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BIBERON

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Recent French and foreign court decisions

Arbitral awards

The Procedure before the International Commercial Chambers of the Paris Courts

By Dany Habel

Interview with Sara Little

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TABLE OF CONTENTS

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.

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Enjoy reading!

FRENCH COURTS

COURT OF CASSATION

Court of cassation, First Civil Chambers, 1 December 2021, No. 20-16.714
By Arthur Etronnier

On 1 December 2021, the Court of Cassation handed down a decision concerning the application of Article 1520, 1° of the Code of Civil Procedure following an appeal to set aside an arbitration award.

In the present case, Mrs K P and her daughter Mrs K L ("the K consorts") came into possession of shares of two Venezuelan companies. The latter recovered and obtained Spanish nationality in 2003 and 2004 respectively. In 2012, the K consorts initiated arbitration proceedings against the Bolivarian Republic of Venezuela on the basis of the bilateral treaty for the promotion and mutual protection of investments (concluded between the Kingdom of Spain and the Bolivarian Republic of Venezuela in 1995).

The arbitral award issued in Paris in 2014, following the filing of the 2012 arbitration claim, was subject to an annulment appeal. This judgment therefore follows a previous judgment of the Paris Court of Appeal of 3 June 2020 rendered on remand after cassation (Cass., 1st Civ., 13 February 2019). The decision of the Court of Appeal was the subject of an appeal in cassation filed by the K consorts.

The K consorts submitted two pleas to the Court of Cassation. The first ground of appeal concerned the rejection of the grounds for dismissal put forward by them. Indeed, they argued that they had waived a claim following the partial award enshrining the court's jurisdiction to respond to the said claim. The tribunal then took this into account in its final award by not ruling on the latter. Consequently, the parties considered that the plea for annulment raised by Venezuela and directed against the partial award is devoid of object since the tribunal was not competent to rule on the claim.

The Court of Cassation rejected this ground, considering that the possibility for Venezuela to challenge the tribunal's jurisdiction was not called into question by circumstances following the filing of the action for annulment.

The second ground of appeal concerned the application of Article 1520, 1° of the Code of Civil Procedure. The K consorts considered that the Court of Appeal had misapplied the latter. Indeed, pursuant to Article XI (1) of the Spanish-Venezuelan BIT, arbitration is possible between an investor of one contracting party and the other contracting party. Under the same treaty, an investor is defined, in substance, as any natural person possessing the nationality of a contracting party under its national law and investing in the territory of the other. Finally, investment is defined as "*any type of assets, invested by investors of one Contracting Party in the territory of the other Contracting Party*". It should be noted that the list of investments proposed in the BIT is not exhaustive. The consorts K reproached the Court of Appeal for

having added, to the conditions of nationality present in the BIT, that the investor had to have the nationality of the contracting party at the time of the realization of the investment. Consequently, it would have violated Article 1520, 1° of the Code of Civil Procedure, which states that "*an action for annulment is only available if : 1° The arbitral tribunal has wrongly declared itself competent or incompetent* […]". The Court of Appeal had indeed considered that the tribunal had wrongly declared itself competent by not verifying that the condition of nationality was indeed verified on the day the investment was made in 2001.

The Court of Cassation then challenged the decision, considering that the appeal judges had added conditions to the Spanish-Venezuelan BIT that were not initially foreseen.

The Court of Cassation therefore quashed the decision of the Court of Appeal and referred the parties back to the Paris Court of Appeal otherwise constituted.

COURTS OF APPEAL

Paris Court of Appeal, 7 December 2021, No. 18/10220

By Felipe Takehara

On 7 December 2021, the Paris Court of Appeal rejected the Democratic Republic of Congo's ("DRC") appeal against the recognition order of an arbitration award, which discussed the French concept of *retrait litigieux* ("contentious withdrawal"), and the principles of due process and public policy.

The DRC concluded a credit agreement with Energoinvest DD ("Energoinvest") to finance the construction of an electric power transmission line. Ruled by Swiss law, the contract included an ICC arbitration clause with the seat in Zurich. The creditor Energoinvest assigned his claims against DRC to FG Hemisphere Associates ("FG Hemisphere"), who obtained the recognition and enforcement order of the award in France.

The arbitration award condemned the DRC to pay the loaned amount, interest costs, and arbitration fees. On 16 November 2004, FG Hemisphere notified the debtor of the assignment of claim, and on 5 November 2009, an enforcement order within French jurisdiction was granted to this company. On 28 February 2018, the Court of Cassation set aside a prior decision of the Court of Appeal from 12 April 2016.

On 25 May 2018, under reconsideration before the Paris Court of Appeal, the DRC requested the annulation of the enforcement order, which would have disregarded the debtor's prerogative of retrait litigieux and the arbitral tribunal violation of the principles of due process and public policy.

The main debate concerns the *retrait litigieux*, the possibility for a debtor, to "buy off" the claim by paying the assignee the same price the latter paid to purchase the claim. Thus, annihilating any potential upside for the assignee. The Court observes that this institution can impact the amount defined in the arbitration award. In consideration of article 1525 of the Civil Code and

the list of article 1520 of the Code of Civil Procedure, the Court states that this request for "buying off" the debt does not obstruct the recognition and enforcement of the award. It rejects such a plea without further development of the discussions about the competence-competence principle and the French overriding mandatory provisions brought by the parties.

Unlike the previous plea, a violation of due process is a reason to set aside the arbitration award according to article 1520 of the Code of Civil Procedure. The Court of Appeal comments that a party must be proactive, safeguarding the celerity and loyalty of the proceedings, and observes that the DRC was legally represented and given proper notice of the arbitration. Nevertheless, the DRC deliberately chooses to renounce its adversarial role in the procedure.

The DRC pleads that the recognition of the violation of French public policy because, on the one hand, the exceptional circumstance of the armed conflict prevented the right of an appropriate procedure defense (infringement of the principle of equality of arms), and on the other hand, that the assignment of claim was, in fact, a fraudulent operation. The Court of Appeal affirms that the DRC did not provide any complaint about the inequality of arms before the arbitration procedure and that an assignment of claims in itself does not characterize fraud. The Court also rejected this plea, which was not argued and not even brought to the arbiters' consideration.

