PARISBABYARBITRATION

BIBERON

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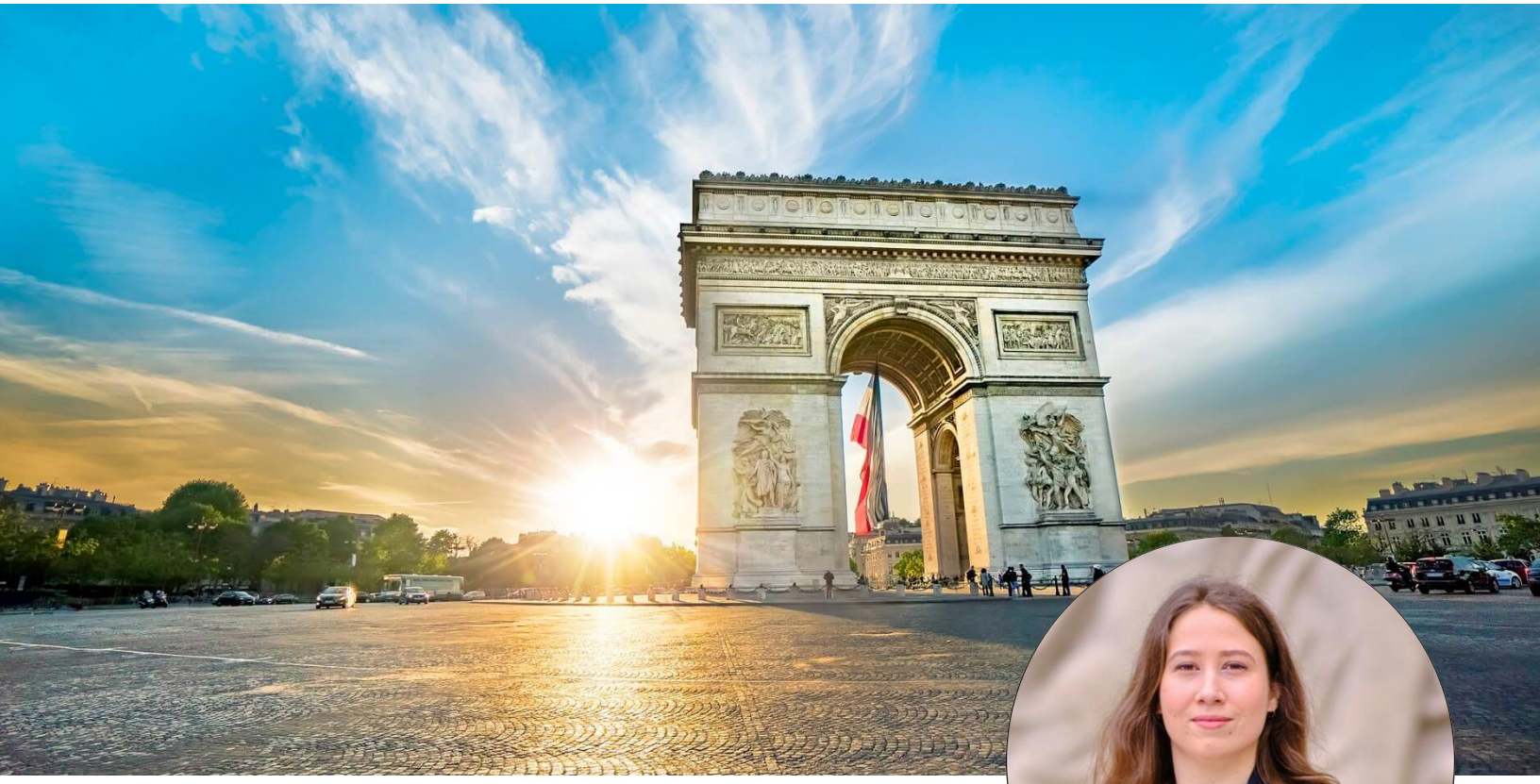

French and foreign courts' decisions

International arbitral awards and decisions

Interview with Alexis Choquet

Our partners: Teynier Pic, Foley Hoag, Hogan Lovells, ReedSmith (Driving progress through partnership), CMAP, Institut 131, CCI Paris Ile-de-France Entreprises

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OUR PARTNERS

LAW PROFILER

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.

Founded in 1943, Foley Hoag is a business law firm specialised in the resolution of national and international disputes. The Paris office has a particular expertise in arbitration and international commercial litigation, environmental and energy law, as well as public law and corporate M&A.

Hogan Lovells stands as a global legal authority, with a footprint in more than 44 offices worldwide. Acknowledged for their excellence across a spectrum of legal domains, the Paris office uniquely amplifies the firm's internaitonal legal recognition. With specialised teams spanning every industry, Hogan Lovells commits to providing top-tier legal support tailored to their clients' needs.

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Reed Smith is a dynamic international law firm dedicated to helping clients move their businesses forward. With an inclusive culture and innovative mindset, they deliver smarter, more creative legal services that drive better outcomes for their clients. Their deep industry knowledge, long-standing relationships and collaborative structure make them the go-to partner for complex disputes, transactions and regulatory matters.

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.

