PARISBABYARBITRATION

BIBERON

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February 2025, N° 75

French and foreign courts' decisions

International arbitral awards and decisions

Interview with Stéphane Vaz Pereira

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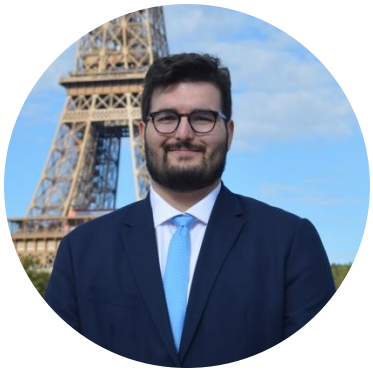

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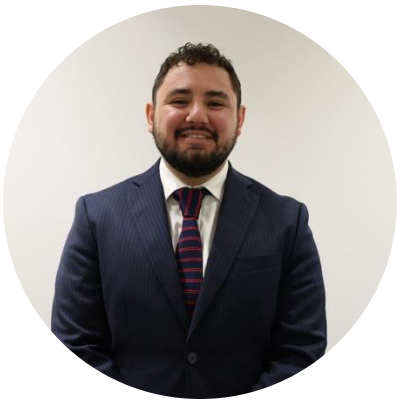

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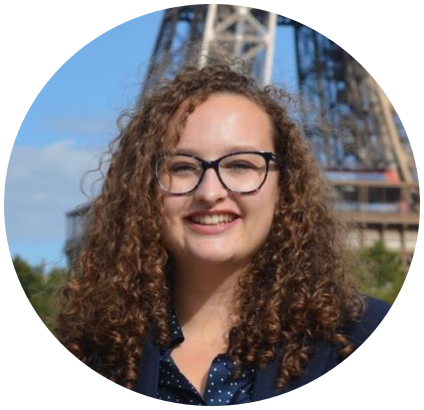

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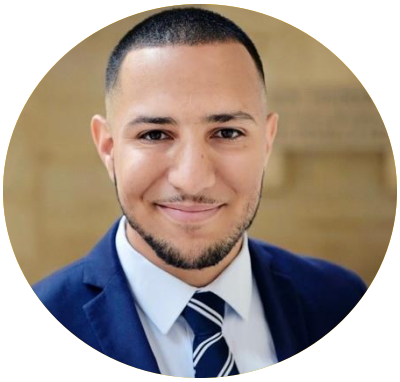

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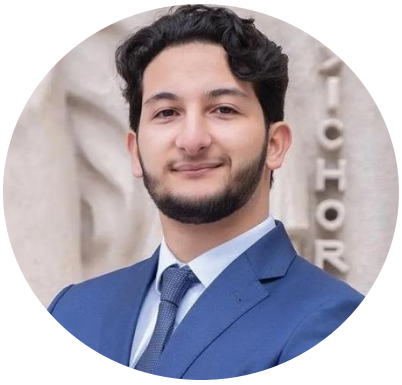
ADEL AL BELDJILALI-BEKKAÏRI



TAHA BEKTIAR

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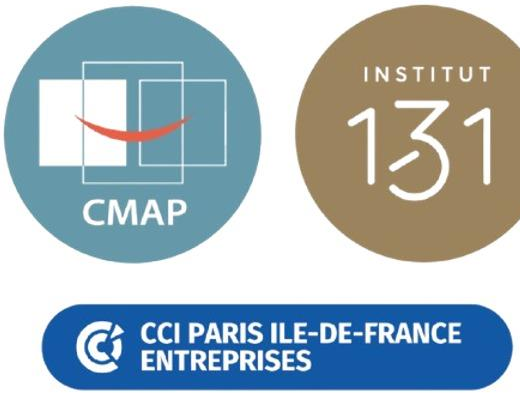

Founded in 1995, the Centre for Mediation and Arbitration of Paris (CMAP) is a leading French institution resolving commercial and civil disputes through mediation and arbitration. With expert mediators and arbitrators, CMAP provides tailored solutions for efficient, amicable outcomes. Its commitment 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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FRENCH COURTS

COURT OF CASSATION

Cour de cassation*, 1st Civil Chamber, 18 December 2024, nº 23-21.292, *Mr. Y v Football Club

The judgment handed down on 18 December 2024 by the First Civil Chamber of the Cour de cassation in *M. Y. v. Club de Football* is one of the rare contemporary illustrations of the high threshold set by case law for characterising the manifest inapplicability of an arbitration clause within the meaning of Article 1448 of the French Code of Civil Procedure.

The Football Club association initiated legal proceedings before the French courts against its former president and a third party, seeking liability and compensation, alleging mismanagement. The third party was accused of having replaced the chairman without the authorisation of the board of directors.

In the course of the proceedings, the chairman and the third party argued that the French court lacked jurisdiction and that an arbitral tribunal should be appointed, relying on an arbitration clause contained in a protocol signed on 13 June 2017. This protocol provided that the chairman undertook to implement a sporting policy for the club.

The Aix-en-Provence Court of Appeal ruled that the arbitration clause was manifestly inapplicable. In its view, the legal action brought by the association was not related to the provisions of the protocol, as the writ of summons made no reference to any violation of the clauses of the said protocol. In reaching this conclusion, the Court of Appeal compared the legal provisions invoked in the writ of summons (notably those of the French Civil Code relating to good faith and the agency contract) with the obligations stipulated in the protocol.

An appeal was lodged with the *Cour de cassation*, which censured this decision. The supreme court considered that the reasons given by the Court of Appeal, *i.e.* the in-depth analysis of the writ of summons in relation to the protocol containing the arbitration clause, were inadequate to establish the manifest inapplicability of the arbitration clause.

