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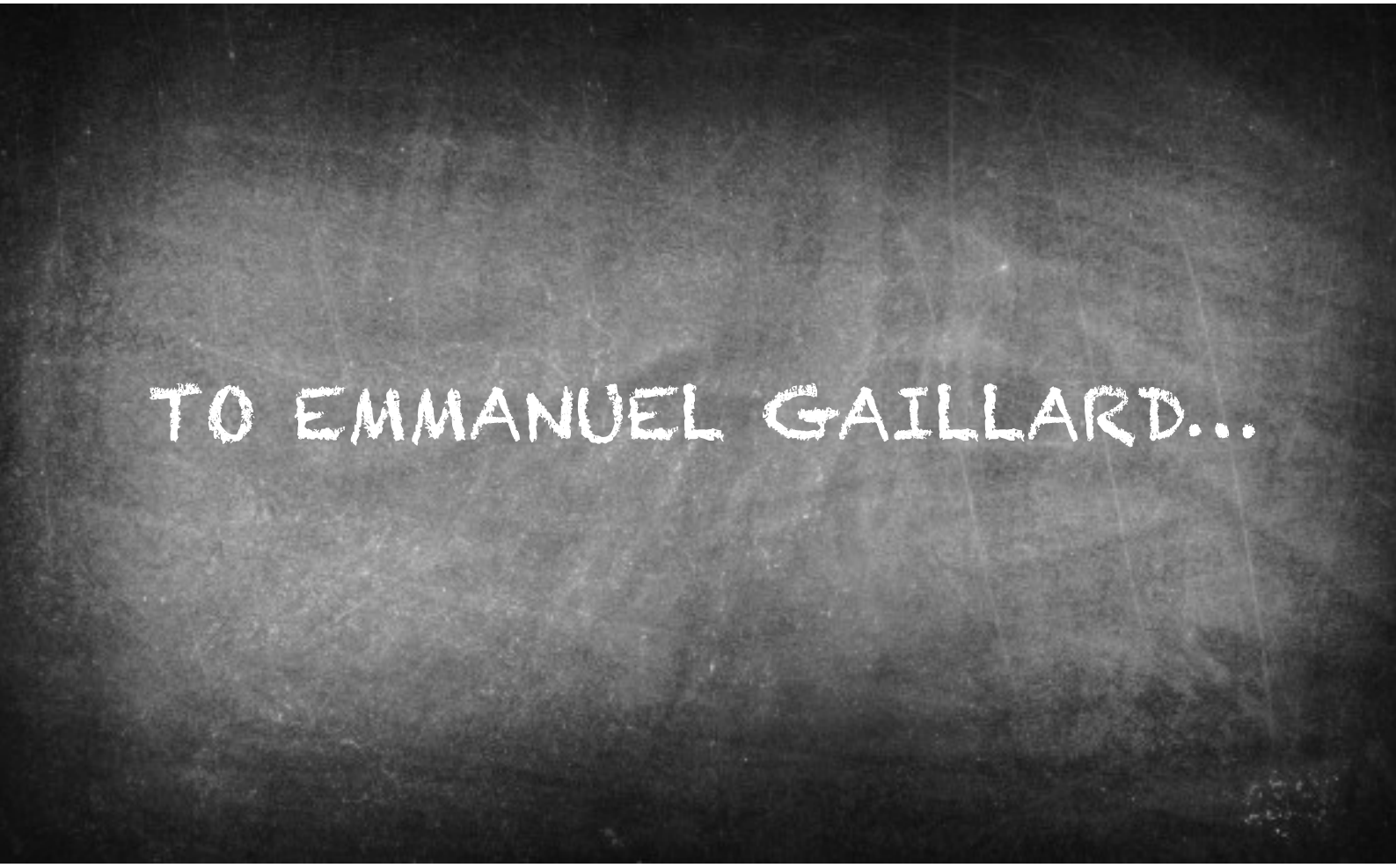

French and foreign court decisions

Arbitral awards

Tribute to Emmanuel Gaillard

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FOREWORD

Paris Baby Arbitration is a Parisian association and an international forum aiming the promotion of young arbitration practice, as well as the accessibility and the popularizing of this field of law, still little known.

Each month, its team has the pleasure to present you the Biberon, an English and French newsletter, intended to facilitate the lecture of the latest and the most prominent decisions given by states and international jurisdictions, and the arbitral awards.

For this purpose, Paris Baby Arbitration encourages the collaboration and the contribution of the younger actors in arbitration.

Paris Baby Arbitration believes in work, goodwill and openness values, which explain its willingness to permit younger jurists and students, to express themselves and to communicate their passion for the arbitration.

Finally, you can find all the previously published editions of the Biberon and subscribe to receive a new issue each month on our website: babyarbitration.com.
We also kindly invite you to follow us in our LinkedIn and Facebook pages and to become a new member of our Facebook group.

Have a pleasant reading!

FRENCH COURTS

COUR DE CASSATION

Cour de cassation, 1st civil chamber, 17 march 2021, n° 20-14.360
Contributed by Celia Kuhn

A dispute over the determination of the value of the shares of one of the shareholders of the company 8 Harlington 2 BV has arisen between the latter and the manager. The leader subsequently died, leaving his wife and son to succeed him.
The shareholder contesting the setting of the value of his shares then assigned another shareholder of the company as well as the successors, to see that this succession is subject to the jurisdiction of the French judge, that the son of the deceased is de facto manager of the company, and that consequently the company's deficits from 2011 to 2017 had to be borne by the succession of the former manager. He therefore asked that the defendants be ordered to pay him a certain sum for the shares he holds in this company and its affiliates.

At the same time, the defendants seized the pre-trial judge of an incident tending to say that the rabbinical arbitral tribunal and the Israeli courts, seized in the first place, had sole jurisdiction.

After an appeal was lodged, the Versailles Court of Appeal, in its order of January 28 2020, rejected the exception of lis pendens and the request for the declaration of an arbitral tribunal sitting in Israel and the Israeli state courts only competent to rule on the dispute. It considered on the one hand that the Nanterre High Court, in whose jurisdiction two of the defendants are domiciled, has jurisdiction under Article 42 of the Code of Civil Procedure.