By these means, the Paris Court of Appeal rejects the request for *retrait litigieux* and the appeal against the recognition and enforcement order of the arbitration award.

Paris Court of Appeal, 7 December 2021, No. 21/04236

By Idil Gizay Dogan

By decision of 7 December 2021, the Paris Court of Appeal refuses to transmit a QPC (the French Priority Preliminary Reference mechanism on issues of constitutionality) relating to the conformity of the provisions of articles 1699, 1700 and 1701 of the French civil code with the rights and freedoms guaranteed by the constitution, to the Court of Cassation.

The Democratic Republic of Congo and the National Electricity Company ("NEC") have concluded with Energoinvest DD ("Energoinvest") a credit agreement governed by Swiss law including an arbitration clause with Zurich as the seat of the arbitral tribunal and referring to the regulations of the International Chamber of Commerce of Paris (ICC). In 2001, Energoinvest requested the initiation of the arbitration procedure with the ICC to obtain payment of a certain sum. The arbitral tribunal sitting in Zurich issued its arbitration award according to which the Democratic Republic of Congo and NEC are jointly and severally ordered to pay the disputed sum. In 2004, FG Hemisphere Associates ("FG Hemisphere") notified the Democratic Republic of Congo of the cession of the debts of Energoinvest. In 2009, at FG Hemisphere's request, the Paris High Court ordered the exequatur of the arbitrable award. However, in 2011, the Democratic Republic of Congo and SNEL appealed against this order. In 2012, the Democratic Republic of Congo notified FG Hemisphere of the exercise of its right

of withdrawal according to article 1699 of the French civil code. FG Hemisphere refused to recognize the exercise of this right.

By a judgment dated 2016, the Paris Court of Appeal declared inadmissible the disputed withdrawal request from the Democratic Republic of Congo and dismissed the appeal against the order of exequatur of the arbitration award. Thus, the Democratic Republic of Congo formed an appeal to the Court of Cassation. In 2018, the Court of Cassation decided to refer the parties to the Paris Court of Appeal, before which the Democratic Republic of the Congo requested the annulment of the order of exequatur of the arbitration award, while FG Hemisphere raised a QPC, according to which the provisions of Articles 1699, 1700 and 1701 of the French Civil Code would infringe the rights and freedoms guaranteed by the Constitution, in particular the right to property, to freedom of entrepreneurship, to the right to maintain the economy of legally concluded agreements, to the principle of responsibility, to the right to an effective judicial remedy, as well as to the principle of equality before the law and public charges. FG Hemisphere also demanded that the Democratic Republic of Congo be dismissed of its request to condemn FG Hemisphere to the payment of a sum of 50,000 euros on the basis of article 700 of the French Code of Civil Procedure. The Court of Appeal decided that the plea based on a QPC was admissible, given that FG Hemisphere raised the plea based on the QPC in a separate writing from the reasoned conclusions.

Regarding the transmission of the QPC to the Court of Cassation, three substantive conditions must be met. First, the disputed provisions must be applicable to the litigation or the proceedings, or form the basis of the prosecution, second, these provisions must not be declared in accordance with the Constitution beforehand and finally, the matter must be of a serious nature. The Court considered that the first and second conditions were fulfilled. Indeed, the Court decided that articles 1699, 1700 and 1701 of the French Civil Code were applicable to the litigation and that these provisions were not declared in conformity with the Constitution. However, the Court considered that the question was devoid of seriousness.

Indeed, with regard to the infringement of the right to property, the Court of Appeal recalls that the Court of Cassation has already considered twice that the question asked is not of a serious nature when the infringement of the right to property can be justified by reasons of general interest. In the present case, FG Hemisphere considers that the disputed withdrawal hinders the right of the creditor to recover all his debt and therefore violates the right to property and that this infringement is not justified by a reason of general interest. However, the Court considers that the infringement of the right to property operated by article 1699 of the French Civil Code pursues a reason of general interest given that the article aims to fight against the speculation of disputed debts and that it is proportionate to the aim sought since the transferee does not incur any loss in relation to the initial purchase.

Regarding the violation of the freedom of entrepreneurship, FG Hemisphere considers that this right has been violated because the transferee is deprived of any financial margin regardless of the existence of a hazard in the recovery of debts due to a potential use of the withdrawal right. For the Court this infringement is justified since the professional activity of buying receivables includes the risk of recovery of the debt as well as the potential profit and that these people can take this hazard into account when determining the purchase price.

FG Hemisphere further maintains that the automaticity of the disputed right of withdrawal makes it impossible for the creditor to rely on the bad faith of the debtor, which undermines the principle of liability and the right to an effective judicial remedy, meaning that the debtor could escape his civil liability as well as the principle of full compensation for the damage and that the creditor could not obtain the judicial condemnation of the debtor to pay all his debt. However, the Court underlines that the legislator can arrange for a reason of general interest, the conditions under which the responsibility can be engaged and can thus, for such a reason, make exclusions or limitations without these measures being disproportionate. The Court reminds that the principle of full compensation is not a principle with constitutional value and that the legislator has the power to make such adjustments. In addition, the Court reiterates that the assigned debtor is not exempt from any liability since by exercising his right of withdrawal it removes the hazard and that the loss of a missed profit does not characterize a disproportionate harm.

With regard to the principle of equality before the law, FG Hemisphere considers that this principle is not respected between the assignees of disputed claims and the assignees of non-disputed claims but also between the assignees of disputed claims and third-party funders. This argument is also devoid of seriousness since, according to the Court, there is a difference in the situation between the assignee of a disputed debt and the assignee of a potentially disputed debt, justifying a difference of treatment. In this case, the difference is based on the contentious nature of the claim at the time of the assignment and not on the time of the assignment of the claim. This difference in treatment is related to the purpose of the disputed withdrawal mechanism.

