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BIBERON

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French and foreign court decisions

Arbitral awards

Review of the webinar "*How to Build your Profile in International Arbitration*"

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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: https://parisbabyarbitration.com/

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Enjoy reading!

COURT OF CASSATION

Court of cassation, 1st Civil Chamber, 7 July 2021, No. 20-15.994

By Nicole Knebel

In a decision of 7 July 2021, the French Court of Cassation sanctioned an enforcement order of an ICSID award of the Paris High Court of 9 January 2020, in which the enforcement judge had authorized the forced sale of a property in France belonging to the Democratic Republic of Congo ("DRC").

According to the DRC, Article L. 111-1-2, paragraph 1, of the French Code of Civil Enforcement Procedures allows for enforcement measures against property belonging to a foreign State only in a limited number of cases, in particular "[w]*here a judgment or arbitration award has been rendered against the State concerned and the property in question is specifically used or intended to be used by the said State other than for non-commercial public service purposes and has a link with the entity against which the proceedings have been brought*." Paragraph 2 of the same text specifies expressly that "[p]*roperty* [...] *used or intended to be used in the exercise of the functions of the diplomatic mission of the State*" are considered to be specifically used or intended to be used by the State for non-commercial public service purposes.

In this case, the property in question was used, or at least intended to be used, as the residence of a DRC diplomatic agent in France.

The Court of Cassation recalls in its decision that when an arbitral award has been rendered against a foreign State, and a conservatory or enforcement measure is required due to the non-voluntary execution of the said State, that these measures come up against the imperative of respecting the inviolability of the State's sovereignty and diplomatic protection.

In this sense, to order the forced sale of the real estate in this case at hand, after the enforcement judge had noted the official nature of the residence of the ambassador of the DRC in these premises by the protocol department of the Ministry of Foreign Affairs as of 2 August 2014, the enforcement judge violated the texts by retaining that the premises do not constitute the personal residence of the ambassador and are not assigned to the diplomatic mission of this State.

Consequently, the Court of Cassation overturned the decision of the Court of Appeal, which had validated the decision of the enforcement judge.

Council of State, 7e – 2e Chamber, 20 July 2021, No. 443342

By Julian Mestre Penalver

By its decision of 20 July, 2021, the French Council of State sets out its jurisdiction to review the validity of arbitral awards involving a French public entity and determines the conditions for reviewing an award when it is enforced in France but involves international commercial interests, particularly with regard to the composition of the arbitral tribunal, its jurisdiction, compliance with the adversarial principle, or French or European public policy.

Pursuant to a public tender and while it was still a Public Industrial and Commercial Establishment (EPIC), Gaz de France concluded a contract with a consortium of private companies including foreign companies (Sofregaz/TCM FR SA [FR], SN Technigaz [FR], SAIPEM SA [ITA, FR subsidiary]) for the construction of a gas terminal (STS Consortium). The contract was signed on 17 May 2004. Once it became a private limited company, Engie (formerly Gaz de France) transferred the contract to its subsidiary, the Société d'Exploitation du Terminal de Fos Cavaou (STMFC), by a contract amendment with retroactive effect on 17 June 2005. Technigaz SN transferred its rights and obligations to Saipem SA and Tecnimont SpA [ITA] joined the STS Consortium by a second contract amendment on 23 January 2008. The operating company changed its name on 26 March 2012 to Fosmax LNG, which remains a subsidiary of the Engie group (Shares: Fosmax LNG owned 100% by Elengy owned 100% by GRTGaz).

A third contract amendment included an arbitration clause on 11 July 2011, which provided for the settlement of disputes by arbitration before the ICC, where the arbitrators would decide on the applicability of administrative law. On 13 February 2015, due to the delay in the delivery of the terminal and the defects identified at the time of delivery, the arbitral tribunal ordered Fosmax LNG to pay EUR 128,162,021 to the STS consortium and ordered the STS consortium to pay EUR 68,805,345 to Fosmax LNG.

On 7 April 2015, the Paris High Court granted the enforcement of the award upon the request of the STS Consortium. Fosmax LNG filed an appeal for an annulment against the award (case RG n °15/16654) and an appeal nullity against the enforcement order (RG n °15/16653) before the Paris Court of Appeal on 18 August 2015.

On 18 March 2015, Fosmax LNG filed an appeal before the Council of State to have the award annulled. In a decision dated 11 April 2016, the *Tribunal des conflits*, the judge deciding on the competence of the administrative or of the judicial judge, (Tribunal des conflits, 11 April 2016, Société Fosmax LNG c/ STS, n ° 4043) considered that the action for the annulment brought against the arbitration award fell within the jurisdiction of the administrative jurisdiction.

Pursuant to the Tribunal des conflits decision, the Paris Court of Appeal declined its jurisdiction on 4 July 2017 (case RG n °15/16653) and the Council of State, by its decision on 9 November 2016 (CE, November 9, 2016, n ° 388806), partially annulled the arbitral award. In a new award of 24 June 2020, the arbitral tribunal sentenced the companies of the STS consortium to pay Fosmax LNG EUR 31,966,704.57 for work performed as a result of the defects identified at the time of delivery. Two of the companies participating in the STS consortium, Tecnimont SpA [ITA] and TCM FR SA [FR], filed a new appeal before the Council of State requesting the annulment of the award.

The Council of State considers that *"when an appeal is lodged against an arbitration award issued in France in a dispute arising out of the performance or breach of a contract concluded between a French legal person governed by public law and a person governed by foreign law, performed on French territory but involving the interests of international trade, it is its duty* (…) *to ensure* (…) *that the arbitration agreement, whether an arbitration clause or an arbitration agreement, is lawful*" (§ 3).

