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BIBERON

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Paris Baby Arbitration is a Paris-based society and a networking group of students and young practitioners in international arbitration. Our aim is to promote accessibility and knowledge of this somewhat lesser-known field of law and industry within the student sphere.

Every month, our team publishes the Biberon. The Biberon is our newsletter in both English and French, designed to review and facilitate comprehension of the latest decisions and awards rendered by national and international courts, as well as arbitral tribunals.

In doing so, we hope to participate in keeping our community informed on the latest hot topics in international arbitration from our French perspective.

Dedicated to our primary goal, we also encourage students and young practitioners to actively contribute to the field by joining our team of writers. As such, Paris Baby Arbitration is proud to provide a platform for its members and wider community to share their enthusiasm for international arbitration.

To explore previously published editors of the Biberon and to subscribe for monthly updates, kindly visit our website: parisbabyarbitration.com .

E also extend an invitation to connect with us on LinkedIn, and we welcome you to follow/share our latest news on LinkedIn and beyond.

Enjoy your reading!

Yours sincerely,

The Paris Baby Arbitration Team

THIS MONTH'S THEMES

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- **Rennes, 16 April 2024, n° 23/06741, *Acierinox*** (domestic arbitration; validity of arbitration agreements, even if (overriding) mandatory provisions are to apply to the merits of the case);

- **Supreme Court of the United Kingdom, *Sharp Corp Ltd v. Viterra BV* [2024] UKSC 14** (possibility of appeal against an arbitral award under section 69 of the Arbitration Act 1996, provided that certain safeguards are met, including the requirement that the appeal concerns a question of law "which the tribunal was asked to determine"; breach of this safeguard by a lower court which granted leave for appeal, despite the fact that it asked itself a question of law which the arbitral tribunal had not been requested to determine and made factual findings when answering that question);

- **Supreme Court of India, *Delhi Metro Rail Corporation Ltd v. Delhi Airport Metro Express Pvt Ltd*, 2024 INSC 292** (arbitration seated in India; reliance of the Indian Supreme Court upon its extraordinary curative jurisdiction under Article 142 of the Indian Constitution to annul a "patently illegal" arbitral award, so as to correct a "grave miscarriage of justice" in the context of an arbitral award which had already gone through several levels of judicial review; arbitral award which had been set aside by a lower court, then restored by the Indian Supreme Court, before being set aside again 7 years later by the Indian Supreme Court);

- **High Court of Singapore, *Crystal-Moveon Technologies Pte Ltd v. Moveon Technologies Ptd Ltd* [2024] SGHC 72** ("rational businessmen" objective test to use when constructing the scope of arbitration agreements, unless there are compelling reasons not to; some claims deemed within the scope of the arbitration agreement, while some others outside thereof, although all of them stemmed from the same business endeavour; necessity to find "sufficient reason", i.e. "exceptional circumstances", to refuse a stay arbitral proceedings when parties have consented to arbitrate; refusal to stay proceedings, even as regards claims outside of the scope of the arbitration agreement, due to risks of inconsistent findings between that of the arbitral tribunal and that of state courts);

- **Swiss Federal Supreme Court, 3 April 2024, n° 4A_244/2023** (non-applicability of European law, including the *Komstroy* case, to third countries like Switzerland; dismissal of the argument whereby the arbitral tribunal constituted on the basis of the Energy Charter Treaty lacks jurisdiction to hear an investor-state arbitration seated in Switzerland between an EU Member State's national and another Member State, given that there exists no conflict between Article 26 of the ECT and EU treaties; obiter where even if there were a conflict, no reason to believe EU treaties would take precedence over the ECT).

FRENCH COURTS

COURTS OF APPEAL

Paris Court of Appeal, 4 April 2024, n° 22/19221, *State of Kuwait*

On 4 April 2024, the *conseiller de la mise en état* (pretrial judge) of the International Commercial Chamber of the Paris Court of Appeal (hereafter "ICCP-CA") issued an order following an application to set aside an arbitral award rendered in Paris under the auspices of the UNCITRAL Arbitration Rules.

On 12 August 2022, an arbitral award was rendered in Paris, wherein the arbitral tribunal ruled that it lacked jurisdiction on the grounds that the operation conducted by a Russian national (hereafter the "Claimant") on the territory of the State of Kuwait (hereafter the "Defendant") within a Kuwaiti public company, could not qualify as an investment within the meaning of the Russia-Kuwait bilateral investment treaty, although it ruled that the Claimant was an investor within its meaning.

As a result, the Claimant lodged an application for annulment before the ICCP-CA, before asking the conseiller de la mise en état to accede to her request of personal attendance, on the basis of the ICCP-CA protocol and in accordance with Articles 184 et seq. of the French Code of Civil Procedure.

While she was domiciled in the Russian embassy in Kuwait, the Claimant claimed that her incarceration during the arbitral proceedings interfered with her right to a fair trial. Although the Tribunal had heard the Claimant, the conditions of her imprisonment had arguably limited her access to evidence and to her counsel. As for the Defendant, it argued that the Claimant was solely responsible for this situation, as she failed to comply with the conditions of her condition release. It concluded that her claim based upon the violation of her right to a fair trial was ill-founded and inadmissible, pursuant to Article 1466 of the French Code of Civil Procedure, in that this claim had not been previously raised before the arbitral tribunal.

As such, the *conseiller de la mise en état* was asked whether he could, in accordance with the provisions of the Code of Civil Procedure and the CCIP-CA protocol, permit an investor, who is a natural person residing in a diplomatic facility of his State of nationality located on the territory of the host State, to make a personal appearance via videoconference, even if the argument whereby the investor's right to a fair trial had not been raised before the arbitral tribunal.

In the present order, the *conseiller de la mise en état* ruled, in light of the circumstances and the parties' adherence to the ICCP-CA protocol – which grants the *conseiller* discretion when deciding whether to allow a hearing request –, that the investor's request of personal appearance was justified under the European Convention on Human Rights, and specifically its Article 6.