TABLE OF CONTENTS

FOREWORD

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

- ***Cour de cassation*, 1st Civil Chamber, 12 February 2025, nº 21-22.978 *Cengiz*** (jurisdiction; corruption; treaty protection conditional on the legality of the underlying investment; principle of autonomy and validity of arbitration clauses in investment arbitration)
- ***Cour de cassation*, 1st Civil Chamber, 12 February 2025, nº 22-11.436 *Nurol*** (jurisdiction; conditions for entry into force of an investment treaty; effect of allegations of corruption on jurisdiction)
- **England & Wales Court of Appeal, *UniCredit Bank GmbH v RusChemAlliance LLC* [2025] EWCA Civ 99** (anti-suit injunctions; power of the Court to vary or discharge an anti-suit injunction that it had already granted)
- **England & Wales Court of Appeal, *Hulley Enterprises Ltd, Yukos Universal Ltd and Veteran Petroleum Ltd v The Russian Federation* [2025] EWCA Civ 108** (State immunity; issue estoppel; enforcement proceedings)
- **England & Wales High Court, *Emma Louise Collins, and others v Wind Energy Holding Company Ltd* [2025] EWHC 40 (Comm)** (set-aside proceedings; s.68 Arbitration Act 1996 challenge; serious irregularity)
- **United States Court of Appeal for the 5th Circuit, *Baker Hughes Saudi Arabia Company Ltd v Dynamic Industries Inc., et al.*, USCA 5th Circuit, Case nº 23-30827** (enforceability of an arbitration clause in favour of an institution that no longer exists; intent to arbitrate; choice of rules also being a choice of forum)
- **Court of Appeal for Ontario, *Vento Motorcycles Inc., v The United Mexican States*, 2025 ONCA 82** (arbitrator bias; minority of the arbitrators are biased; arbitral award declared to be void; natural justice; legitimacy of the tribunal)
- **Singapore High Court, *Swire Shipping Pte Ltd v Ace Exim Pte Ltd* [2024] SGHC 211** (set-aside proceedings; jurisdiction; principle of minimal curial intervention; natural justice)

FRENCH COURTS

COURT OF CASSATION

Cour de cassation, 1st Civil Chamber, 12 February 2025, nº 21-22.978, *Cengiz*

On 12 February 2025, the First Civil Chamber of the *Cour de cassation* dismissed an appeal lodged by the State of Libya (hereinafter "Claimant") against the ruling of the Paris Court of Appeal. This appeal was brought within the context of proceedings initiated by Libya to annul an arbitral award rendered under the auspices of the International Chamber of Commerce (hereinafter "ICC"), which had ordered Libya to compensate the Turkish company Cengiz (hereinafter "Respondent") for the damage suffered.

In 2008, the Respondent had entered into two infrastructure construction contracts with a Libyan public entity. The Arab Spring, which erupted in 2011, not only led to an unprecedented destabilisation of the country but also disrupted the Respondent's investment. Indeed, paramilitary groups compelled it to cease operations. In 2013, two Protocols of Agreement were concluded between the parties.

However, Cengiz subsequently initiated arbitration proceedings under Article 8 of the Bilateral Investment Treaty concluded between Libya and Turkey, which provided for arbitration under the aegis of the ICC. An Award was rendered, which was immediately challenged in annulment proceedings before the Paris Court of Appeal, whose ruling was, in turn, the subject of an appeal before the *Cour de cassation.*

The appeal raised on three principal grounds, one of which alleged that the Paris Court of Appeal had breached Article 1520(1) of the French Code of Civil Procedure by holding that the legality of the investment was a matter of the case's merit rather than of jurisdiction. Consequently, the Court ruled that the Tribunal had not exceeded its mandate. Additionally, Libya contended that the dispute concerning Performance Guarantees related to investments made in Libya was non-arbitrable, arguing that such disputes fell outside the scope of the Treaty. The Court of Appeal had also dismissed this ground.

More peripherally, and without setting out all grounds of appeal in full, Libya asserted that the Tribunal had failed to rigorously lay out the specific episodes of the Revolution in its Award, thereby amounting to a lack of reasoning and, as a result, a violation of French international public policy.

The issue before the *Cour de cassation* was thus to determine whether the legality of the investment, as defined by the terms of the Treaty, constituted a question of the Tribunal's jurisdiction, and whether the scope of the Treaty was confined exclusively to disputes strictly concerning the investment itself.

The Court's response was unequivocal. First, it held that the Agreement on the protection of investments is autonomous and independent of any domestic law. It deduced from this that Article 1(2) of the Treaty establishes criteria for the validity and legality of investments without reference to Libyan law. The Court consequently concluded that the Paris Court of Appeal had correctly held that the legality of the investment under the Treaty was an applicable issue, and that the Tribunal had not exceeded its jurisdiction, thereby rejecting the argument based on Article 1520(1) of the French Code of Civil Procedure.

Furthermore, the Court held that the scope of the Treaty was broad, encompassing all disputes relating to investments, not merely their strict definition. Accordingly, the Tribunal had jurisdiction to hear the dispute concerning the Performance Guarantees issued by the Respondent in the context of its investments in Libya.

As a final attempt, the Claimant challenged the Paris Court of Appeal's ruling, arguing that a failure to provide adequate reasoning constituted a violation of French international public policy. Libya contended that the Tribunal could not merely state that the actions of the insurgent groups that had prevailed following the 2011 Revolution were "*attributable to Libya without addressing the specific cause of the damage*".

The *Cour de cassation*, however, disagreed and dismissed this ground. It reaffirmed that while arbitrators are indeed under an obligation to provide reasoning for their award pursuant to Article 31 of the ICC Arbitration Rules (2012 version) and Article 1482 of the French Code of Civil Procedure, applicable to international arbitration by reference to Article 1506 of the same Code, Libya's ground challenged the merits of the Award rather than its reasoning.

The Court reiterated its well-established jurisprudence on this issue and held that this ground of appeal pertained to the substantive assessment of the case rather than the control of reasoning and, as such, fell outside the scope of judicial review of the Award.

Contribution by Adel Al Beldjilali-Bekkaïri

Cour de cassation, 1st Civil Chamber, 12 February 2025, nº 22-11.436, *Nurol*

The French *Cour de cassation* dismissed the State of Libya's appeal against a Paris Court of Appeal decision which upheld the jurisdiction of an arbitral tribunal in a dispute between the State of Libya and a Turkish company concerning international investments.

Between 2006 and 2008, the Turkish company Nurol Insaat Ve Ticaret Anonim Sirketi (hereinafter "Nurol") entered into contracts with Libyan companies for the repair and construction of infrastructure in Libya. Due to the Arab Spring in 2011, construction projects were disrupted, and sites were abandoned for security reasons. Although resumption agreements were signed in 2013, they were not implemented, and in 2014, one of the Libyan companies terminated its contract with Nurol.

