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Monthly Arbitration Newsletter – English version

FEBRUARY 2023, No. 59

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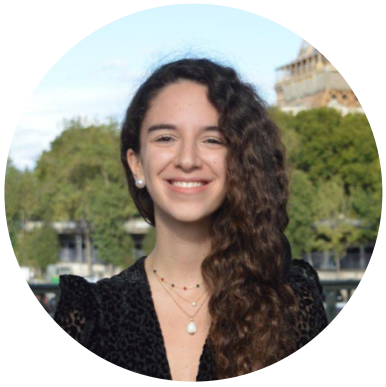

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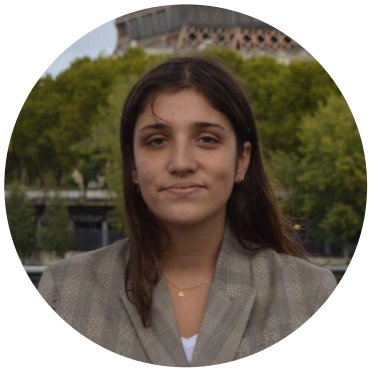

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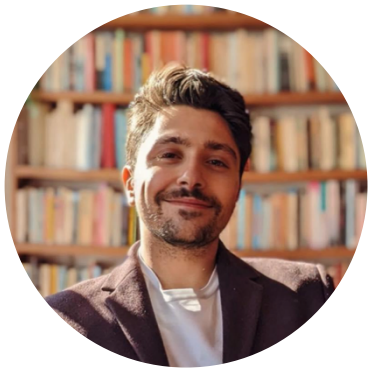

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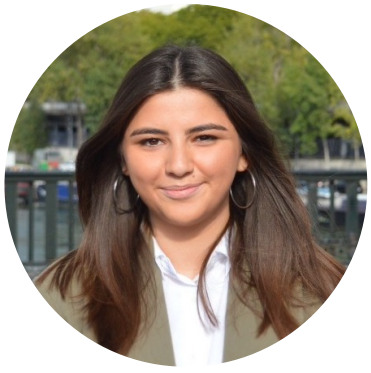

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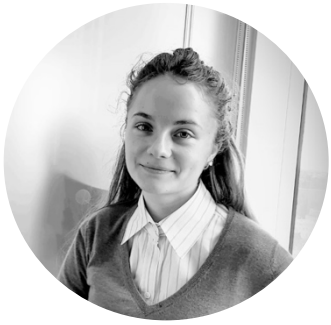

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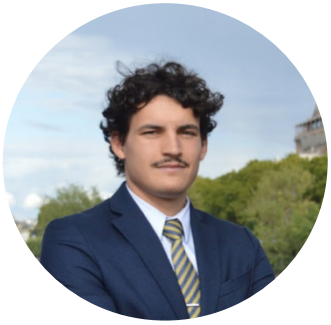

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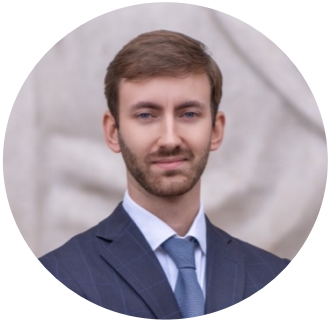

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Founded in 2014, Three Crowns is a law firm specialising in international arbitration and international law. With offices in Paris, Washington D.C., London and Singapore, lawyers from Three Crowns have acted on behalf of leading companies and states in large international disputes with a reputation of securing positive outcomes for their clients and obtaining groundbreaking awards, allowing a development of international arbitration and public international law rules.

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Law Profiler, founded in 2019, is an organisation aiming to grant an easier access to the legal employment market. Law Profiler lists over 80,000 members and assists thousands of lawyers and aspiring practitioners to find jobs free of charge.

Teynier Pic

Founded in 2004, Teynier Pic is an independent law firm based in Paris, dedicated to international and domestic dispute resolution, more specifically with a focus on litigation, arbitration and amicable dispute resolution.

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FOREWORD

Paris Baby Arbitration is a Parisian society and a networking group of students and young practitioners aiming the promotion of International Arbitration practice, as well as the accessibility of this field of law, still little known.

Each month, its team works on editing the Biberon, an English and French newsletter, intended to facilitate the understanding of the latest and the most prominent decisions given by states and international jurisdictions, and the arbitral awards.

By doing so, Paris Baby Arbitration hopes to encourage the contribution of students and junior lawyers.

Paris Baby Arbitration believes in work, goodwill and openness values, which explains its willingness to permit younger jurists and students to express themselves and to communicate their passion for arbitration. The values that drive Paris Baby Arbitration are openness and goodwill, which is why we want to allow students and junior lawyers to express their passion for the practice of International Arbitration.

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We also invite you to follow us on LinkedIn and Facebook and become a member of our Facebook group.

Enjoy your reading!

FRENCH COURTS

COURTS OF APPEALS

Paris Court of Appeal, January 10, 2023, n° 18/14721

Contribution by Paul Gobetti

On January 10, 2023, the Paris Court of Appeal rendered a judgment annulling the arbitral award rendered on October 25, 2013 in Paris in a dispute between the Republic of Moldova (hereinafter "Claimant") and the company Energoalians, itself displaced in its rights by the company under Ukrainian law Stileks Scientific and Production Firm Llc (hereinafter: "Stileks" and "Respondent").