As a result, the request was considered admissible and valid on the merits, despite the fact that a claim as to a violation of the Claimant's right to a fair trial had not been raised before the arbitral tribunal in contravention with Article 1466 of the French Code of Civil Procedure.

Contribution by Adel Al Beldjilali-Bekkairi

Paris Court of Appeal, 30 April 2024, n° 20/10169, *Petrosaudi Oil Services*

By a decision issued on 30 April 2024, the International Commercial Chamber of the Paris Court of Appeal addressed the possibility of ordering a stay of proceedings in the context of annulment proceedings, until the decision of a foreign criminal proceeding is rendered.

The dispute concerned a drilling contract concluded between PDVSA Servicios, a subsidiary of the Venezuelan national oil and gas company, and PetroSaudi Oil Services, a company registered in Barbados, whereby PetroSaudi undertook to equip and operate a drilling vessel on behalf of PDVSA in exchange for remuneration.

Alleging that the contract was unbalanced and resulted from acts of corruption and fraud, PDVSA initiated arbitration proceedings against PetroSaudi to have certain clauses of the contract declared null and void and to obtain damages. PetroSaudi presented counterclaims for payment of invoices. An arbitral tribunal ruled in favour of the latter and ordered PDVSA to pay USD 380 million.

On 21 December 2020, PDVSA filed for the annulment of the award before the International Commercial Chamber of the Paris Court of Appeal. Before the proceedings were concluded, PDVSA requested for a stay of proceedings. This request was linked to the outcome of a criminal case pending before the High Court of Malaysia, which also involved PetroSaudi. PDVSA justified this request by arguing that developments in the Malaysian case, particularly delayed due to the discovery of new evidence, including a witness statement, could potentially provide crucial insights for the annulment proceedings. Furthermore, it supposedly demonstrated significant links between the amounts to be paid to PetroSaudi and alleged money laundering activities.

Referring to Articles 377, 73, and 74 of the French Code of Civil Procedure, the Court first emphasised that a request for a stay is a procedural objection that must be introduced before any defense on the merits or plea of inadmissibility (in limine litis), although it could be raised afterwards in the course of proceedings only if its cause has been revealed after the first submissions on the merits. It then noted that PDVSA's request was based upon press articles, which PDVSA had already mentioned in its initial submissions. Finding that the press articles did not constitute new elements justifying a stay and that PDVSA was already aware of the pending Malaysian case even before the beginning of the annulment proceedings, the Court declared the request inadmissible due to the delay in presenting it.

As such, this decision underscored the interaction between arbitration and ongoing criminal proceedings. It confirmed that the relevance of staying annulment proceedings pending a foreign decision must be examined in a timely manner to ensure proper administration of justice. In other words, such requests must be submitted either at the outset of annulment proceedings or as soon as the parties become aware of the relevant foreign proceedings.

Contribution by Anna Koempel

Rennes Court of Appeal, 16 April 2024, n° 23/06741, *Acierinox*

In a decision dated 16 April 2024, the Rennes Court of Appeal confirmed the decision of the Nantes Commercial Court, dismissing the actions brought by Aciernox Matériel (hereafter the "Claimant") against HD Hyundai Infracore Europe (formerly Doosan Infracore Europe, hereafter the "Defendant"). The dispute related to a distribution contract containing an arbitration clause governed by Dutch law and designating Rotterdam as the seat of arbitration.

The Claimant and the Defendant had established commercial relationships for over twenty years, culminating in 2018 with the signing of a concession agreement for five years. However, in 2020, the Defendant terminated this contract, with effect from 31 January 2021, leading the Claimant to initiate several legal proceedings, notably before the Nantes Commercial Tribunal. The Tribunal ruled that the arbitration clause was neither manifestly null and void, nor unenforceable, and that the measures requested by the Claimant were neither provisional nor protective in nature. As such, the Tribunal also declared that it lacked jurisdiction, and referred the parties to arbitration and ordered the Claimant to pay the costs.

During appellate proceedings, the Claimant alleged that the Defendant's actions, including terminating the contract and preventing the sale of spare parts, were unlawful. It sought various remedies, including being able to access technical data, and the ability to sell spare parts, as well as damages for lost commissions. It also challenged the applicability of the arbitration clause, arguing that its claims were based upon economic public policy rules, so that the clause was arguably to be deemed inapplicable. As for the Defendant, it relied upon the arbitration clause, arguing that any dispute had to be resolved by way of arbitration in accordance with the arbitration clause.

In the present decision, the Rennes Court of Appeal reiterated the importance of abiding by arbitration clauses stipulated in contracts, as Article 1448 of the French Code of Civil Procedure provides that state courts must refuse to hear a case when arbitration has been selected as the dispute resolution avenue chosen by the parties. It noted that the applicability to public policy rules, even if they are overriding mandatory provisions, to the merits of the case was irrelevant to the validity of arbitration clauses. It concluded that only the arbitral tribunal should have jurisdiction to ascertain whether arbitration clauses are inapplicable in that case.

Finally, regarding interim measures requested by the Claimant pursuant to Article 1449 of the French Code of Civil Procedure, the Court underlined that the requirement of urgency is to be ascertained at the date of the present decision, and that mere economic hardships could not be enough to meet that requirement. As such, since the Claimant only relied upon the refusal to sell and the necessity for it to find a new distributor to justify urgency, the Court ruled that this condition was not proven on the facts.

Contribution by Anthony Al Nouar

Supreme Court of the United Kingdom, 8 May 2024, *Sharp Corp Ltd v. Viterra BV* [2024] UKSC 14

In a decision dated 8 May 2024, the United Kingdom Supreme Court (hereafter the "UKSC) shed light on the conditions to appeal an arbitral award under section 69 of the Arbitration Act 1996 (hereafter the "Act").

