 480 and 1506 of the French Code of Civil Procedure, in their wording applicable prior to the reform of 13 January and 29 March 2011, L111 - 10 of the French Code of Civil Enforcement Procedures, articles 1382 (former) and 2241 of the French Civil Code.

The Court finds Wistar's action admissible. The Court comments that the decision of the enforcement judge of 17 December 2013 and the Lyon Court of Appeal judgment of 25 June 2015 did not rule on the merits, but only on its competence. The Court finds that the appeal was filed within the five-year time limit, thus in line with the statute of limitations.

On the merits, the Court rules in favour of TBI, rejecting all the claims against the company:

First, TBI's enforcement actions cannot lead to his conviction. According to the Court, Wistar's motion is not based on the respondent's obligation to return to it what was apprehended during the enforcement proceedings implementations on the basis of the annulled arbitral award, but on the consequences of the organization of those measures themselves.

The Court notes that this implies the demonstration of fault, damage and causation. But regarding the existence of a fault, none of the enforcement proceedings succeeded. As regards alleged damage, the Court notes no evidence of its existence. Consequently, the French-based TBI cannot be blamed for initiating these proceedings to guarantee its rights.

Second, considering the parties' arguments on the facts of unfair competition imputed to the respondent, the Court finds that there is no evidence of damage to the Wistar's reputation. There have been a limited number of the enforcement procedures implementations of enforcement measures that have not been initiated in an abusive way. As regards alleged denigration, the Court refers to the limited nature of TBI's dissemination of the letter recalling that Wistar was convicted by the arbitral tribunal's award apposing the provisional enforcement.

The Court decides, there is no evidence that the e-mail and the letter under consideration were disseminated to the petitioner's business or financial partners, so there is no evidence that Wistar attempted in vain to pursue relationships with its clients who had occasion to know about the attachment of the Wistar's debts.

Third, there was no disclosure of the arbitral award. There is no evidence that the parties made a commitment to keep the arbitral award confidential. TBI has only committed to a confidentiality clause during the arbitration. The letter issued by TBI does not contain any information concerning the conduct of the arbitration procedure, which is only confidential within the meaning of article 1464 of the French Code of Civil Procedure, as well as of the pre-January 2011 texts that were modified by the arbitration reform.

Fourth and last, the court ordered Wistar to pay TBI damages for abusive proceedings due to the damage to the TBI reputation and the inconvenience suffered as a result of four successive proceedings related to the same unfounded subject matter.

Paris Court of Appeal, 19 January 2021, *SAS Hop! v. AY company,* n°18/04465

Contributed by Arthur ETRONNIER

Two airlines, Hop! and AY, have signed a 36-month aircraft lease agreement on April 9, 2014. The clauses of the contract specified that English law was applicable and the co-contractors had inserted an arbitration clause. The latter invited the parties to settle their disputes before the International Court of the International Chamber of Commerce.

One year later, the company Hop! was forced to terminate the contract and to recover the loaned property due to a default in payment by the company AY. In 2016, a request for arbitration was filed by the company Hop!. The parties agreed that the award should be made by a sole arbitrator, and the arbitrator ordered AY to pay amounts in respect of the breach of its contractual obligations.

Subsequently, AY appealed to the Paris Court of Appeal to set aside the award on several grounds. Firstly, it considers that there was a lack of impartiality and independence and that the sentence is contrary to French international public policy, in accordance with Article 1520 §2 and §5 of the Code of Civil Procedure. Secondly, and in a more subsidiary manner, the award would have been the subject of a violation of the principle of adversarial proceedings, thus rendering it null and void pursuant to article 1520§4.

Concerning independence and impartiality, AY considered that the arbitrator had links with Hop! in that he was a member of the European Regions Airline Association (hereinafter ERAA) alongside a member of Hop!'s parent company, Air France KLM. AY, claiming that this information had not arrived in time to challenge the arbitrator, considered that this situation constituted a defect in the formation of the arbitral tribunal and a violation of French international public policy.

