PARISBABYARBITRATION

BIBERON

Monthly Arbitration Newsletter – English version

OCTOBER 2021, No. 49

French and foreign court decisions

Arbitral awards

Commentary: Cass. 1st Civ., 26 May 2021, no. 19-23.996 By Jean-Baptiste Meyrier

Interview with Andrea Rosado Uribe

PARIS BABY ARBITRATION TEAM

ELIZ EROL

General Secretary

ALEXIS CHOQUET

President

ALICE ROLAIN

Vice President

BÉNÉDICTE MARQUISE

Treasurer

EDITORIAL TEAM

NICOLE KNEBEL

Chief Editor

PIERRE COLLET

Chief Editor

FANNY VIGIER

Chief Editor

AFSIA BOUCETTA

News Officer

YOLETH LAINEZ

Contributors' Supervisor

THIS MONTHS' CONTRIBUTORS

KHALIL CHLAIFA

VICTORIA MUNTEAN

MANON CHAMPIGNOLLE

YAMINI RAMASAWMY

JUAN DIEGO NIÑO VARGAAS

JULIETTE LETERRIER

ANA MARIA SANCHEZ SILVA

JUSTINE DOUSSET

DANI HABEL

JORGE ESCALONA

NADINA AKHMEDOVA

FACUNDO MARCONE

JUAN PABLO GOMEZ

ELISA-MARIE GOUBEAU

TABLE OF CONTENTS

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: **https://parisbabyarbitration.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.

Enjoy reading!

FRENCH COURTS

COURT OF CASSATION

Court of cassation, First civil chamber, 29 September 2021, No. 19-19.769

By Khalil Chlaifa

In a decision of the 29th of September 2021, the First Civil Chamber of the Court of Cassation reiterates that judges must not distort the content of a case document.
A consulting contract is concluded by Alstom transport, a French company, Alstom Network ("Alstom"), a British company and Alexander Brothers ("ABL"), a company under Chinese law in order to win many local tenders. Nevertheless, Alstom refused to proceed with the payment, as part of their contractual obligation after they noticed a risk of embezzlement for the purpose of bribery of public agents. ABL company therefore filed a request for arbitration with the International Chamber of Commerce in accordance with the arbitration clause of the contracts.

An award was issued on the 29th of January 2016 in which the arbitral tribunal condemned Alstom company to pay commissions to ABL company. On the basis of the exequatur order granted by the Paris High Court on the 30th of March 2016, a request was filled for the annulment of the above decision before the Court of Appeal.

On 28 May 2019, The Paris Court of Appeal issued a judgment dismissing the exequatur based on two elements of the minutes of the arbitration hearing held on the 23th of mars 2015. In the first place, the Court points out that the manager's refusal to answer questions relating to the way ABL company got confidential documents may lead to presume that these ones have been obtained illegally. In the second place, the fact that the accountant did not specify the exact nature of the supporting documents for operational expenses incurred from the partners' personal accounts may lead to consider ABL as a fund transfer company to accomplish suspicious activities. As a result, the Court of Appeal concludes that if the English company pays that sum of money to the Chinese one, as it was ordered by the arbitral award, it would contribute to finance bribery and thus, rules that the recognition or enforcement of the award would contribute to violate the international public order.

ABL company filed a cassation appeal and argued that the judgment infringed the principle that prohibits any distortion of the content of a case document by disregarding the actual content of the minutes of the arbitration hearing.

The Court of Cassation holds that the Court of Appeal did misstate the content of the transcript. In fact, on the basis of this document, the Court notes on the one hand that the manager did answer the questions that were asked during the hearing since the minutes of the arbitration quote the replies. On the other hand, the Court observes that the accountant did specify the nature and the subject of the supporting documents for operational expenses. The Court states thereby that the judges of the Court of Appeal did distort the minutes of the arbitration hearing and thus, overturns the decision.

COURTS OF APPEAL

Paris Court of appeal, 28 September 2021, No. 19/19834

By Justine Dousset

By a judgment dated 28 September 2021, the Paris Court of Appeal rejects the claims for annulment of the arbitral award of 22 November 2018 submitted by the State of Libya and pronounces the entry into force of the Bilateral Investment Treaty between Turkey and the State of Libya on 22 April 2011.

In the present case, a contract ("Road Contract") had been concluded on 28 August 2006 between the Turkish company Nurol Inşaat ve Ticaret A.Ş. ("Nurol") and the Libyan company African Engineering Projects Company ("AEPC") for approximately US$50 million for the repair and maintenance of a section of road in northwestern Libya. The contract was subject to two further amendments providing for extensions of the duration for the work to be carried out.

Additionally, Nurol entered into two contracts, dated 5 September 2007 and 18 May 2008, with the Libyan entity "Organization for Development of Administrative Centers" ("ODAC") for the construction of university buildings, all referred to as the "University Contracts", for US$140 million. Finally, the company signed a contract for the delivery of advertising services with the Libyan Al-Ghad Media ("Al-Ghad Contract") providing for a payment corresponding to 1% of the amount of the University Contracts.