In 2016, Nurol initiated two joint arbitration proceedings under the International Chamber of Commerce (ICC) framework, based on the 2009 bilateral investment treaty (BIT) between Turkey and the State of Libya (hereinafter "the Treaty").
The State of Libya challenged the arbitral tribunal's jurisdiction, but on 22 November 2018, the arbitral tribunal ruled it was competent. The State of Libya then filed for annulment of this partial award before the Paris Court of Appeal. On 28 September 2021, the Paris Court of Appeal dismissed Libya's annulment request, thereby confirming the tribunal's jurisdiction. Consequently, the State of Libya appealed to the *Cour de cassation.*

The State of Libya argued that the investment treaty had not legally entered into force due to a lack of proper notification. It also claimed that the dispute arose before the Treaty's entry into force and that the alleged corruption tainted the investments, making the arbitration clause inapplicable to the dispute.

Nurol contended that the Treaty had indeed entered into force, that the dispute arose after its entry into force, and that allegations of corruption did not affect the tribunal's jurisdiction.

The legal issue at stake concerned the conditions for the entry into force of an investment treaty. Specifically, the *Cour de cassation* had to rule on the following question: considering the date of entry into force and the temporal scope of the investment treaty between Libya and Turkey, as well as corruption allegations affecting the investments, was the arbitral tribunal appointed under the said treaty competent to rule on the dispute in question?

The *Cour de cassation* answered in the affirmative, dismissing the State of Libya's appeal and upholding the Paris Court of Appeal's decision.

On the Treaty's entry into force: The Court confirmed that the Treaty between Turkey and Libya was in force at the time the arbitral proceedings were initiated. The notification of ratification between the two States did not need to specify the representative of each State, thereby justifying the jurisdiction of the arbitral tribunal.

On the subsequent nature of the dispute: The Court held that the disputes arising from the consequences of the civil war on the contracts emerged after the Treaty had entered into force and could not, therefore, be excluded from the jurisdiction of the arbitral tribunal.

On the question of lack of jurisdiction due to corruption allegations: The Court clarified that the standing offer to arbitrate exists independently of the validity of the transaction that led to or supported the investment. Thus, the acceptance of arbitration, as materialized through the notification of the request for arbitration, is sufficient to establish the arbitral tribunal's jurisdiction to rule on the legality of the investment and the claim for compensation.

This ruling reinforces the French courts' pro-arbitration stance in international investment disputes. It upholds the effectiveness of arbitration clauses in bilateral investment treaties and strengthens the protection of foreign investors by confirming the jurisdiction of arbitral tribunals. It constitutes a confirmation of established French case law on the matter, without any notable departure from precedent.

Contribution by Rheda El Hamzaoui

England & Wales Court of Appeal, *UniCredit Bank GmbH v RusChemAlliance LLC* [2025] EWCA Civ 99

In a surprising turn of events, UniCredit Bank GmbH (hereinafter the "Applicant" or "UniCredit", previously the "Claimant" and "Appellant") has made an application to revoke or vary the Court of Appeal's order granting a final anti-suit injunction (hereinafter the "Order") on the grounds of changed circumstances.

In a previous decision, the Court of Appeal of England and Wales (hereinafter the "Court") granted a final anti-suit injunction prohibiting RusChemAlliance LLC (hereinafter the "Respondent") from pursuing its claims in front of the Russian courts in breach of an arbitration agreement. This decision holding that England and Wales was the proper place in which to bring an application for an anti-suit injunction was made, and upheld by the UK Supreme Court (hereinafter "UKSC") in April 2024, notwithstanding the arbitration agreement designating a seat of arbitration located in France.

Despite being bound by this final injunction, the Respondent obtained a ruling from the Arbitrazh Court of St Petersburg in December 2024 (hereinafter the "Ruling") which (i) prohibited UniCredit from initiating an arbitration, (ii) prohibited UniCredit from pursuing any proceedings outside the Russian courts, (iii) obliged UniCredit to take any measure possible to cancel the effects of the Court's final anti-suit injunction order, and (iv) if it failed to do so, pay the Respondent €250 million by way of a court imposed penalty.

As a result of the "*commercial pressure*" applied by the Russian courts, UniCredit applied to revoke or vary the Court's Order. The changed circumstances on which the Applicant grounded its application were that (a) the Respondent refused to respect the Court's Order and (b) that Russian law had undergone unprecedented changes leading to the Ruling. Due to the risk of the St. Petersburg Court imposing the penalties if the Court's Order remained in place, the Applicant submitted arguments on five issues before the Court.

Firstly, on whether or not there was a risk that UniCredit would be forced to pay a penalty, the Court held that "*such a risk plainly exists*" since they cannot predict how the St Petersburg Court would act. On the second issue, the Court found that in exceptional and appropriate circumstances, it has the power under the Civil Procedure Rules to discharge or vary a final anti-suit injunction due to "*the unusual nature of the [order's] grant*". On the third issue, after asserting that "*an anti-suit injunction is a coercive remedy wherever it is granted*", the Court held that UniCredit had not been coerced into making its application and instead acted of its own commercial interest. With regards to English public policy as the fourth issue, the Court noted its disapproval of the Respondent's approach, but nevertheless judged that the arguments put forward didn't strongly militate in favour of refusing the application.

Finally, on whether or not the application should be allowed, the Court clearly and concisely laid out four reasons for granting UniCredit's application. Neither the commercial pressure applied to UniCredit by the Russian courts, nor the public policy reasons were found to "*weigh heavily in the balance*". Moreover, UniCredit was entitled, in its own interests, to tell the court it no longer wanted the anti-suit injunction. In light of the above, the Court stated that it would have been "*unjust and unfair to force UniCredit to risk massive penalties in Russia that may be avoidable if the CA's Order is discharged or varied*".

On these grounds, the Court varied the Order (rather than discharging it in its entirety) in order to preserve the decisions made on jurisdiction by the Court and the UKSC, all the whilst discharging its injunctive parts. As a result, the Court simultaneously confirmed that it has the power to vary or revoke final anti-suit injunctions in certain "*appropriate*" circumstances and pragmatically balanced the binding force of English court orders with the need to ensure justice by avoiding potential additional loss that could be suffered in practice by the parties.

