PARISBABYARBITRATION

BIBERON

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French and foreign courts' decisions

International arbitral awards and decisions

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OUR PARTNERS

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Founded in 2019, Law Profiler 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.

Founded in 1995, the Centre for Mediation and Arbitration of Paris (CMAP) is a leading French institution resolving commercial and civil disputes through mediation and arbitration. With expert mediators and arbitrators, CMAP provides tailored solutions for efficient, amicable outcomes. Its commitment to alternative dispute resolution fosters a culture of collaboration and transparency in the legal landscape.

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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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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 editions of the Biberon and to subscribe for monthly updates, kindly visit our website: parisbabyarbitration.com (currently undergoing maintenance).

We 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!

Sincerely yours,
The Paris Baby Arbitration team

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Paris, 11 June 2024, nº 22/12494, *State of Senegal*

In a decision dated 11 June 2024, the Paris Court of Appeal dismissed an action for annulment brought by the State of Senegal and provided important clarifications concerning the grounds for annulment relating to international public policy, violation of due process and the breach by the arbitral tribunal of the mandate conferred onto it.

Following a dispute arising from a concession agreement, the Senegalese company GTA Environnement initiated arbitration proceedings against the State of Senegal before the ICC. Subsequent to the initiation of the arbitration proceedings, the company was placed under judicial liquidation by a Senegalese Court. In a procedural order, the arbitral tribunal decided that the opening of these proceedings would have no effect on the arbitration proceedings. The tribunal thus rendered its award, ruling in favour of GTA. The Dakar Court of Appeal subsequently overturned the liquidation judgment.

The State of Senegal filed for annulment before the Paris Court of Appeal, on three grounds : the recognition and enforcement of the award would be contrary to international public policy (1), due process has not been followed (2), and the arbitral tribunal breached the mandate conferred onto it (3).

The Court rejected all these grounds for annulment, while providing important clarifications as to their substance.

(1) On the question of whether the award is contrary to **international public policy**, the Court of Appeal first looked at whether there has been a violation of French insolvency law provisions. The Court confirmed the public-policy nature of French insolvency law provisions with respect to the principle of prohibition of new proceedings after the opening judgment, the principle of the divestiture of the debtor in case of liquidation proceedings (the fact that the liquidator takes over the administration of assets), and the principle of stay of pending proceedings at the date of the opening judgement. However, the Court added that the conformity of an award with international public policy is assessed on the day the judge rules. As the liquidation judgment was overturned on appeal, it was retroactively annulled and stripped of all scope. No violation of international public policy could therefore be found. The fact that the State of Senegal has lodged an appeal to the Supreme Court against this ruling is irrelevant, since this appeal does not have a suspensive effect.

The Court also addressed the principle "*nul ne plaide par procureur*," a violation of which was alleged by the State of Senegal. First of all, the Court defined this principle, stating that its sole aim is to protect the rights of the defendant, which would be prejudiced if the true identity of the other party was concealed and therefore if the said defendant would be deprived of the possibility of putting forward personal arguments. The Court then clearly stated that this principle is not part of international public policy.

The court then checked whether the award complied with procedural public policy. Most notably, the State of Senegal alleged that the arbitral tribunal based its decision on an expert's report which was not communicated in its original form, but only in a language not spoken by the expert. However, the court rejected this argument, holding that it is up to the arbitrators, and not to the annulment judge, to assess the validity, relevance and scope of the evidence submitted. The translation of an expert's report into a language

other than the one in which it is written is therefore not likely to result in a violation of procedural public policy.

(2) With regard to the **violation of due process**, the State of Senegal argued that the arbitral tribunal motivated the award by using elements that were not linked to the legal order agreed upon and debated by the parties; certain sentences or parts of sentences are cited in support of this argument. Nevertheless, the Court maked two interesting clarifications. On the one hand, it stated that the use by the arbitrator of a law other than that chosen by the parties is an argument arising from the tribunal's breach of the mandate conferred onto it, and not the violation of due process. As the claimant did not invoke the appropriate ground for annulment, the court refused to examine the argument. On the other hand, the Court pointed out that respect of due process cannot be assessed sentence by sentence - no breach was found in this case, since the isolated sentences cited by the claimant are taken out of context and are in fact part of a general statement of reasons, dealing with issues amply debated by the parties.

(3) With regard to the **tribunal's breach of the mandate conferred upon it**, the Court pointed out that the subject of the dispute is determined solely by the respective claims of the parties; while the tribunal is required to respond to each of these claims, it is not required to respond one by one to all the allegations made by the parties. The Court also pointed out that the mere fact that the arbitrator affirms that his assessment of the lost profit is "equitable for the parties" is not sufficient to imply that the arbitrators have violated their mission by ruling in equity, especially since legal grounds are otherwise mobilised in the motivation. Lastly, the Court noted that the ICC Rules of Arbitration do not lay down any specific rules for recalling the facts or reopening the debate; no breach of these rules can therefore be found.

Contribution by Anca Nechita

Paris, 10 September 2024, nº 24/00152, *Republic of India*

On 10 September 2024, the Paris Court of Appeal addressed the question of whether a party that had been assigned rights to an arbitral award could intervene in proceedings for its enforcement before French courts. In its ruling, the Court overturned the pre-trial judge's order authorising US companies to intervene in enforcement proceedings after being assigned rights to the award by their Mauritian subsidiaries.