In the wake of the 2011 Arab Spring events the construction sites were attacked and damaged. In 2013, Nurol concluded takeover agreements with ODAC and AEPC for the University Contracts and the Road Contract providing for 30 days and 6 months respectively from the payment of 50% of the unpaid invoices by AEPC and ODAC. In 2014, Nurol, having failed to proceed with payment of invoices, was demanded by ODAC and AEPC to resume the yards. Finally, on 9 June 2014, AEPC terminated the Road Contract with Nurol.

In the absence of an amicable agreement between the parties, Nurol initiated arbitration proceedings against AEPC and ODAC on the 17 of June and the 11 of July 2016 respectively. The proceedings are based on Article 8 of the Agreement on the Encouragement and Reciprocal Protection of Investments ("BIT" or "Treaty") concluded on 25 November 2009 between Turkey and the State of Libya, comprising an arbitration agreement under the Arbitration Rules of the International Trade Chamber. The two proceedings were joined on the 6 of January 2017.

The State of Libya requests that its jurisdictional objections be disjointed and dealt with beforehand on the merits. The arbitral tribunal allows this bifurcation procedure on 5 June 2017 and decides to rule on the sole objections raised by the State of Libya of incompetence *ratione materiae* et *ratione temporis*.

The Arbitral Tribunal rendered on 22 November 2018 a partial award on jurisdiction only ("Award") declaring that the Libya-Turkey BIT entered into force on 22 April 2011 and that Nurol's assets constituted an investment at the date of the alleged violations of the Treaty.

However, the Tribunal held that the State failed to demonstrate that the said investments did not benefit from the protection of public international law and that the Tribunal lacked jurisdiction on grounds of unlawful behaviour. Thus, the Tribunal partially upheld the State's objection regarding the Tribunal's jurisdiction *ratione temporis*. .

On 14 January 2019, the State of Libya, therefore, filed for annulment of the Award by declaration at the Registry of the Paris Court of Appeal. Per Article 1520 of the Code of Civil Procedure, the State primarily requested that the Award be annulled because the Tribunal has wrongly declared itself competent even though the BIT has never entered into force, and that all the facts giving rise to Nurol's claims predate the alleged entry into force of that BIT; that the Nurol claims are based on contracts vitiated by corruption and that the latter does not justify investment as defined by the BIT in its Article 1(2) and customary public international law. Alternatively, the State sought annulment of the Award on the grounds that the contracts were vitiated by corruption, rendering the Award contrary to the French conception of international public order and that the tribunal did not respect the mission entrusted to it. For its part, Nurol, based on Articles 700, 1520 and 1524 of the Code of Civil Procedure, asks the Court to reject the action for annulment, to dismiss the State of Libya of its claims and to condemn it to the payment of 300,000 euros.

The Court of Appeal, in ruling on this action for annulment, admitted the entry into force of the Turkey-Libya BIT on 22 avril 2011. Thus, the Arbitral Tribunal had rightly declared itself competent *ratione personae*.

On the allegations concerning investments being tainted by corruption, the Libyan State asserted the existence of serious, precise and concordant clues, while also underlining the donation of US$1,38 million to the Al-Ghad company, which happens to be owned by one of Colonel Gaddafi's sons, to ensure that ODAC does not terminate the University Contracts. The Court reiterated that it can not rule on the legality of investments, a question falling solely on the merits of the case and not on the assessment of the jurisdiction of the arbitral tribunal. However, on the question of acts of corruption, recalling that a standing offer of arbitration is an autonomous concept, independent of the validity of the transaction which gave rise to the said investment, it is not supported, or established that there is a corruption defect that could invalidate the jurisdiction of the arbitral tribunal. Thus, the plea alleging the jurisdictional plea *ratione materiae* of the arbitral tribunal for acts of fraud or corruption under article 1520, 1° of the Code of Civil Procedure was rejected by the Court.

Furthermore, the Libyan State maintained that the contracts in dispute are not investments within the meaning of the BIT, Libyan and international law. In response, the Court emphasized that the BIT does not make its application subject to the definition of investment by reference to Libyan law but merely lays down a condition of legality. The Treaty also specified that the investment must be made following the laws and regulations of the host State, but it need not to be defined by those rules, this being a requirement of legality and not of conformity. The Court rejected this plea and declared that the Nurol contracts constituted investments within the meaning of the Treaty.

Ultimately, the State of Libya raised a subsidiary plea concerning the opposition of the recognition and enforcement of the Award in International Public Order following which the Tribunal had sufficient serious, precise and consistent evidence of corruption surrounding the contracts to conclude that they are tainted with corruption. The Court submitted that the Award only ruled on jurisdiction and not on the merits, that the review of the judge could not focus solely on the

consequences that the execution of the Award might have on the French interpretation of International Public Order. The Court rejected the application as the Tribunal alone could rule on its jurisdiction.