On the facts, Viterra BV (hereafter the "Appellant") concluded contracts for the sale of legumes with Sharp Corp Ltd (hereafter the "Respondent") in 2017, whose terms were to be in majority those of a model contract of the Grain and Free Trade Association (hereafter "GAFTA"), including a GAFTA arbitration clause allowing for a first-tier arbitral tribunal to be appealed to an appeal board. The Appellant nominated a vessel to ship certain quantities of legumes from Canada to the Respondent in India. However, the Respondent failed to pay for the goods within five days prior to the vessel's arrival in India, in contravention of the terms of the contracts.

As such, the Appellant commenced arbitration proceedings against the Respondent, seeking damages for breach of contract. The arbitration ultimately yielded two awards by an appeal board (hereafter the "Appeal Board") in 2021, which found the Respondent liable for breach of contracts to pay damages, based upon the estimated value of the goods on the date of the default to pay. The Respondent appealed the awards, in particular the decision on damages and the way they were quantified, pursuant to section 69 of the Act. The Court of Appeal allowed the appeal, but only on the basis of an appealed question of law that the Court had modified in such a way that the Appeal Board was not asked the same question of law. As such, the Appellant appealed against the Court of Appeal decision on the grounds that it had exceeded its jurisdiction.

The UKSC was to consider several questions of law, including questions pertaining to arbitration law and to the quantification of damages. For the purposes of this summary, only those concerning arbitration will be summarised here.

The question of arbitration law that the UKSC was asked to determine was whether or not the Court of Appeal, hearing an appeal against arbitral awards on the basis of section 69 of the Act, exceeded its jurisdiction due to (i) its modifying a question of law for which leave to appeal had been given, (ii) that the arbitral tribunal was not asked, and (iii) as a result of which findings of fact were made by the Court that the tribunal did not make.

Lord Hamblen, giving the unanimous judgment of the UKSC, started by summarising the conditions for appeal against an arbitral award under section 69 of the Act: (a) the application for permission to appeal must "*identify the question of law to be determined*", (b) which must be a "*question of law arising out of an award*", (c) "*which the tribunal was asked to determine*", and (d) for which the Court of Appeal must be satisfied, solely on the basis of the findings of fact made in the award, that the decision of the tribunal was "*obviously wrong*", or that "*the question is one of general public importance and the decision of the tribunal is at least open to serious doubt*" (at [51]).

Issue no. 1: whether the Court of Appeal may amend the question of law for which leave to appeal was granted (yes, but)

On the first issue, it recalled that amendments to the question of law are possible, insofar as "*the substance of the question of law remains the same*", following *Cottonex Anstalt v. Patriot Spinning Mills Ltd* [2014] 1 Lloyd's Rep 615 (at [55]).

In the case at hand, the question of law for which leave to appeal had been granted was the following: "[w]*here goods sold C&F free out are located at their discharge port on the date of the buyer's default, is "the actual or estimated value of the goods* (...) *to be assessed by reference to* [value A]*; or* [value B]*?*". When considering this question, the Court of Appeal had added "*in the circumstances as found by the Appeal Board in the Awards*".

The UKSC held that, by doing so, the amendments did not change the substance of the question, as it simply sought to refer to the fact that the Court of Appeal was bound by the findings of fact made by the arbitral tribunal, as imposed by section 69 of the Act (at [57]). As such, this ground could not be used to reverse the Court of Appeal decision (at [59]).

Issue no. 2: whether the Court of Appeal may decide a question of law which the arbitral tribunal was not asked to determine and on which it did not make a decision (no)

On the second issue, Lord Hamblen explained that while the question of law needs not have been articulated as a question of law before the arbitral tribunal per se, it simply needs to have been put "*fairly and squarely before the arbitral tribunal for determination*" (at [62]).

On the facts, the UKSC found that the Court of Appeal had decided the question of quantification of the value of the goods on the conclusion that the contracts had been varied (at [64]). Since the question of whether, and if so, how the contracts had been varied had not been argued, nor determined by the Appeal Board (at [68]), this question of law was not one that the tribunal was asked to determine, in contravention of section 69 (at [69]). As such, this ground could be used to reverse the Court of Appeal decision (at [70]).

Issue no. 3: whether the Court of Appeal may make findings of fact on matters on which the arbitral tribunal had made no finding (no)

On the third and last issue, while the Court of Appeal may not make its own findings of fact under section 69 (at [71]), it can infer that the tribunal has implicitly made a finding of fact even if it was not expressly set out in the award (at [72]), in cases where the finding to be inferred is "*one which inevitably follows from the findings which have been made*" by the arbitral tribunal (at [74]).

The Court of Appeal found that, on the facts, discharge was made against presentation of the original bills of lading (at [77]), which was central to its conclusion that the contracts had been varied (at [78]).

Since this finding was deemed not to be inevitably inferable from the findings made by the Appeal Board (at [77]), Lord Hamblen concluded that the Court of Appeal had erred by making this finding of fact, in contravention with the conditions laid down in section 69 of the Act (at [79]).

As such, the UKSC allowed the appeal on the second and third issues, but denied it on the first one.

Contribution by Yoann Lin

Supreme Court of India, 10 April 2024, *Delhi Metro Rail Corporation Ltd v. Delhi Airport Metro Express Pvt Ltd*, 2024 INSC 292

In a decision dated 10 April 2024, the Indian Supreme Court had to set aside an arbitral award using its curative and exceptional jurisdiction under Article 142 of the Indian Constitution so as to correct a "*grave miscarriage of justice*".

On the facts, Delhi Metro Rail Corporation (hereafter the "Appellant") was a state-owned company owned by the Indian Government, which concluded a concession agreement in 2008 with Delhi Airport Metro Express Private Ltd (a consortium made up of foreign companies, hereafter the "Respondent") for the construction of a metro link between New Delhi railway station and the Indira Gandhi International Airport. The agreement contained an arbitration clause and a termination clause. In 2012, the Respondent decided to halt operations on the basis that the line was unsafe to operate and that a series of construction and design defects prevented it from performing its obligations. It then sought to terminate the concession agreement pursuant to the termination clause the same year.