The dispute in this case arose from the execution of a series of contracts concluded in 1999 for the supply of electricity to the Republic of Moldova. Under a tripartite contract concluded on February 1, 1999, Energoalians, a private Ukrainian company specialising in the production and distribution of electricity, undertook to purchase electricity from Ukrenergo, the national operator of the Ukrainian electricity network, for resale to Moldtranselectro, the Moldovan state-owned company responsible for operating the national electricity network, the volumes of electricity to be supplied being agreed each month between Ukrenergo and Moldtranselectro. Under a tripartite contract of February 24, 1999, Energoalians undertook to supply electricity to Derimen Properties Limited (hereinafter "Derimen"), which undertook to purchase it for the benefit of Moldtranselectro, which received the electricity supplied via Ukrenergo on the Ukrainian side of the border between Ukraine and Moldova.

However, as Moldtranselectro did not pay all the amounts due to Derimen under this agreement, Derimen assigned its receivable on Moldtranselectro to Energoalians on May 30, 2000. On July 8, 2010, Energoalians initiated *ad hoc* arbitration proceedings under the UNCITRAL Arbitration Rules due to Moldova's breach of certain obligations under the Energy Charter Treaty of December 17, 1994 (hereinafter "ECT"), to which Moldova and Ukraine are parties, and the Moldova–Ukraine Investment Protection Agreements.

In its award of 2013, the Arbitral Tribunal found that it had jurisdiction under the ECT, considering that the claim acquired by Energoalians from Derimen constituted an "*investment*" within the meaning of Article 1(6) of the ECT and that the territoriality criterion of Article 26(1) was met. The Court found that the Republic of Moldova had breached its obligations under the Treaty and ordered it to pay Energoalians a total of USD 48.7 million. The Republic of Moldova therefore filed an action for annulment of the award before the Paris Court of Appeal on November 25, 2013. By a judgment of April 12, 2016, the Paris Court of Appeal annulled the award, considering that the tribunal had wrongly declared itself competent, as the assigned receivable could not be considered as an "*investment*" in relation to the ECT. Following an appeal lodged by Komstroy, which took over Energoalians' rights, the Court of Cassation, in a ruling dated March 28, 2018, quashed and set aside the 2016 ruling of the Paris Court of Appeal.

By a judgment of September 24, 2019, the Paris Court of Appeal stayed the proceedings and referred to the Court of Justice of the European Union (hereinafter "CJEU") several preliminary questions concerning the interpretation of the ECT. By a judgment of September 2, 2021, the CJEU stated that "Article 1(6) and Article 26(1) of the ECT must be interpreted as meaning that

the acquisition, by an undertaking of a contracting party to that Treaty, of a claim arising under an electricity supply contract, not associated with an investment, held by an undertaking of a State which is not a party to that Treaty against a public undertaking of another contracting party to that Treaty, does not constitute an 'investment' within the meaning of those provisions".

The Republic of Moldova asked the Paris Court of Appeal, based on Article 1520 of the Code of Civil Procedure, Articles 1 and 26(1) of the ECT and the judgment of the CJEU, to set aside the arbitral award rendered on October 25, 2013, insofar as the arbitral tribunal had wrongly declared itself to have jurisdiction and/or insofar as the recognition or enforcement of the award would have been contrary to international public policy. In response, Stileks asked the court, on the basis of Article 1520 of the Code of Civil Procedure, Articles 1 and 26 (1) of the ECT and Article 1 of Additional Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, to declare that Energoalians had indeed made an investment on the territory of the Republic of Moldova within the meaning of the ECT, and therefore that the arbitral tribunal had jurisdiction to hear the dispute, and consequently, to dismiss the action for annulment brought by the Republic of Moldova.

The Court of Appeal maintains that the "*solution given by the Court of Justice of the European Union as to the interpretation of the term 'investment' within the meaning of that Treaty is binding in the present case, the referring court being bound by the answer given by that Court to the question which it put to it*". The aim is to ensure a uniform interpretation by the Member States of the European Union of the concept of investment within the meaning of the ECT. The Court of Justice has, in the same judgment, affirmed that this Treaty is not applicable to disputes between a Member State and an investor from another Member State.

The Court stated that the answer given by the CJEU to its preliminary questions was necessary to settle the dispute and that the parties had designated Paris as the seat of the arbitration, so that European Union law was binding on them. The Paris Court of Appeal referred to the CJEU's ruling that "*the claim at issue in the main proceedings does not constitute an 'investment' within the meaning of the ECT since, on the one hand, a claim arising out of a simple contract for the sale of electricity cannot, as such, be regarded as having been conferred for the purpose of carrying out an economic activity in the energy sector, in accordance with Article 1(6), first subparagraph, point (f), and, secondly, that if it can be regarded as an "asset owned or controlled directly or indirectly by an investor", that claim does not arise from a contract associated with an investment, a simple supply contract being a commercial transaction which cannot, as such, constitute an "investment*" {. ..}".

The Court held that, even if it were possible to qualify as an investment, the requirement that the investment be "made by" the investor was not met since it was not made by Energoalians, the claimant in the arbitration, but by Derimen, a company that was not a national of an ECT Member State. Finally, the Court of Appeal noted that the investment was not made "in the area" of the host State, as required by the ECT, as the contract of February 24, 1999 from which the claim arose provided only for the delivery of electricity to the Ukrainian side of the border between Ukraine and Moldova.