Hop! replied that AY was aware of this situation, particularly because of the transmission of the arbitrator's *curriculum vitae* and the mention of this activity in email exchanges. She supported her statement by specifying that the ERAA association is composed as well of partners and competitors and that consequently one could not deduce from it the partiality of the referee. Finally given that AY renounced to

challenge the arbitrator within the time allowed, this was equivalent to recognizing him as competent according to the company Hop!.

The Court then responded to the visa of article 1466 of the Code of Civil Procedure by saying that the company AY had waived its right to challenge an arbitrator. Indeed, it considers that the AY company could not have been unaware that the appointed arbitrator was a member of the ERAA and that he participated in the decisions of the association in view of the previous exchanges. Similarly, it could not be unaware that some of the members of Air France KLM were also members of the ERAA given the information provided on the association's website. The Court therefore rejected AY's first claim.

In a second plea, the company AY considered that the principle of adversarial proceedings provided for in Article 1520§4 had not been respected in the sense that the parties did not take part in the expert appraisals and were not able to consult the report resulting from them. It specifies that this report is what served as a basis for the arbitrator's decision and that the principle of adversarial proceedings must be respected even if the expert is not requested on the day of the hearing.

Hop! responded by saying that the parties had agreed that the expert's findings would be used to make the final award.

The Court then based itself on article 1520§4 by recalling what the notion of adversarial proceedings implied. It specifies that the parties must discuss all points of fact and law so that the arbitrator does not take decisions that could have escaped their exchanges. The Court then considered that the power granted to the arbitrator, by article 25 of the Rules of Arbitration of the Court of International Trade, to appoint an expert does not preclude the holding of a contradictory debate on the expertise rendered by the latter even if the said expert does not intervene during the hearing. This is all the more important since the report allows the sole arbitrator to make his decision. The Court thus makes a classic reminder of the importance of the adversarial principle and insists on the fact that one cannot presume from the conduct of a party that it has waived an adversarial debate.

Thus, the Paris Court of Appeal partially annulled the award because of this lack of a contradictory debate and considered that AY did not file its application with the sole aim of hindering the enforcement of the award.

Paris Court of Appeal, 26 January 2021, Vidatel LTD v. PT Ventures SGPS SA, Mercury Servicos de Telecomunicacoes SA & Geni SA, n° 19/10666

Contributed by Virginie BRIZON

Vidatel, Mercury, Geni and PT Ventures are equal shareholders of Unitel, an Angolan company. PT Ventures believes that it has been excluded from the management of this company by its shareholders and has filed a request for arbitration before the International Chamber of Commerce (ICC). The arbitral tribunal, composed of 5 arbitrators, issued an award on 20 February 2019 recognizing the liability of the three shareholders and ordered them to pay compensation to PT Ventures.

This award was the subject of an addendum as to the quantum of the award on 30 April 2019. On 11 June 2019, Vidatel filed an action for annulment of the award and its addendum. This action is based on two grounds, namely (1) the ICC's failure to comply with the rules applicable to the constitution of the arbitral tribunal, and (2) the lack of independence of two arbitrators.

(1) As regards the first ground, Vidatel submits that (a) the ICC Court violated the parties' agreement on the constitution of the arbitral tribunal, which is contrary to the ICC Rules (Articles 11(6) and 12(8)), by appointing the five arbitrators when the parties had agreed in the arbitration clause on the appointment by each of them of one arbitrator and on the appointment of the chairman by the ICC President in case of disagreement of the four arbitrators. (b) It considered that the existence of a disagreement between the parties on a proposal to amend the clause did not justify the deviation from its provisions.