As a result, the Appellant decided to commence arbitration against the Respondent, which culminated in a domestic arbitral award issued in 2017, ruling in favour of the Respondent by finding the termination lawful and ordered the Appellant to pay a substantial amount of money as damages plus interest (close to USD 1 billion).

The Appellant petitioned for annulment of the award before the Delhi High Court, which was heard by a High Court single judge who upheld the award, on the basis that the arbitral tribunal had analysed material and evidence in great detail before reaching a plausible conclusion.

This decision was then appealed before a Division Bench of the same court as allowed by the Indian Arbitration and Conciliation Act 1996, which allowed the appeal and partially annulled the award as being "*perverse and patently illegal*". It found that the arbitral tribunal had failed to be unequivocal regarding the relevant date of termination, and to consider all the relevant issues and facts when ascertaining whether the contract had been validly terminated, such as the effective steps taken by the Appellant to cure the defects.

That decision was then subject to a second appeal to the Indian Supreme court, which reversed the Division Bench's decision and restored the arbitral award. In its decision rendered in 2021, it held that there was no ambiguity as to the date of termination, and the tribunal's finding that the defects had not been cured was one of fact, so that it could not warrant interference from Indian courts.

The Indian Supreme Court's decision was then subject to a curative petition under Article 142 of the Indian Constitution, which provides that "[t]*he Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it* (...)". The petition raised two questions : (i) whether the Indian Supreme Court was justified in restoring the arbitral award which had been set aside by the Division Bench of the High Court on the ground that it suffered from patently illegality, and (ii) whether the curative petition was maintainable.

Issue No. 1 : whether the Indian Supreme Court was justified to restore the arbitral award which had been set aside by the Division Bench of the High Court on the ground that it suffered from patently illegality (no)

On the first issue, Chief Justice Dhanajaya Chandrachud, on behalf of the Indian Supreme Court, explained that, pursuant to section 34 of the Arbitration and Conciliation Act 1996, Indian courts may set aside an award if (i) the subject-matter of the dispute is not capable of being settled by arbitration, (ii) the award is in contravention with Indian public policy, or (iii) the court finds that the award has been vitiated by patent illegality appearing on the face of the award, provided that the award does not arise out of an international commercial arbitration (such as a domestic arbitral award).

Focusing upon the third ground of annulment, the Supreme Court added that while construction of a contract is within the sole domain of the arbitral tribunal, a patent illegality is deemed to arise "*where the arbitrator adopts a view which is not a possible view*", i.e. a view that is "*perverse or irrational*", in a way that "*no fair-minded or reasonable person would take*" (at [38]), by virtue of *Associate Builders v. Delhi Development Authority*, 2015 3 SCC 49. Chief Justice Chandrachud then went on to give examples of patent illegality, which include (at [38]):

- Findings by the arbitral tribunal based upon no evidence;
- Findings by the arbitral tribunal based upon irrelevant material;
- Findings by the arbitral tribunal ignoring vital evidence;
- An award made in breach of the provisions of the arbitration statute (e.g. where no reasons for the decision have been given);
- An award made in breach of the principles of natural justice; and
- An award made by an arbitral tribunal exceeding its jurisdiction (at [40].

The termination clause stipulated that, after communicating a cure notice to the Appellant, the Respondent could terminate the contract if the Appellant failed to cure the defects or take effective steps for curing them within a 90-day cure period. In the case at hand, the arbitral tribunal found that since certain defects had remained after the cure period, it necessarily meant that not only were the defects not cured, but also that no effective steps had been taken by the Appellant. However, the Indian Supreme Court held that this finding was tainted with patent illegality, as the tribunal failed, by doing so, to envisage that effective steps *could* have been and *had* been taken by the Appellant (such as repairs conducted by an independent engineer), although they were not enough to *completely* cure the defects (at [49]). As such, the view taken by the tribunal was deemed to be one that could not have been arrived at on an objective assessment (at [54]).

Furthermore, Chief Justice Chandrachud added that this erroneous and misleading framing of the issue led the arbitral tribunal to also overlook vital evidence on the record (at [55]). On the facts, a joint application had been made by both parties to the Commissioner of the Metro Railway Safety in 2012 one month after the Respondent had issued a termination notice but before the end of the 90-day cure period. In 2013, the Commissioner issued his report concluding that the Appellant's repair works had been successful and that all systems were then properly functioning at various speeds (at [57]). However, since the 'effective steps' aspect of the termination clause was overlooked by the arbitral tribunal, the report from the Commissioner – which was vital evidence on the record which established that the Appellant had in fact cured the defects – was erroneously deemed to be irrelevant (at [56]).

As such, it was held that the arbitral tribunal also failed to consider vital evidence, so that its decision was patently illegal, as no such decision could have been reached by a reasonable person (at [67]).

Issue No. 2 : whether the Indian Court Supreme enjoyed a curative jurisdiction under Article 142 of the Indian Constitution (yes)

On the second issue, the Indian Supreme court recalled – pursuant to the case of *Rupa Hurra v. Ashok Hurra*, 2002 4 SCC 388 – that its curative jurisdiction may only be invoked in order to "*(i) prevent abuse of its process; and (ii) cure a gross miscarriage of justice*", such as in case of a violation of the principles of natural justice, or when a judge failed to disclose their connection with the subject matter or the parties so as to give rise to reasonable doubts as to their impartiality (at [33]). In any case, it is necessary to consider whether "*declining to reconsider the judgment would be oppressive to judicial conscience and cause the perpetuation of irremediable injustice*" (at [32]). In addition, the curative jurisdiction should not be adopted as a matter of ordinary course, nor be "*used to open the floodgates and create a fourth or fifth stage of court intervention in an arbitral award*" (at [70]).

In the present case, the Indian Supreme Court held that it had erred in law when restoring a patently illegal arbitral award and deciding to reverse the decision of the Division Bench of the High Court which had correctly applied the law to the facts. This created a grave miscarriage of justice, which warranted the intervention of the Supreme Court by virtue of Article 142 of the Indian Constitution (at [68]).