It further considered that the son of the deceased was not a party to the proceedings conducted in Israel, while the companies were not parties to the present proceedings, and that the subject of the dispute, in France and in Israel, was not the same since the applicant seeks in the present proceedings the conviction of the defendants.

The first civil chamber recalls that according to article 1448 of the code of civil procedure, applicable to international arbitration by virtue of article 1506 of the same code, when a dispute relating to an arbitration agreement is brought before a State jurisdiction, the latter declares itself incompetent unless the arbitral tribunal has not yet been seised and if the arbitration agreement is manifestly null or manifestly inapplicable. It therefore considers that the arbitral tribunal, first seised, has priority jurisdiction to assess whether a dispute falls within the scope of the arbitration agreement.

Thus, it considers that the Court of Appeal of Versailles ruled on ineffective grounds, whereas being alleged the previous referral to an arbitral tribunal, it was incumbent on it to verify its jurisdiction with regard only to the provisions of article 1448 of the Code of Civil Procedure, by first obtaining the observations of the parties on this point. The court of cassation thus considers that the court of appeal violated this text and annuls in all its provisions the judgment rendered on January 28 2020.

COURTS OF APPEAL

Paris Court of Appeal, 23 February 2021, Lerco v Noc (I)
Contributed by Baptiste Huon

On 23 February 2021, the Paris Court of Appeal dismissed the action to set aside the award that was issued on January 4, 2018 in an ICC arbitration between the Libyan Emirates Oil Refining Company ("LERCO") and the National Oil Corporation ("NOC").

On 9 March 2009, LERCO, the Buyer and NOC, the Seller, entered into a contract for the supply of raw materials from a refinery in Libya ("Contract"). However, in 2011, the Libyan conflict led to the suspension of the refinery's operations. The present dispute arose from this suspension. LERCO accused NOC of charging prices that were not in accordance with the Contract, of not supplying the quantity of oil stipulated in the Contract and of having used the refinery illegally during the Libyan revolution. The NOC alleged that LERCO had failed to pay for certain oil deliveries and had failed to comply with its "take or pay" obligation.

Following the arbitration agreement stipulated in the Contract, LERCO initiated arbitration proceedings against NOC, under the aegis of the ICC and its Rules. After the rejection of its claim and its order to pay damages for the default of payment, LERCO filed an action to set aside the award based on (i) the lack of independence and impartiality of the arbitral tribunal, (ii) the fact that the arbitral tribunal wrongly declined jurisdiction to hear LERCO's claims relating to the unauthorised use of the refinery by NOC and (iii) the award being contrary to international public policy.

The Paris Court of Appeal rejects the first ground because of the absence of any business between the arbitrator appointed by NOC and the company's counsel that could give rise to reasonable doubt as to his independence. The Paris Court of Appeal also noted the absence of specific observations by the parties on this subject during the proceedings, which lasted more than four years.

On the second plea, the Paris Court of Appeal considers that the arbitral tribunal wrongly declined jurisdiction. The intention of the parties was in fact to extend the arbitration clause to disputes arising not only from the Contract but also to disputes in connection with it, in particular those arising from the consequences of unauthorised supplies of raw materials.

Finally, the Paris Court of Appeal rejects the third plea. The French legal order conception of international public policy could not be affected by the enforcement of the arbitral award, even though the arbitrators' interpretation and application of the Contract invite the Court of Appeal to review the merits of the award, which is prohibited.

The Court of Appeal partially annuls the arbitral award insofar as the arbitral tribunal wrongly declined jurisdiction to hear the claim relating to the unauthorised use of the refinery. Otherwise, the Court of Appeal rejects the action to set aside and orders LERCO to pay NOC the sum of EUR 100,000 in respect of legal costs.

Paris Court of Appeal, 2 March 2021, n° 18/16891

Contributed by Fanny Vigier

In Lebanese Media Holding Ltd c/ Lebanese Broadcasting Corporation-International SAL, the French Paris Court of Appeal dismissed an action to set aside two awards, holding that the sole arbitrator had rightly found that he had jurisdiction to hear the claim.

Lebanese Media Holding Ltd ("LMH") was created in 1996 and initially 51% held by the shareholders of the Lebanese Broadcasting Corporation International ("LBCI"). LMH has several subsidiaries, including PAC Ltd ("PAC"), LBC-IP Ltd ("LBC-IP") and LBC Intellectual Property UK Ltd ("LBC Intellectual Property"). In 2003, Kingdom 5-KR-170 Ltd ("Kingdom"), became a majority shareholder in LMH. Kingdom is the financial holding company of Saudi Prince Al Waleed and belongs to the Rotana group, which also includes Rotana Holding FZ LLC ("Rotana Holding"). This transaction was subject of a memorandum of understanding (MoU) in July 2007 and a share sale and association agreement ("SSA") in December 2007.

Subsequently, in September 2009, LBCI entered into a corporation and service agreement (CSA) with LMH and its subsidiaries, including PAC, with retroactive effect to 1 January 2008.

The CSA was governed by French law and included an arbitration clause providing for International Chamber of Commerce ("ICC") arbitration seated in Paris. Subsequent to the signing of the CSA, Mr El Daher (the main shareholder and CEO of LBCI) and Rotana TV (another member of the Rotana group of companies) entered into a new service agreement.

In 2011, a dispute arose between the parties relating to the use of the LBC Europe and LBC America trademarks by LMH. LMH objected to LBCI's request to discontinue its use of these trademarks and terminated the CSA with immediate effect in January 2012, citing alleged violations of the CSA by LBCI. Shortly after, PAC went into voluntary liquidation in the Cayman Islands, and its Lebanese branch was placed in bankruptcy in November 2015 in Lebanon.