Ultimately, the Paris Court of Appeal rejected the appeal for annulment of the arbitral award of 22 November 2018 submitted by the State of Libya. Thus, it demands payment of 100,000 euros for the benefit of Nurol as per Article 700 of the Code of Civil Procedure and compensation of costs.

Paris Court of appeal, 5 October 2021, No. 19/16601

By Juan Diego Niño Vargas

Court of Appeal, Paris, 5 October 2021, DNO Yemen AS, Petrolin Trading Limited and MOE Oil & Gas Yemen Limited v. the Ministry of Oil and Minerals of the Republic of Yemen, Yemen Oil & Gas Corporation and Dove Energy Limited, No. 19/16601.

On 14 September 2021, the Paris Court of Appeal dismissed the appeal to set aside an award rendered on 15 July 2019 by an Arbitral tribunal under the auspices of the International Chamber of Commerce ("ICC").

At the origin of this dispute is the Production Sharing Agreement dated 12 January 1997 for the exploration and production of oil in Yemen (Product Sharing Agreement hereinafter "PSA") entered into between the Ministry of Petroleum and Minerals of the Republic of Yemen on the one hand, and Dove Energy ("Dove") on the other.

Following various assignments between Dove and Petrolin Trading Limited ("Petrolin"), MOE Oil & Gas Yemen Limited ("MOE") and DNO Yemen AS ("DNO"), these companies became parties to the PSA.

Pursuant to the PSA, a Joint Operating Agreement ("JOA") was also entered into on 12 January 1997 between DOVE and Yemen Oil & Gas Corporation ("YOGC"). DNO, Petrolin and MOE also became parties to the JOA as a result of subsequent assignments.

On 31 January 2015, Dove, DNO, Petrolin and MOE decided to prematurely withdraw from the PSA.

On 29 December 2015, the Ministry of Oil and Minerals initiated ICC arbitration proceedings against all parties to the JOA and PSA, i.e., Dove, DNO, Petrolin, MOE and YOGC, challenging the validity of their withdrawals and claiming compensation for damages suffered as a result of contractual breaches under the PSA and JOA.

On 9 March 2015, YOGC also filed a request for arbitration against these same defendants.

By award issued on 15 July 2019, the arbitrators jointly and severally ordered Dove, DNO, Petrolin and MOE to pay the Ministry and YOGC certain amounts (the "Award").

On 19 September 2019, DNO filed a request to set aside the Award before the Paris Court of Appeal and Petrolin and MOE did the same on 7 October 2019. A joinder of the two requests was pronounced.

Claimants requested to set aside the Award under Article 1520, paragraphs 3°, 4° and 5° of the French Code of Civil Procedure, on the grounds that (i) the Award was contrary to French international public policy, (ii) the Arbitral Tribunal ruled without complying with the mandate conferred upon it and (iii) the Arbitral Tribunal had violated due process.

Under the first ground relating to the breach by the Award of French international public policy, claimants argued before the Court that the enforcement of the Award would lead to a violation of human rights, international humanitarian law and United Nations and European Union sanctions.

As for the violation of French international public order, claimants contended that the sums that would be paid in enforcement of the Award to the Ministry of Oil and Minerals of Yemen and YOGC, would be used to commit human rights violations in the context of the armed conflict in Yemen. In fact, according to claimants, the Ministry is part of the government of President Abdrabbo Mansour Hadi, which is guilty of human rights violations and violations of international humanitarian law as noted by human rights groups and the United Nations Group of Experts.

As for the international sanctions, claimants argued that it is likely that YOGC is under the control of Houthi rebel groups, which control part of the country and are subject to international sanctions. Indeed, according to claimants, there is a possibility that the sums due under the Award could be made available to persons under such international sanctions, given the current geopolitical situation in Yemen.

The Paris Court of Appeal rejected this first ground, while recognizing that the fight against human rights violations is a principle that is among the values and principles that the French legal system cannot disregard, even in an international context.

First, the Court held that compliance with international public policy is assessed at the time the judge rules and hypothetical future circumstances presuming the use by one of the parties to the dispute of the sums awarded cannot be considered. Furthermore, neither during the arbitration nor in the present proceedings have the parties argued that the contracts that are the subject of the Award were obtained under conditions that violate the above principles.

Second, with respect to the violation of international sanctions, the Court found that the evidence provided by claimants was not sufficient to demonstrate a direct or indirect violation of international sanctions and thus to obtain the setting aside of the Award.

Under the second ground relating to the non-compliance by the Arbitral tribunal of the mandate conferred upon it, DNO argued that the Arbitral tribunal failed to comply with its mandate by (i) failing to give reasons for its finding that the Ministry was entitled to cash payments under the PSA for the improperly recovered costs and (ii) failing to consider the argument that the Ministry could not derive any right to cash payments for the costs under the PSA.

The Paris Court of Appeals also rejected this second ground for annulment, holding that the Arbitral Tribunal had motivated its decision on the Ministry's right to cash payments for improperly recovered costs and had implicitly but necessarily considered the counter argument presented by DNO.