The ICC allegedly usurped the powers of the arbitral tribunal to interpret the arbitration clause and violated the principle of kompetenz-kompetenz. In this respect, Vidatel disputes that it waived its right to rely on this complaint relating to the kompetenz-kompetenz principle since it expressed reservations in a letter to the ICC dated 23 February 2016, in the challenge request dated 2 May 2016 and in the Terms of Reference dated 31 May 2016. The ICC violated Article 12 of the ICC Rules on the grounds that none of the conditions set out in that Article were met when the ICC appointed the 5 arbitrators, as the ICC Rules are applicable only to a

3-member tribunal and only in the event of failure to jointly appoint an arbitrator by a plurality of claimants/defendants or involving an intervening party. (c) Furthermore, the ICC improperly refused to confirm the arbitrators already appointed by the parties; there was no doubt as to their independence or impartiality and no party had objected to their appointment. (d) Finally, by appointing the Chairman of the Arbitral Tribunal, the ICC violated the agreement of the parties designating as appointing authority the President of the ICC, a natural person distinct from the Court of Arbitration.

(a) The Paris Court of Appeal recalls Article 1453 of the French Code of Civil Procedure (FCCP), applicable through Article 1506, which provides that where there is a disagreement on the modalities of constitution of the arbitral tribunal in a multiparty arbitration, the person in charge of organizing the arbitration (failing which, the judge acting in support of arbitration) appoints the arbitrator(s).

Here the arbitration is organized by the ICC, which provides via Article 11(6) of its Rules that the arbitral tribunal is constituted in accordance with Articles 12, and 13 which deal, indeed, only with the sole arbitrator and three-arbitrator tribunals. However, Article 41 of the Rules provides that when cases are not covered by the Rules, the Court and the arbitral tribunal shall proceed in accordance with the Rules.

These provisions have made it possible to set up an arbitral tribunal and to respect the will of the parties to have their dispute settled in this way and thus overcome the obstacle. In the Court's view, it was indeed incumbent on ICC as the center in charge of organizing the arbitration and taking into account the opposition of the parties, to organize the modalities of appointment in accordance with its Rules, in order to satisfy the principle of public policy of equality of the parties in the appointment of arbitrators.

If, on the day of the conclusion of the arbitration agreement, it complied with the principle to provide for the appointment of an arbitrator by each of the parties, on the day the dispute arose, this principle must also be assessed in the light of the parties' claims and interests. If several of them are likely to defend common and shared interests against one, care should be taken to set up a tribunal to ensure that this is respected. Thus, respect for the equality of the parties justifies, in the absence

of a better agreement between the parties, ensuring a method of appointment compatible with respect for the said principle.

(b) In the Court's view, Vidatel did not justify having stated precisely the grievance relating to the violation of the principle of kompetenz-kompetenz.

It recalls Article 1466 of the FCCP on the failure to invoke an irregularity before the arbitral tribunal in due time and indicates that this provision does not refer only to procedural irregularities but to all grievances that constitute cases for the opening of an action for the annulment of awards (with the exception of the arguments based on Article 1520 5°).

According to the Court, it appears from the facts that the kompetenz-kompetenz principle was not invoked by Vidatel in respect of the grievances to challenge the irregularity in the constitution of the arbitral tribunal, so that this grievance is not admissible. Moreover, even if it was admissible, the Court of Appeal found that the Court of Arbitration did not interpret the arbitration agreement or exceed its powers in assessing the validity of the clause, but rather applied Article 1453 of the FCCP.

(c) It follows from Article 13 of the ICC Rules that ICC has a wide discretion to confirm or reject the appointment of an arbitrator.

Thus, in view of the discrepancies that arose between the parties when the arbitral tribunal was constituted, it was for the Court of Arbitration to make the appointment. It was under no obligation to confirm the appointed arbitrators.

(d) Finally, the Court noted that the appointment by the President of the ICC of the Chairman of the Tribunal was envisaged only if the co-arbitrators appointed by the parties could not agree.

However, this condition was not fulfilled in the present case, as the appointment of all the arbitrators was made by the ICC Court of Arbitration. Moreover, in view of the discrepancies that arose, it was up to the Court of Arbitration to make the appointment.

The Court rejects this argument.