Therefore, "*without any particular procedural rules applicable to arbitration proceedings falling within the jurisdiction of the administrative jurisdiction*", it may be claimed before the Council of State that an award is irregularly issued if the tribunal was improperly constituted (particularly with regard to the principles of independence and impartiality), if it wrongly claimed jurisdiction or lack of jurisdiction, if the principle of adversarial proceedings was breached, or if the award is insufficiently substantiated (§ 3).

Regarding the review of the merits, the Council of State limits its review to the respect of public policy, for example, "*when it is based on a contract whose object is illegal or is tainted by a particularly serious defect concerning, particularly, the conditions under which the parties gave their consent*", when the award is incompatible with the rules which public entities cannot infringe, or when it is incompatible with the rules of public policy of European Union law (§ 3).

Before the Council of State, the applicant companies claimed that the arbitral tribunal had wrongly assumed jurisdiction, ignoring the res judicata (§ 5), and that the arbitral tribunal had failed to respond sufficiently to the argument concerning the accountability of non-performance (§ 4). These two arguments were rejected by the Council of State and the two companies Tecnimont SpA [ITA] and TCM FR SA [FR] were condemned.

COURTS OF APPEALS

Paris Court of Appeal, 29 June 2021, No. 20/01301

By Arthur Etronnier

The companies COMPAGNIE MEDITERRANEENNE DE REPARATION TUNISIE (hereinafter "CMRT") a company under Tunisian law, and Sofema, a company under French law, were in a business relationship from 1 August 2012. Their relationship mainly concerned the refurbishment of a military ship, which was later to be sold to the Republic of Cameroon. This work took place in Tunisia and was supervised by the company Marine Propulsion Service (hereinafter "MPS") represented by Mr. S. In 2014, the ship left Tunisia for Toulon and was subject to a "blackout" due to an electrical shortage. After several repairs, Sofema therefore claimed EUR 2,462,654 in compensation from CMRT for the losses suffered as a result of this incident. In the absence of a reconciliation between the two companies, Sofema filed a request for arbitration with the International Court of Arbitration of the International Chamber of Commerce in Paris.

A first partial award was issued in February 2018. At that time, the arbitral tribunal rejected, among other things, the objection of inadmissibility of the arbitration claim made by the CMRT and specified that the proceedings will continue on the merits. CMRT filed for annulment with the Paris Court of Appeal. On 11 September 2019, the latter also filed a complaint against Sofema for attempted fraud and witness tampering.

This complaint was dismissed. On 29 October 2019, Sofema filed a complaint against X for slanderous denunciation and intimidation committed against an arbitrator.

On 22 November 2019, the arbitral tribunal issued its final decision. It found CMRT liable and ordered it to pay EUR 1,662,385.68 and USD 307,500 to Sofema. The CMRT filed an action for annulment on 9 January 2020, and then on 7 April 2021, it filed a complaint for attempted defrauding of judgment and witness tampering.

In the annulment proceedings against the arbitral award, CMRT has asked the Court of Appeal to stay the proceedings pending the response to the complaint filed in September 2019. It is also seeking to have the award set aside on the grounds of an alleged disregard of the principles of respect for international public policy and adversarial process. For its part, Sofema argues that the application for a stay of proceedings is inadmissible and asks the Court to dismiss the CMRT of all its claims.

As regards the application for a stay of proceedings, the dispute concerns the characterization of this application. The CMRT considers that this application is an incident of proceedings, giving the Court jurisdiction to rule on the request. It maintains that the facts denounced in the criminal proceedings will have an impact on the decision to annul the award. For its part, Sofema maintains that this application constitutes a procedural objection falling within the jurisdiction of the Pre-Trial Judge. Likewise, the fact that the September 2019 complaint was dismissed implies the dismissal of the application for a stay of proceedings.

The court accepted the characterization of a procedural objection and therefore rejected the request for a stay of proceedings. In fact, the request related to a complaint filed before the arbitration award was rendered. In addition, since the Pre-Trial Judge issued his closing order on 3 May 2021, CMRT had time to submit its request for a stay of proceedings at this stage of the proceedings. Finally, the Court of Appeal considered that the application for annulment was not related to the decision that would be rendered in the criminal proceedings in that the application for annulment was not based on the same claims as those that were subject to the complaint.

As regards the violation of the adversarial principle, CMRT considers that the technical expert reports were carried out by experts commissioned by Sofema. It also considers that Sofema concealed information crucial to the proceedings. In response, Sofema states that the principle of adversarial proceedings is the duty of the arbitrators, not the parties. Therefore, the CMRT should have invoked a fault of the arbitrators and not of Sofema itself. Similarly, it considers that the information allegedly withheld was part of acts preceding the arbitration proceedings and therefore not subject to the principle in question. Finally, it recalls that the Tribunal based its decision on elements that were the subject of written discussions and pleadings.

The Court then recalled that the adversarial principle implied only that the parties are able to express their claims and that there is a possibility for the parties to discuss the elements used in the decision. According to the Court, this principle has not been violated. Indeed, the CMRT was in a position to challenge the technical reports without having done so. More broadly, the Court found that all the documents that led to the recognition of its liability had been discussed in adversarial proceedings without the CMRT having objected.

With regard to the violation of international public policy, the Court recalls that in order to have a decision annulled on this ground, there must be a manifest, effective and concrete violation of the principles included in French international public policy. The CMRT noted three grievances likely to violate French international public policy, namely non-compliance with the Incoterms, fraud in the compensation

orchestrated by Sofema with a third company (Tarvos International) and Sofema's lack of loyalty towards the arbitration institution.

The CMRT therefore considers that international public policy has been violated by the failure to comply with the Incoterms, particularly with regard to the receipt of the vessel and the limitation period. On the other hand, Sofema considers that the incoterms are contractual in nature and must therefore be provided for by the parties, that in no case are they integrated into French international public policy and that they can only be used in the case of an international sale.