This ruling is in line with the Court of Cassation's consistent case law, which requires a high level of certainty to characterise manifest inapplicability. Consistent with the judgment in question, in the case *Soc. Aig Europe v soc. Nuovo Pignone* (*Cour de cassation*, 1st Civil Chamber, 30 September 2009, no. 08-15.708), the Court specified that the manifest inapplicability of an arbitration clause can only be upheld if no reasoning or legal interpretation is necessary.

As noted by Professor F.-X. Train (Rev. arb. 2009, p. 157), the concept of manifest inapplicability is based on an immediate and obvious observation, requiring no analysis or complex demonstration. In fact, any in-depth demonstration shows that the inapplicability is neither manifest nor indisputable. Precisely, in the judgment in question, the Aix-en-Provence Court of Appeal took the exact opposite approach.

Based on these elements, the Montpellier Court of Appeal, designated as the referring court, will be called upon to make its ruling. Given the facts provided, it does not appear entirely unreasonable to suggest that the alleged mismanagement may have some connection, however tenuous, with the obligations stipulated in the protocol containing the

arbitration clause. This doubt benefits the arbitrator.

Contribution by Iulian Chetreanu

Versailles Court of Appeal, 10 December 2024, nº 23/03647, *Citigroup Global Market*

On 30 July 2013, an arbitral tribunal under FINRA rules awarded Mr. Z compensatory damages totalling $11 million, comprised of $250,000 from Mr. M. and $10,750,000 from Citigroup Global Markets Inc. The damages were related to the alleged mismanagement of Mr. Z's $25 million investment portfolio.

Mr. Z, a dual Italian-American citizen, alleged that Citigroup and its representative, Mr. M., negligently managed his portfolio following the financial crisis of 2008, resulting in significant financial losses. The dispute was submitted to arbitration under FINRA rules. Following the tribunal's award, Citigroup and Mr. M. challenged the outcome, leading to prolonged litigation in multiple jurisdictions.

The arbitral award was annulled by the New York State Supreme Court in 2014 on the grounds that the dispute had already been settled. This decision was upheld by the Appellate Division and the Court of Appeals in New York. Despite these rulings, Mr. Z sought enforcement of the annulled award in France. In 2016, the *Tribunal de grande instance de Paris* granted exequatur to the award, enabling enforcement in France. Citigroup and Mr. M. appealed this decision. The Paris Court of Appeal rejected Mr. Z's claims in 2021, but the French Cour de Cassation remitted the case to the Versailles Court of Appeal in 2023.

The Versailles Court of Appeal examined two key issues:

1. Whether the annulled arbitral award could still be enforced in France under international arbitration principles.
2. Whether Mr. Z's request for exequatur was barred by the five-year prescription period stipulated by Article 2224 of the French Civil Code.

The court upheld that annulled arbitral awards may be enforced in France but concluded that Mr. Z's claim was time-barred. The court determined that Mr. Z's attempts to interrupt prescription through enforcement actions were invalid as these actions had been withdrawn.

On 10 December 2024, the Versailles Court of Appeal declared Mr. Z's request for exequatur inadmissible due to prescription. The court also dismissed Citigroup's request for damages for alleged abuse of process but ordered Mr. Z to pay legal costs associated with the appeal.

Contribution by Cristian Zannier

England & Wales High Court, *Barclays Bank PLC v VEB.RF* [2024] EWHC 3088 (Comm)

By a judgment delivered on 28 November 2024, the High Court of England and Wales (hereinafter the "High Court") varied an anti-suit injunction "*for pragmatic reasons*": as to permit proceedings to be commenced in the courts of England and Wales without breaching the previously ordered anti-suit injunction (hereinafter the "final ASI").

The dispute arose between a UK-based bank (the "Claimant") and a Russian-registered bank (the "Defendant") under an agreement for the currency of swap transactions (the "Agreement"). Under said Agreement, the parties included a jurisdiction and arbitration agreement (the "Jurisdiction and Arbitration Agreement") in favour of the London Court of International Arbitration ("LCIA"), which however provided for the exclusive jurisdiction of the courts in England if notice is served to require "*that all disputes or any specific dispute be heard by a court of law*" within 14 days of a request for arbitration.

In December 2019, the parties varied the terms of the Agreement so as to make the sanctioning of the Defendant a termination event. As a consequence of the Defendant becoming a sanctioned person under the economic sanctions regimes in the US, UK and EU, the Claimant exercised its right to termination and became liable to pay the Defendant USD 147,000,770. However, the Claimant maintains it is unable to pay such a sum due to the sanctions regime. A jurisdictional dispute thus arose on 19 May 2023, after the Defendant commenced proceedings in the Arbitrazh Court of the City of Moscow in breach of the arbitration agreement. On 15 April 2024, the London Circuit Commercial Court granted an anti-suit injunction in favour of the Claimant prohibiting the Defendant from continuing its claim before the Moscow Court. Consequently, the Defendant commenced arbitration before the LCIA on 21 June 2024. However, on 4 July 2024, the Claimant, in accordance with the Jurisdiction and Arbitration Agreement, gave notice to the Defendant. Since the Defendant declined to act on the notice, the Arbitrator gave permission to the Claimant to bring the application for an order to vary the terms of the final ASI under Section 32(2) of the Arbitration Act 1996.

In this application, the Defendant argued that (i) it was impossible to comply with the notice due to the effect of the final ASI, and that (ii) the Claimant waived its right to rely on the asymmetric exclusive jurisdiction agreement.