(2) With regard to the second plea, Vidatel argues that one of the arbitrators (Mr. Ferro) and the chairman (Mr. Sachs) do not have the requisite qualities of independence because of existing links with PT Ventures and its majority shareholder, OI, which were not disclosed at the time of their appointment or during the arbitration.

In the case of Mr. Ferro, Vidatel considers that he did not disclose the multitude of former, continuous direct and indirect links with OI and Mr. Tanure. At the time of Mr. Ferro's appointment, OI was the majority shareholder of PT Ventures and would have been the true party to the arbitration (PT Ventures would only be an investment vehicle). In addition, Mr. Ferro and his firm were and still are Mr. Tanure's usual counsel.

It points out that while the links between Mr. Tanure and OI were notorious, the links between Mr. Tanure and his companies and Mr. Ferro and his firm were not. In addition, Mr. Ferro was the regular counsel to The Bank of New York Mellon Corporation, a partner of OI. These circumstances only became significant and likely to raise a doubt as to the independence of the arbitrator during the arbitration. Moreover, this disputed information was not easily accessible.

In the case of Mr. Sachs, he failed in his obligation by not declaring that his law firm (CMS) had worked during the arbitration proceedings for PTIF, the largest company in the OI group, and that an award in favour of the group was beneficial to PTIF. One of Mr. Sachs' partners was appointed in October 2016 as administrator and then in April 2017 as administrator in bankruptcy of PTIF.

Moreover, these facts were subsequent to Mr. Sachs' appointment, so Vidatel was not required to conduct any research. It also contests the notorious nature of this appointment and specifies that the notorious nature issue of the disputed information does not arise after the constitution of the arbitral tribunal.

The Court of Appeal begins by confirming that all circumstances arising after the arbitrator's acceptance of his mission, even if they are notorious, must be disclosed by the arbitrator.

On the general obligation of disclosure of the arbitrators, the Court notes that the content of this obligation is not specified by Article 1456 of the FCCP, however it is

possible to refer to the recommendations issued by the ICC ("Guidance Note On Conflict Disclosures By Arbitrators") which specify the circumstances that should be particularly considered by the arbitrator or his law firm.

These recommendations relate to circumstances in which the arbitrator or the law firm to which he belongs has a direct relationship with one of the parties or with a subsidiary company of that party. Apart from these causes deemed to be objective, the arbitrator is exempted from revealing, unless they may be of such a nature as to create, in the minds of the parties, a reasonable doubt as to his independence.

Such reasonable doubt must result from a potential direct or indirect conflict of interest, it being specified that if it is indirect, the assessment of the reasonable doubt depends on the intensity and proximity of the link between the arbitrator, the third party concerned and one of the parties.

Mr. Ferro:

The links with Mr. Tanure and the JVCO, Sequip, and Docas Investimentos (100% owned by Mr. Tanure)

The Court notes that these companies are not parties to the arbitration and have no direct or indirect connection with any of the parties. Even if it is established that Mr. Ferro or his firm assisted these companies, even if they were 100% owned by Mr. Tanure, these links did not have to be disclosed, in particular with regard to the ICC recommendations. Moreover, these links were notorious as they had been published by the Global Arbitration Review.

The Court went on to state that, pursuant to Article 1464(3) of the FCCP, the parties are required to comply with the principle of expeditiousness and fairness in the conduct of the proceedings, and as such, in case of doubt as to the impact of these circumstances, must notify the arbitrator or the ICC in that case in order to obtain additional observations, without waiting for the outcome of the arbitration. Failing this, the parties, in this case Vidatel, are presumed to have considered that this circumstance was not such as to create a reasonable doubt in their minds.

Links with Mr. Tanure

The Court notes that the links between Mr. Tanure and OI were notorious. Moreover, it is clear that there is a professional link between Mr. Ferro and/or his firm and Mr. Tanure (due in particular to the existence of an arbitration in which Mr. Ferro took up his defence). However, this link is not sufficient to consider that Mr. Ferro had to disclose these elements.