The dispute arose from a contract concluded in 2005 between Devas Multimedia Private Limited - an Indian company - and Antrix Corporation Ltd - an Indian public company. The contract involved the allocation of part of the Indian electromagnetic spectrum for the provision of satellite telecommunications services. However, in 2011, Antrix notified Devas of the termination of the contract, invoking a decision by the Indian government to reserve the S-band spectrum for strategic activities.

In response, Devas initiated several arbitration proceedings. The first arbitration, under the auspices of the International Chamber of Commerce, resulted in an arbitral award in Devas' favor in September 2015. At the same time, three Mauritian companies, shareholders of Devas, initiated arbitration against the Republic of India, based on the 1998 Bilateral Investment Treaty between India and Mauritius. This arbitration, conducted under the auspices of the Permanent Court of Arbitration in The Hague, led to two awards: one on jurisdiction and liability in July 2016, and another on damages in October 2020.

After a French judge granted the enforcement of the award, the shareholders transferred their rights to three American companies. India appealed the exequatur decision, while the assignees sought to be part of the proceedings.

First, the Court examined the **admissibility of the intervention** by the American companies in the exequatur appeal proceedings, based on Articles 325 and 554 of the French Code of Civil Procedure (CPC). It recalled that the provisions concerning appeals of exequatur orders, both in domestic and international arbitration, are strictly governed by Article 1527 of the CPC. The Court thus affirmed that the voluntary intervention of third parties is not permitted in annulment proceedings or appeals against exequatur orders, "*except by the express will of the parties, which can only result from the parties' agreement*" (§41).

Subsequently, the Court found that the American companies, described as "*assignees*," could not claim a right of action to annul the arbitral award "*in their personal capacity*", nor could they intervene in the appeal of the exequatur order, as these rights are reserved for the parties to the arbitration. The Court emphasized that intervention "*is independent of any subrogation*". The assignment agreements do not provide for subrogation. Therefore, due to the lack of explicit mention in the assignment agreements, the Court rejected any presumption of subrogation.

Second, the Court rejected the notion of a **denial of justice**, stating that the inadmissibility of the intervention does not deprive a third party of its right to access a judge, in accordance with Article 6 of the European Convention on Human Rights. It also indicated that a decision to reject an intervention is not a denial of justice as long as the case continues regularly between the parties bound by the arbitration clause.

Thus, this decision reflects a strict interpretation of the conditions for intervention in international arbitration matters, reaffirming the necessity of direct participation by the parties to the arbitration for any legal action in enforcement or annulment proceedings.

Contribution by Elena Andary

Paris, 1 October 2024, nº 21/11112, *State of Libya*

The International Commercial Chamber of the Court of Appeal of Paris (hereinafter "ICCC-CA"), in a ruling dated 1 October 2024, overturned the order for the enforcement of an international arbitration award on the grounds that the adversarial proceedings principle had not been respected during the arbitration process.

Libya underwent a significant revolution in 2012, plunging the country into a situation of insecurity and prompting the Libyan state to undertake a significant restructuring of its judicial police force. In this context, the Libyan National Transitional Council (hereinafter "LNTC"), a state entity, signed five commercial contracts with an Italian company in the same year. These contracts, along with their amendments, concerning the importation of police equipment and the provision of training services, were assigned in 2014 to Siba Plast, a Tunisian company.

Siba Plast, alleging that the LNTC had failed to fulfil its obligations under the aforementioned commercial agreements, initiated ad hoc arbitration, resulting in an award issued on 28 November 2014, condemning the Libyan state to pay over 280 million euros to Siba Plast for all the contracts. In 2017, the Paris "*tribunal de grande instance*" issued an order for the enforcement of this award in France. However, the Libyan state appealed this order on 15 June 2021, citing four grounds for refusal of enforcement under Article 1520 of the French Code of Civil Procedure: irregularity in the constitution of the arbitral tribunal, violation of the principle of adversarial proceedings, non-compliance of the arbitral tribunal with its assigned mission, and the inconsistency of enforcing such an award with international public policy. Libya argued that it had not been given the opportunity to defend its position fairly, claiming that the arbitral tribunal had not made sufficient efforts to allow it to present its views in adversarial proceedings before issuing a default award, notably by failing to notify it of the hearing and not providing a reasonable time frame to appear.

The Paris Court of Appeal was thus asked to rule on whether the principle of adversarial proceedings had been respected during the arbitration process at issue and assess its implications for the enforcement order. The judges noted that the arbitral tribunal had not respected the principle of adversarial proceedings, which requires that "nothing that served as a basis for the arbitrators' decision be excluded from their contradictory debate" (§30). Indeed, Libya had not been properly notified of the arbitration proceedings. Notifications sent by Siba Plast using inappropriate email addresses did not ensure that Libya could fully exercise its rights. Moreover, the Court emphasized the absence of evidence confirming the notification of hearing summonses and the documents presented.

Consequently, in compliance with Articles 1520 and 1525 of the French Code of Civil Procedure, the Court overturned the enforcement order of the arbitration award on the grounds that the principle of adversarial proceedings was not respected during the arbitration process that led to the default award. Additionally, the Court rejected the request for enforcement of this award in France.