The Court then decided to reject the CMRT's arguments on the grounds that the Incoterms have only contractual value. Concerning the fraud between the company Sofema and the third party company Tarvos International. The CMRT considers that it paid compensation based on false invoices and in particular VAT fraud. The award under appeal would then have validated contracts with aspects of corruption. In reaction, Sofema wishes to recall that these allegations had already been presented to the arbitral tribunal, which had sovereignly rejected them. It also added that the allegedly corrupt contract had not been explicitly identified by the CMRT. Lastly, it adds that the award in no way gave effect to a contract but condemned the CMRT.

The Court of Appeal then considered that there had been no such fraud with regard to the invoices used by the arbitral tribunal to render its decision. It recalled that, although there had been an investigation by the Tunisian tax authorities, the proceedings in question had no connection with the mandate received by the arbitral tribunal, in view of the documents placed on file by the CMRT. In the absence of further evidence, the Court was therefore obliged to reject this claim as well.

Finally, concerning the lack of loyalty on the part of Sofema towards the arbitration institution. The CMRT points to the fact that Sofema made it liable by means of fraudulent collusion with MPS. It also claims that Sofema produced false documents in the arbitration proceedings, which can be considered a criminal offence, but also an ethical offence tainting the proceedings with disloyalty. Sofema retorted that the disputed documents had been withdrawn from the debate and that, in any event, the disloyalty did not fall within the scope of Article 1520 of the Code of Civil Procedure on which the CMRT relied.

The Court then rejected CMRT's arguments once again, adopting those of Sofema and in particular the argument that the court had set aside the disputed documents.

The Court, in its judgment, orders the CMRT to pay the costs and dismisses the application for a stay of proceedings and the action for annulment.

European Court of Justice, 1 July 2021, opinion of Advocate General Szpunar in case n ° C-638/19

By Julian Mestre Penalver

The Advocate General of the European Union considers that compensation following the enforcement of an ICSID arbitration award for events that took place before the accession of a Member State to the European Union does not violate European law, as European law was not applicable at the time of the disputed events, even though these events were a direct consequence of the accession process to the European Union.

In an ICSID arbitration concerning events that took place before Romania's integration into the European Union, the European Commission argued that the compensation of a Swedish investor for its alleged expropriation could constitute illegal state aid and contrary to EU law, at a time when the integration process had already begun. The European Commission supported this reasoning before the arbitral tribunal as an amicus curiae to the proceedings.

The arbitral tribunal ruled against Romania (ICSID, 11 December 2013, ARB/05/20, Micula v. Romania) on the grounds that the Swedish investor's legitimate expectations were violated, while rejecting the European Commission's argument: the investor enforced the award before the Romanian national court. The Commission intervened before the Romanian court to suspend the enforcement of the award until a judgment on the merits of the case had been rendered. The Commission then suggested to the Romanian jurisdiction to ask for a preliminary ruling to check the enforceability of the arbitral award. While the investor filed several appeals through national courts in the European Union and the United States to enforce the award, Romania has already compensated the other affected investors in accordance with Article 54 of the ICSID Convention. The Commission then required Romania to declare these compensations as state aid and, once submitted, ordered Romania to refrain from paying any further compensation under the penalty of a sanction.

The Commission ended up condemning Romania for the payment of state aid contrary to European Union law and ordered it to recover the compensation it had granted under the enforcement of the arbitration award.

The Commission's sanction was challenged before the General Court of the European Union by the uncompensated investors. The Court held that EU law did not apply prior to Romania's accession and declared that the Commission had no jurisdiction to issue such a sanction (T 704/15, § 104).

The Commission has appealed the decision to the Court of Justice. Advocate General Maciej Szpunar found that the Court of First Instance erred in law and in legal qualification by categorizing this compensation as a state aid when it was proven that Romania had breached its obligations under the BIT (§§129–132). Therefore, the Court erred in law and did not sufficiently demonstrate the existence of an advantage granted by this alleged state aid (§ 142). Thus, the Advocate General states that in the case of the present compensation, EU law does not apply, although the ICSID award includes compensation for periods occurring after Romania's accession to the European Union (§ 143).

The decision of the Court of Justice will be known in a few months.

European Court of Justice, 2 September 2021, No. C-741/19, *Komstroy v. Moldavia*

By Kevin Péricart

The European Court of Justice (ECJ) holds that Article 26 of the Energy Charter Treaty (ECT) is incompatible with EU law and thus confirms the application of the Achmea case law (C-284/16) in which the CJEU held that bilateral investment treaties between EU Member States were incompatible with EU law. With this decision, the Court follows the conclusions of the Advocate General of the Court of Justice of the European Union Maciej Szpunar of 3 March 2021.

Under contracts concluded in February 1999, Ukrenergo (Ukraine) sold electricity to Energoalians (Ukraine), which in turn sold it to Derimen (British Virgin Islands), and finally to Moldtranselectro (Moldova), a Moldovan public company.

Derimen paid Energoalians for the electricity supplied, while Moldtranselectro paid Derimen for only part of the electricity sold by assigning some of their claims. Derimen having assigned its claim against Moldtranselectro to Energoalians by a contract dated 30 May 2000, Energoalians considered that Moldova's actions were contrary to its commitments under the Energy Charter Treaty (ECT). An ad hoc arbitration procedure has been initiated in Paris by Energoalians against the State of Moldova under article 26 of the ECT.

The arbitral tribunal, by an award of 25 October 2013, declared itself competent by a majority and found that the State of Moldova had failed to comply with its commitments under the ECT. The President of the ad hoc tribunal issued a dissenting opinion on the jurisdiction of the ad hoc tribunal, which encouraged the Moldovan State to file for annulment against the award of 25 October 2013 based on Article 1520 of the Civil Procedure Code, before the Paris Court of Appeal.