Under the third ground relating to the violation of due process, claimants argued that the Award violated the adversarial principle, arguing that (i) the Arbitral Tribunal ruled on the standard of proof of personal conviction, whereas the only standard of proof submitted to the debates was

that of the preponderance of evidence, and that (ii) the Arbitral Tribunal, in ruling on DNO's request for "Costs Recovery Audits", found a "practice between the parties" that was neither pleaded nor debated by the parties.

Similarly, the Court of Appeal rejected this third ground, indicating that (i) documents referring to several standards of proof, including that of personal conviction, had been submitted to the Arbitral Tribunal, and that (ii) the Arbitral Tribunal only found the "practice between the parties", in the context of the "Costs Recovery Audits" request, after examining and analyzing the factual exhibits submitted for discussion by the parties, which were thus submitted to debate in compliance with the adversarial principle.

Consequently, the Court of Appeal dismissed the request to set aside the Award rendered by the Arbitral tribunal on 15 July 2019, under the aegis of the ICC.

Paris Court of appeal, 12 October 2021, No. 20/02301

By Yamini Ramasawmy

On 12 October 2021, the Paris Court of Appeal rejected the action for annulment by the company Tasyapi ("Tasyapi") against the sentence handed down on 3 December 2019 since the pleas of the adversarial principle and the principle of equality of arms weren't receivable by the annulment judge.

Tasyapi was awarded lots 4,5 and 6 by the COMMITTEE FOR ROADS OF THE MINISTRY OF INVESTMENTS AND DEVELOPMENTS ("Committee") on 19 July 2017 as part of the rebuilding project of the Aktobe Makat line in Kazakhstan. The contractual negotiations between the parties thus give rise to the commitment of Tasyapi to provide, on the one hand, a performance guarantee at 15% of the contract price and, on the other hand, a mobilization clause. The contract is, therefore, finalized for lots 4,5 and 6 as of 16 August 2017 by the committee. As agreed, Tasyapi provides a performance guarantee as well as a guarantee of return of 15% of the contract price. However, the engagement clause experienced accountability challenges and the committee concluded the termination of the contracts on February 21 2018.

The arbitral tribunal, on December 3 2019, rejected the claims of Tasyapi because it violated its obligations with regard to the mobilization clause. The arbitral tribunal thus partially granted the Committee payment and interest at the expense of Tasyapi. The court argues that Tasyapi has refrained from invoking within the time limit imposed the violation of the principle of adversarial proceedings and the principle of equality of arms before the arbitral tribunal. Indeed, the court refers to Article 1466 of the Code of Civil Procedure to confirm that Tasyapi cannot rely on these two pleas if there is knowledge of the case and no legitimate reason.

First and Foremost, Tasyapi didn't challenge the arbitral award partially granting his request.

Secondly, the allegation of infringement of the adversarial principle by Tasyapi is manifestly late as it did not challenge the Court's decision partially granting its requirement for disclosure by the Committee. Moreover, the court's assessment of the failure to produce documents by the Committee cannot fall within the purview of the annulment judge.

Thirdly, in the minutes of the hearing of March 21 2019, the Chair of the Tribunal found that it was not relevant for Tasyapi's advisors to question the committee' s witness in order to establish a comparison with the contractors hired by the committee. In fact, Tasyapi did not object to this analysis despite knowing the violation of the adversarial principle.

Fourthly, it is apparent that, instead of challenging the decision preventing it from questioning the witness, Tasyapi, at the last hearing of the March 22, 2019 minutes, expressed its satisfaction with the "very fair and efficient conduct of the hearing".

Finally, the Court notes that Tasyapi did not take the opportunity of its last brief filed after the hearing on May 31 2019 to argue that the court had failed to comply with both the adversarial principle and the principle of equality of arms.

The Court, therefore, rejects Tasyapi's appeal for annulment against the arbitral award of 3 December 2019.

Paris Court of appeal, 19 October 2021, No. 19/23071

By Juliette Leterrier

On 19 October 2021, the Paris Court of Appeal dismisses the application for annulment of Magpower Soluçoes de Energia SA and H Inovaçao S. A. (hereinafter "the Magpower companies") against an arbitral award rendered on 4 September 2019 in a WIPO arbitration. The Court maintains that the deliberate absence of a party from a hearing, despite the arbitrator's reasoned decision to refuse to postpone it, does not give rise to a violation of the adversarial principle and international public policy.
On 19 January 2015 and 29 January 2016, the companies Magpower and Heliotrop concluded two commercial agent and representation agreements including an arbitration clause. On 2 August 2018, following a dispute regarding the performance of the contracts and the payment of invoices, Heliotrop filed a request for arbitration before the WIPO.
An arbitration award, rendered on 4 September 2019 by a sole arbitrator, ordered the legal representatives of the Magpower companies to pay EUR 205,842 and EUR 696,842 respectively and jointly EUR 53,011.59 to Heliotrop. On 21 and 30 October 2019, the Tribunal de Grande Instance de Paris declared the award enforceable. On 11 December 2019, the Magpower companies filed an appeal for the annulment of this award before the Paris Court of Appeal.