This decision highlights the importance of the principle of adversarial proceedings in arbitration. This principle requires that parties be duly informed, with the opportunity to participate in the proceedings and confront their arguments with those of the opposing party. Therefore, arbitral tribunals are required to ensure adequate and effective notification throughout the arbitration process, even when they issue default awards.

Contribution by Rheda El Hamzaoui

Supreme Court of the United Kingdom, *UniCredit Bank GmbH (Respondent) v. RusChemAlliance LLC (appellant)* [2024] UKSC 30

In a highly anticipated judgment, the Supreme Court of the United Kingdom dismissed an appeal in which Appellant sought to challenge a ruling by an English court granting an anti-suit injunction which prevented him from pursuing, in breach of an arbitration agreement, Russian legal proceedings against the respondent.

In this case, RusChem, a Russian company, entered into two contracts for the construction of liquified natural gas and gas processing plants in Russia. Under the said contracts, RusChem agreed to make advance payments of around €2 billion to the German companies (hereinafter "the Contractor"). The performance of the Contractor's obligations was guaranteed by bonds, seven of which were issued by Respondent, UniCredit, a German bank. Each contract contained in these bonds designated English law to govern the contract and had an arbitration clause in favour of Paris as the seat of arbitration under the International Chamber of Commerce rules.

The dispute arose following the European Union's introduction of sanctions against Russia due to its invasion of Ukraine in February 2022. As a result of these EU sanctions, the Contractor could not continue to perform and RusChem consequently terminated the contracts and requested the return of the advance payments. Both the Contractor and UniCredit refused to make the payments, either for the reimbursement of the advance payments or under the bonds, on the ground that it was prohibited by article 11 of EU Regulation No 833/2014 to make such payments.

On the first hand, RusChem, as a result of the refusal of payments, started proceedings, on 5 August 2023, against UniCredit before the Arbitrazh Court of St Petersburg in Russia, claiming €448 million under the bonds. Under Article 248.1 of the Arbitrazh Procedural Code, Russian Arbitrazh Courts have exclusive jurisdiction over disputes between Russian and foreign persons arising from foreign sanctions. On 1 November 2023, the Russian judge ruled in favour of RusChem and confirmed the exclusive competence of the Arbitrazh Courts of the Russian Federation. These proceedings were, however, honourably stayed pending the outcome of the proceedings in England.

On the other hand, UniCredit began proceedings before the Commercial Court in London on 22 August 2023, for an interim injunction prohibiting RusChem from continuing the Russian proceedings. RusChem disputed the English court's jurisdiction to hear UniCredit's claim. At the hearing, the High Court judge ruled that the English court had no jurisdiction, but upheld the interim anti-suit injunction until the end of the appeal procedure.

In January 2024, the Court of Appeal allowed the appeal and granted a final anti-suit injunction requiring RusChem to discontinue the Russian proceedings. The Court of Appeal decided that the English courts had jurisdiction because (a) the arbitration agreements in the bonds were governed by English law, and (b) England and Wales is the proper place in which to bring the claim.

The sole issue that arose in front of the Supreme Court of the United Kingdom was whether the English court had jurisdiction over UniCredit's claim. The Supreme Court therefore looked at both of the Court of Appeal's conclusions in turn, starting with "the governing law issue" and then "the proper place issue".

On the governing law issue, the Supreme Court relied on both *Enka v Chubb (2020)* and *Kabab-Ji v Kout Food (2021)* to apply the general principle that in the absence of agreement, the system of law that governs an arbitration agreement is the choice of law governing the whole contract, even when the parties chose a different system of law as the seat of arbitration. Lord Leggatt described this interpretation as "*natural*" due to it providing "*certainty, achieves consistency, avoids complexities and uncertainties, avoids artificiality and ensures coherence*". The difficulty, however, of such a conclusion, is that the current draft bill to reform the UK Arbitration Act 1996 follows a recommendation of the Law Commission and sets the default law of the arbitration agreement as the law of the seat. Nevertheless, until publication, the draft remains open to modification. The Supreme Court added that there is "*no international consensus in favour of either rule*", but that it was clear in this case that the parties had agreed the arbitration agreements in the bonds would be governed by English law.

On the proper place issue, the Supreme Court ruled that it was not sufficient to establish that the claim fell within the contract gateway under the English law Civil Procedure Rules, but that England and Wales had to be the proper place in which to bring the claim. In applying fundamental principles such as *forum non conveniens* and *pacta sunt servanda*, the Supreme court considered many factors such as international policy to uphold arbitration agreements (New York Convention 1958), compatibility of the claim with the arbitration agreement, the inability of the French courts to grant anti-suit injunctions and the lack of coercive force, or possible enforcement in Russia, of an arbitration award granting an interim measure. Neither French courts nor arbitration proceedings could provide an effective remedy for RusChem's breach of the arbitration agreements.

Thus, the Supreme Court held that England and Wales is the proper place in which to bring this claim and "*the fact that the seat of any arbitration would be in France provides no reason why the English court should refrain from upholding UniCredit's English law contractual rights by granting an anti-suit injunction*". The appeal was dismissed, confirming the Court of Appeal's anti-suit injunction order.