Regarding the principle of equality before public charges, FG Hemisphere considers that imposing only on assignees of disputed claims the burden of waiving part of the claims they hold constitutes an infringement of the principle of equality before public charges. The Court of Appeal recalls that the legislator has the prerogative to regulate in a different way different situations and can derogate from equality for reasons of general interest provided that, in both cases, the difference of treatment which results from it is in relation to the object of the law which establishes it. In the present case, as the parties concerned are in a different situation, the only potential loss of "lost earnings" for the transferee does not constitute a violation of the principle of equality before public charges.

On the violation of the right to maintain the economy of contracts, FG Hemisphere believes that the economy of all contracts for the assignment of a disputed debt is affected and determined by the risk of being opposed to a disputed withdrawal by the debtor. The right to maintain the economy of contracts is not a principle with constitutional value except in the case of retroactive questioning by a legislative provision of the convention thus legally concluded. In the present case, the disputed provisions of the French Civil Code were in force before the cession, which once again shows for the court the lack of seriousness of the question.

Finally, FG Hemisphere considers that by ruling that the disputed right of withdrawal can be invoked by the debtor assigned at the stage of contesting an arbitration award, the Court of Cassation would have conferred unconstitutional scope on articles 1699, 1700 and 1701 of the French Civil Code. However, "constant" case law cannot result from a single judgment, even

if a case law is emanating from the Court of Cassation. In addition, the QPC tends in this particular case to challenge the scope given to Article 1699 of the French Civil Code by this same decision rendered in the same instance.

In view of the lack of seriousness of the question, the Court of Appeal rejects the request for transmission of the question to the Court of Cassation, condemns FG Hemisphere to pay the Democratic Republic of Congo the sum of 20,000 euros according to the article 700 of the Code of Civil Procedure and condemns FG Hemisphere to pay the costs related to the QPC.

Paris Court of Appeal, 9 December 2021, No. 19/12417

By Sarah Lazar

On 14 December 2021, the Paris Court of Appeal dismissed the annulment application filed by the State of Ecuador against two (undated) arbitral awards based on the lack of jurisdiction of the arbitral tribunal and the failure to fulfill its mandate.

In this case, the dispute is between the Republic of Ecuador and the company MANTENIMIENTOS, AYUDA A LA EXPLOTACION Y SERVICIOS (“MAESSA”), the company SOCIEDAD ESPAGNOLA DE MONTAJES INDUSTRIALES (“SEMI”), the company TESCA INGENIERIA DEL ECUADOR S.A. (“TESCA”) and the CONSORCIO GLP ECUADOR (“GLP Consortium”). The Consorcio GLP (a business consortium under Ecuadorian law) was awarded a construction project, following a tender issued in 2011, by Flopec, which is an Ecuadorian state-owned oil and gas transportation company. In December 2014, Flopec initiated administrative proceedings against the Consorcio GLP and unilaterally rescinded the contract. Flopec company considers that the Consorcio GLP had failed to comply with its contractual obligations.

On 1 July 2015, the Consorcio GLP and the Maessa and Tesca Companies thus sent the Republic of Ecuador a notice of arbitration based on the BIT in order to obtain the revocation of these decisions and the payment of damages. On 21 August 2015, the Consorcio GLP and the Tesca and Maessa Companies wrote to the Republic of Ecuador stating that the 1rst July 2015 notice was a notice of the existence of a dispute under the BIT. On 19 May 2016, Maessa and Semi companies sent a second Notice of Arbitration to the Republic of Ecuador. However, for the Republic of Ecuador, the 1 July 2015, notice already constituted a notice of arbitration (and not a mere notice of the existence of a dispute).

The arbitral tribunal issued two awards: the first one states that the 2016 notification is a notice of arbitration within the meaning of the BIT and the second award gives the arbitral tribunal jurisdiction over the dispute. In response, the Republic of Ecuador filed an action for annulment of the two awards. The parties accepted the protocol of procedure of the International Commercial Chamber before the Court of Appeal.

The Republic of Ecuador raised four pleas for annulment of the two arbitral awards, of which only two will be of particular interest to us.

In the first plea, alleging lack of jurisdiction of the arbitral tribunal, the Republic of Ecuador argues that the constitution of the arbitral tribunal is determined by the consent of the parties to the arbitration. Consequently, the Republic of Ecuador considers that the arbitral tribunal formed following the 2016 Notice of Arbitration was partly constituted before its consent was obtained. Ecuador also argues that the two notifications are based on different legal grounds and have different signatories. Finally, to support its point of view, the State of Ecuador underlines that the appointment of the arbitrators took place before the second request for arbitration. On this ground, the Court of Appeal stated that when the arbitration agreement results from a BIT, the jurisdiction of the arbitral tribunal depends on the treaty that invests it. The consent of the Republic of Ecuador to the arbitration is based on the standing offer to arbitrate to which it consented by entering the BIT (in 1996). The Court of Appeal stated that the State of Ecuador was aware that the BIT required the parties to enter a preliminary negotiation phase before initiating the arbitration procedure. The Court of Appeal rejected this argument in its entirety.

In a second plea, based on the irregularity of the constitution of the arbitral tribunal, the Republic of Ecuador argues that in substance the tribunal was constituted in an irregular manner. It explains that the appointment of "its" arbitrator took place on 3 March 2016, in other words, before the arbitration proceedings had even begun, assuming that the commencement of the proceedings was considered to be the sending of the second Notice (2016). It would therefore have been deprived of the possibility to choose its arbitrator according to the characteristics of the dispute as described in the notification of 19 May 2016. The Court considers that, in the absence of having referred it in due time and acting with full knowledge of the facts, the Republic of Ecuador is presumed to have renounced its right to claim the irregular constitution of the arbitral tribunal. The Court of Appeal will also declare this plea irrelevant.

The last two pleas, alleging that the arbitral tribunal failed to comply with its mission, and the second, alleging that the award violated international public policy, were also rejected.