Contribution by Saskia Dodds

England & Wales Court of Appeal, *Hulley Enterprises Ltd, Yukos Universal Ltd and Veteran Petroleum Ltd v The Russian Federation* [2025] EWCA Civ 108

In a decision dated 12 February 2025, the Court of Appeal of England and Wales provided important clarifications concerning the interaction between issue estoppel and sovereign immunity in the context of arbitral enforcement proceedings against a State.

The decision is part of the long-running legal saga pitting the Russian Federation (hereinafter, "Russia") against Hulley Enterprises Limited, Yukos Universal Limited and Veteran Petroleum Limited, the former majority shareholders in Yukos Oil Company (hereinafter, the "Yukos shareholders").

On 18 July 2014, an arbitral tribunal issued three awards ruling that Russia had breached its obligations under Article 13(1) of the Energy Charter Treaty and ordering it to pay over $50 billion in damages, plus interest, to the Yukos shareholders.

On 10 November 2014, Russia initiated annulment proceedings in the Netherlands, the arbitral seat. Russia raised multiple challenges, including jurisdictional objections (arguing there was no binding arbitration agreement between Russia and the Yukos shareholders) and allegations of procedural fraud in arbitration due to the bribery of a witness and the non-disclosure of key documents.

On 30 January 2015, the claimants sought recognition and enforcement of the awards in England. Russia challenged the jurisdiction of the English courts, asserting state immunity under the State Immunity Act 1978 (hereinafter, "SIA 1978").

On 20 April 2016, the District Court of The Hague annulled the awards. The Yukos shareholders appealed, and, while the appeal was pending, the English enforcement proceedings were stayed by consent.

In February 2020, the Hague Court of Appeal overturned the lower court's decision, reinstating the awards. Russia then appealed to the Dutch Supreme Court.

On 5 November 2021, the Dutch Supreme Court upheld the Court of Appeal's ruling regarding the existence of a binding arbitration agreement between Russia and Yukos shareholders but found errors in its assessment of procedural fraud. Consequently, it overturned the appellate ruling and referred the case to the Amsterdam Court of Appeal.

Following this, the Yukos shareholders successfully obtained a partial lifting of the stay on the English enforcement proceedings, but only to allow the court to determine, by way of preliminary issues, whether Russia was precluded from rearguing its arbitration agreement objections due to Dutch court rulings and, if so, whether the jurisdictional challenge should be dismissed immediately.

These preliminary issues were heard by Mrs Justice Cockerill, who delivered the judgement of the High Court of Justice of England and Wales on 1 November 2023.

Cockerill J held that there was an issue estoppel precluding Russia from re-arguing the question of whether it had agreed to submit the dispute to arbitration, with the consequence that Russia's challenge to the jurisdiction of the English court on the ground of state immunity should be dismissed.

Russia challenged that conclusion before the Court of Appeal, contending mainly that the principle of issue estoppel is not applicable in the particular context of an English court deciding whether one of the exceptions to state immunity applies under Sections 2 and 11 of the SIA 1978.

It should be noted that between the judgement of the High Court and the ruling of the Court of Appeal, the Amsterdam Court of Appeal rejected Russia's procedural fraud claims and declined to refer the matter to the CJEU. However, Russia filed a further cassation appeal with the Dutch Supreme Court, which remains pending.

The issue presented to the Court of Appeal of England and Wales in this case was thus the following: given the findings by the Dutch court that Russia had agreed in writing to submit the disputes with the Yukos shareholders to arbitration, did the issue estoppel principle preclude Russia from re-arguing the same issue before the English courts in an attempt to challenge the English Courts' jurisdiction under the State Immunity Act?

Since it was accepted that, in general, issue estoppel can arise from the decision of a foreign court, and that the requirements of an issue estoppel were satisfied in this case, the decision mainly focused on the interaction between issue estoppel and sovereign immunity.

First of all, Lord Justice Males explained that, pursuant to Section 1 of the SIA 1978, the general rule is that a State is immune from the jurisdiction of United Kingdom courts. However, this general rule is subject to a series of exceptions. The burden of proof to prove that the claim falls into one of these exceptions falls on the claimant, who must establish its case on the balance of probabilities.

The exception on which the Yukos shareholders relied upon was the arbitration exception set out in Section 9 of the SIA 1978, which is subject to a series of requirements. The only contested requirement was whether the State had agreed in writing to submit the dispute in question to arbitration.

In assessing this contestation, Males LJ commenced by affirming that while the SIA comprehensively sets out the list of exceptions to State immunity, "*it says nothing about the legal principles by which it is to be determined whether one of the exceptions to immunity applies*". In determining this question, a judge must thus apply the ordinary principles of English Law.

One of these ordinary principles is precisely issue estoppel, which is a type of estoppel *per rem judicatam*. As explained by Lord Justice Diplock, quoted by Males LJ, pursuant to this principle, when the fulfilment of an identical condition is a requirement common to two or more different causes of action, if in litigation upon one such cause of action the relevant condition is deemed fulfilled by a court of competent jurisdiction, neither party can, in subsequent litigation between one another, deny that the condition was fulfilled.

In this precise case, the Hague Court of Appeal ruled that Russia had agreed to submit the dispute to arbitration – pursuant to issue estoppel, Russia would thus be precluded from denying the fulfilment of this condition before the English courts.

However, Russia contested the applicability of issue estoppel in these circumstances. As understood by Lord Justice Males, Russia's argument consisted in saying that, under the SIA 1978, the English Court had a duty to independently determine whether an exception to State immunity applied. According to Russia's counsel, a conclusion on the matter based on an issue estoppel arising from a foreign judgement is not a determination at all.