The Magpower companies raise four grounds for annulment of the arbitral award.

A first plea alleging non-compliance with the principle of contradiction (1520, 4° Code of Civil Procedure). In a first grievance, they argue that the final hearing was held in their absence on 3 June 2019 despite their reasoned request to postpone the hearing. On this point, the Court rejects this grievance and holds that it covers another seeking that the annulment judge review the decision to refuse to postpone the arbitrator's hearing rendered on 31 May 2019. The Court emphasizes that the Magpower companies deliberately did not attend the hearing. The second complaint of this plea concerns the automatic submission of pleas relating to the respect of the adversarial principle and the rights of the defence. The Court notes that the parties had made their position known on

the refusal to postpone by communicating their briefs and exchanging information by teleconference with the arbitrator. Therefore this grievance is rejected.

A second plea alleging violation of international public policy (1520, 5° Code of Civil Procedure). Firstly, they note a violation of the principle of adversarial proceedings and the rights of the defence. They consider that the arbitrator's refusal to postpone the hearing, which they consider to be based solely on the participation of Heliotrop and its witness, was unjustified. On this point, the Court recalls that the judge's review of international public policy is carried out in the light of the conception of it in the domestic legal order. The Court recalls the exemplary nature of the refusal to postpone and thus rejects this complaint. Next, the Magpower companies consider that the granting of the requests for a stay or postponement made by Heliotrop constitutes a violation of the principle of equality of arms. On this point, the Court holds that no element of the arbitration award placed Magpower in a substantially disadvantageous situation compared to Heliotrop. The Court rejects this argument.

By the last two pleas, the Magpower companies consider that the arbitrator exceeded his competence. Firstly, he exceeded the missions entrusted to him in the Terms of Reference (1520, 3° Code of Civil Procedure). The Court recalls that the arbitrator's mission can exceed those mentioned and that it was in order to maintain the hearing of the 3rd June 2019 that the arbitrator invoked these points. This plea is therefore rejected. Secondly, the claimants consider that the arbitrator should have declared himself incompetent to rule on their requests for payment in instalments (1520-1° Code of Civil Procedure). The Court agrees with the arbitral award and holds that in this case the arbitration clause did not confer the power to decide ex aequo and bono in equity. This argument is rejected.
In sum, the Court dismisses the Magpower companies' action for annulment and orders them to pay the costs. Finally, the Court rejects the claim for damages for abusive recourse brought by Heliotrop on the grounds that there was no evidence of fault or negligence on the part of Magpower.

FOREIGN COURTS

Singapore Court of appeal, 4 October 2021, [2021] SGCA 94

By Dani Habel

On October 4, 2021, the Singapore Court of Appeals dismissed the applications of Bloomberry Resort and Hotel Inc (Appellant) to set aside an arbitral award rendered in an ad hoc arbitration conducted under the UNCITRAL Arbitration Rules against Global Gaming Philippines (Respondents).

Initially, the appellant, Bloomberry, owned the "Solaire Resort & Casino", a luxury hotel and casino in the Philippines. A contract signed on September 9, 2011, bound him to Global Gaming Philippines LLC (GGAM) and related to the development and operation of the "Solaire Resort & Casino". Under the terms of the contract, GGAM was to provide management and technical services for the development of the casino and to oversee its operation for two five-year periods after its construction. Bloomberry's unilateral termination of the management services contract led GGAM to initiate arbitration proceedings against Bloomberry under the arbitration clause between them, which provided for ad hoc arbitration under the UNCITRAL rules. Once the arbitration commenced, an order of the constituted arbitral tribunal separated the arbitration into two phases; one relating to liability and the other to the remedy phase.

The above ruling is not the first in the case. In fact, it puts an end to the second appeal resulting from the same arbitration procedure and concerning the termination of the management contract mentioned above. As for the first appeal, its purpose was to annul the partial arbitration award dated September 20, 2016, ruling on the appellants' liability towards the defendants for breach of the management contract. The court of appeals subsequently upheld the liability award, stating that the appellant's claims to have it set aside were without merit. In the meantime, the arbitral tribunal rendered the appeal award, which was thus the subject of the second appeal to the Singapore Court of Appeal.

The award challenged by this second appeal had ordered the Appellant to pay the Respondent US$85.2 million as damages for lost management fees, US$391,224 as damages for pre-termination costs and expenses, US$14.9 million plus interest as costs, as well as to pay the full value of the shares based on their value as of December 9, 2014. In this regard, the appellants' application to set aside the said award was on the grounds that the appeal award dealt with matters beyond the scope of the submission to arbitration that the arbitral tribunal made the appeal award in violation of natural justice, which enforcement of the appeal award would be contrary to the public policy of Singapore.