On the Formal Validity issue, the High Court noted that such orders (as an ASI) are to be given their ordinary meaning and are to be construed in their context, citing *Navigator Equities Ltd v Deripaska.* The High Court therefore found it "*fanciful*" to suppose that the court would have construed the final ASI order as precluding the commencement of proceedings by the defendant in the High Court, especially given that it would deprive a party of access to the court without proportionate qualifications contrary to Article 6 of the European Convention on Human Rights.

On the Waiver, the High Court deduced, after laying out the legal principles, that (i) there was no sufficient unequivocal act or statement capable of supporting the allegation of waiver, (ii) there was no promise or representation in support of that allegation, nor sufficient reliance to support it and that (iii) informal waiver had been excluded by a clause in the Agreement which requires such a waiver to have been in writing and executed or confirmed by the parties to render it effective.

In conclusion, in order to eliminate any remaining doubts or concerns, the High Court amended the

final ASI as to allow the Defendant to pursue proceedings before the courts of England and Wales, in line with the notice, without being in breach of the final ASI.

Contribution by Saskia Dodds

Singapore Court of Appeal, *Reliance Infrastructure Ltd v Shanghai Electric Group Co Ltd* [2024] SGCA(I) 10

On 17 December 2024, the Singapore Court of Appeal upheld the decision of the Singapore International Commercial Court (hereinafter "the SICC") to enforce an arbitral award in favour of Shanghai Electric Group ("SEC" or the "Respondent"). Reliance Infrastructure Limited ("RINFRA" or the "Appellant") sought to set aside the award on the grounds of public policy and forgery.

In this case, SEC, a company incorporated in the People's Republic of China, and RINFRA, a company incorporated in India, were involved in a large-scale construction project for a power generation plant in an Indian village through RINFRA's affiliate, Reliance UK. Reliance UK entered into a supply contract (the "Contract") with SEC for the provision of necessary equipment and services for the project. RINFRA's Vice President signed the Contract on behalf of Reliance UK. On the same day, RINFRA allegedly issued a guarantee letter (the "Guarantee Letter"), serving as guarantor for Reliance UK's obligations under the Contract. A dispute subsequently arose when the Respondent alleged a breach due to unpaid amounts under the Contract by RINFRA's affiliate. Relying on the Guarantee Letter, which mandated that all disputes be resolved through arbitration administered by the Singapore International Arbitration Centre ("SIAC"), SEC initiated proceedings to enforce the RINFRA's guarantee of its affiliate's obligations.

RINFRA contended that the Guarantee Letter was invalid and unenforceable, being not aware of its existence and that the Vice President had no authority to execute it. The Arbitral Tribunal ruled in favour of SEC. First, the Arbitral Tribunal found that RINFRA had not alleged that the Guarantee Letter was a forgery and must be taken to have conceded that it existed. Second, the Arbitral Tribunal held that the Vice President had the authority to sign the Guarantee Letter and decided to award SEC damages.

RINFRA challenged the award before the SICC seeking to rely on new evidence including the Vice President's claim that he did not sign the Guarantee Letter and a handwriting expert's report alleging the signature and initials were forgeries. During the cross examination, the Vice President affirmed to have never signed the Guarantee Letter. RINFRA also argued that the Arbitral Tribunal lacked jurisdiction because of the invalidity of the arbitration agreement and because the award was affected by SEC's fraud. RINFRA further contended that it had not waived its jurisdictional objections insofar as it only learned of the alleged forgery after the publication of the award. RINFRA cited its inability to secure the Vice President's cooperation due to his employment with a competitor. On the other hand, SEC contended that the Guarantee Letter was genuine and that RINFRA had waived its jurisdictional objection on grounds of forgery and lack of authority. According to the SEC, RINFRA had sufficient knowledge of the facts during the arbitration to raise its objections but failed to do so.

The legal issues to be determined by the SICC were the following:

1. Whether RINFRA waived its jurisdictional objections on both grounds of forgery and want of authority;
2. Whether the Guarantee Letter was a forgery; and
3. Whether the signatory had apparent authority to sign.

On the first issue, the SICC held that RINFRA waived its jurisdictional objections under Article 16(2) of the UNCITRAL Model Law on International Commercial Arbitration. The SICC found that RINFRA failed to raise its objections in a timely manner and that the delay had no valid justification. On the second issue, the SICC also held that RINFRA waived its right to object to the Arbitral Tribunal's jurisdiction by failing to raise

the issue during the arbitration proceedings, despite having knowledge of the relevant facts. On the basis of its findings, the SICC dismissed the application to set aside the award.

RINFRA appealed the SICC's decision to the Singapore Court of Appeal, arguing errors in the SICC's waiver findings. The appeal was dismissed for the following reasons. The Court of Appeal found that the Appellant had knowledge of facts that could have raised doubts about the authenticity of the Guarantee Letter's signature, such as the alleged absence of any copy or record of the Letter within its files. Despite this, the Appellant explicitly stated in its opening submissions to the Arbitral Tribunal that it would not rely on forgery as a claim. This clear disclaimer was inconsistent with any later attempt to challenge the Tribunal's jurisdiction on the basis of forgery. Therefore, the Court of Appeal agreed with the SICC's conclusion that the Appellant had waived its right to set aside the award on jurisdictional grounds by choosing not to raise the issue during arbitration.