In sum, the Republic of Ecuador is ordered to pay damages to the defendant companies. Furthermore, the Court declares the annulment proceedings against the arbitral awards inadmissible and declares the arbitral tribunal competent.

FOREIGN COURTS

United Kingdom Court of Appeal, 30 November 2021, [2021] EWCA 1799

By Katerina Nikolaou

The Court of Appeal grants an appeal against the Judge Andrew Baker's judgment for dismissal of the Contempt Application made by Appellants and remits the matter to the Commercial Court. Appellants obtained an arbitral award against Mr Deripaska and his company Filatona Trading Lt with regard to valuable real property in Central Moscow through Navio Holdings Limited ordering the Defendant to pay out Mr Chernukhin's interest in Navio in the sum of approximately USD 95 million. Appellants obtained also a worldwide freezing order ("WFO") asserting their concerns about certain legal and practical obstacles to enforcing a London arbitral award with regard to Mr Deripaska's assets in Russia. In a counter-proposal made by Mr Deripaska seeking for the withdrawal of the continuance of the WFO by Appellants, a set of specific undertakings was suggested. The content of each undertaking was 45,500,000 certificated shares in EN+Group plc held through B-Finance Ltd-a subsidiary of a Panamanian company, Fidelitas International Investments Corporation- of which Mr Deripaska was the ultimate beneficial owner. Appellants contended that the Russian State established a "redomiciliation" mechanism in an effort to protect the assets of certain companies from outside interference. Pursuant to this process foreign companies were allowed to become incorporated in certain "protective zones" within the exclusive jurisdiction of the Russian courts and therefore any orders issued by non-Russian courts would not be enforced against the Russian companies in question.
The Court holds that the Jersey shares were canceled through the redomiciliation and ceased to exist and in this regard this process was highly contrary to Appellants' interests. The Court further admits that the Judge erred in disregarding the arguable merits of the Contempt Application, namely that Mr Deripaska had committed a serious contempt of the court. The Court also emphasizes the wrongful reliance by the Judge on the Appellants' subjective motive as a ground for an abuse of process finding and therefore for striking out the Contempt Application. Lastly, the Court finds that the judgment was premised incorrectly on Appellants' duty to prosecute the Contempt Application solely on their public interest.

High Court of England and Wales, 14 December 2021, [2021] EWHC 3376

By Facundo Marcone

On 14 December 2021 Sir Andrew Smith, judge of the High Court of Justice rejected two challenges to an award under the rules of the London Court of International Arbitration issued on 21 December 2020. The first application raised by Mr. Ovsyankin intended to challenge the award on the grounds of serious irregularity affecting the tribunal, the proceedings or the award. The second application raised by Mr. Ovsyankin and Retemmy Finance Limited ("Retemmy") sought to remove the three arbitrators as they failed to be impartial.

On 30 November 2012, the parties entered into three agreements that agreed to LCIA arbitration in London:

(i) A Shareholders Agreement between Angophora Holdings Limited ("Angophora") and Retemny to enter into a joint venture to be effective through Grooks Global Limited. Angophora acquired 34,59% of the shares in Grooks, and Retemmy held the remaining 65,41%. The agreement provided that parties should cooperate in good faith with each other in order to sell the shares within four years. Angophora had drag-along rights, whereby, before making a transfer of its shares to a third party, it had to offer to sell the shares to Retemmy. If Retemmy refused the offer, Angophora had the right to sell all the shares in Grooks to a third party.

(ii) a Deed of Guarantee between Mr. Ovsyankin and Mr. Kirilov as guarantors and Angophora. Mr Ovsyankin and Mr Kirilov undertook to perform (or procure the performance of) and satisfy (or procure satisfaction of) of the obligations of Retemmy in case it does not perform them.

(iii) A Non-Compete Agreement between Angophora, Mr. Ovsyankin and Mr. Kirilov, whereby they agreed not to engage in competition with the activities of Grooks and the Packer Group.

In August and November 2018, Angophora began three arbitral proceedings complaining breaches of the agreements. Angophora alleged that Mr. Ovsyankin caused the operating companies to enter into a series of transactions that breached the Shareholders Agreement and deprived Angophora's shareholding in Grooks of any value, such that its interests worth nothing instead of the substantial value that it should have had. These transactions were outside the ordinary course of business and were with third parties at inflated prices or had no commercial purpose for the operating services' business. The transactions were made without proper disclosure to and approval of the directors of the Grooks subsidiary that managed the operating companies of the Packer Group. These matters put Mr Ovsyankin and Mr Kirilov in breach of, and to have made them liable under, the Guarantee Agreement. Also, Angophora alleged that Retemmy, Mr Ovsyankin and Mr Kirilov breached the Non-Compete Agreement by reason of fraudulent activities and diversion of Packer Group's assets. The arbitration under the Shareholders Agreement was brought first, and parties appointed the same Tribunal to address the remaining arbitral proceedings. It was determined that the Guarantee arbitration should be decided before the others.

On 21 December 2020, the Tribunal issued the award finding the conduct of Mr. Ovsyankin improper and ordered Mr. Ovsyankin and Mr. Kirilov to pay Angophora US$43,200,000.

Mr. Kirilov Challenged the award on the grounds of is the quantum awarded, or rather about the procedure and proceedings relating to this part of the award.

Mr Ovsyankin objected that the Tribunal introduced a proposition not pleaded by nor the case presented by Angophora and that the Tribunal was inconsistent with the strict rules of pleading stipulated in the Procedural Order. The Tribunal was instructed to obtain new evidence to support a different case without subscribing to any controversial connotations and only as a matter of convenience. The Tribunal asked the experts to think about what the value of the shares are in the case of a distressed sale to a third party because the value of the shares cannot have been nil since there was a company or a group of companies that was still producing

revenues. Mr Ovsyankin held that, if Angophora had presented such a case, he would have come with completely different evidence. Thus, Mr Ovsyankin regarded as most unfair that the Tribunal, having heard all the evidence, would go and come up with a measure of damages which is totally different from the pleaded case against him.