Contribution by Saskia Dodds

Judicial Committee of the Privy Council, *Sian Participation Corporation (In Liquidation) v. Halimeda International Ltd* [2024] UKPC 16

In a decision dated 19 June 2024, the *Privy Council*, one of the highest courts in the United Kingdom, clarified the relationship between insolvency and arbitral proceedings in the law of the British Virgin Islands.

The dispute arose from a loan agreement concluded between Halimeda International Limited (hereinafter "Respondent") and Sian Participation Corporation (hereinafter "Appellant"). According to this agreement, any dispute arising out of or in relation to it should be resolved by arbitration under the rules of the London Court of International Arbitration (LCIA).

As Appellant did not comply with the terms of the agreement, Respondent filed a winding-up action on 29 September 2020, arguing that the company was insolvent. The Appellant objected, arguing that the debt was not owed because the Respondent itself owed a debt to the Appellant as a result of its participation in corporate raids on shares held by the Appellant.

On 19 May 2021, the trial judge ordered the company to be wound up, considering that the debt linked to the loan agreement was not in dispute. The Court of Appeals confirmed this order on 11 November 2022. Afterwards, Appellant filed an appeal before the Privy Council on 2 December 2022, as per sections 3(1)(a) et 3(2)(a) Virgin Islands Order 1967 allowing appeals as a matter of rights and appeal on the ground that there is a point of law of general or public importance. Appellant argued that the first instance judge should have stayed the proceedings because, under the terms of the arbitration clause, only an arbitral tribunal could rule on disputes relating to the disputed debt. As the law of the British Virgin Islands is similar to English law, Appellant asked the Council to apply the test adopted by *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575; [2015] Ch 589 (hereinafter « *Salford Estates* ») according to which the judge should immediately stay insolvency proceedings when there is a dispute regarding the debt's validity that should be resolved by arbitration.

On 15 November 2023, the Privy Council decided to hear the appeal and analysed the issue of which test to apply when a winding-up procedure is filed despite an arbitration agreement and/or possible ongoing arbitration proceedings about the same debt. The Privy Council recalled that section 18(4) of the *Arbitration Act 2013*, which was inspired by Article 8 UNCITRAL Model Law on international commercial arbitration, requires that any action filed before domestic courts and related to a matter included in the scope of the arbitration agreement should be stayed in favour of the arbitration proceedings.

However, the Privy Council stated that in many common law jurisdictions, winding-up actions do not fall under the scope of Article 8 UNCITRAL Model Law because these proceedings do not decide on the validity of debts but rather determine whether a company is insolvent.

In addition, the Privy Council held that only a dispute on genuine and substantial grounds would justify a stay of the winding-up proceedings. On the contrary, in the present case Appellant disputed the debt but failed to present genuine and substantial grounds to sustain its pretentions.

Therefore, the Privy Council confirmed the order designating a liquidator and stated that the liquidation proceedings should not be stayed because of possible ongoing arbitration proceedings when the debt at stake is not disputed on genuine and substantial grounds. It rejected the reasoning of *Salford Estates* and stated that the test applied in *Sian v Halimeda* should represent the actual law of England and Wales.

Contribution by Chloé Cerveau

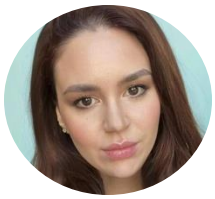
Hong Kong Court of First Instance, *A v. R1 and R2* [2024] HKCFI 1511

On 12 September 2023, the Hong Kong Court of First Instance ruled to enforce two arbitration awards issued by the Shenzhen Court of International Arbitration (SCIA), despite objections from the second respondent (R2). The respondent argued that the awards should not be enforced due to delays and procedural issues, claiming these violated fairness and public policy.

The first award, issued on 7 January 2019, required the respondents to pay RMB 59,854,000 for breaching a Cooperation Agreement. The second award, from 11 August 2021, added interest for the period from October 2011 to August 2019. The applicant (A) attempted to enforce these awards in Hong Kong, and an enforcement order was granted on 20 March 2023.

R2 challenged the enforcement, arguing that the long delay in issuing the first award violated procedural rules and public policy. However, the Court found that while there were delays, they did not breach public policy or justify blocking enforcement. The Court ruled that the awards met Hong Kong's legal requirements and confirmed their enforceability, reinforcing Hong Kong's support for arbitration.

This decision confirms Hong Kong's commitment to upholding valid international arbitration awards, even when procedural challenges are raised.



Contribution by Maria el Mawla

Singapore International Commercial Court, *DJO v. DJP* [2024] SGHC(I) 24

On 16 August 2024, the Singapore International Commercial Court ("the Court") set aside an award for breach of the principle of natural justice.

As far as the facts are concerned, the dispute originally dealt with the substantial and temporal scope of contractual provisions on adjustments of costs in case of a change of legislation. The Defendant, a consortium formed by two Indian companies (DJQ and DJR) and a Japanese company (DJP) (together, "Consortium X") sought for adjustment after a notification issued by the Indian ministry of Labour in January 2017 ("the Notification") increased the rate of the daily minimum wage.