In this case, RINFRA's decision not to raise jurisdictional objections during arbitration was ultimately decisive, precluding it from later setting aside the award. This outcome highlights the importance of timeliness and the limits of the public policy exception in arbitral proceedings. As the Court of Appeal recalls it, "*Parties are entitled to choose what issues they will take in an arbitration and if it turns out that it made a wrong tactical or strategic choice, that is entirely of its own making and does not in any way implicate public policy*".

Contribution by Elisa-Marie Goubeau

Singapore High Court, *DJK v DJN* [2024] SGHC 309

In a judgment dated 3 December 2024, the High Court of Singapore dismissed an application to set aside a SIAC arbitration award in the dispute between DJK and others (the "Claimants") and DJN (the "Respondent").

On 10 November 2022, the Respondent submitted a request for arbitration to obtain from the Claimants the performance of the lease contract entered into between them. On 29 December 2022, the President of the SIAC Court of Arbitration appointed Lomesh Kiran Nidumuri as arbitrator. Following the Respondent's request for an early dismissal of the case, the arbitrator rejected this request, but ordered the Claimants to furnish both security for the claim and for costs.

On 13 June 2023, the Claimants asked the arbitrator to withdraw from the arbitration after he had made the security orders, which he refused on 16 June 2023. On 21 June 2023, the Claimants filed their Notice of Challenge with the SIAC court pursuant to Article 14 of the SIAC Rules, which was denied. After refusing to participate in the arbitration, on 20 March 2024 the Plaintiffs filed the present application to set aside the Final Award ordering them to pay the principal amount with interest and costs to the Respondent.

The Claimants argued that (i) the arbitrator's conduct in ordering and rejecting the application to set aside the securities, and (ii) the arbitrator's prejudgement of the merits, gave rise to a reasonable suspicion of apparent bias.

With respect to the security orders, the Claimants alleged that the arbitrator breached the fair hearing rule and acted in excess of his jurisdiction. The Court rejected these arguments on the grounds that the breach of the fair hearing rule and the excess of jurisdiction were unfounded and that they did not objectively give rise to a reasonable suspicion or apprehension of apparent bias.

With regard to the arbitrator's prejudgement on the merits, the Claimants argued that the security orders fell outside the boundaries of what a reasonable tribunal might have done, that the arbitrator quickly dismissed their defences as weak and ordered the production of irrelevant documents. The Court rejected these arguments as "*not sufficient to show that the arbitrator had prejudged the merits of the dispute in the arbitration*".

The Court therefore dismissed the application for setting aside the Award and ordered the Claimants to pay costs set at USD 33,000.

Contribution by Louise Nicot

Ontario Court of Appeal, *Lochan v Binance Holdings Ltd*, 2024 ONCA 784

The Ontario Court of Appeal (hereinafter "ONCA") dismissed Binance Holdings Limited's appeal, which was based on an arbitration clause, seeking a stay of a class action lawsuit brought against it.

Binance Holdings Limited (hereinafter "Binance"), operator of the world's largest cryptocurrency trading platform, offered Canadians cryptocurrency derivatives through its website between September 2019 and early 2022. These financial products are considered complex and risky securities that raise investor protection concerns. As such, Ontario law requires sellers of these products to register with the Ontario Securities Commission (OSC) or, at a minimum, to obtain an exemption from registration before offering them. Binance failed to meet either requirement.

In June 2022, Christopher Lochan and Jeremy Leeder, acting as representatives of a class action, filed a lawsuit under section 133 of the Ontario Securities Act (R.S.O. 1990, c. S.5). This provision grants purchasers a right of action for rescission or damages against companies selling securities without being registered with the OSC. Binance filed a motion to stay the class action, arguing that its website's terms of use contained an arbitration clause mandating that all disputes between Binance and its users be resolved through arbitration in Hong Kong.

The motions judge denied Binance's request for a stay of the class action, finding the arbitration clause to be contrary to public policy because it imposed prohibitive costs and inaccessible conditions. Furthermore, the judge determined the clause to be unconscionable, as it was embedded in a non-negotiable "click-wrap" contract with deliberately opaque and complex terms that unfairly advantaged Binance.

Binance appealed this decision to the ONCA, arguing that the Ontario court erred in its factual findings by concluding that the arbitration clause was unreasonable and contrary to public policy. Binance also contended that the lower court improperly conducted an in-depth examination of the clause rather than the limited review required to justify an exception to the competence-competence principle.

Can Ontario courts rule on the validity of an arbitration clause embedded in the terms of use of a cryptocurrency trading platform, where the clause imposes conditions deemed inaccessible for the average investor, pursuant to an exception to the competence-competence principle?

The Ontario Court of Appeal dismissed Binance's appeal and upheld the lower court's decision on 28 October 2024. The Court concluded that Ontario courts have jurisdiction to rule on the validity of the arbitration clause under an exception to the competence-competence principle.

Relying on the Supreme Court of Canada's decisions in *Dell Computer Corp. v. Union des consommateurs* and *Uber Technologies Inc. v. Heller*, the Court reaffirmed the exceptions to the competence-competence principle, which generally recognizes the authority of arbitral tribunals to rule on the validity of their arbitration clauses. Specifically, the Court held that the arbitration clause in this case raised a solely legal question or required only a superficial examination of the evidence, justifying judicial intervention. The Ontario court appropriately examined the clause to determine whether the exception applied.

The prohibitive costs, combined with the clause's complexity and inequitable terms, effectively prevented any real challenge to the clause before the arbitral tribunal, further justifying the intervention of the Ontario courts.