On the issue of going beyond the scope of submission to arbitration, the issue was whether (a) the arbitration clause was broad enough to cover the particular dispute concerning the shares, (b) the parties expressly submitted the issue concerning the shares to arbitration, (c) and whether the court sought to enforce its prior orders in the appeal award. First, the Court of Appeals found that the arbitration clause was broadly worded and covered any dispute that "arises out of or relates to" the service management contract. This language was held to be sufficient to encompass any dispute arising between the parties with respect to the shares since the shares were acquired pursuant to a

right granted to the defendant by the management contract. Second, the Court stated that the share issue was a matter raised at the outset of the arbitration, and addressed by the arbitral tribunal through an interim order in December 2014. Finally, while it is a principle that the arbitral tribunal has no direct coercive power to compel the enforcement of its awards or orders for provisional measures, however, in this case the tribunal sought to compensate the respondent for the loss caused by the appellant's interference with the sale of the shares, and not to compel the enforcement of its previous orders.

With respect to the breach of natural justice, the court concluded that the appeal award did not violate natural justice because, on the one hand, the appellant had the opportunity to present its case. But also, on the other hand, the finding of a refusal of the arbitral tribunal to consider the evidence was unfounded because while the appellants' evidence of alleged fraudulent transactions was considered, the evidence relating to the issue of liability could not be considered because the tribunal is *functus officioe* with respect to it.

Finally, on the issue of the award being contrary to the public policy of the State of Singapore, the Court again rejected the appellants' claims, stating that a public policy objection must involve either exceptional circumstances that would justify the Court's refusal to enforce the award or a violation of the most basic notions of justice. In support of its refusal, the Court adds that the appellants' enforcement of the appeal award, by awarding US$85.2 million in damages to the defendants for lost management fees, does not in any way require them to violate Philippine tax laws.

For all these reasons, the Singapore Court of Appeals dismissed the claims asserted by Appellant Bloomberry.

High Court of Justice of England and Wales, 8 October 2021, [2021] EWHC 2666

By Nadina Akhmedova

In its ruling dated 8 October 2021, the High Court of Justice closely examines whether the failure of one party to comply with the requirement of resorting to mediation set as a pre-requisite for commencing arbitration affects the substantial jurisdiction of the tribunal or goes to the question of admissibility in the context of commercial arbitration. In its consideration of the matter the Court makes extensive references to cases with similar issues, such as Lukoil Asia Pacific Pte Limited v Ocean Tankers (Pte) Limited [2018] EWHC 163 ("Lukoil Asia case"), Sierra Leone v SL Mining Limited [2021] EWHC 286 ("Sierra Leone"), Obrascon v Qatar Foundation for Education, Science and Community Development [2020] EWHC 1643 seeking to encapsulate the development of legal issues. The Court balances its analysis by examining the issue under the loop of relevant provisions of the Arbitration Act 1996 ("Act") on the one hand and by seeking to define the intention of the parties by means of construction of Arbitration Agreement. It further proceeds to determine the validity of the concluded arbitration agreement in light of non-compliance of one of the parties to conduct the mediation. Lastly, the Court briefly addresses the question regarding which matters have been submitted to arbitration in line with the arbitration agreement.

The parties have concluded a written Arbitration Agreement on 25 June 2007 ("Agreement") which primarily concerned the development of intellectual property products and reorganization of relevant business dealings in connection therewith. The Agreement in its clause 10.2(a) determined

that in case of a dispute the parties shall first seek settlement of such dispute by means of mediation under the London Court of International Arbitration ("LCIA") prior to commencement of arbitration proceedings. On 18 April 2019 NVF, RWK and KLB ("Defendants") referred a Request for Arbitration ("RFA") which provided for a stay period prior to commencement of arbitration and proposed mediation to take place within the period not exceeding 30 days from the date of RFA. The NWA and FSY ("Claimants") claimed non-receipt of the RFA and relevant documents and later explicitly refused to participate in mediation proceedings while referring to limitation defense. After fruitless attempts seeking mediation and expiration of 30 days, Mr. Ó hOisín SC was appointed as sole arbitrator for the dispute. The Tribunal ruled among other things that the clause 10.2(a) was not sufficiently clear and certain and did not classify therefore as a condition precedent and in any case Defendants' (Claimants in the Arbitration) efforts sufficed the requirements of the named clause. Claimants maintained to claim lack of substantive jurisdiction of the tribunal under the Act.

Regarding the first issue before the Court, i.e. whether failure to mediate is relevant to admissibility of the claim or to the substantive jurisdiction of the tribunal it applies ordinary principles of contractual interpretation developed in Lukoil Asia case and concludes that: (1) the parties intended to utilize arbitration for any dispute arising out of Agreement; (2) such dispute should be settled swiftly, therefore a 30-day period for mediation was resorted. The Court acknowledges that as a matter of fact, mediation never took place as one of the parties refused to mediate, nonetheless it would not be reasonable that the tribunal lacks jurisdiction in the dispute and determined that the issue clearly concerns admissibility, not jurisdiction in accordance with ruling in Sierra Leone. The Court further notes that the interpretation of the clause 10.2. should be made in conformity with objective intention of the parties, which is speedy and final resolution of their dispute.