In its judgment of January 10, 2023, the Paris Court of Appeal annulled the award rendered in Paris on October 25, 2013 by the *ad hoc* arbitral tribunal in the dispute between Energoalians and the Republic of Moldova on the grounds that the arbitral tribunal had no jurisdiction, as there was no protected investment within the meaning of the ECT. In addition, it orders Stileks to pay the Republic of Moldova the amount of EUR 250,000 under Article 700 of the Civil Procedure Code.

Paris Court of Appeal, international commercial chamber, January 10, 2023, n° 20/18330

Contribution by Ghaïs Ghedjati and Maxime Villeneuve

On January 10, 2023, on an annulment appeal against a partial award rendered under the auspices of the ICC, the international commercial chamber of the Paris Court of Appeal (CCIP-CA) ruled on the question of the irregular constitution of the arbitral tribunal for lack of independence and impartiality of the arbitrator.

Douala International Terminal (hereinafter "DIT") and *Le Port Autonome de Douala* (hereinafter "PAD"), both companies incorporated under Cameroonian law, signed an agreement in 2004 for the concession of the management and operation of the modernized containers terminal in the port of Douala, Cameroon. This agreement included an arbitration clause designating an arbitration tribunal under the aegis of the ICC.

Several successive disputes, over a disputed debt and the exclusion of DIT from the tender process for the renewal of the concession, led DIT to initiate arbitration proceedings before the ICC on January 16, 2019. The two parties then each appointed an arbitrator, and these two arbitrators appointed a third as chairman of the arbitral tribunal.

By a partial award rendered on November 10, 2020, the arbitral tribunal granted DIT's various claims and ordered the PAD to compensate DIT for the damage caused. An appeal for annulment to set aside this partial award was then filed by PAD before the Paris Court of Appeal.

While the arbitration proceedings continued, the PAD filed an application with the Secretariat of the ICC International Court of Arbitration on April 20, 2021 to challenge the chairman of the tribunal. The PAD argued that it had discovered non-notorious facts about the relationship between DIT's counsel and the tribunal's chair. This challenge for an arbitrator was rejected by the court secretariat a few weeks after.

In support of its annulment proceeding, the PAD first invokes Article 1520, 2° of the French Code of civil procedure, stating that "*the discovery by the PAD of non-notorious facts voluntarily concealed by* [the president of the arbitral tribunal]*, in his close relationship with* [counsel] *of DIT, caused a reasonable doubt in the minds of the PAD's management as to the independence and impartiality of* [the chairman of the arbitral tribunal]", rendering the constitution of the tribunal irregular, regardless of the fact that the award was made unanimously and that the impartiality of the other arbitrators was not disputed.

In response to this argument, DIT raised a defense consisting of a plea of inadmissibility based on Article 1466 of the French Code of civil procedure, which provides that "*[a] party who, knowingly and without legitimate reason, refrains from invoking an irregularity before the arbitral tribunal in good time is deemed to have waived the right to invoke it"*. According to DIT, the claimant had indeed waived its right to rely on the irregularity in the constitution of the arbitral tribunal since it did not raise the argument in good time.

Two other arguments were also presented by the PAD in support of its application for annulment: the arbitrators had ruled *ultra petita*, without complying with the mission entrusted to them, and the recognition of the award was contrary to international public policy, in that it would give effect to the concession agreement, which was tainted by corruption.

In its decision, the Paris Court of Appeal first dismissed the claim under Article 1466 of the French Code of civil procedure, on the grounds that the doubts about the independence and impartiality

of the chairman of the arbitral tribunal "relate *to facts revealed after the arbitral award*" and that the PAD could not therefore have invoked them before the tribunal that made the award.

On the merits, the court then accepted the claimant's plea that the arbitral tribunal had not been properly constituted. Although the court recognised the particular context of the tribute published in honor of DIT's Counsel, a "*respected figure in arbitration law*", it stated that the president of the arbitral tribunal should have mentioned the existence of a close personal relationship in his declaration of independence. Indeed, it noted that "*the proximity and intimacy thus revealed appear to be such that they cannot, without emptying the notion of its substance, but lead to consider this relationship as characterizing the existence of close personal ties*". The court therefore admitted that a reasonable doubt as to the independence and impartiality of this arbitrator could have been created in the mind of the PAD and declared that the arbitral tribunal was indeed irregularly constituted within the meaning of Article 1520, 2° of the French Code of civil procedure.

After stating that there was no need to rule on the other arguments raised, the International commercial chamber of the Paris court of appeal therefore annulled partial award no. 24211/DDA rendered on November 10, 2020 under the auspices of the ICC.

FOREIGN COURTS

Supreme Court of the United Kingdom, October 27, 2021, Kabab-Ji v. Kout Food [2021] UKSC 48

Contribution by Axel Audren

On October 27, 2011, the UK Supreme Court dismissed the appeal lodged by Kabab-Ji against the English Court of Appeal decision dated January 20, 2020 whereby it refused enforcement of an ICC arbitration award against a non-party.

Kabab-Ji, a Lebanese restaurant company, entered in 2001 into a franchise development agreement with Al Homaizi Foodstuff Company, a Kuwaiti company, Kabab-Ji being the franchisee and Al Homaizi Foodstuff Company, the franchisor. The Parties expressly chose English Law to govern the main contract and included an arbitration clause providing that any disputes arising from this agreement would be settled under the ICC rules by a tribunal seated in Paris. However, the contract was silent as regards the law governing the arbitration clause itself.