Males LJ rejected this argument, affirming that it would be wrong to consider "*that when the English court gives effect to an issue estoppel, whether arising from an English or a foreign judgment, it is not making a determination at all*". When relying on the findings of the Dutch court on the matter, the High Court did not decline to determine whether Russia had agreed to submit the dispute to arbitration. On the contrary, it "*determined that it had so agreed, applying the substantive principle of English law that when the requirements for an issue estoppel are satisfied, as they were in this case, the previous decision of a court of competent*

jurisdiction is conclusive on the issue in question".

Males LJ insisted on the qualification of issue estoppel as a substantive right of which the SIA 1978 does not deprive the parties.

This interpretation is said to be supported, to some extent, by the precedent ruling in *Zhongshan Fucheng Investment Co. Ltd. v. Federal Republic of Nigeria* [2023] EWCA Civ 867.

Lord Justice Males also rejected the argument that State immunity should override issue estoppel on public policy grounds. He explained that the court's duty is to apply the SIA 1978 as enacted, which means that the court needs to decide whether an exception to sovereign immunity exists by applying the ordinary rules of English Law. When a court decides that an exception to immunity applies as a result of an issue estoppel arising from a decision of a foreign court, it is simply applying that rule as part of English law, without choosing between two concurrent policies.

Additionally, the Court of Appeal confirmed that the requirements of Section 31 of the Civil Jurisdiction and Judgements Act 1982 were satisfied. It agreed with the High Court that no special circumstances warranted disregarding the Dutch Court's decisions.

Consequently, the appeal was dismissed.

Contribution by Anca Nechita

England & Wales High Court, *Emma Louise Collins, and others v Wind Energy Holding Company Ltd* [2025] EWHC 40 (Comm)

On 14 January 2025, the High Court of Justice of England and Wales provided clarifications on what constitutes a "*serious irregularity*" under Section 68 of the Arbitration Act 1996.

On 17 November 2023, an arbitral tribunal issued a Final Award in LCIA Arbitration No. 225475, dismissing the claims of Emma Louise Collins and others and upholding the counterclaims of Wind Energy Holding Company Ltd (hereinafter, "WEH"). The tribunal found the Letter of Indemnity (hereinafter, "LOI") to be unenforceable and ordered the claimants to repay legal costs incurred by WEH, along with interest and arbitration costs.

The claimants, former board members and shareholders of WEH, initiated arbitration on 20 April 2022, alleging that WEH had breached a Letter of Indemnity (LOI) by failing to cover their legal costs in separate litigation. WEH counterclaimed, arguing that the LOI was void due to lack of consideration, authority, and potential illegality. The arbitration was conducted under LCIA rules, with an evidentiary hearing held in October 2023.

The claimants challenged the arbitral award before the High Court of Justice of England and Wales under Section 68 of the Arbitration Act 1996, arguing serious irregularities:

- The arbitrator refused to adjourn the hearing despite the claimants' inability to secure legal representation, exacerbated by a freezing order.
- The tribunal's rejection of additional evidence late in the proceedings resulted in procedural unfairness.
- Last but not least, the arbitrator's handling of the proceedings deprived the claimants of a fair opportunity to present their case.

The High Court examined whether the alleged procedural issues amounted to a "serious irregularity" under Section 68 of the Arbitration Act 1996, which requires demonstrating that an irregularity caused substantial injustice. The court found:

- That the arbitrator had broad discretion under LCIA Rules and properly refused an adjournment given the late-stage withdrawal of counsel.
- The exclusion of late-filed evidence was justified, as it contravened procedural orders and would have unfairly prejudiced WEH.
- Furthermore, the claimants were given opportunities to participate and present their case, meaning no substantial injustice had occurred.

Consequently, the High Court dismissed the Section 68 challenge, ruling that no serious irregularity had occurred. The court upheld the arbitral tribunal's findings and ordered the claimants to bear the costs of the set-aside proceedings, reinforcing the principle of minimal judicial intervention in arbitration under English law.

Contribution by Cristian Zannier

United States Court of Appeal for the 5th Circuit, *Baker Hughes Saudi Arabia Company Ltd v Dynamic Industries Inc., et al.*, USCA 5th Circuit, Case nº 23-30827

By a decision dated 27 January 2025, the United States Court of Appeals for the Fifth Circuit overturned the first instance ruling in the case of *Baker Hughes v. Dynamic Industries*, and ordered the parties to resolve their dispute through arbitration.

In 2017, Baker Hughes Saudi Arabia Co., Ltd. (hereinafter "Baker Hughes") and Dynamic Industries Saudi Arabia, Ltd. (hereinafter "Dynamic") entered into a contract to supply materials, products, and services for an oil and gas project undertaken by Dynamic Industries in Saudi Arabia. The contract was governed by Saudi law. Under Schedule A, Dynamic could request arbitration in Saudi Arabia. If Dynamic did not do so, then under Schedule E, either party could initiate arbitration under the rules of an alternative forum: the DIFC-LCIA Arbitration Centre, a partnership between the Dubai International Financial Centre and the London Court of International Arbitration.

After fulfilling its contractual obligations, Baker Hughes filed a claim before the US federal courts, asserting that Dynamic Industries had failed to pay $1.355 million for the work performed. Defendant, Dynamic Industries, requested the court to dismiss Baker Hughes' claim based on the doctrine of *forum non conveniens* and to compel arbitration as the dispute resolution method.

The Federal Court rejected Dynamic Industries' arbitration request, agreeing with Baker Hughes' position that the arbitration clause referred to a forum (DIFC-LCIA) that no longer existed, thereby revoking the parties' consent to resort to this alternative dispute resolution mechanism. Dynamic Industries appealed the decision, bringing the matter before the Fifth Circuit Court of Appeals.

The US Appellate Court reversed the first-instance ruling, which had refused to recognise the competence of the arbitral bodies, on the grounds that the forum designated in the contract, namely the DIFC-LCIA, had been abolished, rendering the arbitration clause unenforceable. The Court of Appeals conducted a *de novo* review, reassessing the case and the interpretation of the dispute resolution clauses, and focusing on an in-depth analysis of the so-called 'Schedule E' arbitration clause and its terms.