This is particularly so because even though Mr. Tanure had acquired a majority interest in OI after the arbitration proceedings had begun, Mr. Tanure's links with PT Ventures are indirect since they are the result of the links that Mr. Tanure may have had with OI, the parent company of PT Ventures. However, the documents show that these links themselves remained indirect or short-lived.

Finally, OI's participation in the capital of PT Ventures is equally indirect due to the existence of four distinct levels of legal entities between the two, each with its own corporate purpose and distinct corporate bodies. As a result of all these elements, the links between Mr. Ferro and/or his firm and Mr. Tanure do not create a sufficiently close and intense link between PT Ventures and Mr. Ferro and/or his firm, causing reasonable doubt as to his independence.

Links with Bank of New York Mellon Corporation

Here the Court holds that this company appears to be a provider of financial services on behalf of OI, whose interests do not appear to be convergent or likely to be convergent. In light of the ICC's recommendations, Mr. Ferro was not required to complete his statement. Furthermore, the fact that Mr. Ferro's firm was appointed to advise a third party to the arbitration offering services among other companies to OI does not create a sufficient link between PT Ventures and Mr. Ferro and/or his firm.

The argument is dismissed.

Mr. Sachs:

The Court recalls that PTIF is not a subsidiary of PT Ventures but a subsidiary of OI, a company that includes 40 subsidiaries. The Court considers that the opposition of Mr. Sachs' partner in his capacity as administrator to the restructuring plan of OI

cannot be inferred from a decision taken in connection with the fate of the arbitration.

This opposition seems rather reasonable for a administrator of a company charged with defending its interests as well as those of its own creditors. In addition, Mr. Sachs is a partner at CMS in Munich, which is separate from his partner's practice at the firm in the Netherlands. Even though these firms are part of the same network, these two persons are not direct partners of the same law firm and there is no evidence of a business relationship between Mr. Sachs' law firm and PTIF or even between the two law firms. Moreover, the particularity of this network is that each member firm is a legally independent entity.

Thus, simply belonging to the network under these conditions does not oblige an arbitrator to make a statement to that effect. Moreover, the Court noted that Vidatel could not have been unaware of this circumstance, which it itself produced during the arbitration. Vidatel could not retreat behind the voluminous nature of the documents produced to argue that it could not have had sufficient knowledge of them. Thus, the Court considers that this information was not of such a nature as to create a reasonable doubt as to the arbitrator's independence.

This plea is dismissed, as is the action for annulment.

FOREIGN COURTS

Carlos Rios y Francisco Javier Rios v. Republic of Chile, 11 January 2021, ICSID Case N° ARB/17/16

Contributed by Julian MESTRE PENALVER

In an award of January 11, 2021, the ICSID arbitral tribunal rejected the claims of two majority shareholders of Colombian transport companies against the Chilean State. The tribunal held that although the absence of a plan against fraud in public transportation in the host State runs against the legitimate expectations of the investor, such omission is not sufficient to characterize an indirect expropriation as it does not affect the value of the investment or deprive the investors from enjoying it.

In 2005, two majority shareholders of two different Colombian transport companies signed a concession contract with the Chilean Ministry of Transport for bus lines in Santiago, the capital of Chile. However, the conditions under which the investment had been made jeopardized the development of the transportation network, leading to the conclusion of a new concession on December 22, 2011, succeeding the previous one, which was terminated in 2010.

Once the transportation network had been developed, the operating companies (Inversiones Alsacia and Express) were affected by fraud in their public transportation activities, as well as delinquency. Following the creation of new services, some of the services granted to Inversiones Alsacia and Express were reallocated to other transportation companies through a call for tenders.

In two petitions filed before the Chilean courts in 2016 and 2017, Inversiones Alsacia and Express challenged the Chilean government's termination of the previous concession, which occurred in 2010. These petitions also challenge the conduct of these calls for tenders, certain fines imposed, as well as the expropriation of their bus terminals.