In 2005, following a corporate reorganization, Al Homaizi Foodstuff Company became a subsidiary of Kout Food Group. Despite the fact that only Al Homaizi Foodstuff Company signed the franchise development agreement, Kout Food Group became involved in its performance to a great extent. Further on, as a dispute arose between the Parties, Kabab-Ji initiated arbitration against the non-signatory Kout Food Group with an arbitral tribunal seated in Paris under ICC rules.

On September 16, 2017, the arbitral tribunal rendered a final award in favour of Kabab-Ji. A majority of the tribunal ruled that the law of the seat, namely French Law, was applicable to the arbitration clause itself. Subsequently, the arbitral tribunal ruled that under French Law, the involvement of Kout Food Group in the performance of the agreement made him an additional party to the arbitration agreement by way of a novation. Following this, Kabab-Ji sought enforcement of the award before the courts of England and Wales while, at the same time, Kout Food Group endeavored to annul the award before the French Courts.

Thus, the UK Supreme Court's decision was mainly one to rule whether, under the New York Convention, English Courts could make a final determination refusing enforcement pending determinations of the award before the French Courts and, whether the arbitration clause was governed by the law of the main contract, i.e. English Law, or the law of the seat, i.e. French Law.

In a decision dated October 27, 2021, the UK Supreme Court found that English Courts could render a final decision refusing the award enforcement despite the ongoing proceedings in France and that English Law was governing the arbitration clause. Therefore, the Court noted that, under English Law, Kout Food Group did not become an additional party to the arbitration agreement. On this ground, the UK supreme court rendered a final decision refusing the enforcement of the *Kabab-Ji v. Kout Food* award.

England and Wales Court of Appeal (Civil Division), November 24, 2022, DHL Project & Chartering Limited v Gemini Ocean Shipping Co Limited [2022] EWCA Civ 1555

Contribution by Victoria Muntean

On November 24, 2022, the Civil Division of the English Court of Appeal rendered a decision in the case of DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd, centred on the 1996 Arbitration Act, section 7 statutory principle of "*separability*". The main question before the Court was whether a charterparty proposed for the Newcastle Express bulk carrier expressly provided to be "*subject shipper/receivers approval"* contained a legally binding arbitration agreement conferring a sole arbitrator jurisdiction to establish if the main contract had been concluded.

The Owner of the vessel argued in favour submitting that the arbitrator, albeit whose appointment lacked the consent of the Charterer, had jurisdiction to determine if the effect of the "*subject"* was such as to invalidate the conclusion of the charterparty. Furthermore, Counsel for the Owner contended that the resulting ruling in favour of the Owner and subsequent issued award could only be challenged at law by virtue of an appeal lodged under section 69 of the 1996 Act.

The Charterer challenged the award under section 67 of the 1996 Act regarding substantive jurisdiction. Failing that, it sought leave to appeal under section 69 on a point of law. Having heard the case in the Commercial Court, Justice Jacobs found that the tribunal lacked jurisdiction. Nonetheless, he granted a section 69 leave to appeal to the Commercial Court, also allowing appeal under section 67.

LJ Males clarified that, unlike a jurisdiction challenge brought under section 67 that entails in itself a rehearing with a view of addressing the jurisdiction of the tribunal, an appeal on a question of law under section 69 tacitly recognises jurisdiction and confines the court to the fact established by the arbitral tribunal and its reasoning. To this end, commentaries as to the unsatisfactory position under the current regime which seems to allow for the jurisdiction questions to be contested in two separate hearings do not stand in a case like the present: a party may raise a section 67 challenge to jurisdiction by fresh court consideration and argue that it is not bound by an award issued by a tribunal seating in proceedings to which it never took part and whose jurisdiction it never agreed to. Hence, in this matter, the court proceeded from the more extensive factual matrix established by the lower instance judge rather than what the arbitrator had previously found.

The charterer informed the owner that they will not accept the vessel because of the Owner's failure to complete the vessel's inspection in a timely manner during the process of the vessel's suitability identification as well as the latter's failure to maintain such approval throughout the voyage, as required by Clause 2 of the charter agreement. The Charterer communicated its intention to release the vessel and requested a substitution. Subsequently, the Owner submitted the case to arbitration resulting in an award of damages in his favour. It argues that a binding charterparty with a valid arbitration clause was in fact concluded and that Charterer have acted unreasonably in releasing the vessel thus leading to repudiation. Consequently, the Charterer challenged the award issuing a section 67 application alongside a section 69 appeal on a question of law. The former, having been successful, was heard by Justice Jacobs who found that the "*subject*", namely the receiver's approval was not secured. Thus, the Parties' intention to enter binding charterparty was negated. Nevertheless, the judge granted leave to appeal under section 69 allowing the case to proceed to this Court.

On appeal, the Owner challenged the judge's findings and claimed that the issue of separability was not properly applied and that the question of acceptable by the receiver had no effect on the validity

of the arbitration clause. Conversely, Counsel for Charterers proceeded from a consideration of the effect and meaning of the *"subject*" stating that it created a pre-condition which until "lifted" prevented the conclusion of a binding contract that included a valid arbitration clause.