In April 2013, LBCI commenced ICC arbitration proceedings against Rotana Holding, Kingdom, LMH and its subsidiaries (including PAC, LBC-IP and LBC Intellectual Property UK) pursuant to the arbitration agreement contained in the CSA.

First of all, a partial award was rendered in July 2015 on certain issues relating to LMH and LBCI pursuant to the CSA.

A final award was then rendered in June 2018, dealing with LBCI's other claims, and mainly as to the validity of the termination of the CSA. In this award, the sole arbitrator: (i) determined that he had jurisdiction over PAC, LBC-IP and Rotana Holding; (ii) found that LMH breached and unlawfully terminated the CSA and that Rotana Holding actively participated in the termination and (iii) ordered LBCI, LMH and Rotana Holding to pay significant amount plus interest.

In July 2018, LMH, its subsidiaries, Kingdom and Rotana Holding filed a claim before the Paris Court of Appeal to set aside the partial and final awards. In September 2018, PAC also filed a claim with the Paris Court of Appeal to set aside both awards.

The two sets of proceedings were joined by the court, and PAC's request to set aside the award became incidental to the main request filed by LMH, Kingdom and Rotana Holding.

Regarding the main application to set aside the awards, Claimants' raised several arguments to support their case.

First of all, the claimants argued that Rotana Holding, as a non-signatory to the CSA, could not be bound by the arbitration agreement since the company was incorporated after the CSA was signed. They further argued that the common intention of the parties to be bound by the agreement could not be deduced from documentary evidence submitted in the arbitration, which did not demonstrate the involvement of Rotana Holding in the execution and termination of the CSA.

The claimants further argued that LBC-IP was not a party to the CSA and that the sole arbitrator wrongly considered that he had jurisdiction because (i) LMH's rights to register the LBC trademarks did not emanate from the CSA, and (ii) LBC-IP could not be considered to be the assignee of a right derived from the CSA, with the result that the arbitration clause contained in the CSA could not bind LBC-IP.

The claimants then argued that the tribunal was not properly constituted and that some of the decisions taken by the arbitrator were ultra petita (beyond what is sought).

The claimants also argued that the arbitrator violated the principle of contradiction by raising arguments without submitting them to adversarial debate, and that in particular, he raised ex officio the failure to transfer the trademarks as a basis for LBCI's compensation, without submitting this question to the parties for adversarial debate.

Finally, the claimants argued that enforcement of the award would be in breach of French international public policy since portions of the award were based on misleading statements made by LBCI, relating notably to LBCI's income derived from the broadcasting of LBC Europe in the Gulf countries.

Regarding the incidental application, PAC submitted four arguments in support of its claim.

First, PAC argued that the arbitrator had wrongly ascertained jurisdiction over PAC pursuant to the CSA.

PAC further argued that, being in liquidation, it could not be brought before any court, including an arbitral tribunal, without the express permission of the Cayman Islands bankruptcy court.

As did Claimants, PAC also argued that enforcement of the awards would constitute a breach of French international public policy but to the extent that it would infringe on its right of access to justice, in that the arbitrator had failed to rule on PAC's claims relating to LBCI's alleged wrongful retention of assets.

Finally, PAC argued that enforcement of the award would result in a violation of French international public policy in that it violated the equality of creditors because the arbitrator should have avoided favouring LBCI, PAC's creditor, over other creditors.

In its decision dated 2 March 2021, the Paris Court of Appeal dismissed all arguments contained in both the request to set aside and the incidental request to set aside and upheld both awards in their entirety.

As per the main request for set aside, the court dismissed Claimants' arguments for the following reasons.

First of all, the sole arbitrator had properly accepted jurisdiction over Rotana Holding, and Rotana Holding intervened directly to obtain the execution of the CSA.

Second, the court noted that, in accepting jurisdiction over LBC-IP, the sole arbitrator had held that the existence of a previous agreement between the parties providing for the transfer of LBC's trademark rights had no bearing on the fact that the CSA also provided for such rights, since the CSA superseded any contract or agreement between LMH and LBCI. The court held that the arbitration clause contained in the CSA was therefore validly transferred to LBC-IP, such that the sole arbitrator had also properly accepted jurisdiction over LBC-IP.

The court also summarily dismissed the argument that the tribunal was not properly constituted, holding that this amounted to a challenge to the substance of the arbitrator's reasoning for the award, which was not subject to review in set aside proceedings.

Besides, the court notably held that the arbitrator ruled within the limits of the claims submitted to him by granting LBCI a lower compensation than the one requested by LMH for the loss of advertising revenues due to the early termination of the CSA, while quantifying the amount of this loss by reference to the calculation method he considered most relevant for the relevant year. The court dismissed the ultra petita claim.
The court found that the failure to transfer the trademarks had been expressly and contradictorily debated in the context of LBCI's plea of non-performance and the

arbitrator did not raise any plea of his own motion. Therefore, the arbitrator complied with the principle of contradiction and the court rejected the ground based on the violation of this principle.

Finally, as to the alleged misleading statements made by LBCI, the court held that to establish a procedural fraud of such a nature had taken place would involve demonstrating that false documents were produced, false testimony was taken, or documents relevant to the resolution of the dispute were fraudulently concealed from the arbitrators such that the arbitrator could not make an informed ruling on this matter. The court found that the claimants did not adduce any evidence of such fraud, such that a violation of French international public policy was not established in the present case, and the awards could not be set aside on this ground either.

As per the incidental application, the Court also rejected the PAC's claim for the following reasons.

The Court turned to PAC's incidental application for set aside for the same reason it dismissed all of LMH, Kingdom and Rotana Holding's arguments on this point.

The court then held that the validity of the arbitration agreement contained in the CSA was not affected by the alleged nullity or invalidity of PAC's consent to be bound by the CSA resulting from an alleged conflict of interest, a defect in consent due to a constraint exerted on PAC or a situation of economic dependence of PAC with regard to LBCI.

The court recognized the sole arbitrator ascertained jurisdiction over PAC after noticing that two procedural orders rendered by the Grand Court of the Cayman Islands that the liquidators of PAC were granted authority to bring or defend any action or other legal proceedings in the name and on behalf of PAC in respect of its claim against LBCI.