According to a construction contract concluded on 18 August 2015 with the Claimant DJO, an Indian company, the Consortium X gave notice to the Claimant seeking for the reimbursement of additional costs. The notification having been issued on 6 March 2020, three years after the publication of the Notification, the Consortium's request intervened after the twenty-eight-day contractual delay after the event. Therefore, in its response on 9 June 2020, DJO rejected the request of adjustment considering that the delay expired and that the Notification did not entail any change of legislation. The Consortium X, unsatisfied with the decision and following failed attempts at amicable settlement, initiated an arbitral proceedings on 16 December 2021.

In accordance with the arbitration clause inserted in the contractual grouping and with Consortium X's qualification as a foreign company, the seat of arbitration was settled in Singapore under ICC proceedings rules. In its 24 November 2023 award, the arbitral tribunal ruled in favour of Consortium X, declaring its request of adjustment admissible.

It is important for a better understanding of the present case to mention that during the arbitration, two other ongoing arbitrations were dealing with the same facts (contractual consequences of the Notification), virtually involving the same parties, but with different subject matters (the matter of delay was not at stake in the parallel arbitrations). Although the co-arbitrators were not the same in these different proceedings, the same presiding arbitrator ("Judge C") was appointed in all three arbitration proceedings. Awards in the parallel arbitrations were already rendered when the challenged award was issued.

Unsatisfied with the award of the present case, the Claimant DJO sought an order before the Court to set aside the award. The raised arguments concerned the principle of natural justice and conflict with public policy of Singapore, which are grounds for setting aside an award under Singapore law. The Claimant argues the arbitral tribunal did not rule independently and impartially by quoting entire passages of a previous award.

The issue raised before the Court was whether the tribunal breached the principle of natural justice by ruling in a biased manner, quoting passages from a previous award in a parallel arbitration.

To answer, the Court firstly indicated that Judge C, being the presiding arbitrator in all three arbitrations, could have been influenced by his opinion established in the previous parallel arbitrations on the arbitration of the present case. However, the Court considered this element to be insufficient to grant an order to set aside the challenged award as it is speculative. Nonetheless, it noticed the arbitral tribunal did not thoroughly analyse matters of law inherent to the situation, such as the issue of delay, an element differentiating the present case from the parallel arbitrations, but issued a reminder it can only operate a *prima facie* analysis. Moreover, the Court mentioned the fact the arbitral tribunal erred in the application of the right *lex arbitri*. Indeed, it applied Indian law for some subject matters, *lex arbitri* for the parallel arbitrations instead of Singapore law, *lex arbitri* for the present case.

Indeed, it applied Indian law for some subject matters, *lex arbitri* for the parallel arbitrations instead of Singapore law, *lex arbitri* for the present case. When Singapore law was applied, the Court notices the arbitral tribunal followed the same line of reasoning as the previous awards, yet contractual terms in the three arbitrations were different. Finally, the Court observed that the arbitral tribunal relied upon submissions and other material not cited by the parties but cited in the parallel arbitrations rather than relying exclusively on what was cited by the parties in their submissions.

In applying Article 22 of ICC Rules providing a requirement of non-biased arbitrators and under Singapore precedent case law according to which natural justice is based on a right to a fair hearing, especially a right to an independent and impartial decision, the tribunal stated that when an arbitral tribunal, in the making if its decision, does not sufficiently take into account specific facts and arguments of the case, relying heavily on submissions from another arbitral proceedings, it contradicts the right to an impartial and independent award, the latter being based on out-of-case elements.

Consequently, the Court concluded that the arbitral tribunal having drawn heavily on an award rendered in a similar case, the award rendered in this case was not impartial nor independent, which is contrary to the principle of natural justice. The Court therefore annulled the 2023 award on this ground.

Contribution by Audrey-Anne Gomis

United States Court of Appeal for the 11th Circuit, *Commodities & Minerals Enterprise v. CVG Ferrominera Orinoco CA*, USCA 11th Circuit, Case nº 21-14504

On 8 August 2024, the United States Court of Appeals for the Eleventh Circuit (a federal appellate court based in Atlanta, Georgia, which has jurisdiction over federal cases originating in the states of Alabama, Florida and Georgia) rendered a decision confirming that a party's failure to vacate an arbitration award within the time-limits prevents it from opposing the confirmation of that award, even on public policy grounds. The Court ruled that Commodities & Minerals Enterprise Ltd. ("CME", a British Virgin Islands corporation) was entitled to enforce a $187.9 million arbitration award against CVG Ferrominera Orinoco C.A ("FMO", a state-owned mining company in Venezuela), despite FMO's claims of bribery and corruption.

The case arose from multiple agreements entered into by CME and FMO from 2004 onwards. These agreements resulted in a 2010 Transfer System Management Contract ("TSMC"), which outlined CME's responsibility for managing FMO's iron ore deliveries. Due to disagreements over FMO' failure to supply enough iron ore, CME terminated the contract in 2013.

In 2016, CME initiated arbitration against FMO for breach of contract. After (almost) three years of proceedings, the arbitral tribunal ruled in favour of CME, awarding them $187.9 million. The arbitration was governed by the New York Convention, and the proceedings were held in New York.