In its reasoning, the Court first questioned whether the arbitration clause mentioning the DIFC-LCIA forum referred to a forum or simply to procedural rules. The Court declined to recognise the clause as a forum selection clause, concluding that the text referred only to procedural rules. The judges rejected the interpretation put forward by the Defendant on appeal, which viewed the referenced arbitration institution as more than a mere reference to procedural rules, but rather as the arbitration forum where the proceedings should be conducted.

The Court then considered whether the parties, by selecting a body of procedural rules, intended to have their dispute administered by the institution providing those rules. The Court expressed doubt about this argument. Until then, federal courts had held that the designation of procedural rules implicitly meant the administration of the dispute by the institution that issued those rules. However, decisions on this matter were not unanimous, and there were divergent interpretations.

Assuming the parties had indeed chosen the DIFC-LCIA as the forum for disputes, the Court then turned to the question of whether this forum was available in light of Decree 34 abolishing the institution. Here, the Court found this issue to be novel. The Court, referencing Decree 34, stated that the successor institution, the DIAC, adopted the substance of the prior procedural rules and its operations, thus considering both institutions to be fundamentally the same.

The American Court then questioned the parties' general intent to resort to arbitration, or whether this method of dispute resolution was conditioned on the administration of the DIFC-LCIA. The Court concluded that the parties had not designated the DIFC-LCIA as the exclusive forum. According to the appellate judges, the general intent was to submit any dispute arising from the contract to arbitration, in accordance with the terms of the contract and the annexes referring to dispute resolution.

For all these reasons, on 27 January 2025, the Court of Appeals reversed the first instance ruling and remanded the case for further proceedings consistent with its judgment. The Court clarified that if the DIFC-LCIA rules could be applied by any other available forum, including LCIA, DIAC, or a forum in Saudi Arabia, in accordance with the parties' objective intent, the district court should order arbitration in that forum. Otherwise, the district court should consider ordering arbitration in Saudi Arabia pursuant to the terms of Schedule A.

Contribution by Esther Gesnel

Ontario Court of Appeal, *Vento Motorcycles Inc., v The United Mexican States*, 2025 ONCA 82

On February 4, 2025, the Ontario Court of Appeal ruled in *Vento Motorcycles, Inc. v. Mexico* (2025 ONCA 82), setting aside an arbitral award rendered in favour of Mexico under the North American Free Trade Agreement (hereinafter, "NAFTA"). The Court found that one of the arbitrators, Mr. Hugo Perezcano, was subject to a reasonable apprehension of bias due to undisclosed communications with Mexican officials during the arbitration proceedings.

Vento Motorcycles Inc. (hereinafter, "Vento"), a United States-based motorcycle manufacturer, filed a claim under NAFTA Chapter 11 in 2017, alleging that Mexico wrongfully denied preferential tariff treatment to its motorcycles assembled in the United States. According to Vento, this action led to the collapse of its business in Mexico.

An ICSID Tribunal was constituted to hear the case, with Vento appointing Professor David Gantz, Mexico appointing Mr. Hugo Perezcano, and the ICSID selecting Dr. Andrés Rigo Sureda as the Tribunal's president. Following a five-day hearing in November 2019, the Tribunal issued its final award on July 6, 2020, unanimously dismissing Vento's claim.

After the award was rendered, Vento discovered that Mr. Perezcano had been in direct communication with Mexican officials, including Mr. Orlando Pérez Gárate, Mexico's lead counsel in the arbitration. These communications involved discussions about Perezcano's potential appointment to future arbitration panels under trade agreements, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Canada-United States-Mexico Agreement (CUSMA).

Vento applied to the Ontario Superior Court of Justice to set aside the award, arguing that these undisclosed communications created a reasonable apprehension of bias. While the application judge agreed that the conduct raised concerns of bias, she declined to annul the award, reasoning that the presence of two other impartial arbitrators and the significant costs of re-arbitration justified upholding the award.

On appeal, the Ontario Court of Appeal was tasked with determining whether the finding of a reasonable apprehension of bias should necessarily lead to the annulment of the arbitral award.

The Court of Appeal ruled in favour of Vento, overturning the lower court's decision and setting aside the Tribunal's award. It made several key findings :

1. A reasonable apprehension of bias is a fundamental breach of natural justice. The Court of Appeal reaffirmed the principle that when an arbitrator is subject to a reasonable apprehension of bias, the entire decision is tainted and must be nullified, regardless of whether the bias actually influenced the outcome.

2. The bias of one arbitrator affects the legitimacy of the entire Tribunal. The Court rejected the argument that the other two arbitrators' impartiality "neutralized" Perezcano's bias. It held that the presence of even one biased arbitrator compromises the integrity of the deliberations and creates an unacceptable risk that the decision was unfairly influenced.

3. The high threshold for setting aside an arbitral award was met. The Court of Appeal emphasized that while courts generally respect arbitral awards, this deference cannot override fundamental principles of fairness and impartiality in arbitration. It found that Perezcano's failure to disclose discussions about future appointments, combined with the

timing of these communications during the arbitration, justified setting aside the award.

4. Rehearing costs cannot justify upholding a procedurally flawed award. The Court dismissed Mexico's argument that re-arbitration costs and time delays outweighed the procedural breach. It held that the overriding priority must be ensuring a fair arbitration process, rather than protecting efficiency at the expense of integrity.

Contribution by Sofia Bensouda

Singapore High Court, *Swire Shipping Pte Ltd v Ace Exim Pte Ltd* [2024] SGHC 211

In a judgment delivered on August 16, 2024, the High Court of the Republic of Singapore (hereinafter the "High Court") reiterated the high threshold for setting aside arbitral awards. The General Division of the High Court refused to set aside an arbitration award on the grounds of alleged breaches of the rules of natural justice, emphasizing the principle of minimal curial intervention in arbitration matters. This principle limits judicial interference in arbitral proceedings, ensuring that courts intervene only in exceptional circumstances to uphold the integrity and finality of arbitration.