This decision underscores the two strict conditions under Canadian law for applying the exception to the competence-competence principle:

1. An exception applies when a jurisdictional challenge raises a purely legal question or requires only a superficial examination of the evidentiary record (the "Dell exception"); and

2. An exception applies when a jurisdictional challenge cannot realistically be resolved by the arbitral tribunal due to a clear impossibility of contesting the clause in that forum (the "Uber exception").

Contribution by Rheda El Hamzaoui

Supreme Court of India, *Central Organisation for Railway Electrification v M/s ECI SPIC SMO MCML (JV)*, 2024 INSC 857

In a decision dated 8 November 2024, *Organisation for Railway Electrification v. M/S ECI SPIC SMO MCML (JV)*, the Supreme Court of India delivered a new judgment on critical issues regarding the interplay between party autonomy and the independence and impartiality of arbitral tribunals, specifically where public-private contracts are at play. The Court ruled on the validity of clauses granting unilateral control over arbitrator appointments. Additionally, the Court considered the application of constitutional and statutory principles of equality, impartiality, and fairness under national arbitration law.

In this case, the Central Organisation for Railway Electrification (hereinafter the "Employer") hired M/S ECI SPIC SMO MCML (JV) (hereinafter the "Contractor") to complete a railway electrification project. The parties' contract contained an arbitration clause that required disputes resolved by an arbitral tribunal to be composed of a retired railway officer, nominated by the Employer. When a dispute arose concerning the encashment of the bank guarantee, the Managing Director of the Employer appointed a sole arbitrator in accordance with the arbitration clause and the Contractor challenged the clause. The Contractor argued that the unilateral appointment procedure violated core principles under the Arbitration and Conciliation Act 1996 (hereinafter the "Arbitration Act"), such as independence, impartiality, and equality. The matter was then brought before the Supreme Court of India.

Initially, the Contractor brought the case before the High Court under the premise that the aforementioned arbitration clause violated section 12(5) of the Arbitration Act. The Contractor argued that under these provisions, the unilateral procedure was inconsistent with the statutory requirements, which provide for the independence and impartiality of arbitrators in arbitral proceedings. According to this argument, the Contractor contended that the clause enabled the Employer to dominate the composition of the arbitral tribunal, thereby raising a reasonable apprehension of bias.

The High Court reasoned that the contractually prescribed appointment procedure was restrictive but still allowed the Contractor some degree of participation. In addressing the first relevant issue – whether the appointment of retired railway officers as arbitrators is valid under section 12(5) of the Arbitration Act – the Court relied on *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd*., and stated that section 12(5) of the Arbitration Act, read together with the Seventh Schedule, does not bar former employees of the parties from being appointed arbitrator. The Court upheld the validity of the arbitration clause and directed the constitution of the arbitral tribunal in the terms of the agreement.

Before the Supreme Court, the Employer contended that parties have the freedom to agree to their own procedures under the principle of party autonomy, a cornerstone of the Arbitration Act, and the Court should respect this freedom. Moreover, the Employer emphasized that retired railway officers are not automatically disqualified under section 12(5) of the Arbitration Act, as they are independent professionals regardless of their prior association with the railway.

Conversely, the Contractor raised the precedents set in *Perkins Eastman Architects DPC v. HSCC (India) Ltd*. and *TRF Ltd. v. Energo Engineering Projects Ltd*., highlighting the importance of equality and impartiality in the appointment process. The Contractor further argued that allowing the Employer to select the panel of arbitrators unilaterally created an inherent imbalance, giving one party undue influence. Finally, the latter raised Article 14 of the Indian Constitution, which guarantees equality before the

law. Under this clause, the Contractor asserted that arbitration clauses in public contracts should adhere to a stricter standard of fairness and impartiality, particularly when one party is a government entity.

The issues before the Court consisted of, firstly, whether an appointment process that allows a party who has an interest in the dispute to unilaterally appoint a sole arbitrator, or to curate a panel of arbitrators and mandate that the other party select their arbitrator from the panel is valid in law. Secondly, the Court had to address whether the principle of equal treatment of parties applies at the stage of the appointment of arbitrators. And lastly, whether an appointment process in a public-private contract which allows a government entity to unilaterally appoint a sole arbitrator or the majority of the arbitrators of the arbitral tribunal violates Article 14 of the Constitution.

The Court held that under section 18 of the Arbitration Act, the principle of equal treatment of parties is a mandatory principle, which applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators. In their reference to *Perkins*, the Court explained that an imbalance in the appointment process can otherwise contravene these principles.

Secondly, the Court held that the Arbitration Act does not prohibit public sector undertakings (PSUs) from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs, which was similarly seen in *Voestalpine* where the Court emphasized that decision panels must be broad-based and neutral to avoid perceptions and actual bias.

Thirdly, it held that a clause which allows one party to unilaterally appoint a sole arbitrator, violates section 12(5) of the Arbitration Act and gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, the Court explains that such a unilateral clause is exclusive and hinders equal participation of the other party, in this case the Contractor, to participate in the appointment process of arbitrators. The process of appointing arbitrators in this case is unequal and prejudiced in favour of the Railways. Additionally, unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution and should be approached cautiously as public contracts are under a heightened scrutiny.

Moreover, the Court noted that the principle of express waiver contained under the proviso to section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. Once the dispute arises, then the parties can determine whether there is a need to waive the *nemo judex* rule. Lastly, the Court made it clear in this influential decision that the law ultimately laid down in the present case should apply prospectively to arbitrator appointments made after the date of this judgment, ensuring legal certainty.

Contribution by Rachel Hage

Federal Supreme Court of Switzerland, 18 November 2024, nº 4A_396/2024

On 18 November 2024, the Swiss Supreme Court handed down a decision in a sports arbitration case involving an appeal to set aside an international arbitration award.