In addition to these actions before domestic jurisdictions, the majority shareholders of these plaintiff companies have declared their intention to initiate arbitration proceedings, on May 16, 2016. More than a year later, on May 23, 2017, the plaintiff shareholders waived their right to sue in domestic courts, as provided for in Article 9.18.2(b) of the Chile-Colombia Free Trade Agreement (FTA). A request for arbitration was registered at the ICSID Secretariat on June 13, 2017.

Supporting their claim before the arbitral tribunal, the claimants allege several violations of the FTA by the Chilean State, including the minimum standard of treatment and national treatment. They also denounced the absence of a plan to combat fraud in public transportation and the lack of protection against acts of vandalism. In addition, the applicants denounce the reorganization of certain routes, the imposition of fines, and the minimum number of buses required to provide service. According to the claimants, such measures would have led to the indirect expropriation of investors, which would constitute the main justification for their claim before the ICSID.

For its part, the Chilean State contests having consented to the jurisdiction of the arbitral tribunal. The defendant State considers that the claimants did not comply with the terms of the FTA by having exceeded the 39-month period during which they could submit their claims when their rights were affected. Also, the Chilean State contests the fact that the claimants waived their right to sue in domestic courts, as required by the FTA, since their companies are continuing their proceedings in domestic courts.

The arbitral tribunal dismissed these grounds, considering that the claimants are majority shareholders of the claimant companies, and that in this case, the waiver formulated only concerns themselves and not the companies of which they are majority shareholders. As the claims are brought in their own name, the arbitral tribunal declares its partial jurisdiction, only on the allegations of indirect expropriation.

Examining the claims made by the claimants, the arbitral tribunal finds that claims relating to national treatment, as well as claims relating to violations of the minimum standard of treatment, cannot be considered and declares its lack of jurisdiction over these claims. This lack of jurisdiction is justified by an examination of the facts in the

light of the FTA and not according to the articles of the International Law Commission on the responsibility of States for internationally wrongful acts.

In light of the provisions of the FTA, the majority of the arbitral tribunal considers that the 39-month period begins to run when the investors become aware of the alleged violation and of the prejudice suffered, when the violation is continuous. However, the arbitral tribunal considers that these acts were repeated and not continuous, which implies that the claimants may have become aware of the violations sufficiently in advance before the 39-month period expires (this position of the majority of the arbitral tribunal resulted in a dissenting opinion of arbitrator Oscar Garibaldi, who considered that in the case of a continuous illegal act, the claimant may not have become aware of the alleged violation before the termination of such act; that the majority of the arbitral tribunal blurs the difference between a continuous and repeated act).

The claimants' argument that their intention to submit a request for arbitration would have interrupted or extended the 39-month period was rejected by the arbitral tribunal. However, the claimants argued that the act of expropriation they are alleging occurred after the expiration of the 39-month period, as the actions of the state would have caused the companies to be unable to fulfill their obligations, which would have led to the alleged act of indirect expropriation. The arbitral tribunal therefore considers that this act could not have occurred before the end of the 39-month period and declares itself competent to consider the claim.

Finally, the arbitral tribunal rejects all of the claims on the merits relating to the indirect expropriation. Although it is established that the lack of an anti-fraud plan for public transportation in the host State runs against the legitimate expectations of the investor, they do not constitute acts of sovereignty. Moreover, since the value of the company has not been affected and the investors have not been deprived of the enjoyment of their investment, indirect expropriation cannot be characterized in this case.

The plaintiffs are sentenced to pay all of the arbitration costs of the State of Chile, as well as 40% of their representation costs.