On 12 April 2016, the Paris Court of Appeal cancelled the award, ruling that a claim could not constitute an "investment" under the terms of the ECT. Komstroy, as successor to Energoalians, appealed to the Court of Cassation. In a judgment dated 28 March 2018, the Court of Cassation overturned the decision of the Paris Court of Appeal and referred the parties to the same court, otherwise composed.

By a decision of 24 September 2019, the Paris Court of Appeal decided to suspend the proceedings by referring three preliminary questions to the ECJ relating to the interpretation of the ECT and the concept of investment within the meaning of the Treaty. The purpose of these three preliminary questions is to determine whether a claim, transferred, acquired, resulting from an electricity sale contract, belonging to an investor, can constitute an investment within the meaning of the ECT without the latter carrying out any other economic operation on the territory of the contracting party to the ECT?

As regards its jurisdiction, the Court recalls that, in accordance with Article 267 TFEU, it has jurisdiction to interpret actions taken by the institutions, bodies, offices or agencies of the Union. The Court notes, on the one hand, that its case law consistently holds that an agreement concluded by the Council falls within the scope of that provision, and on the other hand, that the fact that the agreement in question is a mixed agreement (concluded by the European Union and many Member States) does not have the effect of excluding the Court's jurisdiction. The provisions of the agreement thus form an integral part of the Union's legal order from the date of its entry into force, and the Court has jurisdiction to give preliminary rulings within that legal order. Moreover, the Court specifies that in the present case the questions referred for a preliminary ruling concern the concept of "investment" within the meaning of the ECT, and since the entry into force of the Lisbon Treaty, the EU has had exclusive jurisdiction over direct foreign investments and mixed jurisdiction over investments other than direct investments; in those circumstances, the Court has

jurisdiction to interpret the ECT. The Court recalls that it does not, in principle, have jurisdiction to interpret an international agreement as regards its application in the context of a dispute not falling under EU law. However, the Court notes that when a provision of an international agreement can be applied to situations both within and outside the scope of EU law, there is a general interest in maintaining a uniform and coherent interpretation, regardless of the conditions of application (Giloy, C-130/95; Hermès, C-53/96; and Dior and others, C-300/98 and C-392/98).

The Court first analyses which disputes can be brought before an arbitral tribunal under Article 26 from ECT. The ECJ then applies the solution of the *Achmea* case in which it found that bilateral investment treaties between EU Member States were incompatible with EU law. The Court held that, despite the multilateral nature of the ECT, the provisions of Article 26 are in fact intended to govern relations between two contracting parties in a manner analogous to a bilateral investment treaty (in this case the one referred to in the Achmea case law).

The Court notes that the exercise of the Union's competence in international matters cannot extend to allowing a provision in an international agreement whereby a dispute between an investor of a Member State and another Member State relating to Union law may be removed from the jurisdictional system of the Union in a manner which does not guarantee the full effectiveness of European law. The Court applies the Achmea case and confirms the points raised in the opinion of the Advocate General, holding that this solution would be such as to call into question the preservation of the autonomy and specific character of Union law. This solution reinforces the Achmea case, which reflects the desire of the ECJ for a uniform interpretation of Union law and to guarantee its autonomy. However, this incompatibility with Union law concerns only article 26 and not the entire ECT.

As regards the application of the concept of "investment", the Court considers that, in the absence of a contribution by the creditor to the investment from which the claim derives, it cannot be considered as an investment within the meaning of Article 1(6) from ECT.

High Court of Singapore, 15 July 2021, No. SGHC 178

By Pierre Collet

On 15 July 2021, the General Division of the High Court of Singapore ("SGHC") ruled that an arbitral tribunal is not entitled to depart from the pleadings of the parties to the extent of making its decision based on a ground that has not been pleaded at all and which cannot be said to be ancillary to what has been pleaded.

Two companies, CIZ and Z Co entered into an agreement (the "Agreement"). Under the Agreement, Z Co was to provide CIZ with information and consultation/advisory services relating to business opportunities. In return, CIZ agreed to pay a fee (the "fee") subject to certain conditions in the Agreement. Z Co later assigned the Agreement to another company, CJA. Under a new Agreement ("Amended Agreement") between CIZ, Z Co and CJA, Z Co's obligations and liabilities were transferred to CJA. Both Agreements contained an arbitration clause before the Singapore International Arbitration Centre ("SIAC"). The Amended Agreement expiration date was fixed at 31 December 2013.

In 2012, Z Co presented an opportunity ("X Opportunity") to CIZ to buy a company. However, CIZ did not enter into any sale and purchase agreement ("SPA") relating to the X opportunity by the expiration of the Amended Agreement. On 31 July 2016, CIZ acquired the company of the X Opportunity.

On 17 April 2018, the CJA commenced the arbitration proceedings against CIZ under the SIAC Arbitration Rules claiming its fee in respect to the acquisition of the company of the X Opportunity.

CJA argued that, although the term of the Amended Agreement expired, there was an oral agreement between the parties to extend it for "a further period", and alternatively, an *"implied contract"* and that CIZ was *"estopped from denying that the Amended Agreement was no longer valid"*. In its Defense, CIZ argued that there was no agreement for the extension of the Amended Agreement and the Amended Agreement provided that parties had no further obligations to each other unless an SPA had been executed but not completed at the time the Amended Agreement expired.

On 25 September 2020, the arbitral tribunal issued its final award ruling that CIZ was liable to pay the defendant the fee for the X Opportunity. Despite expressly rejecting CJA's argument of the existence of an oral or implied agreement between the parties, the arbitral tribunal based itself on the ground that the Amended agreement did not require an SPA to be entered into before the Amended Agreement expired and that *"a clear link to the successful completion of the Opportunity"* was sufficient.