The dispute was between a coach of a national basketball team (hereinafter "Claimant") and a National Basketball Federation (hereinafter "Respondent"), which proposed an employment contract for the period of the 2020 Tokyo Olympic Games. The employment contract provided for a remuneration of $240,000, due in 12 monthly instalments. Article 12 of the contract provided for a system of late payment penalties in the event of non-payment due to the coach.

The Claimant therefore applied to the Basketball Arbitral Tribunal (hereinafter "BAT") for non-payment of the sums due. After initial arbitration proceedings, the parties reached a settlement agreement providing for payment of $590,135 by 30 September 2020. The agreement also stipulated that the Claimant reserved the right to refer the matter to the BAT again within a time limit of sixty days in the event of non-payment. Having obtained 95% of the due amount, the Claimant once again appealed to the BAT to obtain the sums due under the settlement agreement. However, the BAT issued an Award on the basis of Equity in accordance with Article 15 of the BAT Arbitration Rules. The claims were dismissed under the principle of *Verwikung* (foreclosure).

The Claimant brought a set-aside proceeding before the Supreme Court on the basis of Article 190 paragraph 2 of the Swiss Federal Law on Private International Law (hereinafter "LDIP"). The Claimant argued that the arbitrator, in rendering the Award, breached the principle of *pacta sunt servanda*. The arbitrator also wrongly applied the principle of *Verwirkung*, as the Claimant never waived his rights. Finally, he also invoked an alleged infringement of his right to be heard. The Respondent considered that the arbitrator correctly applied the said principles. It therefore concluded that the claims were inadmissible and that the set-aside proceeding should be dismissed.

To what extent can an international arbitration award, which relied on the principle of foreclosure to dismiss a party's claims, uphold substantive public policy while respecting the principle of *pacta sunt servanda* and a party's right to be heard?

The Swiss Supreme Court first noted that the Award had been issued in accordance with extensive BAT case law, which establishes that claims cannot be filed at any time. Under the principle of *Verwirkung*, a claim is deemed untimely if a "*substantial period has elapsed between the due date of the disputed claim and the initiation of proceedings, and if the debtor could reasonably assume that the creditor no longer intended to assert their rights in the future*" (paragraph 5.2).

The Swiss Supreme Court first affirmed that the application of the principle of *Verwirkung* fell within the Arbitral Tribunal's sovereign discretion. Second, the Award did not constitute an application of the principle of *pacta sunt servanda*, as the arbitrator did not contradict the outcome of their interpretation of the contract by refusing to apply any provision. Finally, the Swiss Supreme Court held that the foreclosure period, raised as a violation of substantive public policy, could not be upheld, as prescription was not a fundamental principle of Swiss public policy. Therefore, the set-aside proceeding was dismissed.

Contribution by Adel Al Beldjilali-Bekkaïri

European Court of Human Rights, *NDI Sopot SA v North Macedonia,* 26 November 2024, nº 6035/17,

In a judgment dated 26 November 2024, the European Court of Human Rights (hereinafter "ECHR") ruled against the Respondent State in the case between NDI SOPOT S.A (hereinafter "NDI") and the Republic of North Macedonia (hereinafter "North Macedonia"). The Court found that the domestic courts had violated the European Convention on Human Rights, specifically Article 6§1, which enshrines the right to a fair trial. This significant decision underscores the importance of observing principles of impartiality and fairness when examining exequatur applications for international arbitral awards.

In this case, arbitration arose from a dispute between the Polish company NDI and a Macedonian company about an infrastructure project in Poland. The Arbitral Tribunal's award, rendered under the Rules of the International Chamber of Commerce (hereinafter "ICC"), ordered the reimbursement for costs borne disproportionately by NDI under the Joint Venture agreement.

The Polish company then sought recognition of this arbitration award in North Macedonia. However, Macedonian domestic courts refused to grant exequatur of the award based on lack of impartiality and public policy. By failing to disclose his prior ties with a lawyer involved in a contract related to the dispute, the arbitrator raised doubts in Macedonian courts, which deemed the failure to disclose such information an impartiality standard breach. Therefore, domestic courts found that the award's recognition was impossible because it would violate the international public order of North Macedonia.

Having exhausted the available internal remedies, NDI brought the case before the ECHR. The applicant invoked Article 6§1 of the European Convention on Human Rights, arguing that the appellate court lacked impartiality given the personal connections between one of its judges and the respondent: The spouse of one of the judges had both professional and financial ties to the Macedonian company. The applicant also claimed that the appellate court failed to address his objections by remaining silent or providing an incomplete response.

The ECHR concluded that Macedonian courts had violated NDI's rights under Article 6§1. Regarding the appellate court's lack of impartiality, the ECHR found that the aforementioned personal connections create legitimate doubts vis-à-vis the court's ability to guarantee a fair trial. Concerning the second argument, the European court agreed with the applicant: the domestic courts had not sufficiently addressed the applicant's arguments, undermining the fairness of the proceedings. The Court therefore ordered North Macedonia to compensate NDI.

By this decision, the European Court emphasizes the importance of judicial impartiality in enforcing international arbitral awards. The decision also serves as a warning to domestic courts to ensure that their exequatur proceedings comply with the principle of impartiality, as failure to do so exposes member States of the Council of Europe to ECHR condemnation.