As such, it allowed the curative petition, and ordered that the parties be placed back in the position they were, following the decision of the Division Bench of the High Court (at [69]).

Contribution by Yoann Lin

High Court of Singapore, 14 March 2024, *Crystal-Moveon Technologies Pte Ltd v. Moveon Technologies Pte Ltd* [2024] SGHC 72

In its decision of 14 March 2024, the High Court of Singapore dismissed the Respondent's appeal regarding a stay of proceedings in favour of arbitration under section 6 of the Singaporean Arbitration Act of 2001 (hereafter the "AA") on the grounds of "*sufficient reason*" as provided for in the same section.

In this case, Crystal-Moveon Technologies Pte Ltd (hereafter the "Claimant") and a publicly listed company in China, Zhejiang Crystal-Optech Co Ltd (hereafter "COC"), agreed to participate in a joint venture in 2021. For this operation, Moveon Technologies Pte Ltd (hereafter the "Respondent") was incorporated in Singapore.

Around 1 June 2022, an Equipment Transfer Agreement (hereafter the "ETA") was concluded for the transfer of certain equipment from the Claimant to the Respondent. The ETA concerned two units of "A1350" and one unit of "Hitachi Regulus 8100, FESEM with Hybrid Ion Miller, IM4000Plus and Oxford EDX" (hereafter "Equipment AH"). The ETA included an arbitration clause submitting any disputes to the Singapore International Arbitration Centre (hereafter the "SIAC").

The Claimant contended that an agreement was reached, whereby it would initially bear expenses on behalf of the Respondent to meet the latter's deadlines, which the Respondent would later reimburse. As a result, the Claimant initiated steps to recover from the Respondent, *inter alia*, the capital expenditures incurred in its operations (hereafter the "Capital Expenditure Claim").

The Claimant made a demand for the reimbursement of equipment expenses totaling USD 5,910,246.45 and SGD 959,308.93 (hereafter the "Equipment Claims"), also encompassing expenses related to Equipment AH. It asserted that the Respondent had agreed to settle these amounts, as evidenced by email exchanges between the parties from January to May 2022. The Claimant thus based its claims upon email correspondence rather than on the ETA.

On 16 January 2024, the learned Assistant Registrar (hereafter the "AR") confirmed that the claim fell within the scope of the ETA's arbitration clause but rejected the Respondent's stay application. The Respondent appealed this decision before the Singaporean High Court.

The two main issues were thus whether the Equipment Claims and specifically the Equipment AH were covered by the ETA's arbitration clause, and whether there was "*sufficient reason*" not to submit the dispute to arbitration under section 6 of the AA.

The High Court first interpreted the scope of the arbitration clause using the generous approach of what a "*rational businessman*" would intend, meaning that the parties are presumed to have intended to include all disputes within the scope of the arbitration clause, unless proven otherwise. However, it emphasised that this generous approach may be displaced, especially when there are "*compelling reasons, commercial or otherwise*" that may contradict the presumed intention of the parties to submit disputes to arbitration.

Although the Claimant argued its case based upon email correspondence rather than the ETA, the High Court concluded that the ETA clearly governed the transfer of Equipment AH. The Claimant did not contest the validity of the ETA or its application to Equipment AH. Therefore, the claims related to Equipment AH fell within the scope of the arbitration clause contained in the ETA.

Regarding the Equipment Claims, the Respondent argued that all transfers were subject to arbitration, while the Claimant disputed this by asserting that only transfers of Equipment AH were covered by the arbitration agreement. The High Court held that additional written agreements were necessary to extend the scope of arbitration beyond Equipment AH. Therefore, arbitration was limited to Equipment AH, excluding other equipment transfers from its scope.

Next, the High Court clarified that, under section 6 of the AA, the burden of showing that there is a "*sufficient reason*" not to submit the case to arbitration lies with the party seeking to persuade the tribunal to refuse a stay. Assuming that the opposing party is ready and willing to proceed to arbitration, the court would only refuse a stay in "*exceptional circumstances*". To this end, the High Court highlighted that all of the claims in this case arose out of the joint venture between the Claimant and COC, with equipment purchased by the Claimant on behalf of the Respondent. Despite the separate nature of the Equipment AH claim governed by the ETA, they were still considered to form part of the joint venture's expenditures, and thus connected to the Equipment Claims and the Capital Expenditure Claim. The High Court therefore considered the risk of conflicting decisions between the potential arbitral tribunal and itself, and refused the stay of arbitration in order to guarantee the efficiency and fairness of this dispute's resolution.

Finally, the High Court addressed another scenario where a stay in favour of arbitration would have been refused, that is when the claim is considered "*undisputed*" or "*indisputable*". It highlighted that an "*undisputed*" claim "*requires a clear, unequivocal admission*". In this case, the High Court concluded that the claims for Equipment AH were neither undisputed nor indisputable, as there was no clear and unequivocal admission from the Respondent regarding liability and amount. The High Court also noted that documentary evidence provided by the Claimant, such as the unanimous resolution of the Respondent's directors approving payment for Equipment AH to the Claimant, was insufficient to prove such an admission. Therefore, the High Court believed that the payment claim for Equipment AH had to be heard by the High Court and not by an arbitral tribunal.

Contribution by Meily Lam-Khounborind

Swiss Federal Supreme Court, 3 April 2024, n° 4A_244/2023

In a decision dated 3 April 2024, the Swiss Federal Supreme Court dismissed an application to set aside an arbitration award rendered in Geneva on 11 April 2023, pursuant to Article 26 of the Energy Charter Treaty (hereafter "ECT").

The dispute arose out of an investment by French company EDF in a renewable energy project in Spain, after Spain had repealed certain decrees pertaining to Feed-in-Tariffs (hereafter "FITs") for photovoltaic installations and adopted a new legislative arsenal aimed in particular at replacing fixed FITs by a remuneration that would allegedly ensure investors a reasonable rate of return. The company brought an action against the Kingdom of Spain under the arbitration clause of Article 26 of the ECT after changes were made to the applicable Spanish regulations.