CIZ applied to set aside the award on the ground that the arbitral tribunal had exceeded its jurisdiction, pursuant to Article 34(2)(a)(iii) of the UNCITRAL Model Law read with ss3 and 24(b) the International Arbitration Act.

On 15 July 2021, the High Court set aside the award on the ground that the arbitral tribunal had exceeded its jurisdiction.

First of all, the High Court stated that CJA's case throughout the arbitration proceeding was exclusively based on the existence of a subsisting agreement after the expiration date of the Amended Agreement. The Court noted that the arbitral tribunal found that there was no subsisting agreement. Therefore, CJA's claim should have ended as CJA's claim had been rejected.

The High Court added that nowhere in the CJA's notice of arbitration, pleadings or submissions in the arbitration proceeding did CJA's claim it was entitled to the fee on the grounds raised by the arbitral tribunal. Moreover, the Court underlined that the tribunal's interpretation of provisions of the Amended Agreement were inconsistent with the positions taken by the CJA on those provisions. As a result, the arbitral tribunal's finding that CJA was entitled to the fee was based on grounds that were entirely different from the defendant's case in the arbitration proceedings. Therefore, the arbitral tribunal's findings could not be considered as ancillary to the matter submitted to arbitration.

The High Court concluded that the arbitral tribunal should have respected CJA's decision as to how it chose to frame its case and therefore exceeded its jurisdiction.

Ultimately, the High Court confirms that the arbitral tribunal's jurisdiction has some limits, in particular, when it comes to the pleadings of the parties.

ICSID Case No. ARB/17/47, 14 July 2021, *AS PNB Banka and others v. Latvia*

By Daryna Ivanyuta

On 14 July 2021, an ICSID tribunal rendered a decision on the Intra-EU objection in which it rejected the position of the State.

The case at hand concerned a claim filed by AS PNB Banka, a joint-stock company incorporated under the laws of Latvia ("Bank"), alongside 5 of the Bank's shareholders being UK nationals (together, "Claimants") against the Republic of Latvia ("Respondent"). The claim arose out of the sanctions imposed by the Latvian government on the Bank for its alleged failure to comply with terrorist-financing and anti-money laundering regulations.

The Tribunal focuses on four parts of Respondent's objections: jurisdiction of the Tribunal, applicable law, and arguments regarding the application of Achmea and CETA Opinion. Accordingly, Latvia's position is primarily based on the reasoning developed in the decision of the Court of Justice of the European Union ("CJEU") in Achmea and its CETA Opinion. The main arguments advanced in this regard were related to the interpretation put forward by the CJEU about Article 8 as well as the entire Netherlands-Slovakia BIT being precluded by EU law. The underlying reason for that is the fact that the BIT does not ensure the EU Member States' abilities to regulate and to apply EU law and that it disrupts the division of powers of EU institutions.

Based on that, Latvia submitted that EU law requires the Tribunal to declare the claim inadmissible for lack of jurisdiction and for lack of a valid arbitration offer since Latvia's offer to arbitrate under the United-Kingdom Latvia BIT ("BIT") was precluded by its accession to the EU in early 2004. The Tribunal, in turn, states on this matter that it is not bound to apply the EU law and is not obliged to give the decision of the CJEU a retroactive effect as the CJEU interpreted the EU Treaties on principles that cannot be adopted in international arbitration.

Cumulatively, the very heart of the issue presented before the Tribunal was whether EU law principles could be invoked to defeat consent to arbitration. Claimants argued adversely by submitting that the Tribunal would derive its powers from Article 8 of the BIT and Article 25 of the ICSID Convention unlike from the laws of Respondent and the EU. Moreover, Claimants persisted with the fact that Latvia has never withdrawn from the effect of the BIT. The Tribunal upholds Claimant's position by stating that its jurisdiction derives from the provisions of the ICSID Convention and the BIT as the ICSID Convention establishes a distinct legal order of public international law than the EU.

As regards the Tribunals' analysis of the Achmea and the CETA Opinion arguments, it first and foremost states that the case at hand is different from the case of Achmea as the former is conducted under the auspices of ICSID and the latter - under the UNCITRAL mechanism. The specifics of the distinction are mirrored in the lex arbitri principle, which, in the case of an ICSID arbitration, happens to be international law.

Further, the Tribunal moves on to determining the application of relevant law. It firstly focuses on identifying the nature of EU law and whether Respondent's EU membership interfered with its consent to arbitrate based on the BIT. The Tribunal supports Claimants argument stating that the EU law is "*a sui*

generis and autonomous sub-system that does not touch upon the law" and legal order in which this investment Tribunal operates.

The Tribunal rejects Respondent's invocation of VCLT arguments for several reasons: nor does Latvia challenge the application of the ICSID Convention, nor has it expressed any doubts about the validity of EU Member States being a party to the ICSID Convention. Latvia also did not prohibit the submission of intra-EU disputes. Therefore, the incompatibility issue between the EU legal order and the function of the arbitration mechanism is not justified.

Respondent also argues that based on Article 42(1) of the ICSID Convention. EU law applies to the question of the Tribunal's jurisdiction. The Tribunal, opposingly, cites the findings from Vattenfall, agreeing that Article 42 only addresses the law applicable to the merits of a dispute and does not include a decision on any jurisdictional objections.

With regard to the application of Article 31(3)(c) of the VCLT, the Tribunal finds that Respondent's argument does not serve the purpose of the objection because the preclusion of EU law by force cannot prevail over the ordinary meaning of Article 8 of the BIT.

Up next on the Tribunal's radar was Latvia's incompatibility objection. Respondent's position entails the preclusion of the investor-State dispute settlement mechanism found in Article 8 of the BIT under EU law. The Tribunal rejects the interpretation developed in Achmea as it was not conducted in alliance with the VCLT. Specifically, the Tribunal cannot apply a test turning on the mere possibility of incompatibility creating a conflict, but has to encounter definitive incompatibility instead.