Contribution by Taha Bekhtiar

INTERVIEW WITH STÉPHANE VAZ PEREIRA

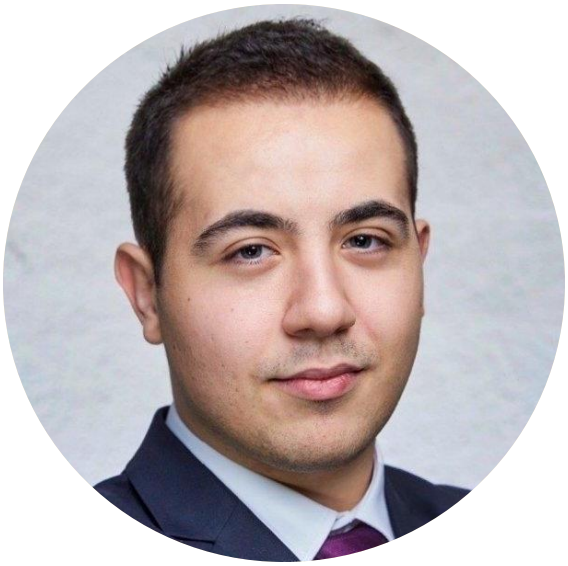
1. To begin with, could you tell us about your background and the reasons behind why you chose international arbitration as a career option?

Before answering your question, I would like to thank Paul Gobetti and all the PBA team for this warm invitation.

My interest in international arbitration was built naturally over the course of my studies. I discovered this discipline during my Master 1 in International and European Business Law, thanks to the classes taught by Professors Clavel and Jault-Seseke, which sparked my curiosity. I developed this initial understanding by writing a Master's thesis in English on Portuguese-speaking arbitration under the supervision of Professor de Fontmichel. This research project was decisive: it not only reinforced my interest in arbitration, but also convinced me to specialise by enrolling in the Master 2 Arbitrage et Commerce International (MACI) at Paris-Saclay University.

Professionally, I had the good fortune to get valuable experience simultaneously with a counsel in arbitration, and alongside an arbitrator and law professor. These experiences enabled me to truly immerse myself in arbitral practice and confirmed my desire to pursue this path.

What makes international arbitration particularly fascinating is the unique dynamic it generates: a balance between technicality, cultural diversity and a pragmatic approach to dispute resolution. It is a demanding and complex discipline, but it is also stimulating and constantly evolving. Working in this field means operating in a multicultural environment, collaborating with legal practitioners from different legal traditions, and practicing in multiple languages – these elements make arbitration an intellectually enriching specialisation that aligns perfectly with my professional aspirations.



2. You are pursuing a Ph.D at Paris-Saclay University where you are writing a thesis on climate arbitration. Could you tell us more about the subject of your thesis and the reasons for which you decided to write one?

I am a Ph.D candidate in private law at Paris-Saclay University, and am affiliated with the DANTE research laboratory. My thesis falls in the "*arbitration and international trade*" research axis, and is tightly linked to its "*ethics, justice and modernity*" research axis.

The idea of orientating my research towards climate arbitration was born from a realisation which profoundly changed my view of the law and reinforced my wish to bring a useful contribution to it. The climate crisis is a global issue which affects every continent, even if its effects are unequally distributed. Arbitration, the usual justice of international commerce, posits itself as the natural jurisdiction for transnational disputes linked to climate change. Indeed, international instruments such as the 1991 Protocol on Environmental Protection of the Antarctic Treaty or the 1992 UN Framework Convention on Climate Change explicitly refer to arbitration. Either way, arbitrators will

increasingly be called upon to rule on issues either directly or indirectly related to climate change, whether because of the arguments or evidence submitted by the parties, or the nature of the disputes themselves.

From this observation, a number of fundamental issues arise, as much for arbitration practitioners as for the rest of society: how should arbitration, a private justice, treat climate disputes? How do such disputes work with arbitration? Are all disputes related to climate change arbitrable or must some of them remain within the jurisdiction of the State. Beyond the contentious aspect, the environmental impact of arbitration itself becomes a major preoccupation. Without going into the details, we can observe that the practice is aware of this issue. Indeed, practitioners no longer hesitate to question themselves and to reflect on their way of conducting arbitrations. This is not without good reason. To give you an idea of the impact of arbitration on the environment, I invite you to look at the work of the Campaign for Greener Arbitrations. We estimate that a single medium or large-scale arbitration can require the planting of nearly 20,000 trees to offset its carbon emissions…

The point of my thesis is double: on the one hand, the businesses of international trade are facing new disputes related to climate issues, particularly concerning energy transition and environmental responsibility. On the other hand, there is the question of arbitration's capability to efficiently respond to these challenges. My research aims to analyse how arbitration can take on climate disputes and evaluate its legitimacy as a forum for climate justice.

Finally, writing a thesis is fully in line with my aim to become a university professor. I hold teaching close to my heart, and research allows me to actively contribute to the evolution of arbitration.

3. You were Prof. Galina Zukova's assistant for her class at the Continental law Foundation's summer university. Could you tell us about this institution and you experience there?

The Continental law Foundation is a private institution of public interest that has been working since 2007 to promote the continental legal tradition internationally. Its Summer University is an unmissable event which brings together law students and legal professionals from across the world in order to discuss the development and influence of continental law on the global legal landscape. One of its major assets is the diversity of legal cultures which are represented, which considerably enriches the debates and exchanges.

I had the opportunity to assist Professor Galina Zukova for her class in English intitled "Settlement of International Disputes". This course introduced students to the fundamental concepts of arbitration, covering topics such as the arbitration agreement, the constitution of the arbitral tribunal, interim measures and even arbitral awards. My role consisted in preparing the supporting teaching aids, ensuring the reporting of the students and contributing to the drafting of the final exam.