The Court acknowledged that tribunals can sometimes properly decide a case on a basis that has not been pleaded.

The Court stated that as a matter of ordinary pleading, Angophora did not thereby restrict its case on diminished value to its primary case of nil value since it was unnecessary for Angophora to spell out that in these circumstances. The Court acknowledged that Angophora fell back on its more general plea of losses by way of diminution in value and that was not necessary for Angophora to plead by how much the value was reduced because its pleading depended on the evidence, and the reduced value could only be assessed in light of the evidence

Mr. Ovsyankin alleged that Angophora did not comply with Procedural Order No 1 that required Angophora, if it pursued a claim based on the shares having some residual, albeit diminished, value, to make this clear in the second round of submissions and the evidence presented in support. The Court rejected such allegation and considered that the exchanges at the Case Management Conference or Procedural Order No 1 required Angophora to do more by way of pleading its case about the diminished value of the shares and that the exchange did not suggest that the Tribunal intended, unless the case was developed further in the second round, to treat Angophora's case about diminished value as being confined, as a matter of pleading, to an argument that the shares had no value.

The Court rejected Mr Ovsyankin's complaint that the different scenario was not covered by Angophora's case not that, if it was covered, it was abandoned by Angophora. The Court considered that, even if it was not properly covered by the pleadings, it was available for the Tribunal properly to adopt in its Award since it was sufficiently covered by the expert and factual evidence of the case and the parties were given a fair opportunity to deal with it.

The Court concluded that Mr Ovsyankin had ample opportunity to argue before the Tribunal that this scenario was not pleaded and could not fairly be considered by the Tribunal. The Court found that the Tribunal did not restrict argument about the proper way to assess damages if Angophora succeeded on liability because the Tribunal made clear that the request did not restrict what the parties might argue. The Tribunal expressly welcomed assistance about the proper way to ascertain the reduction in the value of Angophora's shareholding, which clearly left open questions whether there might have been a commercial sale and whether the loss should be assessed on the basis of a proportion of the value received on a sale of all the shares.

Regarding the allegation of apparent bias by the Tribunal, the basis for the application was that the Arbitrators had expressed final views on matters that went directly to the ultimate issues in the arbitration under the Shareholders Agreement. Mr Ovsyankin and the Tribunal appeared to have decided issues about the proper measure of Angophora's loss pre-maturely and before hearing full argument.

Mr Ovsyankin submitted the issue of whether a "*fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was*

biased": see Porter v Magill, [2001] UKHL 97 at para 103 per Lord Hope. In Mr Ovsyankin's opening submissions, it contended that a reasonable observer would take account of "*all relevant matters* […] *indicative of a closed mind or indeed 'anything other than an objective view'*". The court preferred to address that "*the hypothetical observer would take into account all relevant considerations, both indicative and counter-indicative of a closed mind*". Thus, the Tribunal pointed out three points of the listed twenty considerations raised by Mr Ovsyankin and rejected them.

Regarding the situation that the Tribunal would deal in the remaining arbitrations with decisions already decided, the Court accepted it. The Court concluded that this issue by itself provides no basis for concluding that any of the Arbitrators is, or appears to be, biased. Even more so if the parties clearly agreed to have the same arbitrators in each reference when they knew that this situation might arise.

ARITRAL AWARDS

PCA Case No. 2020-21, 3 December 2021, Decision on Stay of Proceedings, Patel Engineering Limited v. Republic of Mozambique

By Elisa-Marie Goubeau

On 3 November 2021, in a dispute arising between Patel Engineering Limited ("Claimant") and the Republic of Mozambique ("Mozambique" or "Respondent") administered by the Permanent Court of Arbitration ("PCA"), the Tribunal dismisses Respondent's Application to stay the arbitration while parallel proceedings are pending before the International Court of Arbitration of the International Chamber of Commerce ("ICC Arbitration" or "ICC Tribunal").

The present dispute stems from Respondent's failure to fulfill its treaty obligations arising out of the Agreement between the Government of the Republic of Mozambique and the Republic of India for the Reciprocal Promotion and Protection of Investment ("the Treaty"). The Treaty provided the basis for Claimant, an infrastructure and construction service company incorporated in India, to invest in a project estimated at USD 3.115 billion. Such a project aimed to operate a rail corridor as well as to construct a new port in Mozambique.

On 20 March 2020, in order to advance its investment treaty claims, Claimant submitted to the PCA a notice of arbitration pursuant to Article 9(3)(c) of the Treaty and Article 3 of the UNCITRAL Rules. Claimant sought to obtain a declaration that Respondent breached its treaty obligations and full reparation for the loss of its investment. On 20 May 2020, Respondent filed a Request for Arbitration for an ICC Arbitration.

According to the Respondent, a stay of proceedings is desirable for the following reasons. The dispute before the ICC Tribunal deals with rights forming the underlying basis for Claimant's investment treaty claims, and is, as such essential for the outcome of the present arbitration. Respondent contends that a stay of proceedings prevents from having conflicting decisions. In addition, an amendment of the procedural timetable does not go against the Cairn four-factor test. Such a test was developed in Cairn UK Holdings Limited v. The Republic of India case to provide guidance for arbitral tribunals in exercising their authority to stay the proceedings. In the Opinion of Respondent, the decision to amend the procedural timetable would not create an imbalance between the Parties, infringe Claimant's right to equal treatment, deprive its right to present its case nor delay the proceedings unreasonably. Respondent also alleges that the issues pending before ICC arbitration is material to the outcome of the UNCITRAL arbitration.