A compelling part of the Tribunal's analysis was focused on the evaluation of conflict rules. In its submission, Latvia asserts that the principle of primacy of EU law is an international conflict rule, according to which EU law must prevail in any conflict with the BIT. The same arises from the application of the principles of lex specialis, lex posterior (EU law by virtue of Latvia's 2004 accession prevails over the 1994 BIT), and lex superior (EU law prevails over incompatible inter se international obligations between the Member States). The Tribunal dismisses the application of the lex specialis principle explaining that the EU law principle of primacy is neither more nor less "special" than the BIT. As regards the lex posterior principle, the Tribunal states that the relevant conflict arises not between the EU Treaties and the BIT, but between the EU Treaties and the ICSID Convention. The Tribunal rejects an interpretation of the EU treaties that requires exhaustion of local remedies and precludes the recourse to an international tribunal offered by the BIT to an investor. Based on that, the Tribunal dismisses the arguments of Respondent.

Lastly, with regard to the application of Articles 27 and 46 of the VCLT, the Tribunal aims to identify whether the law, which is said to have the consequence that the express offer to arbitrate in Article 8(1) of the BIT, ceased to exist. The Tribunal views the principles in Achmea as an internal law within the meaning of Article 27. The issue, however, is not that an international agreement loses its status as international law, but rather that the EU Treaties override other international obligations undertaken by the Member States.

Consequently, the Tribunal rejects Latvia's case that EU law operates as applicable law on the issue of jurisdiction as well as it rejects Latvia's submissions that there is any conflict rule, which could have the result that EU law could prevail over the terms of the BIT, specifically with respect to Article 8, as a matter of international law. The determinant factor of the Tribunal's jurisdiction is not whether Latvia may be in breach of its legal obligations under EU law. After all, consent is required to establish jurisdiction and it is exactly what the Respondent has expressed in the view of the Tribunal. Based on the analysis above, the Tribunal rejects the Intra-EU Objection to the jurisdiction of the Tribunal.

PARIS ARBITRATION WEEK 2021

20th – 24th September 2021

MONDAY 20th SEPTEMBER 2021

10 : 30 – 11 : 30
Protecting your interest through interim relief from Mainland Chinese courts
Hong Kong International Arbitration Centre (HKIAC)
Inscription

11 : 00 – 12 : 00
Challenges of disruption claims
Diales
Inscription

14 : 00 – 15 : 30
The Future of Investment Arbitration
Laborde Law
Inscription

14 : 00 – 15 : 30
Fact witness memory and the impact of legal traditions
Heuking Kühn Lüer Wojtek
Inscription

14 : 30 – 16 : 30
New trends and future directions of mining arbitration in Africa
Reed Smith
Inscription

14 : 45 – 16 : 45
Harmonization through Arbitration : the arbitrators' role and function
Science Po Law School and Queen Mary University London
Inscription

16 : 00 – 17 : 30
Unconscious Bias in International Arbitration
Laborde Law
Inscription

16 : 00 – 19 : 30
ICC Institute Advanced Level Training on Assessment of Damages by Arbitrators
ICC
Inscription

16 : 30 – 18 : 30
Fast & Furious – Trends in Global Projects Arbitrations
Freshfields Bruckhaus Deringer
Inscription

17 : 00 – 18 : 00
Is There an App for That ? Arbitration of Smaller Commercial Disputes in the Technology Sector
Savoie Laporte
Inscription

TUESDAY 21th SEPTEMBER 2021

08 : 30 – 10 : 00
Arbitration – an effective remedy for Life Science Disputes ?
Hogan Lovells
Inscription

08 : 30 – 10 : 30
Improving Efficiency in Construction Arbitration Proceedings in Easter Europe
Jeantet
Inscription

11 : 00 – 12 : 00
Construction delay, causation, and expert evidence
Kroll
Inscription

12 : 30 – 14 : 30
Africa Outlook : Arbitration Trends
Cleary Gottlieb Steen & Hamilton LLP
Inscription

12 : 30 – 14 : 00
COVID-19 Construction Disputes in Middle East
Masin
Inscription

14 : 00 – 15 : 00
Practical Perspectives on Cross-Border Insolvency and Arbitration
Debevoise & Plimpton
Inscription

14 : 30 – 16 : 30
French courts' review of investment arbitration awards : what's left of
Prof. Fouchard's teachings ?
Teynier Pic
Registration by email: contact@teynier.com

14 : 30 – 16 : 30
Eight disagreements over how to enhance the value of witness evidence
Reed Smith
Inscription

16 : 30 – 17 : 45
Quantum Leap : Diving into the Quantification of Damages
NERA
Inscription

17 : 00 – 19 : 00
Energy and Climate Change – Part I : An Engineer's Account of Science's Lessons on Physical Reality and 'Green' Growth
Castineira
Inscription

17 : 00 – 19 : 30
Independence and impartiality of arbitrators : what, when and how to disclose ? The current state of play in France and England
Herbert Smith Freehills
Inscription

18 : 00 – 20 : 00
YIAG Webinar : 'Managing stress in the international arbitration arena'
Young International Arbitration Group (YIAG)
Inscription

19 : 30 – 21 : 30
Arbitration drinks : Re-learning how to network in a post Zoom era
Latin American Arbitration Practitioners EU (LATAP EU)
Inscription

17 : 00 – 18 : 00
International Organizations as Users and Provers of International Arbitration
Savoie Laporte
Inscription

WEDNESDAY 22th SEPTEMBER 2021

08 : 00 – 10 : 00
Business & Human Rights Disputes : is Arbitration the Effective Remedy that Everyone is Looking For ?
Fierville Ziade
Inscription