In an award issued on 11 April 2023, the *ad hoc* arbitral tribunal declared that it had jurisdiction over the dispute and ordered Spain to pay € 29.6 million for breaching the ECT. The arbitral tribunal considered that, by amending its legislation, Spain had failed in its duty to treat EDF's investments fairly and equitably.

On 16 May 2023, the Kingdom of Spain brought an action for annulment against the award before the Swiss Federal Supreme Court, alleging *inter alia* that the arbitral tribunal lacked jurisdiction. The Kingdom of Spain argued that such lack of jurisdiction resulted from the fact that the dispute was intra-European, that the arbitration clause contained in Article 26 of the ECT was incompatible with European Union ("*EU*") law, and that, in the event of a conflict of laws, EU law should take precedence over the ECT.

The Federal Supreme Court began by highlighting that EU bodies have been waging a crusade against international arbitration for several years.
It went on to say that it was not unaware of the decision adopted by the Court of Justice of the European Union (hereafter the "CJEU") in the *Komstroy* case. However, the Court stated that it was "*not convinced by the reasoning adopted by the CJEU in Komstroy, since it is based essentially, if not exclusively, upon the requirement of preserving the autonomy and specific character of EU law, without in any way taking account of international law or the rules on treaty interpretation*". Consequently, and since Swiss courts are not bound by decisions taken by the CJEU, the Swiss Supreme Court concluded that it would not attach any "*particular value*" to the *Komstroy* decision.

The Federal Supreme Court ruled that the ECT must be interpreted in good faith, in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose. In this case, it considered that this meant that the signatories of the ECT unconditionally consented to arbitration. The Swiss court added that if this consent was to be limited, this would have been indicated in the ECT, as may have been the case in other multilateral treaties that incorporate disconnection clauses, authorising EU Member States not to apply the rules of such a treaty in their mutual relations.

In light of these factors, the Court considered that the unconditional consent given by the Kingdom of Spain to the submission of any dispute to arbitration encompasses intra-European disputes, that there is no conflict between Article 26 of the ECT and EU treaties, and that there is no reason, in light of the rules of conflict between international treaties, to give precedence to EU law over the ECT.

Consequently, the Swiss Federal Supreme Court dismissed the action for annulment brought by the Kingdom of Spain against the arbitration award rendered on 11 April 2023 and ordered it to pay the legal and procedural costs.

Contribution by Valentine Menou

INTERVIEW WITH JAD EL HAGE

1. **To begin with, could you tell us about your background and the reasons as to why you chose international arbitration as a career option?**

I have always aspired to study law. It was a choice that naturally came to me after my baccalaureate. I obtained my undergraduate degree in comparative French and Lebanese law and my master's degree in business law from the Saint Joseph University of Beirut (USJ). I then decided to continue my studies at the University of Paris II Panthéon-Assas, where I undertook a master's degree in international business law under the supervision of Professor Daniel Cohen. With regards to choosing to work in arbitration, your question is very pertinent. When you study law, which I view as a culture rather than a profession, you do not necessarily know what direction you are going to take. I discovered this method of dispute resolution during courses at The Hague Academy of International Law and especially when I took part in the "Willem C. Vis International Commercial Arbitration Moot, Vienna", with the USJ team, an experience that I wanted to repeat with the Paris II Panthéon-Assas team. Arbitration has enabled me to develop not only my legal skills, particularly in drafting memorandums for which research and reflection on the arguments to be developed are essential, but also my presentation skills during pleadings, an exercise that I found fascinating. Arbitration is an all-encompassing field which makes it intellectually stimulating. My internships in arbitration have enabled me to work in my three fluent languages. I have also chosen to write a thesis on arbitration, which I will discuss in my answers below. Beyond the technical aspects, arbitration is a community that brings together people from all around the world, from different legal cultures (Common Law and Civil Law) and different nationalities – what could be more beautiful than that! When you practice arbitration, you don't get bored instead you think, communicate, and travel.

2. **You are pursuing a Ph.D. at Université Paris Dauphine-PSL and are writing a thesis entitled "Le contrôle des sentences en matière d'arbitrage d'investissement" ("The review of arbitral awards in investment arbitration"). Can you tell us more about the subject of your thesis, and the reasons as to why you decided to write one?**

After I first started practicing arbitration in law firms, I had the opportunity to observe the arbitration system and to notice dysfunctions, especially in investor-state arbitration where politics and public interest are particularly relevant. Investment arbitration is a topic that requires thorough consideration. Because of this, I wanted to develop my skills by undertaking a personal project. After reading my thesis proposal, Professor Ibrahim Fadlallah, who had already retired, gave me the go-ahead to start writing a thesis on the review of awards in investment arbitration under the supervision of Professor Sophie Lemaire at Paris Dauphine University. As for why I chose this topic, historically, we have reached the stage where the issue of the review of arbitral awards in investment arbitration needs to be studied in detail. Also, when awards are being reviewed, the major dysfunctions to which I have referred can be resolved. The aim of this thesis is therefore to try to improve the system through proposals and suggestions which are the fruit of an objective analysis of the current state of the system and a selection of the criticisms made against this system. As such, this is not a research paper to be filed away in a library archive. I am preparing a dynamic thesis that oscillates between international law and comparative law, between constructive criticism and highlighting what works well. To answer your question about the reasons for my thesis, and more specifically the reason as to why a thesis in arbitration, I believe that a thesis in arbitration allows you to step back and take an overall view, away from the interests of one of the parties at a proceeding. This exercise of thoroughness, research, perseverance, reflection, understanding and perfecting has given me greater autonomy, maturity, and curiosity. As a result, writing a thesis is not only a responsibility towards the scientific community, but also a source of pride and an essential boost to the legitimacy of practitioners wishing to contribute to the development of knowledge and, above all, to settle disputes fairly when sitting as an arbitrator. To keep the suspense going, I will let you read my thesis once it is published!