According to Claimant, Respondent's Application fails to justify the stay of proceedings as a matter of law or fact. Claimant contends that Respondent uses parallel proceedings to postpone the UNCITRAL Arbitration by filing ICC Arbitration two months after notifying the PCA of its intention to arbitrate. Claimant underlines that not only there would be risks of inconsistency between the UNCITRAL and ICC awards but there is also no genuine contractual dispute to be referred to ICC arbitration. With regards to the Cairn four-factor test, Claimant argues that Respondent did not sufficiently demonstrate that the case at hand meets the test. In its view, the stay of proceedings amounts to preventing Claimant from advancing its treaty claims,

presenting its case and causing the current arbitration to be delayed unduly. Additionally, the outcome of ICC arbitration has no bearing to the outcome of the pending UNCITRAL arbitration.

The Tribunal starts to assert its competence to decide whether or not it is empowered to stay proceedings and amend the procedural timetable. The Tribunal holds that it is entitled to do so pursuant to Article 15 (1) of UNCITRAL Rules and Procedural Order No.1. However, in its view, there are no valid reasons to stay the present proceedings.

First, the Tribunal notes that there is no material change of circumstances requiring a modification of the procedural timetable agreed by both Parties for over a year. Second, the Tribunal points out that, even though a date for the ICC Tribunal to issue a final award has been fixed, there is no guarantee that the Tribunal will comply with the deadline of April 2022. Even if a final award is rendered, this would overlap with the hearing of the UNCITRAL Arbitration which is also scheduled in April 2022. Furthermore, the Tribunal comments that the applicable legal rules do not provide for the adjournment sine die of the proceedings. Third, the Tribunal considers that to the extent the two proceedings do not rely on the same agreement to refer the dispute to arbitration, a stay of these proceedings is not justified. In addition, the Tribunal highlights that the causes of action of both ICC Arbitration and UNCITRAL differ, as do the roles of Claimant and Respondent change in each arbitration.

Considering all the above, the Tribunal therefore rejects Respondent's Application to stay the proceedings and to amend the procedural timetable.

United Kingdom Privy Council, 13 December 2021, Flashbird Ltd v Compagnie de Securite Privée et Industrielle SARL, [2021] UKPC 32

By Victoria Muntean

On December 13, the UK Privy Council, hearing an appeal from the Mauritius Supreme Court, dismissed an appeal seeking to set aside an arbitration award on the basis that the arbitration tribunal had not been constituted per the parties 'agreement. In this matter, sections 39 and 39A of the Mauritian International Arbitration Act formed the underlying legal basis providing for the right to appeal. In dismissing the appeal, the court held that the arbitration clause in question, albeit unclearly drafted as to whether the rules applicable to the arbitration were those of the International Court of the International Chamber of Commerce or those of the Mauritius Chamber of Commerce and Industry's Arbitration and Mediation Centre, was enforceable and the tribunal's approach did not justify the setting aside of the award.

The dispute arose out of a consultancy contract concluded in 2013 whereby the appellant (Flashbird Ltd.) was to assist the respondent (Compagnie de Sécurité Privée et Industrielle SARL) in securing a contract for the development and management of security services in international airports in the Republic of Madagascar (§2). Clause 14 stipulated that the law applicable to settlements of disputes shall be determined in line with the "*arbitration Rules of the international Chamber of commerce by one or more arbitrators appointed in accordance*

with those Rules" and that the applicable law shall be Malagasy law (§9). Additionally, the parties agreed that "*Règlement d'arbitrage*" referred to in the second paragraph of the clause were the Rules of Arbitration of the ICC (§10).

In 2016, the respondent filed a request for arbitration with the Secretariat of the Arbitration and Mediation Center ("MARC") of the Mauritius Chamber of Commerce and Industry seeking termination of the contract on grounds of the appellant's alleged non-performance of contractual obligations (§3). A sole arbitrator was appointed to determine the dispute. The appellant objected and further unsuccessfully filed an application to the Hague Permanent Court of Arbitration seeking the appointment of a triparty tribunal (§4). A final award in favour of the respondent was issued in 2017 (§5). Followingly, the appellant applied to the Supreme Court to set aside the award on the grounds that the arbitration proceedings had been carried in contrast with the parties 'agreement. The appellant contended that on a proper construction of clause 14 the constitution of the tribunal ought to have followed the ICC Rules; a tribunal constituted under the MARC Rules lacked jurisdiction (§6).

Having had its application dismissed, the appellant brought forth its case to the Privy Council, where the court restated the arbitrator's finding in that the arbitration clause gave rise to a contradiction between the opted arbitration rules i.e., the ICC Rules, and the chosen arbitral institution, MARC (§10), further heightened by the fact that choosing MARC as the arbitral institution the parties are bound by its rules and the ICC Rules can only be administered by the International Court of Arbitration of the ICC (ibid). The arbitrator, hence, held that the first paragraph of the clause should prevail, and the rules of the chosen arbitral institution should apply (§11).

The appellant objected, arguing that the correct interpretation is that the clause is a "hybrid" clause: MARC was to administer the proceedings applying the ICC Rules (§12). Therefore, the appellant was seeking setting aside of the award under section 39(2)(a)(iv) of the Act for the composition of the tribunal had not been constituted in accordance with parties' agreement (§13). However, the Supreme Court rejected this argument holding that a presumption arises under the ICC Rules whereby if the parties fail to agree on the constitution of the tribunal, a sole arbitrator shall be appointed in all but complex cases (§14-5). Moreover, the court held that the setting aside of an award under the Act required proof of "substantial prejudice" (§18).

On appeal to the Privy Council, the appellant submitted four grounds of appeal (§19), two of which were stated to be of fact thus outside the scope of this appeal (§22). The other two grounds – the Supreme Court's failure to find that the arbitrator erred in his interpretation of clause 14 and applying MARC Rules as opposed to ICC Rules – were considered together.

The Privy Council found that the Supreme Court was correct in finding that in the circumstances it had not been established that the appointment of a sole arbitrator was not in accordance with the parties' agreement as to arbitral procedure (§25). Further, the Board upheld the finding of the Supreme Court in that a material prejudice to the appellant had not been demonstrated in the circumstances where the only material failure alleged related to the constitution of the tribunal, and where it had not been shown that following the correct rules would be likely to have made any difference (§29). Thus, the Board stated that the Supreme Court was justified in

administering its discretion under the Act and dismissed this application, ruling that the appellant was not entitled to have the award dismissed.