CIRDI, 21st December 2020, Cairn Energy PLC et Cairn UK Holdings Limited c. The Republic of India, PCA Affaire N° 2016-07, Final sentence

Contributed by Jasmine FARNOUD

On December 21, 2020, the Arbitral Tribunal held that the Indian government had failed to uphold its obligations under the 1994 Bilateral Investment Treaty between the Republic of India and the United Kingdom. The Indian government, after implementing retrospective tax levies, is ordered to pay $1.2 billion in damages to the British company Cairn Plc. In June 2006, Cairn UK Holdings Limited was incorporated in the United Kingdom. At the same time, a wholly owned subsidiary of the Cairn Plc Group, called Cairn India Holdings, was incorporated in Jersey.

Cairn UK Holdings Limited then transferred shares related to the Indian oil and gas sectors of the Cairn Plc Group to this new subsidiary. This transfer was made under a share exchange agreement between Cairn UK Holdings Limited and the subsidiary company. Shortly after, Cairn India Limited was incorporated in India.

In the same year, Cairn UK Holdings Limited sold shares of the subsidiary company to this new company incorporated in India as part of an internal restructuring operation of the group. This complex transaction was implemented through an act of purchase that allowed the shares of the subsidiary called Cairn India Holdings Limited to be transferred to the company of the same group incorporated in India.

The consideration consisted of a party formed of share in cash and another formed of shares of Cairn India Limited. As a result of this transaction, the company incorporated in India, Cairn India Limited, sold part of its interest in the subsidiaries of the Cairn Plc Group and part of the proceeds of its IPO. In 2012, the Indian Parliament passed the Finance Act, which clarified the corporate income tax provisions.

In January 2014, the Indian tax Assessing Officer initiated a revaluation procedure against the British company Cairn UK Holdings Limited. The Indian Income Tax Department then issued an notice to Cairn Plc, requesting further information on the 2006 internal restructuring operation. To justify itself, the department claimed to have identified unassessed taxable income resulting from the transaction.

The capital gains realized by the British company during the reorganization of its activity would have escaped the tax assessment. An order was then passed against Cairn Plc estimating the principal tax due on the 2006 transaction at INR 102 billion (US$1.6 billion), plus interest and a penalty. On 10 March 2015, Cairn Energy initiated international arbitration proceedings against the measures adopted by the Indian government.

The company considered that the Bilateral Investment Treaty between the Republic of India and the United Kingdom had been violated by the order adopted and the measures taken by the Indian Income Tax Department regarding punitive retrospective taxes. Moreover, for the entire duration of the arbitration proceedings, the Indian government seized a share of the shares of Cairn UK Holdings Limited, thus depriving the company of the freedom to exercise its property rights. During this period, the Indian government also decided to resell a portion of the seized shares to recover the amount due under the retrospective tax.

Before the arbitral tribunal, the British company requested that the effects of the tax revaluation by the Indian Government be annulled and that compensation from the Republic of India, for the loss of value resulting from the measures taken by the government, be allocated.

On December 21, 2020, the Arbitral Tribunal finds that the Government of India has not complied with its contractual obligations under the Bilateral Investment Treaty between the United Kingdom - Republic of India and international law and "in particular, that it has failed to treat applicants' investments fairly and equitably in violation of Article 3(2) of the Treaty; and deems it unnecessary to make a statement on other matters for which the Applicants seek relief pursuant to paragraph 2(a), (c) and (d) of the Claimants' Updated Request for Relief."

The arbitrators ordered Indian government to compensate the British company for the total damage suffered as a result of treaty violations and asked the Indian government to return the value of the shares sold, the dividends seized and the tax refunds withheld.

INTERVIEW WITH WILLIAM BRILLAT-CAPELLO

Q1. Hi William, would you like to remind us your background?

Thank you very much for inviting me to discuss with you and your readers.

I am a French avocat, registered within the Paris Bar since 2015. I work at Betto Perben Pradel Fihol since that date, and as counsel since 1st January 2021.

Dedicated to the resolution of complex international disputes, our team provides its clients with its broad vision based on a combined expertise in arbitration, major litigation, and international white-collar defence.

Even though I like to diversify my activities, I mainly focus on arbitration, commercial litigation and mediation.