On the raised issue on the validity of arbitration agreement the Court examines the arguments of Claimants advancing the claim of invalidity. The Court concludes that the non-compliance with the requirement to conduct mediation does not render invalidity of the Agreement and does not classify it as "inoperative".

Concerning the third issue raised by Claimants submitting that no matters were referred to arbitration, the Court holds that the Agreement contains the valid reference to arbitration, therefore, the arbitrator was not obliged to specify what matters were submitted to arbitration under the umbrella of this Agreement.

Lastly, the Court makes an important observation on the central issue of the case by stating that the dispute is arbitrable, yet the question is whether 'it is not yet arbitrable because of the mediation clause'. In case the mediation never took place, the arbitrator is entitled to determine the dispute within the exercise of his power.

International Court of Justice (ICJ), 12 October 2021, Somalia v. Kenya

By Elisa-Marie Goubeau

On 12 October 2021, the International Court of Justice ('ICJ') rendered its Judgment on the delimitation of the maritime boundary between the Federal Republic of Somalia ('Applicant') and the Republic of Kenya ('Respondent').

With respect to the historical background, Somalia and Kenya are respectively former colonies of Italy and the United Kingdom. They gained their independence in 1960 and 1963. Their colonial predecessors settled their boundaries in the 1927/1933 treaty arrangement. Applicant and Respondent being adjacent coastal States in East Africa facing the Indian Ocean, a dispute arose from the overlapping of their potential maritime entitlements.

Consequently, Somalia instituted proceedings on 28 August 2014 asking the ICJ to deliver a judgment on "the establishment of the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone . . . and continental shelf, including the continental shelf beyond 200 nautical miles". In accordance with Article 36 (2) of the Statute of the ICJ, Somalia relied on the declarations of Somalia on 11 April 1963 and Kenya on 19 April 1965 to establish the Court's jurisdiction. On 7 October 2015, Kenya submitted in its preliminary objections that Somalia's case was beyond the Court's jurisdiction and inadmissible. By its Judgment of 2 February 2017, the ICJ refused the preliminary objections raised by Respondent and upheld its jurisdiction and found itself competent to rule on the Application filed by Somalia.

With regards to the positions of the parties, Somalia and Kenya held opposing views as to the appropriate method to demarcate the maritime boundary. Applicant requested the ICJ to delimit the inexistent maritime boundary by "using the equidistance/special circumstances method (for the delimitation of the territorial sea) and the equidistance/relevant circumstances method (for the maritime areas beyond the territorial sea)". For its part, Kenya affirms on the contrary that Somalia acquiesced to a boundary following the parallel of latitude.

To start its analysis, the ICJ recalls that both Parties are Contracting States to the United Nations Convention on the Law of the Seat ("UNCLOS") and are therefore bound by the international obligations enshrined in the Convention. In the case at hand, the Court reiterates that delimiting adjacent coasts must be concluded by means of agreement.

On the first issue whether Somalia has, by its conduct taking the form of either silence or absence of protest acquiesced to a maritime boundary following Kenya's reasoning, the ICJ notes that it has set a high threshold. Such undertaking requires two steps. Firstly, the Court examines whether Kenya's claim was maintained in a consistent manner, has demonstrated compelling evidence and called for an answer from Somalia. Secondly, the Court looks at whether Somalia clearly and consistently accepted the boundary claimed by Kenya.

After examining the concordant views of the parties as to the starting point of the maritime boundary, the Court then delimitates the territorial sea pursuant to Article 15 of UNCLOS. It mentions the delimitation methodology, based on the geography of the States concerned and that "an equidistance line is constructed using base points appropriate to that geography".

As regards to the delimitation of the exclusive economic zone and the continental shelf governed by Articles 74 and 83 of UNCLOS, the Court considers that the purpose is to achieve an equitable solution for both Parties. Relying on maritime delimitation methodology and its jurisprudence, the ICJ proceeds to the three stages to follow. First, the Court establishes « the provisional equidistance line from the most appropriate base points on the parties' coasts ». Second, the Court looks at the possible factors that could lead to a shifting of the aforementioned provisional equidistance line for an equitable outcome. Third, such lines must pass the disproportionality test.

Lastly, as to the delimitation of the continental shelf beyond 200 nautical miles, the Court observes that the delineation must be pursued in accordance with Article 76 paragraphs 4 and 5 of UNCLOS. It will depend on "geological and geomorphological criteria" and the Parties' entitlements overlap such as it is the case in the dispute at hand.

In light of the foregoing, the ICJ firstly holds that no maritime boundary is agreed between Applicant and Respondent. It mainly sides with Somalia's position and rejects Kenya's arguments. With the aim to achieve an equitable solution for both, the Court draws a new boundary line relying on the delimitation methodology as well as its previous case law.