INTERVIEW WITH SARA LITTLE

1. **Hi Sara, thank you very much for your availability and for accepting to answer our questions this month. Can you briefly recall your background for our readers?**

   First, I want to thank you very much for having me!

   I know many practitioners in international arbitration have "international" backgrounds, and I certainly do not break the mold, but my path to international arbitration was not a straight line either. I grew up in Chicago, completed both a bachelor's degree and Juris Doctor at Arizona State University and moved to New York. There, I worked as a paralegal at Cooley LLP, and then, after taking my oath for the New York Bar, I worked for the City of New York prosecuting the abuse and neglect of children in family court. Sprinkled throughout those years were numerous encounters with international law, ranging from exchange programs in Paris, to assisting the United Nations OPCAT subcommittee through my law school's partnership with the UN.

   I've tested the waters of many different fields of law, due in large part to the fact that I wanted to practice international law, but simply did not know how to begin, or, as the years went by, perhaps I was afraid to. However, I never found anything else that intrigued me as much, no field of law was as interesting to me, so one day, I finally made the jump.

2. **Before embarking on your career in arbitration, you worked as a prosecutor in family law in New York. Could you tell us what led you to this change of career path and more precisely what attracted you to arbitration?**

   I practiced as an agency attorney for a little over a year. I worked with some of the most disciplined attorneys I've ever met, and I was in front of a judge pleading multiple times a week. I could never be more grateful for that kind of experience. But given the very sensitive nature of our work there, it was like walking a tightrope every day, and in practicing New York family law, I had strayed even further from my original goal of practicing international law. This was made abundantly clear when a case arose in which I had to research the legal status and treatment globally of exit visas issued by Uzbekistan. I stayed up all night writing a memorandum on comparative law, went to court the next day for pleadings, won my case, and finally admitted to myself that I was in the wrong field.

That summer, I prepared my applications for law school in Paris, and made arrangements to pack up my life and move to France. It wasn't easy, but I was determined. I studied first at Paris 1, where I took multiple courses on International Economic Law. It was there that I was introduced to international investment law, and through it, international arbitration. It was one of those "aha" moments; international arbitration would allow me to practice international law by way of investment arbitration, and at the same time, comparative law and contractual interpretation through commercial arbitration. Everything I had ever wanted to do.

3. **Since you have worked and studied in both the United States and France, what would you say are the biggest differences in the way of working in the two countries? As a trained common-law attorney, was it difficult for you to adapt to a civil-law system, in France?**

   Well, that's an easy one: active voice vs. passive voice!

   Jokes aside, adapting to a new system, especially having been out of school for six years, was difficult. Each school system is excellent, and I think a lot of the differences I've seen in both the study and practice of law in each country can be chalked up to the nature of each legal system in place, and by extension, the respective methods of teaching law.

   For instance, in the United States, we come to class having read 80 pages of caselaw (if we're lucky), and then get grilled for 40 straight minutes about every aspect of the case, its implications, and its current position within the framework of US law. In addition, we have classes that teach us how to perform legal research, write persuasively, and argue orally. It makes sense, because in the common law system employed in the US, caselaw can create binding legal precedent, and we will spend our careers either distinguishing or assimilating facts, attempting to do so in as persuasive and concise a manner as possible.

   By contrast, civil law is codified, and so the codes take priority. Instead of Circuit Court or Supreme Court decisions, many of my classes at Paris 1 began and ended with objective lessons about statutes. Which also makes sense, because that's the basis of the French system of law. Accordingly, there was a form and function to everything we wrote in school, and there were entire classes dedicated to methodology. Unfortunately, those courses were offered prior to my master's year in France, so I ended up learning that the hard way!

4. **What about your experience in coaching a student team participating in the International Criminal Court Moot. Could you tell us more about that? In your opinion, what does the experience of a Moot Court offer to students for their career in arbitration?**

   Coaching an international criminal law moot court is such a rewarding experience. It allows me to connect with students and accompany them through a challenge in a legal procedure that is very different from their own. I get to act as a sounding board for their ideas, to help them with research and drafting, and although Covid has certainly made the pleading stage interesting, I use what I've learned in my practice to help hone their oral argumentation. I've had the privilege of coaching some pretty talented individuals; my first year's team

went to the quarter finals at the international round, and my second year, the team placed second overall.

I think the biggest asset of moot court is it forces students into the practical aspect of law. In school, we get theory, but in moot court, we get to watch how the procedure connects with the substance. It's the perfect supplement to your academic courses in that it allows to put what you're learning into practice. You become a full-fledged attorney, and you're able to follow a case from inception to conclusion.

It also helps with stage fright – I don't know anyone who begins an oral argument without being slightly nervous – but moot court practice can help to overcome those nerves, find your voice, and polish your pleading skills. The same is true for written memorials: the more you practice, the better you get. And if you're planning on becoming an international arbitration attorney, get ready to write!

Finally, and very importantly, it helps you network. I used to be one of those people who thought "networking" was distasteful – but it really doesn't have to be. International arbitration is a very small world, and to be able to meet people who have the same passion for it as you can lead to lifelong friendships, mentorships, or even job opportunities.

5. What advice would you give to younger arbitration practitioners starting their career in arbitration?

This is for those who are still in university: begin internships as early as you can. The faster you gain the practical knowledge of what it's like to practice law on a daily basis, the better off you will be when you leave your university and begin your career. You will be able to find a legal environment that best suits you, and you will have valuable experience which will not only set your CV apart from your colleagues, but will allow you to hit the ground running as soon as you are hired.

For those just beginning, I would advise you to do what you can to find the field of law that really interests you. No matter whether you are at a big law firm or a boutique, you will most likely spend a significant amount of hours at work, so make sure you're doing what you love.

Finally, if you are making a change in your career path, this might be the easiest thing to say and the hardest to hear, but don't get discouraged. Take what you have learned in your previous career, outline your skillset, and look for opportunities to use it.