The court noted that, from a plain reading of the award, the arbitrator's adjudication of LBCI's claims relating to PAC necessarily entailed the rejection of PAC's corresponding claims. The court therefore dismissed PAC's grievance as amounting to a request to seek a review of the merits of the award.

Finally, the court noted that its set aside review was only designed to assess whether the execution of the provisions taken by the arbitral tribunal infringed in a manifest, effective and concrete manner the principles and values constitutive of French international public policy. Since the liquidation proceedings of PAC in the Cayman Islands had, apart from any exequatur, effects limited to the designation of a liquidator, and even if it were accepted that the arbitrator failed to rule on the liquidator's request for restitution of assets belonging to the debtor, the awards did not infringe the principle of equality of PAC's creditors in a manifest, effective and concrete manner.

Paris Court of Appeal, 9 March 2021, State Road Agency of Ukraine v. Todini Costruzioni Generali S.p.A, n° 19/04410

Contributed by Alexander Mironov

The judgment concerns an appeal of the State Road Agency of Ukraine against one of the partial awards rendered by an arbitral tribunal under the auspices of the ICC International Court of Arbitration. The Claimant brought an action for partial annulment of the award on the grounds, inter alia, of the arbitral tribunal's incompetence and of its violation of international public policy. The Paris Court of Appeal dismissed all Agency's claims.

Ukravtodor is part of the government of Ukraine with the function of road development in Ukraine. Ukravtodor is also responsible for maintaining and repairing these roads.

Todini is a company under Italian law, represented in Ukraine and active in civil engineering.

On 4 January 2013 Ukravtodor and Todini concluded two contracts. According to the contracts, Ukravtodor entrusted Todini with repair work on the M03 road that connects Kiev, Kharkiv and Dovzhansky.

The contracts contained arbitration clauses as well as the obligation of the parties to comply with a pre-arbitration procedure of dispute resolution. Under this procedure, the parties were required to refer disputes to a Dispute Board ("Dispute Board") before resorting to arbitration.

The contracts did not authorize Todini to assign all or part of its rights under the Contracts to a third party without prior consent from Ukravtodor.
Disputes arose between the parties over payments related to the execution of the contracts. Todini referred to the Dispute Board which issued several decisions condemning Ukravtodor.

At the same time, in 2016, Todini underwent a restructuring during which Todini ceased its activities in Ukraine in favour of an Italian company HCE Costruzioni

("HCE"). Todini and HCE Costruzioni were subsidiaries of a company Salini.

Ukravtodor considered that Todini violated the agreed provisions by assigning the contracts to HCE without Ukravtodor's consent.

On 7 March 2017, Todini notified Ukravtodor of the termination of the contracts, considering Ukravtodor responsible for various shortcomings.

On 8 March 2017, Todini initiated arbitration proceedings under the auspices of the ICC International Court of Arbitration. Todini asked to enforce the decisions of the Dispute Board.

On 26 June 2018, the arbitral tribunal rendered a first partial award in favour of Todini. The tribunal ordered Ukravtodor to pay the sums determined by the Dispute Board. In addition, the tribunal charged interest on the allocated amount. Todini had to calculate the amount of interest himself, according to the principles set out in the first partial award. Then Todini had to send the calculations to Ukravtodor to get his agreement.

On 30 January 2019, in the absence of agreement between the parties, the arbitral tribunal issued a second partial award determining the amount of interest that Ukravtodor had to pay.

On 22 February 2019, Ukravtodor appealed to the Paris Court of Appeal for the annulment of the second partial award.

The Paris Court of Appeal found the appeal admissible.

An element of the Claimant's memorial, alleging a lack of a fair trial, was not considered by the Court as a new claim within the meaning of Article 910-4 of the French Code of Civil Procedure.

The Court held that the element at issue "is not a new claim but an additional element of discussion" *i*n support of the plea for annulment on the ground of violation of international public policy.

Further, the Paris Court of Appeal rules on the pleas for annulment raised by Ukravtodor.

First, the Court rejects Ukravtodor's plea of incompetence of the arbitral tribunal based on the claim of the alleged assignment of the contracts.

Ukravtodor argued that the tribunal was incompetent because of the assignment of the contracts.

In rejecting the plea, the Court states that the arbitration clause is legally independent of the contract that contains it or refers to it.

The Court also notes that the existence or validity of the arbitration clause depends solely on the common intention of the parties provided that no mandatory provision of French law or of international public order is violated.

Thus, regardless of whether the contract containing the arbitration clause has been assigned or not, the Court must verify the existence and scope of the consent of the parties to the arbitration.

After examining the contracts, the Court concluded that the common intention of Todini and Ukravtodor, was to entrust all disputes arising from these contracts to an arbitral tribunal after the examination of the disputes by the Dispute Board.

Thus, according to the Court, the arbitral tribunal was competent to settle the dispute.

Secondly, the Court rejects Ukravtodor's plea, based on the arbitral tribunal's incompetence to enforce non-final decisions of the Dispute Board.

According to Ukravtodor, the arbitral tribunal wrongly considered itself competent without seeking the common intention of the parties.

After examining the contracts, the Court concludes that there is no evidence that the parties have limited the jurisdiction of the arbitral tribunal and that the parties could have intended to deprive the tribunal of the enforcement of Dispute Board

non-final decisions.

Consequently, there was nothing to prevent Todini from requesting the arbitral tribunal for the provisional enforcement of the decisions of the Dispute Board by partial award until the dispute was finally settled.

Thirdly, the Court rejects Ukravtodor's plea based on the violation of international public order.

Ukravtodor argued that the recognition or enforcement of the second partial award is contrary to international public policy on the ground that it was fraudulently obtained by Todini who deliberately concealed the assignment of the contracts.

Applying the criteria of Article 1520, 5° of the French Code of Civil Procedure, the Court notes that no fraudulent conduct is established in support of the appeal against the second arbitral award. Accordingly, the Court sees no violation of international public order.