The dispute arose from an English law-governed contract between Swire Shipping Pte Ltd (hereinafter the "Claimant"), a Singapore-based global shipping provider, and Ace Exim Pte Ltd (hereinafter the "Defendant"), a Singapore-incorporated company specializing in vessel recycling. Under the agreement, Ace Exim agreed to buy a ship from Swire, paying 30% upfront. The rest was due once Swire issued a notice of readiness (hereinafter "NOR"), confirming the ship was ready for delivery at the Port of Alang, India.

However, COVID-19 restrictions rendered the Port of Alang inaccessible. Swire asked Ace Exim to propose an alternative delivery location but received no response. Undeterred, Swire proceeded to direct the vessel toward the port and issued the NOR upon its arrival at the "Jafarabad Waiting Place". Ace Exim rejected the NOR, asserting that the ship was not at the agreed delivery location. Swire, on the other hand, insisted that Ace Exim was still contractually bound to complete the purchase.

As a result, Ace Exim initiated arbitration in Singapore under the Singapore Chamber of Maritime Arbitration rules, seeking a refund of the 30% deposit. Swire counterclaimed for the remaining purchase price.

On September 23, 2023, the sole arbitrator issued a 386-page decision in favour of Ace Exim. Unwilling to accept the outcome, Swire challenged the award before the High Court, claiming that the arbitrator had violated the rules of natural justice under the Singapore International Arbitration Act. The crux of Swire's challenge rested on two key arguments.

First, it claimed that the arbitrator had wrongly classified the "Jafarabad Waiting Place" as merely a "*customary waiting area for heavily laden ships*". Swire contended that this finding was unfair, as it had not been given a proper opportunity to present its case. Swire further alleged that by making this determination, the arbitrator had exceeded his authority.

Second, Swire disputed the arbitrator's interpretation of the testimony given by its expert witness, Mr. Shashank Agrawal. It claimed that the arbitrator had misrepresented Agrawal's evidence, wrongfully concluding that it supported the Jafarabad findings. According to Swire, this mischaracterization distorted its position and deprived it of a fair chance to argue its case. It also maintained that the arbitrator had failed to fully consider the evidence, further undermining the fairness of the proceedings.

Finally, Swire contended that the award's "*manifestly incoherent*" reasoning showed that the arbitrator had either fundamentally misunderstood the case or failed to engage with it properly.

However, the High Court rejected Swire's arguments and upheld the Final Award. Regarding the Jafarabad issue, the High Court ruled that the arbitrator acted within his jurisdiction, as the issue was closely tied to the core dispute and had been raised by both parties. It also found no breach of natural justice, concluding that Swire had been given a fair opportunity to address the issue and that the arbitrator's reasoning was reasonably

linked to the arguments presented.

As for the Agrawal evidence issue, the High Court dismissed Swire's claim, affirming that the arbitrator had duly considered the matter. The High Court clarified that Swire's challenge was, in essence, a disagreement with the arbitrator's assessment of the evidence, which does not constitute grounds for annulment. Since all key points had been addressed in the proceedings, and Swire had been afforded a fair opportunity to present its case, the High Court found no basis for intervention.

Notably, the High Court of Singapore was unequivocal in its criticism, describing the arbitral award as "*borderline unintelligible*" and a "*maze-like combination*". Nevertheless, despite its complexity, the High Court upheld the award, reinforcing the principle of minimal judicial intervention in arbitration. It underscored that parties who choose arbitration must accept its inherent risks, including the limited ability to challenge awards in court.

This ruling highlights Singapore's steadfast commitment to arbitration. By imposing a high threshold for judicial interference and reinforcing the finality of arbitral awards, Singapore solidifies its status as a pro-arbitration jurisdiction.

However, the High Court also conveys a crucial lesson to arbitrators: in their effort to shield awards from legal challenges, they must not sacrifice clarity for complexity. Overly intricate reasoning can undermine confidence in the process rather than enhance it. Ultimately, the case underscores the delicate balance between safeguarding arbitral autonomy and upholding procedural fairness, further solidifying Singapore's standing as a premier arbitration hub.

Contribution by Redeat Zewdie

INTERVIEW WITH ALEXIS CHOQUET

1. To begin with, could you please tell us about your background?

First of all, I would like to thank you for the interview. PBA is an association that is very close to my heart, as I was its Treasurer and its President between 2020 and 2022. I wish this association all the best, and hope that it will help to open up new opportunities for students in international arbitration.

I studied Law in Rennes I University for two years. At that time, I already had an interest in international affairs, and I already knew I wanted to enrol on an Erasmus program for my third year. Thus, I followed my third year of law school at Maastricht University where I embarked upon my career path in international and European law. Starting that Erasmus year, I decided to specialise in European law and international law. I was accepted on a Master 1 in general international law at Paris 1 Panthéon-Sorbonne University where I discovered international economic law. I was fascinated by this subject blending law, macro-economics, geo-politics and international relations. I therefore decided to continue my specialisation in this subject and was admitted to the Master 2 in international economic law at Paris 1 Panthéon-Sorbonne University.

I studied international investment law and investment arbitration in detail. I decided to continue in this area without knowing exactly the career path I wanted to follow (international organisation, lawyer, companies). My entry in the world of "policy making" occurred at the OECD secretariat where I was able to do an internship. At the same time, I was enrolled on a correspondence Master 2 in international and comparative environmental law. This enabled me to write a master's thesis on the links between international environmental law and international investment law.

At the same time I was involved in multiple associations which allowed me to create close links with the arbitration community, such as the with the arbitration and mediation department of the Sorbonne Legal Clinic, and with Paris Baby Arbitration.

2. You are currently working as Deputy Head of the International Trade and Investment Rules Unit at the French Treasury. Could you explain what this role involves?

Since June 2023, I have worked as Deputy Head of the International Trade and Investment Rules Unit at the French Treasury. In this role I am in charge of investment protection treaty reform. I, alongside my colleagues from other departments and ministries, voice France's opinion within three main international organisations where such reforms take place.