THE PROCEDURE BEFORE THE PARIS' INTERNATIONAL COMMERCIAL COURTS

By Dany Habel

The notion of "attractiveness" in law is hardly new. It is well established in the field of direct foreign investment through a certain adequacy of state standards to the needs of economic operators; today we are witnessing a quest for attractiveness in the field of justice. Making the offer of judgement attractive is a new challenge. This is done in particular through the creation of specific jurisdictions for international disputes within judicial systems.

Since this phenomenon is not specific to a particular region, the main objective is to attract the largest number of large cases. The competition between legal places has been tough from the start: the *Qatar International Court and Dispute Resolution Centre* dates from 2009 and the *Singapore International Commercial Court* from 2015. Added to this is the advent of Brexit, which will make it impossible for the UK to take advantage of the mechanism for the circulation of legal decisions within the European judicial area.

Faced with this, France had to position itself quickly in order to attract these international commercial disputes. Thus, in 2018, two Protocols of procedure[1], signed by the Heads of Court, the President of the Paris Commercial Court and the Paris Bar Association, established the Paris International Commercial Chambers.

The publication by the Ministry of Justice of the practical guide to proceedings before these two chambers is therefore an opportunity to review the novelties introduced by the two protocols.

A. The procedure applicable before the CCIP-TC and the CCIP-CA

The common general provisions of the code of civil procedure[2], as well as the specific provisions of each court[3] are applicable to the proceedings before the two international chambers. However, the specific nature of these two chambers means that the procedures for handling cases are specified in their respective protocols, which are subject to the express agreement of the parties.

B. Competence of the international commercial chambers

On the one hand, the CCIP-TC and CCIP-CA are competent in matters of disputes which involve the interests of international trade. The disputes that can be referred to them are listed in articles 1.2 of the CCIP-TC protocol and 1.1 of the CCIP-CA protocol. On the other hand, if the competence of the international chambers is based on territorial and material rules of an objective nature, it remains that the parties will be free to stipulate contractually the allocation

[1] The Protocol on proceedings before the International Chamber of the Commercial Court of Paris and the Protocol on proceedings before the International Chamber of the Court of Appeal of Paris.

[2] Articles 1 to 749 of the Code of Civil Procedure.

[3] Articles 853 to 878-1 of the Code of Civil Procedure for the CCIP-TC and Articles 528 to 570 and 899 to 972-1 of the Code of Civil Procedure for the CCIP-CA.

of their disputes to the international commercial chambers. The inclusion of such clauses does not prejudge the decision that will be given on its validity by the court.
It is also important to note that the CCIP-CA is competent in matters of appeal against decisions rendered in international arbitration[4].

C. Proposed procedural techniques

1) **Language -** The use of the English language is given a high priority. Subject to adherence to the Protocol, documents may therefore be produced by the parties in English. English may be used by the parties, witnesses and experts or technicians as well as lawyers who appear at the hearing. However, procedural documents have to be submitted in French[5]. International arbitral awards must also be translated.
2) **The production of documents -** A new feature of the English system is the introduction of a mechanism for the compulsory production of documents at the request of one of the parties[6]. These documents may be held by the other party or by a third party. The request for production may concern not only certain documents, but precisely identified categories of documents.
3) **Personal appearance of the parties -** The judge mainly examines the parties. However, the Protocols also provide for an examination between the parties, under the supervision of the judge[7].
4) **Hearing of witnesses -** This innovation introduces a dose of arbitration into the procedure. On the one hand, each party must ensure that the witnesses whose testimony it requests are summoned. On the other hand, if any person can be questioned by the judge, any party can also cross-examine the other party's witnesses[8].

D. Conclusion

The procedural contributions mentioned are in favor of a modern judicial administration of evidence. We are witnessing the emergence of a serious alternative to arbitration justice in France, without being in competition with it. Indeed, the supporters of any alternative to state justice will always see the pre-arbitration phase as a major asset that can in no way be replaced. However, there is a concern that could hinder the development of such a state model with an international dimension. The effectiveness of jurisdiction clauses that elect the jurisdiction of international chambers depends on the parties' acceptance of the Protocol of one of them. In practice, the application of the Protocols can be refused by one of the parties who, for example, objects to the internationalization of the proceedings. This therefore jeopardizes all the benefits of the scheme and would require further reflection.

[4] Article 1.1 CCCIP-CA Protocol.
[5] Article 2 CCPI-TC Protocol and Article 2 CCPI-CA Protocol.
[6] Article 5.1.2 CCPI-CA Protocol and Article 4.1.2 CCPI-TC Protocol.
[7] Article 5.2 CCPI-CA Protocol and Article 4.2 CCPI-TC Protocol.
[8] Article 5.4 CCCIP-CA Protocol and Article 4.4 CCCIP-TC Protocol.

NEXT MONTHS' EVENTS

January 18th, ICC YAF : The Unwritten Rules of a Career in International Arbitration

ONLINE

Webinar dedicated to the soft skills arbitration practitioners need in order to build their career in international arbitration.

Website: https://2go.iccwbo.org/icc-yaf-the-unwritten-rules-of-a-career-in-international-arbitration.html

January 19th, John E.C. Brierley Memorial Lecture : Towards the end of arbitrability ? About Achmea, Komstroy, PL Holdings, et al.

ONLINE

This lecture on arbitration commemorates the life and work of Professor Brierley, prominent figure in the discipline of comparative law internationally and the leading Canadian expert on arbitration.

Website: https://www.transnational-dispute-management.com/events.asp

January 21st, "A practical guide to the 2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration (Part 2)"

ONLINE

In this webinar presented by the Asia Pacific Arbitration Group (APAG), speakers will discuss the grounds for refusing requests for document production, privilege and confidentiality related issues in international arbitration, the requirements for translation of documents under Article 3.12(c) of the IBA Rules among other topics.

Website: https://www.ibanet.org/conference-details/CONF2127