Paris Court of Appeal, 9 March 2021, n° 18/21326

Contributed by Thibault Cardonne

Arbitration is an eminently contractual matter, so that the will of the parties is its center of gravity, subject to respect for international public policy. The case before us is a perfect reminder of this.

On January 4, 2013 two contracts were concluded between a civil engineering company under Italian law (TODINI) and the state agency of the government of Ukraine competent in the development, maintenance and repair of roads (UKRAVTODOR).

A dispute board clause followed, if necessary, by ICC arbitration proceedings, appointing the Paris Chamber of International Commerce, is stipulated, with Ukrainian law applicable.

These contracts also contained an approval clause prohibiting the Italian company from transferring its rights without the prior authorization of the Ukrainian agency. However, difficulties arose in the execution of these contracts, forcing the dispute board to issue several decisions. At the same time, in 2016, the Italian company proceeded to its restructuring, resulting in the transfer of its shares to another company.

The Ukrainian agency considered that the company had violated the approval clause by not seeking its approval and notified it on August 4, 2016 of the termination of the contracts effective August 23 of the same year, which was challenged by its co-contractor before the dispute board. On the other hand, the Italian company will point out the breaches of the Ukrainian agency and will notify it of the termination of the contracts on March 7, 2017, then introduces an arbitration procedure the following day at the ICC of Paris in order to order the forced execution of the decisions of the Dispute Board in its favor.

The Tribunal rendered a first partial award and ordered the enforcement of certain amounts decided by the Dispute Board, except for the interest rates, which the Tribunal modified, and rejected, on the other hand, the claims made under the performance bond.

Not satisfied, the Ukrainian agency filed an appeal to set aside this first award on September 25, 2018. Subsequently, the Tribunal issued three other partial awards, all of which have been appealed for annulment.

The Ukrainian agency argues that the Arbitral Tribunal lacks jurisdiction on the grounds that, by the assignment made during the restructuring, the Italian company had assigned the contracts, and as a result, had caused the arbitration clause to be transferred to the acquiring company. On this point, the Respondent invokes Article 1466 of the Code of Civil Procedure, since it considers that its opponent raised an objection to jurisdiction only in the third partial award. The Appellant counters that the jurisdiction of the Arbitral Tribunal was indeed challenged during the proceedings.

The Italian company also considers that the contracts had not been assigned by it because it did not have the consent of the Ukrainian agency, but were only the subject of a mandate, and that, in any case, this question was not a plea of jurisdiction but of admissibility to act, which is not concerned by article 1520 1° of the Code of Civil Procedure, just like jurisdictional power, which is a notion distinct from jurisdiction.

Finally, the agency considers that the Arbitral Tribunal was not required to rule on the decisions of the dispute board because of their non-binding nature, and in doing so, had extended the scope of the jurisdiction clause without just cause. In response, the Italian company considers that the parties must comply with the Dispute Board's decisions, even if they are not final, because they are subject to a Notice of Disagreement, and that any refusal by a party to comply with the Dispute Board's decision justifies the other party taking the case directly to an Arbitral Tribunal in order to obtain its enforcement.

The Ukrainian agency also considers that the recognition or enforcement of the first partial award is contrary to international public policy on the grounds that it was obtained fraudulently by the Italian company, which voluntarily concealed the assignment of the contracts and the true beneficiary of the rights deriving from them. In response, the Italian company claims that it informed the Ukrainian agency of its restructuring before the request for arbitration.

The International Chamber of Commerce of the Paris Court of Appeal rejects all of the appellant's arguments and confirms the award rendered by the arbitral tribunal on September 25, 2018.

First, the Court recalls the principle of autonomy of the arbitration clause and the rule that provided that no mandatory provision of French law or international public policy is affected, its existence or validity depends solely on the common intention of the parties without the need to refer to any national law. Everything therefore depends on the scope of the consent of the parties to the arbitration.

It follows that the objection raised by the Ukrainian agency, motivated by the alleged assignment of the contracts or the lack of power of the arbitral tribunal, does concern the jurisdiction of the arbitral tribunal, so that the court is seized of a plea that can be challenged in the action for annulment on the basis of article 1520 1° of the Code of Civil Procedure.

Then, the Court considers that the Ukrainian agency is admissible to request the application of article 1466 of the Code of Civil Procedure since it had indeed contested the jurisdiction of the Tribunal as from the first partial award and decides that the common will of the parties to the contract was to entrust all the disputes resulting from these contracts to an arbitral tribunal after examination of their differences by a Dispute Board allowing the Arbitral Tribunal to decide the question on the merits in spite of the transfer of the contracts.

With respect to the enforcement of non-final Dispute Board decisions in the First Partial Award, there is no evidence that the parties limited the jurisdiction of the arbitral tribunal and intended to deprive it of the possibility of reviewing the enforcement of a Dispute Board decision before reviewing or revising the merits of the decision by a final award. Furthermore, the Court of Appeal noted that under the contractual provisions, the Dispute Board's decisions must be enforced even if they are subject to a notice of dispute.

Finally, with regard to the violation of international public policy, the Court of Appeal considers that the review exercised by the judge in charge of the annulment in defense of international public policy is only concerned with examining whether

the execution of the provisions taken by the arbitral tribunal infringes in a manifest, effective and concrete manner the principles and values included in international public policy.

Thus, procedural fraud committed in the context of an arbitration may be sanctioned under international public policy, which presupposes that false documents were produced, false testimony was given or documents relevant to the resolution of the dispute were fraudulently concealed from the arbitrators, so that their decision was taken by surprise. However, in this case, the International Chamber of the Paris Court of Appeal considers that the Italian company cannot be accused of any fraudulent conduct since it was entitled to rely on the arbitration agreement according to the will of the parties, and that the effects of the assignment are currently being debated before the arbitral tribunal.

Furthermore, it is specified that the arbitral tribunal's ability to take interim measures is entirely possible in view of the common will of the parties identified in the arbitration agreement and the Terms of Reference.