Firstly, on the European level I represent France within the Trade Policy Committee of the Council of the European Union in its investment experts' subgroup. Here, we exchange ideas on European negotiations on the subject of investment protection and the facilitation of investments.

Secondly, at the multilateral level, I am part of the French delegation to the United Nations Commission for International Trade Law (UNCITRAL)'s Working Group III charged with the reform of investor-State dispute settlement. In this framework, we negotiate multiple texts, including the Statute of the Multilateral Investment Court in order to replace ad hoc investment arbitration with a two-tiered institutional jurisdiction including an appellate mechanism in order to create « *jurisprudence constante* » and move away from the Common Law precedent system which dominates current investment arbitration.

Finally, I represent France within the Investment Committee of the Organisation for Economic Cooperation and Development (OECD) which notably works on the convergence of substantial standard for clauses in old-generation bilateral investment treaties.

3. You did an internship at the OECD before joining the French Treasury. Could you please tell us about this experience and what you took away from it?

After an internship in project finance at Société Générale, I did an internship with a law firm and then another with the OECD Investment Committee secretariat. During this internship I participated in two main projects. First of all, I worked on the analysis and comparison of clauses contained in hundreds of investment treaties within the framework of the project on the future of investment treaties, started by the OECD in 2020 with more than 100 countries invited to work on common understanding of the substantial protection standards in BITs. In addition, I worked on the comparison of different investment screening mechanisms. This experience in an international organisation allowed me to understand that I was mainly drawn to investment law itself, especially in its political dimension. Since then, I hoped to pursue a career in international economic law within international organisations and especially with the French administration.

4. You attend the sessions of UNCITRAL's Working Group III on the reform of investor-State dispute resolution as a member of the French delegation. Could you tell us about the work undertaken by this Group and of France's position?

Working Group III achieved its first concrete results in 2023 and 2024 with the adoption, during plenary sessions of the Commission, of draft instruments on three elements of the reform. First of all, the provisions allowing recourse to mediation to be encouraged. Then two codes of conduct aimed at arbitrators or judges of a permanent jurisdiction mechanism. Finally, the statutes of an advisory center aiming at supporting States, especially those in development, regarding the prevention and management of disputes related to international investments. The effective implementation of this advisory center, which several States (including France) have proposed to host, is currently ongoing.The operationalisation of the center started in December 2024, within a group of interested countries which benefits from the support of the UNCITRAL Secretariat and whose deliberations will continue throughout 2025. France has largely supported this reform effort and continues to support it.

Four other main areas for reform are still on Working Group III's agenda. This includes the finalisation of: (i) a guide on best practice for the mitigation and prevention of disputes; (ii) provisions relating to procedural questions and cross-cutting issues; (iii) the statutes of a permanent jurisdiction and an appellate mechanism; and (iv) a Framework Convention destined to put into place the overall reform.

5. Since 2018, the EU has been wanting to create a multilateral investment court. In your opinion, what would this change when compared to the current investor-State disputes resolution mechanism?

UNCITRAL's Working Group III was mandated in 2017 to set out a large-scale reform of investor-State dispute settlement. After having documented the problems raised by the current investor-State arbitration system, and then identified possible reforms to resolve these issues, Working Group III started the third phase of its mandate, which consists in the creation of concrete reform proposals based upon the draft instruments prepared by the Secretariat. The European Union defends a structural or systematic approach based upon the following observation: ad hoc arbitration tribunals were at the origin of the problems inextricably linked one to another (incoherence of the decisions, elevated costs and duration of procedures, questions on the independence of arbitrators, etc.) which justifies their replacement by a permanent multilateral investment court. Beyond the creation of a certain coherence in the decisions, the aim is also to create a Court which would, through its judges, create an institution representative of the different regions of the world, of linguistic diversity, from different legal systems and to ensure a parity, in order to create a better balance between the different interests which are confronted to each other within procedures opposing investors against States. This approach is supported by the European Union as well as France and is seen favourably by other delegations.

The Multilateral Court will offer better legal certainty and a reduction in the costs and duration of procedures, benefiting investors as well as States, thanks to (i) the creation of jurisprudence which will eventually allow certain cases to be decided quicker and (ii) thanks to designated permanent judges paid via the annual contributions of the member States, which will reduce the procedural fees. New procedural rules will also enable States to clarify their intentions in their old-generation investment treaties to restrict the risks of conflicts of interests (for example thanks to a Code of Conduct for judges). Furthermore, the Advisory Center on the resolution of international investment disputes will, itself, help developing or less developed countries in their defense against investors. Indeed, the cost of ad hoc arbitration tribunals and associated procedural costs can sometimes be exorbitant for the defending State. Together, these elements of the reform will, I believe, bring back confidence in the investor-State dispute resolution system.

NEXT MONTH'S EVENTS

7th March 2025: Conference on "The future of International Arbtiration: Adopting to New Challenges"

Organised by Columbia Paris Law Society

Where ? The Sorbonne

Website: https://www.linkedin.com/posts/columbia-paris-law-society-m2-global-business-law-and-governance-745531137_cpls-2025-conference-the-columbia-activity-7300487993012703233-ic5I?utm_source=share&utm_medium=member_desktop&rcm=ACoAABpTfDMBKhtZbeQY_X9IZCUln3YoBiFZ1JI

13th March 2025: Webinar on the subject of "How will arbitration meet the future needs of the tech industry"

Organised by CMS UK

Where ? Online

Website: https://cms.law/en/gbr/events/technology-disputes-arbitration-trends-challenges-and-the-future

INTERNSHIP AND JOB OPPORTUNITIES

LAW PROFILER

INTERNSHIP
A&O SHEARMAN

INTERNATIONAL ARBITRATION
Start date: January 2026
Duration: 6 months
Location: Paris

INTERNSHIP
D'ALVERNY AVOCATS

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

INTERNSHIP
ALEM & ASSOCIATES

INTERNATIONAL ARBITRATION
Start date: July 2026
Duration: 6 months
Location: Abu Dhabi

INTERNSHIP
NORTON ROSE FULBRIGHT

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