Following an analysis of the leading authorities regarding the effect of "*subjects*" in commercial negotiations, LJ Males concluded that in the present case subject of "*shipper/receivers'* approval" was a precondition that to be "*lifted"* by the Charterer and communicated to the Owner in order to bring into existence a binding contract. This was not addressed in the Owner's submission firstly because it deemed so unnecessary due of the separability principle the "*subject*" had no application to the arbitration clause, and, secondly, because the "*subject*" had to be read in conjunction with clause 20 which provided that approval could not be unreasonably withheld.

The judge discussed the separability principle explaining that the statue did not expand on the applicability of this principle as developed by case law. Harbour v Kansa Parliament had firmly established that the arbitration tribunal did not have jurisdiction to determine contract formation issues. Section 7 is confined to issues of validity rather than contract formation and applies solely where an arbitration agreement, defined in section 6 as an agreement to arbitrate all contractual and non-contractual disputes, was concluded despite the underlying agreement being invalid, non-existent, or ineffective. LJ Males noted that if a contract was never concluded neither was an arbitration clause agreed to, thus clarifying the position in Fiona Trust & Holding Corporation v Privalov [2007].

Finally, LJ Males addressed the argument that "*subjects"* should be read together with clause 20 of the proposed contract. The judge agreed with Justice Jacobs who found against such a statement; clause 20 on the nomination of a vessel had no applicability to a situation where a vessel had been already identified and nominated.

In summary, he held that use of "subjects" in charterparties is a longstanding commercial practice equivalent to the expression "subject to contract". In the present case, the "*subjects"* were a pre-condition which if not fulfilled operated to negate any intention to conclude a binding agreement leaving the parties free to walk away from the proposed fixture. As such, the arbitration clause purported to be contained therein was by extension negated; there were no grounds to establish the tribunal's substantive jurisdiction and the award should be set aside as provided for in section 67 of the 1996 Act.

Supreme Court of Sweden, December 14, 2022, *PL Holdings v. Poland*, case No. T 1569-19

Contribution by Aysha Saleh

Given in Stockholm on December 14, 2022, the findings of the court in PL Holding v. Poland (PL Holdings) leaves a major hallmark and floodgate for upcoming challenges in the intra-EU investment landscape. It goes one step further than the precedents set in the Achmea B.V. v Slovakia and Republic of Moldova v. Komstroy case raising alarm bells for EU investors looking to secure or enforce their investments within the EU, based on either intra-EU BITS or intra-EU arbitral awards.

Achmea based his claim on the incompatibility of an investor to resort to arbitration under a bilateral investment treaty (BIT) between two EU Member States (intra-EU BITs) in accordance with mutual trust and compatibility with EU Law, and Komstroy extended the incompatibility between an EU investor and an EU Member State (intra-EU investment arbitration) under the Energy Charter Treaty. The recent case of PL Holdings however concludes that an ad-hoc arbitration could not be undertaken between EU Member States and EU investors where the said agreement is similar to that of an arbitration agreement found in a BIT between EU Member States.

The case concerns a Luxembourg entity; PL Holdings, initiating arbitration proceedings against Poland under a BIT following a suspension of voting rights of PL Holdings and an order of sales of PL Holdings shares by a financial authority in Poland. The proceedings started at Stockholm Chamber of Commerce's Arbitration Institute by way of an arbitration clause. An award was granted in favour of PL Holdings in 2017.

Poland filed an action for annulment of the arbitration awards before the Swedish courts on the grounds that PL Holdings lacks the rationed of being called an investor as per the investment agreement definition thereby rendering the arbitral tribunal not suitable to decide the dispute and later after six months that the arbitration clause was "*inoperative*" and contrary to the principle of Union Law (EU law) as well as the Swedish legal order. The court held that suspension of voting rights and the order to sell its shares amounted to a violation on part of Poland and that PL Holdings should be entitled to recover damages. It further added that although the arbitration agreement in the BIT was against the principles laid down by the Court of Justice of the European (CJEU) in Achmea, it did not forbid an EU Member State and an EU investor from entering into an ad hoc arbitration agreement. The failure on Poland's part to raise an objection earlier meant that it accepted ad-hoc arbitration under Swedish law.

Poland subsequently appealed to the Swedish Supreme Court asking a question as to whether Articles 267 (mutual trust between Member States and principles of EU law) and 344 (autonomy of EU law) Treaty on the Functioning of the European Union (TFEU) mentioned in Achmea meant that a Member State refraining to object after an investor starts arbitration proceedings is to be interpreted as invalid in an intra-EU arbitration agreement.

The CJEU ruled that where the party seeking to set aside arbitration award on the ground's contrary to Articles 267 and 344 TFEU exists, the national courts are to uphold such an application as there may be instances where national courts are faced with disputes that 'guarantee full effectiveness of EU law'. Following Article 7(b) of the Termination Agreement, and in line with the arbitral award given under BIT, the Contracting Parties "*shall ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it*". Thus, concluding that national courts are to deal with not only disputes that contradict the legality of EU but should also challenge the validity of such agreements or arbitration clauses before the court or the arbitration body as such arbitration clauses undermine Articles 267 and 344 TFEU.

Since the examination done by Swedish law in PL Holdings was insufficient, it therefore contravenes the principles of EU law and hence not competent enough to be dealt with by the arbitral tribunal. The question of whether raising a claim after an investor commences arbitration proceedings is to be interpreted as invalid in intra-EU arbitration agreement is irrelevant.