Paris Court of Appeal, 23 march 2021, n° 18/05756

Contributed by Fanny Vigier

On 23 March 2021, the International Commercial Chamber of the Paris Court of Appeal ("ICC-AC") ruled that when the OIC General Secretary fail to appoint an arbitrator on behalf of the Contracting Party to the treaty, the Secretariat of the Permanent Court of Arbitration cannot proceed to the designation of an appointing authority of the arbitrators as it would constitute an irregular modality of constitution of the arbitral tribunal in the light of the parties' intention and of the OIC treaty.

DS Construction FZCO ("DS Construction") is a company registered in the United Arab Emirates which has made significant investments in Libya. Following a dispute with the State of Libya, DS Construction notified the State of Libya of a claim on 25 May 2016, pursuant to the provisions of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference ("the OIC Treaty"), in force since 23 September 1986 and to which Libya is a party.

As the parties could not reach an amicable settlement, DS Construction commenced arbitration proceedings against the State of Libya on 19 October 2016, pursuant to the UNCITRAL Rules and Article 17 of the OIC Treaty.

It is worth recalling that, the Parties usually have sixty days to appoint an arbitrator pursuant to Article 17(2)(b) of the OIC Treaty. If they fail to do so, "either party may request the Secretary General to complete the composition of the arbitral tribunal".

On 8 February 2017, noticing the absence of reaction from Libya and the silence of the Secretary General of the OIC, DS Construction decided to refer the matter to the Secretary General of the Permanent Court of Arbitration ("PCA"). DS Construction requested the PCA to appoint an arbitrator on behalf of the State of Libya, as per the UNCITRAL Arbitration Rules.

In opposition to this request, the State of Libya argued that the PCA did not have the jurisdiction nor the legitimacy to designate an appointing authority since the

State of Libya had never given its consent to the application of the UNCITRAL Arbitration Rules in the present case. In response, DS Construction argued that the consent of the State of Libya to UNCITRAL arbitration could be "imported" from Article 11 of the Bilateral Treaty between the State of Libya and Austria on the basis of Article 8 of the OIC Treaty, which DS Construction described as a most-favoured-nation clause ("MFN clause").

On 20 March 2017, the PCA Secretary General argued that the request for arbitration should be considered as per the 1976 UNCITRAL Arbitration Rules and designated an appointing authority in accordance with Article 7 of the said Rules.

The arbitral tribunal was constituted despite Libya's objections.

By mutual agreement, the Parties requested the arbitral tribunal to address the question of the regularity of its constitution under the UNCITRAL Rules.

On 15 February 2018, the arbitral tribunal issued a partial award and rejected the State of Libya's objection to the regularity of its constitution.

On 17 August 2020, the State of Libya files a claim with the Paris Court of Appeal to set aside the award on the basis of the irregularity of the constitution of the arbitral tribunal.

First and foremost, the State of Libya argued that the objection raised by the defendant is itself inadmissible on the grounds that it should have been raised during the arbitration proceedings.

Furthermore, the Claimant argued the irregularity of the arbitral tribunal constitution and the violation of the principle of contradiction. According to the State of Libya, by relying on Articles 8 and 17 of the OIC Treaty to apply the 1976 UNCITRAL Rules as to the modalities of its constitution, the Arbitral Tribunal distorted the provisions of the OIC Treaty and the Respondent State's consent to arbitration, and violated the general principles of international arbitration.

In response, the defendant raised a plea of inadmissibility regarding the challenge to the regularity of the constitution of the arbitral tribunal. It submitted that Libya

has committed an abuse of rights by deliberately trying to obstruct the arbitration proceedings. Furthermore, the DS Construction argued that the tribunal did not infringe the specific rules for the constitution of the arbitral tribunal and that the principle of adversarial proceedings was not violated. In the alternative, DS Construction requested the Court of Appeal to reappoint the current members of the arbitral tribunal directly.

On 23 March 2021, the Court of Appeal rejected all the arguments of DS Construction for the following reasons.

First of all, the Court of appeal found the defendant inadmissible in its plea alleging the appellant inadmissible to challenge the regularity of the constitution of the arbitral tribunal on the basis of the abuse of right the State would have committed.

Article 1466 of the French Code of Civil Procedure, applicable to international arbitration and to the present case, since the seat of the disputed arbitration was set in Paris, provides that "[a] party which, knowingly and without a legitimate reason, fails to object an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity".

The ICCP-CA held that the company had never raised a plea of inadmissibility based on the appellant abuse of rights during the arbitral proceedings, and had even adopted the opposite procedural attitude by expressly agreeing for the arbitral tribunal to rule on the regularity of its constitution at the its request, so that it was no longer admissible to invoke an abuse of rights before the annulment judge.

The Court of appeal then ruled that the constitution of the arbitral tribunal was not regular. It held that although Article 8 of the OIC Bilateral Investment Treaty can be qualified as a most-favoured-nation clause, this article does not allow the "importation" of the agreement of the appellant to the application of the UNCITRAL Arbitration Rules in the bilateral investment treaty concluded with a third country on 18 January 2002. To do so, the Court relied on an interpretation of articles 8 and 17 of the OIC treaty in light of its context, object and purpose. In particular, the Court considered that the intention of the parties to the OIC Treaty was to provide for an ad hoc procedure pending the establishment of a specific

body with its own procedural rules, without having to resort to a third-party dispute settlement procedure.

Ultimately, the Court confirms that the ambiguous terms used in Article 8 do not allow this article to be considered as extending to the procedural advantages of dispute settlement provided for in other investment protection treaties.

ARBITRAL AWARDS

ICSID, Final Award, 22 février 2021, Agility v. Iraq

Contributed by Kévin Péricar

The decision discussed is an arbitration award made by the International Centre for Settlement of Investment Disputes (ICSID), Case No. ARB/17/7, on 22 February 2021. The award was made under the auspices of the International Centre for Settlement of Investment Disputes (attached to the World Bank) on the basis of the Agreement Between the Government of the State of Kuwait and the Government of the Republic of Iraq for Reciprocal Promotion and Protection of Investments, which entered into force on 4 February 2015 (the "2015 BIT") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). The case is between Agility Public Warehousing Company K.S.C. ("Agility" or the "Claimant"), a Shareholding Company incorporated and existing under the laws of the State of Kuwait ("Kuwait") ; and the Republic of Iraq ("Iraq" or the "Respondent").