This experience was extremely enriching. It confirmed my desire to teach and reinforced my belief that a professor in arbitration law must maintain a strong link with practice.

4. Since September 2023, you have worked alongside Prof. Philippe Stoffel-Munck at PSM Arbitration, first as a trainee, then as an associate and research assistant. This experience has led you to participate in a number of arbitrations as tribunal secretary and as tribunal timekeeper. Could you please tell us more regarding what you have taken away from these experiences? How have these roles enriched and expanded your understanding of arbitration and fed your thoughts in the context of your thesis?

Working alongside Professor Philippe Stoffel-Munck at PSM Arbitration is a particularly enriching experience which has allowed me to blend theory and practice of international arbitration.

As a tribunal secretary, I work on both *ad hoc* and

institutional arbitrations, which implies preparing the cases, attending hearings, and helping with the preparation of orders. These tasks have enabled me to acquire a concrete vision of the conducting of an arbitration proceeding as well as to experience different sets of arbitrations rules and soft law instruments.

My role as timekeeper enabled me to attend hearings and to observe a wide range of pleading styles and procedural strategies.

Broadly, my reading and/or participation in the preparation of requests to the supporting judge, of submissions, of Redfern schedules and procedural orders has considerably refined my analytical and writing capabilities.

In parallel, my work also involved the preparation of seminars and academic events, the writing of memos and the updating of lectures. This dual hat of practitioner and Ph.D student has been made possible thanks to my CIFRE funding, which enables me to fully take part in the law firm's work while working on my thesis.

This framework is rather atypical, but I find it particularly well-suited to arbitration research. It has enabled me to anchor my theoretical thoughts in concrete reality, and to benefit from the insights of an experienced arbitrator. Furthermore, international arbitration is an area in constant evolution, where practitioners are confronted with brand new challenges. By being immersed in the arbitration practice while pursuing my research work, I can better understand the issues and envisage solutions adapted to them, particularly in the context of climate disputes, which constitute the heart of my thesis.

Truly, the synergy between research and practice, in my view, constitutes a great training lever. It allows me not only to develop a precise expertise in arbitration, but also to rigorously prepare my professional goals, which are found at the junction between the academic world and legal practice.

5. To come back to your thesis subject, what difficulties (or opportunities) do you envisage for arbitration when faced with climate change?

Climate arbitration is an ambitious and current topic. Beyond the growing climate backlash, arbitration faces recurring criticism from both European institutions and civil society, questioning its legitimacy. And yet, I believe that we can be optimists regarding arbitrator's ability to react to climate issues. We must not forget that arbitration has already had to resolve environmental issues in the past. The famous *Trail Smelter* case, which laid the foundations for the principle of preventing transboundary atmospheric pollution, is a good example. The integration of climate disputes in the sphere of arbitration therefore seems to be quite natural for some. But is it truly the case? That is what we will find out.

To concisely answer your question, I think that the acceptability, the transparency and the legitimacy of climate arbitration are issues that cannot be overlooked. Citizens, the press, but more generally all of civil society is interested in climate disputes. They will undoubtedly want to understand the reasons behind such arbitrations and the decisions of arbitrators, if not participate in them directly. How, then, can we articulate these competing interests? Furthermore, what tools can arbitrators mobilise to address the various challenges posed by climate disputes? Similarly, we know that the jurisdiction of the tribunal vanishes once the award is rendered. How, then, can we ensure the follow-up of non-monetary remedies and potential remedies in kind that may be sought? These are fundamental questions that deserve to be explored.

But the challenges are not insurmountable, and I remain firmly convinced that arbitration has its role to play in climate disputes - provided that the arbitral community can address societal and environmental concerns… The future of climate arbitration will therefore depend on its ability to strike a balance between efficiency and legitimacy.

NEXT MONTH'S EVENTS

20th February 2025: "Swiss vs. German Supplemental Arbitration Rules: A Comparative Perspective"

Organised by Swiss Arbitration Association

Where ? At A&O Shearman Frankfurt

Website: https://www.swissarbitration.org/events/swiss-arbitration-ambassador-for-germany-2025/

25th February 2025: seminar on "Enforcement of arbitral awards against States and State-affiliated entities"

Organised by 36 Stone

Where ? 36 Stone and Online (hydrid event)

Website: https://www.linkedin.com/posts/36stone_arbitration-36stone-activity-7297224325185560576-rbJ3?utm_source=share&utm_medium=member_desktop&rcm=ACoAABpTfDMBKhtZbeQY_X9IZCUln3YoBiFZ1JI

4th March 2025: 'Fundamental Skills in the Counsel Practice of Arbitration' Virtual seminar on "Preparing and conducting cross-examination"

Organised by Chartered Institute of Arbitrators

Where ? Online

Website: https://www.ciarb.org/events/fundamental-skills-in-the-counsel-practice-of-arbitration/

INTERNSHIP AND JOB OPPORTUNITIES

LAW PROFILER

INTERNSHIP
DECHERT LLP

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

INTERNSHIP
WATSON FARLEY & WILLIAMS

LITIGATION & ARBITRATION
Start date: January 2026
Duration: 6 months
Location: Paris

INTERNSHIP
ALEM & ASSOCIATES

INTERNATIONAL ARBITRATION
Start date: July 2025
Duration: 6 months
Location: Abu Dhabi

INTERNSHIP
NORTON ROSE FULBRIGHT

LITIGATION & ARBITRATION
Start date: January 2026
Duration: 6 months
Location: Paris