The Supreme Court declared the arbitration awards invalid considering that they are contrary to Swedish procedural public policy. The latter also annulled the decision of the Court of Appeal

concerning the legal costs and exempted Poland from the obligation to compensate PL Holding for the legal costs before the Court of Appeal.

Swiss Federal Tribunal, December 22, 2022, case TF 4A_232/2022

Contribution by Louise Dyens

On December 22, 2022, the 1st Civil Court of the Swiss Federal Tribunal (hereinafter "SFT") rendered a decision on the jurisdictional competence in anti-doping matters in international arbitration. The SFT determines for the first time the role of the Anti-Doping Chamber of the Court of Arbitration for Sport (hereinafter "ADC CAS"), recently created by the CAS when acting as a court of first instance.

The dispute is between the International Biathlon Union (hereinafter IBU), the world governing body of biathlon, and a former international biathlete. The athlete is appealing in civil matters against an award *CAS 2020/A/7509* rendered on April 8, 2022 by the Appeals Chamber of the Court of Arbitration for Sport (hereinafter "AC CAS"). In January 2020, the former biathlete was accused of having violated, between 2010 and 2014, one of the IBU's anti-doping rules, contrary to a declaration that the athlete had signed in 2006. The athlete never resigned from the commitments he made to the IBU by signing the declaration. The athlete contests the doping charges. IBU filed a "request for arbitration" with the ADC CAS, which, since an agreement between IBU and the ADC CAS in October 2019, has replaced the internal federative body as the first instance authority.

In a first decision, the ADC CAS, finding the existence of a violation of the IBU's anti-doping regulations, suspended and disqualified the athlete. The athlete appealed the decision to the AC CAS. At the same time, in November 2020, the athlete filed a civil appeal to the SFT in order to obtain the annulment of the decision rendered by the ADC CAS. In March 2021, the AC CAS suspended the appeal proceedings pending the decision of the CAS. In June 2021, the CAS declared the athlete's appeal unacceptable. The AC CAS therefore ordered the resumption of the proceedings. In the contested award of 8 April 2022, the AC CAS declared itself competent to hear the athlete's appeal. On May 24, 2022, the athlete lodged a second appeal in civil matters with the Swiss Federal Tribunal, seeking to have the above-mentioned award set aside.

The Claimant (in this case, the athlete) argues that the ADC CAS is an arbitral tribunal. The Claimant proclaims that, as he did not consent to arbitration, and since arbitration is a process that must have been agreed to by the parties, using arbitration in this case was not possible. Therefore, the ADC CAS had no jurisdiction to hear the dispute. The Claimant also invokes the lack of jurisdiction of the first instance jurisdictional authority, namely the ADC CAS, which would also entail the lack of jurisdiction of the appellate authority, the AC CAS, which should also have declared itself incompetent. Finally, the Claimant argues that the AC CAS could not validly rule because of its irregular composition, since it does not present sufficient guarantees of independence and impartiality, given its organic links to the ADC CAS. The IBU as Respondent contradicts the Claimant and asserts that the ADC CAS acted as a disciplinary authority, and not in the context of a genuine arbitration procedure, which is apparent from the Respondent's contract of delegation of its decision-making power in anti-doping matters to the ADC CAS. Thus, the decision rendered by the ADC CAS is of the same nature as that rendered by the internal body of a sports federation

and cannot be assimilated to an arbitral award. Since the Claimant never withdrew his consent from the 2006 regulations, the delegation of disciplinary authority from the IBU to the ADC CAS provided by the 2019 contract applies to him.

The question before the Tribunal is whether the ADC CAS acted as an arbitral tribunal and therefore issued a true arbitral award, in which case the award would be contestable by the athlete. In order to resolve such a dispute, the SFT questions the role assigned to the ADC CAS in this case, the nature of the power exercised by the ADC CAS, and the legal basis of the ADC CAS's jurisdiction. In this case, the SFT finds that the ADC CAS does not act as a 'true' arbitral tribunal. It derives its jurisdictional competence from a contract concluded with the Respondent, and is not intended to replace the State courts, as does arbitration, but only to replace the internal disciplinary court of the IBU sports federation. Also, the SFT overturns claimant's arguments on the independence issue of the ADC CAS, indicating that, since we are not dealing with an arbitral tribunal in this case, no question of independence arises. Furthermore, the Tribunal indicates that, as the AC CAS is totally independent from the ADC CAS, even if it had been admissible, this claim could not have succeeded.

The Tribunal thus dismissed the athlete's application for annulment of the decision rendered by the AC CAS, alleging the lack of jurisdiction and the irregular constitution of the ADC CAS.

Singapore Court of Appeals, January 6, 2023, *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] SGCA 1

Contribution by Marilena Tsiantou

On January 6, 2023, the Singapore Court of Appeal ruled on the law governing the arbitrability of the subject matter at the pre-award stage.

The dispute arose out of a corporate divorce between the founders of the target company ("Claimant") and a private equity fund ("Respondent"). In 2017, the parties' relationship started to deteriorate, when the Respondent expressed his willingness to exit the company and sell his share to an alleged competitor. The Claimant filed a petition to the National Company Law Tribunal ("NCLT") in India seeking remedies for corporate oppression. The Respondent, based on a Singapore-seated ICC clause in the shareholder's agreement, filed a permanent anti-suit injunction against the Claimant, to prevent Claimant from pursuing the Mumbai persecution suit under the NCLT.