This dispute relates to the Claimant's investment in an Iraqi telecommunications joint venture. The Claimant alleges that the Respondent breached its substantive obligations under the 2015 BIT and customary international law. The claims are related to Iraq's expropriation of Agility's investment of USD 380 million, its failure to treat Agility fairly and equitably, and its failure to accord Agility with due process, each in breach of the bilateral investment treaty signed between Kuwait and Iraq

In March 2004, the Coalition Provisional Authority of Iraq established the Iraqi Communications and Media Commission (the "CMC"), an administrative institution managing the telecommunications in Iraq. In August 2007, the CMC awarded a nationwide mobile telecommunications license to Korek Telecom Company LLC ("Korek"), which was an Iraqi limited liability company incorporated in August 2000 with the Registration Directorate of Companies of the Kurdistan Regional Government in the Republic of Iraq. In September 2007, the Claimant made an initial investment of USD 250 million to fund the second instalment of the license fee payment which Korek needed to pay to the CMC (investment made by the Claimant through a wholly owned subsidiary Alcazar). This initial investment was followed by other investments and guarantees. In total, the Claimant had made an investment of over $380 million.

On 10 December 2013, the CMC sent Korek a letter stating that the CMC could not verify whether Korek had met the requirements imposed by the CMC for the transaction. Korek responded with delay, but following the submission, no further action was taken by the CMC. On 24 June 2014, following changes in the shareholder structure, the CMC declared the partnership as void, null and invalid as the conditions of the approval had not been met. On 17 July 2014, Korek filed an appeal against the order, which was rejected on 18 August 2014. Unsuccessful exchanges between CMC and Korek and its shareholders (including Agility) followed.

On 16 October 2014, Korek filed a claim with the Iraqi Administrative Court, seeking judicial review of the CMC Order. On 25 January 2016, the Administrative Court dismissed Korek's claim for lack of jurisdiction. On 21 February 2016, Korek filed an appeal to the Iraqi Supreme Administrative Court against the Administrative Court's decision'. On 18 January 2018, the Iraqi Supreme Administrative Court denied Korek's Appeal.

On 9 February 2017, the ICSID received a request for arbitration dated 8 February 2017 from Agility (the "Request"). The Claimant requested that the Tribunal declares Iraq is in breach of its obligations under the BIT and customary international law and direct the country to pay more than $600 million in damages and the cost of the arbitration process.

The Tribunal decides (i) to dismiss all the Claimant's claims on the merits and denies in full the relief sought by the Claimant, (ii) the Claimant has to pay the Respondent's professional fees and administrative costs fixed at USD 5,039,488.28 and a proportion of the arbitration costs fixed at USD 136,116.36 (in the event the Claimant has not pay the Respondent within 30 days, interests computed as 6-month USD rate of LIBOR + 2% will be applied). The Tribunal refused to discuss about the merits of the decision issued by the CMC to expropriate Agility's investment and claimed lack of jurisdiction.

EVENTS OF THE MONTH

April 6th, ICC 2021 Rules of Arbitration – Launch in Israel

ONLINE

This event held in Hebrew aims to analyse the 2021 ICC Rules that have entered into force on January 1st 2021, and the main changes they brought in Israel.

Website : https://2go.iccwbo.org/icc-2021-rules-of-arbitration-launch-in-israel.html

April 7th, ICC YAF : Arbitral Awards and Costs of the Arbitration

ONLINE

Presentation of articles 31 to 43 of the ICC Arbitration Rules governing the procedural rules on rendering the final award and more.

Website : https://2go.iccwbo.org/icc-yaf-arbitral-awards-and-costs-of-the-arbitration.html

April 8th, Arbitrators' independence and impartiality

ONLINE

During this event organized by Paris Baby Arbitration, two speakers will address arbitrators' independence and impartiality, two key elements which contribute to arbitration's attractiveness, in French.

Website : https://www.facebook.com/events/1426674327667481

April 8th, Formation to the new 2020 Incoterms rules

ONLINE

https://formation-incoterms2020.com/formation-incoterms-a-distance/

April 12 th, 5th ICC European Conference on International Arbitration

ONLINE

The conference addresses diverse questions around arbitration in Europe, through an analysis of the latest arbitral institutional developments and the evolution of arbitration across the continent.

Website : https://2go.iccwbo.org/icc-european-conference-on-international-arbitration.html

April 12th, ICC 2021 Rules of Arbitration – Launch in Macedonia

ONLINE

This event held in English aims to discuss the 2021 ICC Rules that have entered into force on January 1st 2021, and the main changes they brought in Macedonia.

Website : https://2go.iccwbo.org/icc-2021-rules-of-arbitration-launch-in-macedonia.html

April 13th, Big Data and Foreseeability of Decision Making in International Arbitration

ONLINE

The conference will discuss questions related to Artificial intelligence and the ability of technology to predict outcomes of arbitral decisions

Website : https://www.disarb.org/fileadmin/user_upload/Veranstaltung/DIS40/DIS40_International_Online_Conference_2021-Invitation-13_Apr_2021.pdf

April 13th,Webinar on Connecting and Digitising Women Entrepreneurs

ONLINE

The event will focus on gender equality in entrepreneurship and how to empower women entrepreneurs globally by leveraging networks and digital platforms.

Website : https://2go.iccwbo.org/webinar-on-connecting-and-digitising-women-entrepreneurs.html

April 15th, Resolving International Commercial Disputes : Arbitration and Mediation Trends

ONLINE

Interactive roundtable discussion on the advantages of arbitrating international disputes, recent institutional innovations, and key points to consider to effectively and efficiently manage and resolve disputes.