I graduated from Sciences Po Law School and Paris I Panthéon-Sorbonne and then worked for different firms in Paris and Milan. In particular, I am very proud of my secondment in Milan, at ArbLit. This law firms shares many features with our own firm, and I was really happy to work there.

Q2. Would you please tell us about the arbitration practice and your arbitration experience in Italy?

Even if France and Italy have very close legal traditions, their arbitration set of rules are different.

However, the day-to-day handling of cases is pretty similar. There are of course cultural peculiarities, but real discrepancies are very limited.

Given that I am both French and Italian, I was not an expatriate confronted with an unknown culture, including in the firm. ArbLit is a boutique with an international practice, composed of excellent lawyers, who practice in a similar manner to what I have known in France.

I had the unique opportunity to work with highly reputed lawyers like Luca Radicati di Brozzolo, Michele Sabatini and Massimo Benedettelli. It confronted me with different methods, which is a very enriching exercise. I also learned a lot working with young lawyers, and the exchanges that we continue to have are part of the pleasure that I feel working every day.

It is the proof that even without any network abroad, smaller firms can offer fascinating professional experiences to their associates!

All the same, one significant difference is that there are still only a few women practicing international arbitration in Milan. I hope that the next generation, in all its diversity, will soon take the place it deserves.

Q3. You have been author or co-author of various publications on arbitration, do you intend to continue this doctrinal activity?

Drafting academic publications is part of a lawyer's job and life, including for those who, like me, are still at the beginning of their career.

It is first an excellent way to help gain an opinion on various issues that are raised before arbitral tribunals and domestic courts.

It is also a way to share an interest on specific issues. When I drafted an article on the Hague Rules, which are designed to promote and facilitate the use of arbitration to solve disputes related to human rights breaches by corporates in their international business activities, I had the opportunity to think about what makes a set of arbitration rules attractive to arbitration users, and about the different uses which can be made of these rules by arbitrators and counsel.

Eventually, you cannot neglect the fact that publications help young lawyers raise their profile visibility, which is crucial in the very competitive world of international arbitration.

Q4. How are you experiencing your new appointment as a counsel? What does this position involve?

I am enjoying it!

Within the firm, this promotion was a natural step. Since I joined the firm, I have learned and built a lot thanks to the support of the partners. My relationship with them, on the one hand, or with the other associates, on the other hand, did not change. I was also very much involved and independent in the handling of my cases. This promotion comforts me to continue along this path.

I am very happy of this wonderful acknowledgment of both my legal and human commitment. It is also the result of the work of all the lawyers that work with me every day.

For people outside the firm, it is also a message of trust that is sent to our clients and colleagues. I was very touched by the congratulations that I have received from both.

The biggest challenges are still to be faced, and I will not ease up in efforts but will keep working hard to continue to earn that trust and pursue the interest of my clients and the firm's.

Q5. Do you have any tips for young people who want to start their career in international arbitration?

I believe that all the advices given by the practitioners that you interview for this publication are relevant and should be followed.

I believe there is first a state of mind to follow, by being humble and conscious that you can learn from every single person with whom you work. I have in mind a long list of recognized lawyers with whom I had the pleasure to work with. Each of them, in their own way, allowed me to broaden myself and develop additional skills. I am very grateful to all of them, even if it was not always without difficulties and required lots of work.

Being humble does not mean that you have to diminish yourself. I urge you to ask yourself how you can be useful to the team in which you work, without fearing to suggest something new, or to make mistakes. Each situation, each brief, each cross or pleading, or each hearing preparation, whatever your role, is a unique opportunity to learn and show that you think of how to make the team work more efficient.

By doing this you will assert yourself. It is also the best way for you to be able, when the time comes, to play a more important role in the defence of your clients!

I also recommend taking part in the arbitration community's life, which offer many opportunities to meet your peers. It is a fundamental dimension of our work, and it is a way to feed both your mind and practice. My experience as PVYAP co-chair is one of the founding moments of my career.