3. **You have participated in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III sessions on Investor-State Dispute Settlement Reform in Vienna and New York. Could you share with us what this experience was like, and what the sessions led to?**

As I decided to embark upon a research project on investment arbitration, my participation in the sessions of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) on the reform of investor-state dispute settlement enabled me to incorporate into my thesis practical and political considerations that I would not have been able to observe in the library. The discussions within the Working Group and my exchanges with specialists, academics and practitioners have enabled me to enrich my thesis on the question of the control of investment awards, which is one of the Working Group's priorities and for which elements of reform are planned. The negotiation of multilateral treaties, especially when it involves a major reform of an entire system, highlights the political nature of investment arbitration. The speeches made during the formal sessions do not represent the entire reform process.

In addition to these, one should add the tension between capital-exporting and capital-importing countries, regional groupings, alliances based upon common interests, concessions, compromises, and informal exchanges. This combination of factors is what creates an impetus for change. With regards to the organisation and structure of UNCITRAL, it is composed of the Commission of the 70 member states, several working groups dealing with different subjects and the UNCITRAL Secretariat. Now returning to Working Group III, decisions are taken, in principle, by consensus. One should note that not only do representatives of states participate therein, but also NGOs, institutions and a community of lawyers who represent all stakeholders of the system. The UNCITRAL Working Group III began work in 2017 and its mandate was limited to procedural issues relating to the settlement of investor-state disputes. Nevertheless, the *prima facie* broad definition of what constitutes procedural issues – and therefore the scope of the mandate – has been an issue that has often arisen during meetings. There have been three successive phases: the first involved identifying the problems in investment arbitration, the second aimed to decide whether reform would be desirable, and the third concerned the development of solutions, *i.e.,* elements of reform to be proposed to the Commission. At the moment, the third phase is in progress. A number of ready-made reform proposals have been or will be submitted to the Commission. These include two Codes of Conduct for arbitrators and judges of a potential Multilateral Investment Court, provisions on mediation in investor-state disputes and provisions for setting up an advisory centre to assist developing and least developed countries in particular. The Working Group has therefore decided to submit the elements of reform to the Commission as they were gradually finalised, bearing in mind that the way in which the elements of reform will be incorporated is in itself a question to be decided by the Group. Several aspects of the reform are still being negotiated, and time is running out, while the financial resources and time available to finalise this reform are rapidly diminishing. Consequently, the results of the Working Group bear witness to the success of the process.

4. **As an academic, you are teaching various courses at university and were recently invited to speak at a conference on the « Interaction between arbitration and human rights » in October 2023. For those who were not able to attend it, could you explain what this was about, and can you share your experience as a lecturer?**

Teaching at university is not only an exciting experience that I had always wanted to do, but also a responsibility. I started teaching quite early on with students who were barely younger than me, which made it easier for us to communicate and understand each other. Intellectual generosity is essential when teaching, as are the abilities to listen, reformulate, and summarise. In addition, rigour, precision, sensitivity, and empathy are also vital when working with students. Also, I try to fill the endless hours of teaching, which represent the culmination of a long process of preparation, with my passion for the subject. The reason for this is that at the end of the day teaching is a theatrical performance that can keep the audience interested and engaged or leave them uninspired taking home little more than a final grade. I believe that the key to a teacher's success, even before ensuring the success of their students, lies in the teacher's ability to encourage critical thinking. This means explaining the whys and wherefores, showing them that the law is not purely abstract but is closely linked to their everyday lives. The law evolves in response to the needs of society and is the result of the development of history. In short, my aim is to transform what they see as an obligation into a good opportunity for exchange, reflection, and contextualisation of everything that may seem remote and theoretical.

Concerning the courses, I have had the opportunity to teach – both in lectures and seminars – contract law, tort law, corporate law, and legal methodology. Teaching is a two-way process; you impart knowledge but also gain knowledge along the way through experience. As for my area of expertise, *i.e.,* arbitration, the fact that I have studied these subjects in depth has enabled me to better understand the legal issues that usually arise in the context of an arbitration, because ultimately arbitration is a procedure, in the context of which substantial legal issues arise, particularly in relation to contract law and corporate law. To those aspiring to teach, remember to keep smiling!

The academic world is not limited to teaching; it also includes researching, writing articles and, above all, speaking at conferences. I recently spoke at one on the interaction between investment law and human rights. Very briefly, while investment law has traditionally been limited to protecting foreign investments in the host country, it can no longer afford to overlook other imperatives, particularly environmental ones, and human rights. Investment law is political by nature and taking these considerations into account allows a conflict's political and real dimensions to be considered. The arbitrators' role is certainly to apply the law but also to put the case in its political context, otherwise, they lose all legitimacy with those directly concerned by the conflict that they are deciding on. Investment treaties have been described by some as "old-fashioned", underscoring the need to update their provisions. The need to take these considerations into account has prompted the system's law-making bodies to incorporate into investment treaties provisions imposing obligations on investors and states. I asked myself several questions in the course of my presentation. First, the legitimacy of arbitrators' interest in dealing with human rights. I then addressed the question on the relationship between arbitration proceedings and human rights, in particular the question of the adaptability or adaptation of investment arbitration proceedings to human rights issues. I mentioned, *inter alia*, the possibility for states to submit counterclaims, and initiatives such as the Hague Rules on Business and Human Rights Arbitration (the question of consent to these rules remains central). Finally, I dealt with the question concerning the relationship between substantive law and human rights. While the place of human rights in the UNCITRAL Working Group III reform project has been limited, the OECD, for example, is doing a good job in bringing investment treaties into line with the Paris Agreement, and certain "new generation" treaties are now making sure that they include provisions on human rights. In conclusion, getting out of the investor-state arbitration system is by no means the right solution. Responsibility for human rights is collective and rests upon states (the system's law-making bodies), states (public authorities), arbitrators who, through their power of interpretation, can ensure that human rights considerations are respected, and investors who are protected by the system, but not at all costs.