In 2019, CME sought to confirm the award in the Southern District of Florida. FMO opposed the confirmation (nearly two years later), on the grounds of public policy under Article V (2) (b) of the NY Convention. FMO alleged that the contract had been procured through bribery and that enforcement would be against U.S public policy.

The district Court confirmed the award, ruling that FMO's opposition was time-barred because FMO had not filed for vacatur within the three-month window provided by U.S law. FMO appealed the decision to the Eleventh Circuit, arguing that its public policy defence should have been allowed despite the expired deadline for vacating the award.

FMO argued that enforcement of the arbitration award would be against U.S public policy as CME had allegedly procured the contract through bribery and corruption, which is contrary to fundamental American principles.

It had also been contented that, although they had not moved to vacate the award on time, they should still be allowed to raise the public policy defence under the New York Convention's Article V, which allows refusal of enforcement if it violates public policy.

Lastly, FMO alleged that the arbitration panel's decision failed to properly address the issue of bribery in the procurement of the underlying contract and sought a review of the findings related to the TSMC contract.

The Eleventh Circuit dismissed FMO's appeal and affirmed the district Court's confirmation of the arbitration award. The Court of Appeals made the following reasoning:

The Court upheld that under U.S law, FMO's failure to file a motion to vacate the award within the statutory three-month limitations period rendered its defences, including those based on public policy, time-barred and precluded from being raised in opposition to the confirmation of the award.

The Court clarified that FMO's public policy defence was invalid because it attacked the procurement of the contract, not the arbitration award itself. The Court explained that a public policy defence under Article V(2)(b) must focus on

the enforcement of the award, not the underlying contract.

Last but not least, the Court emphasized that under the Competence-Competence principle, the arbitral tribunal has the power to decide on its own jurisdiction and the validity of the contract. The tribunal had conducted extensive documentation production on FMO's allegations and had not found evidence of corruption or bribery. Therefore, the Tribunal's decision was final and binding.

The Eleventh Circuit reiterated that U.S public policy strongly favours the enforcement of arbitration awards, and that a party cannot later challenge an award on public policy grounds without timely filing for vacatur.

Contribution by Cristian Zannier

Federal Supreme Court of Switzerland, 5 September 2024, nº 4A_136/2024

In a ruling handed down on 5 September 2024, the Swiss Federal Court (the "Court") dismissed the appeal lodged against the award rendered on 29 January 2024 by the Court of Arbitration for Sport ("CAS") in a dispute between a Russian figure skater (the "athlete") and the Russian Anti-Doping Agency ("RUSADA"), the International Skating Union ("ISU") and the World Anti-Doping Agency ("WADA").

On 6 and 7 February 2022, the athlete won the gold medal in the figure skating team event at the Beijing Olympic Games. On 8 February 2022, RUSADA provisionally suspended the athlete due to a doping test conducted on 25 December 2021, which revealed the presence of a substance prohibited under the WADA Prohibited List. A second analysis conducted on 17 March 2022 confirmed the presence of the prohibited substance, resulting in RUSADA officially charging the athlete with violating the Russian Anti-Doping Regulations ("RAR").

The Russian Disciplinary Anti-Doping Committee ("DADC") lifted the athlete's provisional suspension on 9 February 2022, following an appeal lodged by the athlete against RUSADA's decision. WADA, ISU, and the International Olympic Committee ("IOC") filed an appeal with the CAS ad hoc chamber contesting the DADC's decision. On 24 January 2023, the DADC waived its right to suspend the athlete and annul her results from the Beijing 2022 Olympic Games. On 14, 20 and 21 February 2023, RUSADA, ISU, and WADA each filed an appeal with the CAS Appeals Arbitration Chamber, which ordered the three proceedings to be consolidated. On 29 January 2024, the CAS Panel overturned the DADC decision on the grounds that "*the athlete failed to prove (…) that the source of the prohibited substance found in her system was the strawberry dessert prepared by her grandfather*". The Panel therefore found the athlete guilty of violating anti-doping regulations, suspended her for a period of four years from 25 December 2021, and ordered the disqualification of all results obtained by the athlete since that date. On 28 February 2024, the athlete (the "appellant") filed an appeal in civil proceedings with the Court, seeking to have the award set aside.

In her initial plea, the appellant cited Article 190 §2 item b of the Swiss Federal Law on Private International Law ("LDIP") to assert that the Tribunal lacked jurisdiction. The Tribunal dismissed the claim of lack of jurisdiction on three grounds. Firstly, it noted that case law of the ECHR considers that forced arbitration is, in principle, valid, provided that the arbitral tribunal offers the guarantees set out in Article 6 § 1 ECHR, which is the case of the CAS. Secondly, it stated that an athlete's consent to the jurisdiction of the CAS can be derived from their conduct. Finally, it found that the appellant has explicitly acknowledged the jurisdiction of the CAS Appeals Arbitration Chamber to hear decisions made by the DADC, as outlined in the RAR.

In a second plea, the appellant contested the arbitrability of the dispute on the ground of Article 190 §2, item b LDIP. The Tribunal found the argument to be inadmissible, as it was raised for the first time before the Tribunal, contrary to rules of procedural good faith.