08 : 30 - 10 : 00
Concurrent Delays in Construction Projects in Middle East
Masin
Inscription

08 : 30 – 10 : 15
Contracting industry : how to anticipate and manage risks ?
Eight Advisory
Registration by email:
margaux.pignede@8advisory.com

09 : 00 – 10 : 30
Compensation claims by States and States' entities in commercial and investment arbitrations
FTI Consulting
Inscription

11 : 00 – 12 : 30
Expert Evidence in International Arbitration Roundtable
White & Case LLP
Inscription

12 : 30 – 14 : 30
Investment Arbitration and the Green Transition
Cleary Gottlieb Steen & Hamilton LLP
Inscription

14 : 00 – 15 : 00
Providing disruption claims : not just a pandemic problem
Secretariat
Inscription

14 : 00 – 15 : 30
Paris as Arbitral Seat
Laborde Law
Inscription

14 : 00 – 15 : 30
Partnering with External Counsel : Mitigating Risk & Creating Value in Arbitration Disputes
Jus Mundi
Inscription

14 : 30 – 16 : 30
Circumventing the natural limitations of witness evidence ?
Young Canadian Arbitration Practitioners (YCAP) & Comité français de l'arbitration – 40 (CFA 40)
Inscription

16 : 00 – 17 : 30
The Users' Perspective
Laborde Law
Inscription

16 : 00 – 20 : 00
ICC Conference on International Arbitration
ICC
Inscription

16 : 30 – 18 : 30
Lusophones' Arbitration Meeting – The Principle of *Iura Novit Curia* in International Arbitration
Derains & Gharavi
Inscription

16 : 30 – 17 : 45
Recent Trends in International Arbitration : What Can You Learn from Counsels and Experts
NERA Economic Consulting and Obeid Partners
Inscription

16 : 30 – 18 : 30
Energy and Climate Change – Part II Accounting for Science in International Arbitration and International Law
Castineira
Inscription

18 : 30 – 20 : 00
Paris as the seat of arbitration : new trends
Freshfields Bruckhaus Deringer
Inscription

THURSDAY 23th SEPTEMBER 2021

08 : 30 – 09 : 30
Enforcement of arbitral awards in the Benelux : recent developments, risks and opportunities
Bonn Steichen & Partners
Inscription

08 : 30 - 10 : 30
Insolvency and arbitration
Le 16 Law
Inscription

09 : 00 – 19 : 00
GAR Live : Construction Disputes
GAR
Inscription

12 : 30 – 14 : 00
London or Paris - Where does your award stand the best chances of surviving annulment proceedings ?
Signature Litigation
Inscription

13 : 30 – 14 : 30
Acceptance of DCF in expropriation claims
Secretariat
Inscription

14 : 30 – 16 : 00
Arbitration trends post COVID-19 : Queen Mary University/W&C Survey Findings
Queen Mary University of London
Inscription

14 : 30 – 16 : 00
CMAP : Nouveau Règlement d'Arbitrage, quelles évolutions pratiques ?
CMAP
Inscription

15 : 00 – 17 : 00
International Arbitration of M&A Disputes
Jeantet
Inscription

16 : 30 – 18 : 30
Energy Reforms in Latin America : impact for arbitration ?
Hogan Lovells
Inscription

16 : 30 – 18 : 30
Arbitration and Trade Secrets
Silicon Valley Arbitration and Mediation Center (SVAMC)
Inscription

17 : 30 – 19 : 30
Loi applicable à la convention d'arbitrage : panorama de droit comparé
Société de législation comparée
Inscription

FRIDAY 24th SEPTEMBER 2021

10 : 00 – 11 : 00
Construction disputes with a focus on the Eastern Mediterranean region
Kroll
Inscription

11 : 00 – 12 : 30
Unbalance between the Parties – how do Neutrals need to act in proceedings ?
FTI Consulting
Inscription

In order to register to an event, just click on the hyperlinks under each entry.

For further information on the programs and the registration process, please visit https://parisarbitrationweek.com/

How to Build Your Profile in International Arbitration ?

On 24 June ICC YAF organised in collaboration with Quadrant Chambers a webinar on How to Build Your Profile in International Arbitration. During this event, prominent arbitration practitioners gave personal advice on how to develop their career in international arbitration. After the panel discussion participants had the opportunity to debate on the subject on virtual round tables moderated by senior lawyers.

HOW TO NETWORK AT LIVE EVENTS ?

It can be very hard, especially for young lawyers and students to network at live events. However, getting to know your peers and building your network from day one of your career in arbitration is of fundamental importance. So how do I network at live events effectively?

1) First top tip that comes to mind is to **put your phone away**. Nowadays, we are used to being connected and of having our phones all the time in our hands, but when trying to meet new people it does not help if you continue looking at your phone.

2) Secondly, you should only **go to events that actually interest you**. If you are interested you will automatically be engaged in the presentation and this will give you a perfect pretext to talk to your peers afterwards.

3) It might also be helpful, especially at the beginning, to **go with a friend or a colleague**, since it makes it easier for you to talk to other groups and makes you feel more comfortable.

4) Before the presentation, it might also be a good idea to **introduce yourself to the people sitting next to you**. This is actually a nice and simple way to get to know people.

5) Although it might be tempting, especially for young lawyers, to go to talk to senior arbitration lawyers who already have a certain reputation in the field, it might be more effective to **try to develop a network of your peers**. Concentrate and focus on your peer groups is important in order to make yourself part of your generation.

6) Also, do not forget to **have a common exit line**, so that you do not stick to only one person for the entire event. Everybody is there to network so having the ability to say "It's really nice meeting you, but I would also like to meet other people" is fine.

7) Afterwards, make sure you **follow up with the people you met at the event**: send them a connection request on LinkedIn or an email in order to stay in touch.