Website : https://2go.iccwbo.org/resolving-international-commercial-disputes-arbitration-and-mediation-trends.html

April 17th, ICC YAF : Emergency Arbitration in India : The Present and the Future

ONLINE

Session on the evolution of Emergency Arbitration in India with a panel of young and dynamic legal practitioners who will discuss their view on the Indian position when it comes to the urgent remedy of Emergency Arbitration.

Website : https://2go.iccwbo.org/icc-yaf-emergency-arbitration-in-india-the-present-and-the-future.html

April 20th, ICC YAF : Selecting arbitrators : wor(l)d of mouth or wor(l)d of click?

ONLINE

Discussion on the selection process of arbitrators in a new digitalized world.

Website : https://2go.iccwbo.org/icc-yaf-selecting-arbitrators-wor-l-d-of-mouth-or-wor-l-d-of-click.html

April 21st, GAR Interactive: Moscow Workshop

ONLINE

More than 10 practitioners will address the current issues of international arbitration in Russia

Website : https://events.globalarbitrationreview.com/event/23d191a4-dc94-4074-8d3b-c67e440e55cb/summary

April 21st, Arbitration in Family and Inheritance Law

ONLINE

Conference in French on whether international arbitration is an effective global alternative for the resolution of conflicts in specific cases and issues related to Family and Succession Law.

Website : https://www.uianet.org/fr/evenements/arbitrage-en-droit-de-la-famille-et-des-successions?backlist

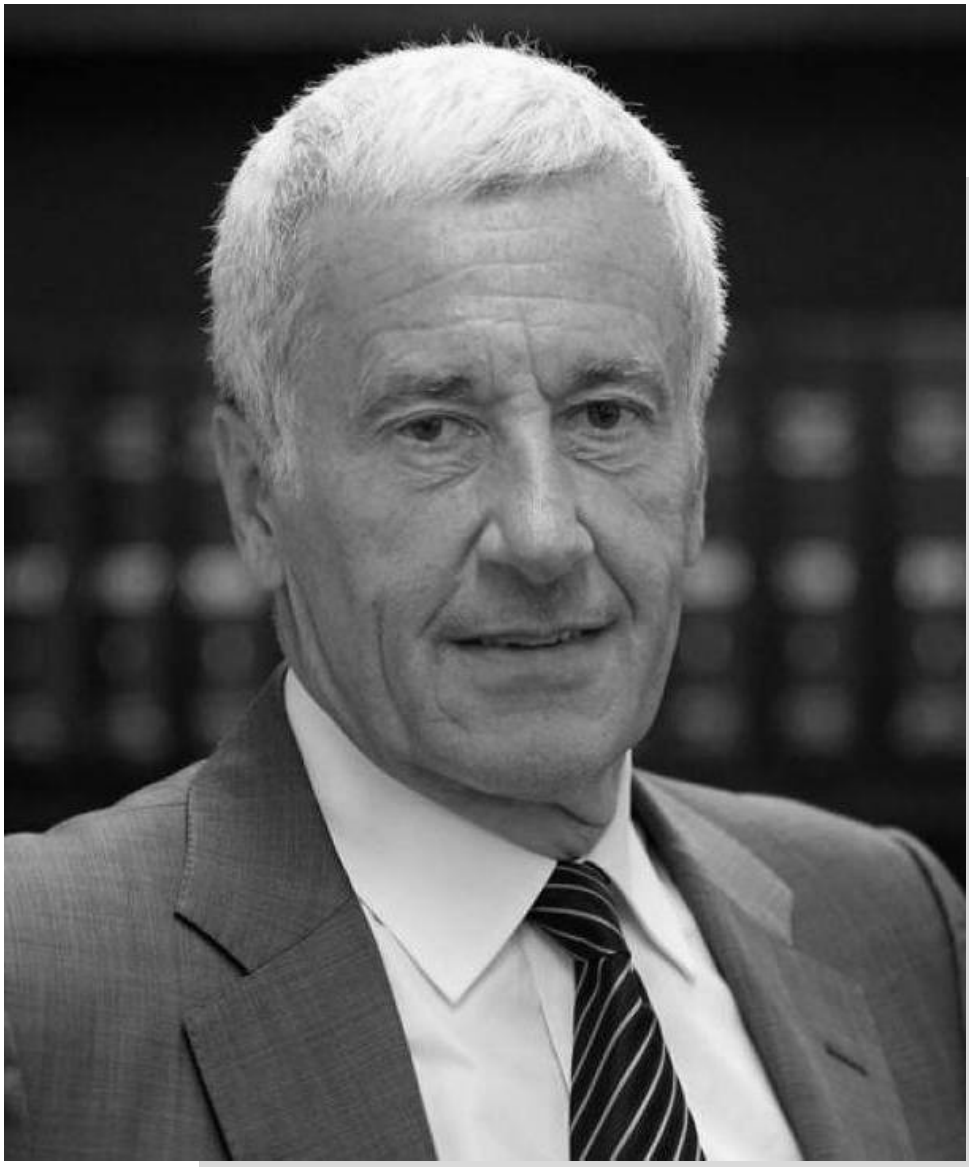
April 26th, ICC Dispute resolution solutions that won't break the bank : SME LABS

ONLINE

Conference on the importance of risk management and dispute prevention for an effective dispute resolution.

Website : https://2go.iccwbo.org/icc-dispute-resolution-solutions-that-won-t-break-the-bank-sme-labs.html

TRIBUTE TO EMMANUEL GAILLARD



The passing of Emmanuel Gaillard on April 1, 2021 has shaken the world of arbitration and the world of law in general.

This tragic loss is difficult to accept.

As an eminent Professor, a brilliant legal theorist, a fine counsel and an excellent arbitrator, Emmanuel Gaillard leaves an irreplaceable void.

Through his genius, his simplicity and his rigor, he inspired and will continue to inspire all the actors of arbitration for many years to come.

Our deepest thoughts are with his family and friends.

If a man has passed away, the flame he left in each of us is only rekindled.