5. Before sitting the Beirut bar exam, you interned at many international law firms. How was the experience of working in arbitration departments of law firms?

At the end of my studies, I began to feel the need to put my knowledge into practice. I therefore decided to intern at various law firms specialising in international arbitration. My experiences at Derains & Gharavi International (Paris), Quinn Emanuel, King and Spalding, Eversheds Sutherland and Linklaters strengthened my passion for the practice of arbitration. I worked on diverse arbitration cases and on applications for both annulment and enforcement of awards. A lot can be learnt by working in law firms.

You develop a certain thoroughness, an eye for detail, an ability to deal with emergencies, as well as a great flexibility, tenacity, and perseverance. Teamwork is also important. Working on commercial and investment arbitration cases administered by different institutions with different arbitration rules and different laws applicable to the merits has enabled me to understand the benefits of using arbitration to provide the users of the system with whom I have worked, whether it be states or private entities, with high-quality services. It is also exciting to work on cases in different sectors, including the construction and energy sectors, as well as in different parts of the world, particularly the Middle East and North Africa. Working in Arabic is important to me, and I have come to realise while working here in Paris how important it is to have a good command of this beautiful language.

6. **You have had very diverse experiences throughout your curriculum: from working in law firms and at the UNCITRAL Secretariat, being a PhD candidate and teaching fellow, to participating in international arbitration moot competitions and volunteering as arbitrator in pre-moot events. In light of these credentials, do you have any upcoming future projects?**

As you have mentioned, I have also worked in institutions. I had the opportunity to work in the UNCITRAL Secretariat (UN Office of Legal Affairs) on issues relating to mediation and arbitration. The aim was to promote arbitration, harmonise it through consistent interpretation of provisions and keep abreast of recent developments to meet the needs of states and companies involved in international trade. Arbitration is much more than a case to be won or lost; it is an instrument for bringing people together. Finally, as I particularly enjoyed working in an institution, I shall soon be joining the Centre of Mediation and Arbitration of Paris (CMAP), more specifically its "Alternative Dispute Resolution Unit", to manage mediation and arbitration cases and work with mediators, arbitrators, counsel, parties, and courts, so as to achieve, against all odds, fairer, more appropriate and better organised justice.

I wish to thank PBA for this invitation and send my best wishes to its entire team.

NEXT MONTH'S EVENTS

7 June: Conference "Cultural differences in international arbitration"

Organised by the Francarbi Association

Where? Maison du Barreau – 2 rue de Harlay, 75001 Paris

Website: https://www.30ansdefrancarbi.org (mandatory sign-up and fee)

17 June: Practical workshop "Challenges based upon arbitral jurisdiction: state of play and avenues for thought"

Organised by the Comité français de l'arbitrage CFA

Where? Maison du Barreau, Salle Gaston Monnerville – 2 rue de Harlay, 75001 Paris

Website: https://www.cfa-arbitrage.com/evenements/detailevenement/118/-/le-recours-fond%C3%A9-sur-la-comp%C3%A9tence-arbitrale-etat-des-lieux-et-pistes-de-r%C3%A9flexion.html (mandatory sign-up)

17 June: Lecture "How Not to be a Meme: Technology and International Arbitration"

Organised by the Arbitration Academy

Where? Comité Français de l'Arbitrage – 31 rue de la Boétie, 75008 Paris

Website: https://docs.google.com/forms/d/e/1FAIpQLScBjcLdp6qF1B0kPK2iFFnflJJUzYnMbwYfypvG_5NbvxGj2g/viewform (mandatory sign-up)

26 June: Debate "Is the finality of arbitral awards an essential attribute of international arbitration?"

Organised the Arbitration Academy

Where? Comité Français de l'Arbitrage – 31 rue de la Boétie, 75008 Paris

Website: https://docs.google.com/forms/d/e/1FAIpQLSeCbXaFddq-TIwMMS82-2Xod0R51H7av2hYa5OKRTImtQehmQ/viewform (mandatory sign-up)

26 June: Forum "Foreign Direct Investment Control" followed by a networking event

Organised by ESCP Business School, and Fusion & Acquisitions Magazine

Where? ESCP Business School – 79 avenue de la République, 75011 Paris

Website: https://escp.eu/events/forum-foreign-direct-investment-control (mandatory sign-up)

27 June: Conference "L'arbitrage face à l'émergence de nouveaux « droits humains »"

Organised by the Comité français de l'arbitrage CFA

Where? Maison de la Chimie, Salle 262 – 28 rue Saint-Dominique, 75007 Paris

Website: https://www.cfa-arbitrage.com/evenements/detailevenement/116/-/l-arbitrage-face-%C3%A0-l-%C3%A9mergence-de-nouveaux-droits-humains.html (mandatory sign-up and €50 fee)

2 July: Lecture "The effect of corruption on the decisions of international arbitation tribunals: from the landmark Judge Lagergren's 1963 Award in ICC Case No. 1110 to current times"

Organised by the Arbitration Academy

Where? Comité Français de l'Arbitrage – 31 rue de la Boétie, 75008 Paris

Website: https://docs.google.com/forms/d/e/1FAIpQLScFOnCJ5xoMzvcYH8-y0fwlPskcvjE6joEuouQm582kA06VHA/viewform (mandatory sign-up)

INTERNSHIP AND JOB OFFERS

LAW PROFILER

INTERNSHIP
ALEM & ASSOCIATES

INTERNATIONAL ARBITRATION
Start date: July 2024
Duration: 6 months
Location: Abu Dhabi

INTERNSHIP
A&O SHEARMAN

LITIGATION, ARBITRATION AND INVESTIGATIONS
Start date: July2024
Duration: 6 months
Location: Luxembourg

INTERNSHIP
NORTON ROSE FULBRIGHT

LITIGATION AND ARBITRATION
Start date: July 2025
Duration : 6 months
Location : Paris

INTERNSHIP
SQUIRE PATTON BOGGS

LITIGATION, INSURANCE & ARBITRATION
Start date: July 2025
Duration: 6 months
Location: Paris