In response, the Claimant argued that the Indian law governing the shareholders' agreement, also governs the arbitration agreement. Contrary to the Claimant's arguments, the High Court held that the law of the seat applies to the question of the pre-award arbitrability. Considering this, the High Court decided that the dispute is arbitrable and issued an anti-suit injunction.

Instead, the Singapore Court of Appeal followed a different approach from the line followed by the High Court. The Singapore Court of Appeal held that the law governing the subject matter arbitrability in the pre-award context (e.g., request for suspension of legal proceedings, anti-suit injunction) is the law of the arbitration agreement. This approach is justified based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law), which specifies only the law of the court in the post-award stage. Under Section 11 of the International Arbitration

Act 1994 (IAA), in Singapore, a dispute is not arbitrable if it is "contrary to public policy". The Court holds that the term "*public policy*" is defined broadly enough, which allows the court to take into account the public policy of the foreign jurisdiction. Additionally, the law of arbitration agreement determines the validity of the arbitration agreement. Thus, the arbitration agreement is the basis for the tribunal's jurisdiction, meaning that if a dispute is arbitrable under the law of the arbitration agreement, the law of the seat will be used to assess arbitrability.

The Singapore Court of Appeal provided guidance on which law governs an arbitration agreement, when no express choice was made by the parties. Based on the 3-stage test, first applied in the *BCY v BCZ* [2017] 3 SLR 357, the Court take into account:

- Stage 1: Whether the parties expressly chose a law governing their arbitration agreement.
- Stage 2: In the absence of an express choice, whether the parties implicitly chose the law to be applied in the arbitration agreement.
- Stage 3: Failing both above-mentioned stages, the court will determine the closest law applicable to the arbitration agreement; in most of the cases the law of the seat.

In the light of this recent decision, the Singapore Court of Appeal highlighted two important elements. First, the importance of choosing the law of the arbitration agreement. Although it is not a common practice, the parties should expressly choose the law of the arbitration agreement, regardless of the law governing the main contract. In that way, the parties minimize the risk of the courts enforcing a system of law that they did not intend. Second, the parties should cautiously examine both the law of the arbitration agreement and the law of the seat. It would be beneficial for parties to adopt the law of a "pro-arbitration" jurisdiction to govern their arbitration agreement. Thus, this is a way to avoid any eventual award to be found unenforceable under the laws of the country enforcing it (Article V(2)(a) of the New York Convention).

INTERVIEW WITH PIERRE-BAPTISTE CHIPAULT

1. Hello Pierre-Baptiste, thank you for accepting our invitation and answering our questions for this edition. Can you briefly present your background?

I completed my law degree at the Faculty of Versailles of the University of Paris-Saclay. I also did a Master 1 in general private law, and a Master 2 in arbitration and international trade law there. Then, I interned for a year at the litigation department in Allen & Overy's Paris office. During my internship, I had the opportunity to work on arbitration cases as well as commercial and criminal litigation. After that I took the bar exam and attended the Paris bar school. As a student-lawyer (*élève avocat*), I did my first internship at the Paris Court of Appeal (and, more precisely, in the chamber in charge of appeals against summary orders), and my final internship in the arbitration team of Allen & Overy Paris office. Finally, I studied for a year at the Oxford law school for a Magister Juris (MJur) before joining back Allen & Overy's arbitration team, this time as an associate.

2. You graduated from Oxford where you completed an LLM, can you tell us if you would advise to undertake an LLM abroad?

From the perspective of working in arbitration, I recommend it, yes. Firstly, it is an experience that allows you to deepen your legal culture. Arbitration proceedings almost invariably raise complex and often novel factual or legal issues in specialised fields (telecommunications, aeronautics, construction, banking and finance, etc.), with several laws potentially applicable on the merits. Completing one's studies with specialised training abroad allows one to start working with additional reflexes. For students who have already studied arbitration in France, I would not necessarily recommend taking a new course in arbitration as part of an LL.M. Rather, I would suggest taking the opportunity to study other subjects complementary to arbitration (such as contract law, corporate law, private international law, etc.). Secondly, the LL.M. experience provides an introduction to the common law, which is known to play a crucial role in shaping international arbitration proceedings, particularly through the document production phase, the hearing stage and the person of the arbitrators (many of whom have an Anglo-Saxon background). Finally, it is an experience that allows you to be confronted with different cultures and working methods, which is always enriching on a personal level.

However, I would like to point out that, although I recommend the LL.M. for its contribution in terms of legal knowledge and skills, in my experience, it is neither a prerequisite finding a job as an associate nor a guarantee of employment. The best way is still to do a good final internship.

3. You are a midlevel associate at the Allen & Overy's office. Can you tell us more about your daily life in the litigation and arbitration team? In particular about the opportunity to work with both the Paris and London offices.

I don't have a "typical" day. My day-to-day work consists of a number of different tasks in the cases I work on (drafting briefs, communicating with the court, communicating with clients, meeting with experts, preparing witness statements, preparing cross-examinations, etc.). While most of these cases are ongoing proceedings, I am also regularly called upon to advise clients (private individuals or state entities) in connection with potential arbitrations. I therefore communicate a lot with other departments of the firm, especially with the corporate, banking and public law departments. I am also in constant contact with other Allen & Overy offices, including London, Perth, Hong Kong, Dubai, Madrid and Casablanca. The complexity of the firm's cases, and their geographical connections, often leads the partners to mobilise several offices for our proceedings. Furthermore, I also spend a lot of my time on discussions with my team on a wide range of issues including the issues raised in cases, the way we are going to prepare it, and instructions from the partners. I also delegate a part of the work to more junior associates or give researches to interns. Finally, I work regularly from Allen & Overy's London office. I was fully seconded there from November 2021 to April 2022, thanks to the firm's internal secondment scheme. I return there regularly, either for the purposes of ongoing cases or to provide in-house training.