8) Most importantly, do not to be scared, **keep out there and talk to people!**

HOW TO USE SOCIAL MEDIA EFFECTIVELY ?

Using social media is becoming more and more important to develop your profile as a professional, not just in international arbitration. Here is some advice on how to use social medial more effectively.

1) Differentiate between the social media platform that you are using. It is important to think about the group that you are targeting. For example, on Facebook you are mostly talking to your family and friends so make sure you use more imagery. On LinkedIn, you are targeting your professional relationships, so your posts should be more focused on articles and interesting news on your professional field.

2) Identify your brand and mission. You should target articles and news that are important and interesting for you personally. Identifying what is important for yourself not only guides you to be effective in using social media, but more importantly to choose the right career path for you.

3) Make sure your messaging is consistent with the mission. For example, if work-life balance is important for you, make sure your messaging reveals this aspect of your personality.

4) Work on your content. When posting, give people helpful content. Share a useful article, a graphic, or a research that might actually be useful to people interested in the subject.

5) Be honest and authentic. It is important that you only advertise on subjects that you actually support and that are important for you. Authentic messages are usually more convincing.

6) Keep it kind and classy. Do not engage in heated commenting under posts and blogs. Generally, avoid taking extreme positions in politics and religion that might lead to heated conversations.

7) Try not to brag about yourself. If you had a great success, try to get others to brag about it for you and do it for others as well.

8) Be funny if possible but appropriate.

9) Do not be afraid to try out videoclips. They might be useful for potential clients that are not familiar with the field of international arbitration. Keep in mind that they should be short and easily accessible in order to help you develop your network.

WHETHER/WHEN/HOW TO SPECIALISE IN A PARTICULAR SECTOR/AREA OF LAW?

Whether you should specialise in a particular sector/area of law?

This is a very personal question. Firstly, it is not going to be entirely in your hands, particularly in the first years of your career. However, make sure that you are at least vaguely interested in the area in which the firm is engaged, before applying. If you decide to specialize, only specialize in an area, which genuinely interests you.

The good thing about specializing in a specific area is that it is a virtuous circle since your work is going to attract clients and lawfirms because of what you are doing.
However, when thinking about specializing yourself, keep in mind that the area in which you are interested might not be commercially attractive. That is where you should be pragmatic. Make sure you can do both, your interest and work. You should also be aware of the support that you are going to be getting from your firm and that you might have to fight a little bit harder, if you are going to be an outlier.

When to specialise in a particular sector/area of law?

The most important thing is to have a plan. If you have an interest, you should follow it through. However, if you're in a law firm, you might ask yourself that question when you are becoming counsel or partner.

How to specialise in a particular sector/area of law?

You should join organizations such as ICC YAF, Young ICSID, Young ICCA. That is the first way to build your network. Attend the events that these organisations are proposing and use every chance you get to network. When networking, make sure you talk to people in clever and smart ways so that they keep a positive memory of you. If you want to be known for a specific area, start writing articles, publications, blogs on the subject and team up with people active in the area that you are interested in.

As a general remark, you should take control of your profile: write, speak, network, try to be a good lawyer and foster relationships with your peers.

HOW TO RAISE YOUR PROFILE IN THE DIRECTORIES?

The directories such as BestLawyer, Legal500 or Who's Who Legal are very important to raise your profile as a legal professional. Thus the question, how to be noticed in those directories.

In order to be recognized in legal directories, it is of fundamental importance that **clients know that you are doing great work**.

As a young lawyer, you have to be patient, but do not worry, if you are doing great work your clients will recognize it.

Even before your clients, your senior managers will recognize the quality of your work, nevertheless, you might consider directly talking to your senior managers and your marketing team so that they are aware of the great work you are doing for clients.

In order to be featured in legal directories, you need to **get feedback from clients**. That means that they have to know your work and that they have to be willing to recognize you upon contact.

Additionally, you have to **be involved as an active member in the international arbitration community**. For instance, Who's Who Legal is based on peer review, so that you have to make sure that you are recognized for your work by your peers in order to raise your profile through these directories.

Lastly, you might also consider asking your firm to put your name forward. The big legal directories ask the law firms which lawyers they might want to put forward so that your lawfirm can actually help you raising your profile.

HOW TO GET SPEAKER POSITIONS AT EVENTS?

Speaking at events is an ideal way to enhance your profile in international arbitration. It might help you to get noticed by potential clients as well as your peers. Additionally, you might want to have the opportunity to practice your oral advocacy skills. As arbitration lawyers we do not get that much opportunity to practice oral advocacy, so that speaking at events is also a way to practice.

How to get invited as a speaker?

1) Firstly, it is absolutely essential to **identify the topic on which you want to speak**. However, you should not just randomly pick a subject, since you cannot efficiently speak about a subject, in which you do not have any experience.

2) In order to be invited as a speaker you should **consider publishing and attending events** on the subject in order to communicate on your expertise. Your lawfirm might also help you communicating efficiently through internal or external newsletters and blog posts.
When attending conferences, make sure to ask questions and to speak.

3) As a junior lawyer, you are often asked to assist in the preparation of a conference, which a senior member of your team will be holding. This is an excellent opportunity for you to **prepare and learn** not only on the subject of the conference, but also on how to communicate effectively in a conference.

4) You can also **create your own speaking opportunities** by organizing your own events. You can either rely on the assistance of your lawfirm or you join organizations such as ICC YAF because these organizations will allow you to speak at events.

5) Last but not least, if you want to speak at events, just **be bold and ask to speak at events!**

The editorial team of the Paris Baby Arbitration – Biberon warmly thanks the organizers and participants of the ICC YAF Event: "How to Build Your Profile in International Arbitration" for allowing us to cover the event in this months' edition.

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