In a third plea, the appellant asserted that the Panel rendered an award that is inconsistent with the fundamental principles of public policy as set forth in Article 190 §2, item e LDIP. She advanced that, as a minor and protected person, she should have been afforded differentiated treatment in the fight against doping, and that the Panel failed to take this circumstance into account in its award. The Court rejected this argument on the grounds that the Panel had taken due account of her age, that appellant had not put forward any objective reason justifying separate treatment for her, and that it had not established any incompatibility with substantive public policy.

In a final argument, the appellant stated that the CAS failed to maintain confidentiality regarding a case involving a person with protected status by publishing several press releases. The Court rejected this argument on the grounds that these criticisms did not demonstrate any breach of substantive public policy, given that the appellant was already well known and that the CAS publications were issued after the case had been published in the press during the Beijing 2022 Olympic Games.

For the aforementioned reasons, the Court dismissed the appeal and ordered the appellant to pay the costs of the proceedings and compensation of CHF 8,000 each to the ISU and WADA.

Contribution by Louise Nicot

INTERVIEW WITH KEVIN CUBEDDU

1. To begin with, could you please tell us a bit about your background and the reason that you chose international arbitration as a career option?

First, thank you very much Paris Baby Arbitration for this very kind invitation.

I am a Paris-qualified lawyer and a born and raised Parisian, although my mother is originally from the Philippines and my father is from Corsica. I also did all my studies in Paris. I began with a double degree in Law and Economics from the Sorbonne (Paris 1). I later joined the double master in Business law and Management between Paris 1 and HEC Paris, graduating in 2019. So little to do with arbitration but much more focused on Corporate/M&A, Finance or Tax, and originally this is what I intended to go into afterwards. But then I did a first internship in a law firm in Corporate/M&A during a gap year I took before my last year of master and quickly realized that I did not envision myself continuing in that field. So, I decided to explore whether disputes would be a better fit for me.

I do not remember exactly how I learned about arbitration, probably at some point during my first year of the double master, but I do remember thinking that it sounded like truly international litigation, with proceedings conducted in different languages, under different applicable laws and with people from all around the world, and I became curious. During my gap year, I took an online course on arbitration at the University of Montpellier and then applied for internships. And I got my first internship in arbitration at Latham & Watkins, which I have not left since.

2. You have been working as an associate at Latham & Watkins for 3 years. Could you tell us a bit about Latham & Watkins' arbitration team in Paris and what your day-to-day work is like?

The Latham arbitration team in Paris has one partner and about five associates working exclusively on commercial and investment arbitration. Our practice spans a wide variety of sectors including pharmaceuticals, mining, renewable energy, construction, oil & gas, etc. and a variety of regions, although we do have a strong focus on Latin America-related matters. For example, over the last few years, we have notably represented the Republic of Colombia in a trilogy of ICSID arbitrations arising from certain environmental measures taken by the Colombian government to protect sensitive ecosystems in the Colombian mountains (called the páramos) which were alleged by Canadian investors to be in breach of Colombia's international investment law obligations. All the claims were dismissed last year, strengthening the right of States to regulate in the public interest.

To be honest, it is difficult to describe what my day-to-day work or a typical day is like. It really depends on the exact stage of the proceedings we are at and on the specific needs of the team at that moment. But because we are a pretty small team, as an associate, I get to have quite a bit of responsibility. I can thus go from doing and/or supervising factual or legal research on the issues relevant to our case to drafting substantial portions of the correspondence or written pleadings that we submit to arbitral tribunals, or from preparing oral submissions and cross-examinations of witnesses and experts for hearings to, sometimes, even doing some of the advocacy myself during the hearing. Sometimes, I also prepare and deliver lectures or seminars on topics of international arbitration for law students or write academic articles. The work is very varied, and no day is the same, which to me is the beauty of working in arbitration.

3. Before becoming an associate, you were a trainee with Latham & Watkins' arbitration team for 2 years. Is there any advice that you would give to trainee lawyers hoping to be hired after their *stage final*?

I am not sure I can be of very much help. As you mentioned, I was at Latham doing successive internships for two years before I was hired as an associate, so I had plenty of time to showcase my abilities and prove that I was a good fit for the team. But in general, I always insist that one of the foremost qualities in an arbitration intern is the attention to detail. You can learn about arbitration during the internship, and it is partly our job to teach and train you. But, to be a good intern, it is important to pay attention to even the smallest details. This not only applies from a formal point of view, for example when you are cite checking or proofreading a document, but also from a substantive point of view, because sometimes details can change an entire case or at least bring a fresh perspective and new arguments. It is also important for interns not to be afraid to exercise judgment in their work where appropriate based on their understanding of what purpose their work needs to achieve. But you should always say when you do so, so that your supervisor is aware of a potential bias in your work. But at the same time, you also need to pay close attention to the instructions that were given to you. If you are unsure, just ask!

4. You did an internship at UNIDROIT in Rome before joining Latham & Watkins. Could you tell us about your experience there and what it brought you as an arbitration trainee and lawyer?

For those who may not be fully familiar, UNIDROIT or the International Institute for the Unification of Private Law is an intergovernmental organization founded in 1926 and seated in Rome, Italy whose aim is, as the name suggests, to promote the harmonization of national laws in the field of private and commercial law. In arbitration, UNIDROIT is mostly known for the UNIDROIT Principles, which are a set of rules for international commercial contracts that are sometimes used by parties or tribunals as applicable law.