Furthermore, each week I make sure to take a break from work and devote time to 'non-professional' activities (going out, sport, etc.). Doing these breaks not only allows me to recover physically and mentally, but it also helps me gain perspective on the subjects I am working on and then re-approach them with more lucidity.

4. Can you tell us, since you publish doctrinal articles, what this activity brings to you professionally and more generally to young collaborators who take the time to write?

Several things. Publishing allows you to be visible outside the firm (especially to clients) and, therefore, to develop and contribute to the reputation of the team you are part of. Secondly, it is an opportunity to share one's analysis with as many people as possible on subjects on which one may have developed, or wish to develop, an expertise in the context of one's practice. Finally, it is an exercise that requires critical analysis (insofar as you have to gather information, sort it, define how to present it, be able to express an opinion, etc.), analytical sense and rigour. The exercise requires, in fact, to be perfectly up to date on all the subjects that one tackles. It is therefore a good training for the tasks that you carry out daily as an associate.

5. Since 2021 you have been teaching in several Master 2 courses, can you tell us what this experience brings you?

In fact, I co-teach (with Erwan Poisson, partner in charge of the litigation department of Allen & Overy, Paris) the advanced law of conflicts of jurisdictions course in the Master 2 Arbitration and International Trade Law of the University of Paris 1 Panthéon-Sorbonne, and in the Master 2 Arbitration and International Trade Law of the Faculty of Versailles of the University of Paris-Saclay. Sharing with students my practical work experience is very rewarding. Private international law is a subject which is a little austere at first, based on principles that are sometimes difficult to understand when you start studying it (conflict of laws rules, public policy, public order, etc.). Discovering it in its practical aspects allows one to better understand the purpose of the rules aiming to resolve conflicts of jurisdiction, and how these different rules apply. It is a technical subject but based on logically organised rules. This teaching is of particular importance to me

because, as a lawyer, it is also our duty to support future legal professionals (including our future colleagues) in their training. For me, it is a way to bring my contribution. Finally, these courses bring also purely personal benefits as it enables me to stay up to date on all the subjects on the subjects taught and discussed in class with students.

6. In addition to these teachings, you accompany students in competitions (CAIP, Moot), can you tell us what motivates you to coach them, but also if you recommend to our young readers to try the adventure of competitions?

The will to accompany them in their arbitration training. Arbitration competitions are an excellent opportunity to experience an introduction to the world of arbitration. It is a key moment of the training because, for many students (and this was my case), it is the very first time they can get involved in the practical phase of an arbitration procedure. It is a particularly rewarding experience for mooties as they put into practice the skills they have acquired so far and develop new ones at the same time. It is therefore rewarding to be at their side during this stage of their training. I also have excellent memories of the competitions in which I participated, especially thanks to the coaches I had. Taking on the role of coach today is therefore also a way for me to share what I was able to benefit from as a student.

I highly recommend the competitions, yes. Firstly, it is a very formative experience as it allows you to practice writing briefs (and, more generally, to learn about the writing style used in the arbitration world) and to become familiar with the big ideas they usually deal with (facts, jurisdiction, substance, prejudice). It is also an opportunity to learn the art of pleading and to discover the exercise of cross-examination. Finally, competitions can be an opportunity to travel. For instance, I went to Australia to take part in the International Maritime Law Arbitration Moot. Indeed, I chose this competition to go there!

EVENTS OF THE NEXT MONTH

February 7, 2023: Diner débat n°5 – Preuve testimoniale et arbitrage : mythe ou réalité

Organised by Paris Place d'Arbitrage

Where? At *Bistro Volney – 8 rue Volney, 75002, Paris*

Website: https://my.weezevent.com/diner-debat-n5-la-preuve-testimoniale

February 13, 2023: Le recours en annulation : aspects pratiques et procéduraux

Organised by Paris Very Young Arbitration practitioners

Where? At *Gide Loyrette Nouel – 15 rue de Laborde, 75008, Paris*

Website: https://lnkd.in/eamuWinf

February 16, 2023: Exécution des sentences arbitrales contre des Etats souverains : quel état des lieux en France et en Espagne

Organised by Centre français de l'arbitrage 40

Where? *Sala Fortuny – C/ de Fortuny, 34, Madrid*

Website: https://ciberevents.com/ciber/forms/23miradas/index.php

February 28, 2023: Doing business & arbitrating in France

Organised by par Paris Place d'Arbitrage

Where? *Gornitzky – Vitania Tel-Aviv Tower – 20 HaHarash St, TLV, Israel*

Website: https://www.eventbrite.fr/e/doing-business-and-arbitrating-in-france-tickets-521097224827

March 9, 2023: L'arbitrage d'investissement devant les cours françaises

Organised by Centre français de l'arbitrage 40

Where? *Les Tourteaux – 86 rue de la Boetie, 75008, Paris*

Website: https://www.helloasso.com/associations/cfa40/evenements/diner-debat-cfa40-9-mars-2023

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Practice areas: Dispute resolution

Starting date: 03/07/2023