I indeed had the opportunity to do a 5-month internship there back in 2018 during my gap year. I worked not on the UNIDROIT Principles but on a different instrument, the Cape Town Convention, which is an international convention that provides for a regime for the creation, registration, prioritization, and enforcement of transnational security interests in certain types of mobile equipment. A bit niche, yes but it has almost 90

Contracting parties and a noteworthy application in the field of aircraft financing. At the time of my internship, the UNIDROIT Secretariat was preparing a Protocol to the Cape Town Convention to extend its application to mining, agricultural and construction (or "MAC") equipment, which was signed in Pretoria in 2019, and this was my main project.

My internship at UNIDROIT was a fantastic experience. It was the first time I was exposed to a truly global environment in the legal field, and I think that it has helped me navigate that same kind of environment in arbitration. I also had the opportunity to do a lot of comparative law at UNIDROIT, working for example on the law of security interests in Hungary, Indonesia, or Paraguay. I even wrote a letter to the Russian Central Bank regarding proposed reforms to their law on financial leasing. This really built my skills in applying laws that I may not always be familiar with, which is particularly useful in my practice in international arbitration, where I often have to apply the laws of jurisdictions I am not qualified in. And of course, Rome was wonderful!

5. You have worked a lot on Latin American cases. Is there a case that has left a particular impression on you, and could you tell us about it? Are there any specifics about the Latin American market that stand out as making it different to others?

There are so many but two come to mind. The first one is a case where we represented the Republic of Colombia against a UK mining company in an ICSID arbitration related to various measures taken by the Colombian authorities to recalculate the payment of royalties owed by a ferronickel mine in Colombia. One of those measures was notably the establishment by the mining authority of a methodology to calculate the reference price of nickel, one of the parameters of the royalty formula, which the investor claimed was economically unsound. I had to do a lot of work with our experts to understand how reference prices normally work to prove that the methodology chosen by Colombia was reasonable, which was fascinating.

The second one is a case where we represented three Mexican project companies in a commercial arbitration in Mexico against their EPC contractor and asset manager. The applicable law was Mexican law and there were actually several crucial issues of Mexican contract law that were in dispute between the parties which I really enjoyed researching and arguing with the help of our Mexican co-counsel. It was also my first hearing as an associate and it was held in Mexico, and I even got to do some of the advocacy, which was very exciting and rewarding.

I would not say that there are clear idiosyncrasies to the Latin American arbitration market. To me, arbitration in Latin America is very much like arbitration in any other region of the world, although there may be some specificities in post-award proceedings, notably in relation to the role of constitutional courts, which sometimes interfere to an extent that may be surprising to lawyers from other jurisdictions. You also sometimes come across lawyers with fairly aggressive pleading styles but that can happen anywhere!

6. I understand that you have acted as tribunal secretary. How do you feel that this experience has benefitted you, and would you recommend young practitioners to undertake such an experience?

Absolutely, I have only acted as tribunal secretary once so far, but I would very much recommend it to anyone who gets the opportunity to do it. I think that being an arbitrator, or for younger practitioners tribunal secretary, is one of the most formative things you can do to become a more rounded advocate. Being on the side of the decision-maker really brings a distinct perspective to your practice. You can discover and take inspiration from styles of advocacy from people that you would not have otherwise seen in action. You also get a better understanding of how tribunals deliberate and what arguments work. Nevertheless, I think I still prefer being counsel.

NEXT MONTH'S EVENTS

13th November 2024: Dîner-débat on the theme of "Arbitration and space"

Organised by Comité français de l'arbitrage

Where ? At *Les Tourteaux– 86 Rue de la Boétie, 75008 Paris*

Website: https://www.helloasso.com/associations/cfa40/evenements/diner-debat-cfa40-13-novembre-2024

14 November 2024: Conference on the theme of "L'arbitrage et l'adaptation des contrats de durée (LTA)"

Organised by Comité français de l'arbitrage

Where ? At *Cercle de l'Union Interalliée – 33 Rue du Faubourg Saint-Honoré, 75008 Paris*

Website: http://www.cfa-arbitrage.com/

18th November 2024: Conference on "Enforcement of arbitral awards: universalism or exceptionalism?"

Organised by Université Paris Cité

Where ? At *Univsersité Paris Cité faculty of law, economics and management – 10 Avenue Pierre Larousse, 92240 Malakoff, Greater Paris Metropolitan Area*

Website: https://sondage.app.u-paris.fr/751487?lang=en

18th November 2024: Private international law conference

Organised by the *Cour de cassation*

Where ? In the G*rand'Chambre of the Cour de cassation – 6 Boulevard du Palais, 75001 Paris* or online

Website: https://www.courdecassation.fr/agenda-evenementiel/colloque-droit-international-prive

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

INTERNSHIP
D'ALVERNY

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

INTERNSHIP
NORTON ROSE FULBRIGHT

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

INTERNSHIP
DECHERT LLP

TRIAL, INVESTIGATIONS & SECURITIES
Start date: July 2025
Duration: 6 months
Location: Paris