European Court of Justice (ECJ), 26 October 2021, C-109/20, PL Holding v. Pologne

By Victoria Muntean

On October the 26th, the Grand Chamber of the European Court of Justice held, in relation to a request for preliminary ruling on the interpretation of Articles 267 and 344 of the Treaty of the Functioning of the European Union (TFEU) submitted under the Article 267 TFEU by Supreme Court of Sweden made in proceedings between Republic of Poland and PL Holdings Sàrl concerning the jurisdiction of an arbitration body which has made two arbitration awards in the context of a dispute between them, the aforementioned provisions in the TFEU must interpreted as precluding national legislation which allows a Member State to conclude an ad hoc arbitration agreements with investors from another Member State making it thereby possible to continue arbitration proceedings which has been initiated under an arbitration clause with a content identical to that agreement and where that clause is contained in an international agreements which albeit previously entered into between the two Member States is now invalid by virtue of them being contrary to those articles.

In this case, PL Holdings, an entity incorporated under the Luxembourg law, acquired between 2010 and 2013 shares in two Polish banks which merged at a later stage thus making PL Holdings owner of 99% of shares of the newly created entity as of 2013. Subsequently, the Polish Financial Supervision Authority took a decision to suspend PL Holdings voting rights attached to those shares and forced it to sell them.

In response, the company, in relying on Article 9 of the 1987 BIT between the Kingdom of Belgium and the Grand Duchy of Luxembourg, on one hand, and Republic of Poland on the other, initiated arbitration proceedings against the Republic of Poland before an arbitral tribunal at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). The provision stipulates that failure to settle disputes amicably in the period of six months after the intimation of written notification by the investor to a Contracting Party may give rise to the investor's right o submit the dispute to

arbitration before one of the international arbitration bodies, among which the Arbitration Institute of the Stockholm Chamber of Commerce.

In relying on Article 9 of the BIT, the investor sought to prove that the tribunal had jurisdiction to hear the said dispute and asked it to rule that Poland had infringed the BIT and shall be liable to pay damages. In response, the Republic of Poland expressed its intention to challenge the claim that it had validly consented to the arbitration proceedings initiated by PL Holdings. By its request made on 7 August 2015, the Republic of Poland challenged the jurisdiction of the arbitral tribunal on the ground that PL Holdings was not an 'investor' within the meaning of the BIT. Moreover, it further challenged the jurisdiction of the arbitral tribunal for the arbitration clause in Article 9 of the 1987 BIT was contrary to EU law.

The SCC Tribunal issued a partial award in June 2017, declaring that it had jurisdiction on the basis of Article 9 of the BIT. Further, it submitted that in ordering forced sale of the PL Holdings' shareholdings the Republic of Poland had infringed the BIT and that PL Holdings could, therefore, claim damages. In September, the final arbitration award finally ordered Poland to pay damages and costs incurred by PL Holdings in the arbitration proceedings. This was challenged by the Republic of Poland as it brought an action before the Svea Court of Appeal seeking to have the award set aside. It argued that Articles 267 and 344 TFEU precluded a dispute between an investor from one Member State and another Member State concerning investments from being brought before an arbitration body, and that Article 9 of the BIT was contrary to EU law. Thus, an award made on its basis was incompatible with the EU legal order and thus invalid.

PL Holdings responded that even if the said 'offer of arbitration' under Article 9 was invalid, an ad hoc arbitration agreement was concluded between the parties to the dispute in the main proceedings, in accordance with Swedish law and the principles of commercial arbitration, having regard to the conduct of those parties In dismissing the action, the Svea Court of Appeal held that in light of the Achmea judgement despite the fact that Article 9 of the BIT was invalid, that did not ban Member State and an investor from another Member State from concluding an ad hoc arbitration agreement at a later stage in order to settle that dispute if this was in line with the common intention of the parties to that dispute and is concluded according to the same principles as commercial arbitration proceedings. The arbitration awards were upheld and ruled compatible with the legal order.

Consequently, Poland challenged the decision of the Svea Court of Appeal before the Swedish Supreme Court, which then decided to refer the matter to the Court of Justice for a preliminary ruling. The ECJ reiterated that the referring Court rightly found that Article 9 of the BIT was invalid and incompatible with the EU legal order. Further, it restated the PL Holdings claim that its subsequent request for arbitration had to be regarded as constituting an offer of arbitration whose content was identical to the provisions in Article 9 of the BIT. Hence, that offer, it is argued, was implicitly accepted by the Republic of Poland for it failed to validly challenge the jurisdiction of the arbitral tribunal within the period prescribed for that purpose by Swedish law. This new agreement, allegedly replacing the arbitration clause found in the BIT, established a new legal basis and allowed arbitration proceedings to continue.

Thus, the question for the Court was whether '*Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis*

of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to those articles.'

Following Achmea, the Court restated that per Articles 267 and 344 TFEU Member States are precluded from negotiating international agreements containing provisions whereby an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal. Such clauses may call into question the principle of mutual trust between the Member States and nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU. Hence such clauses are incompatible with the principle of sincere cooperation found in Article 4(3) TEU and adversely impact the autonomy of EU law per Article 344 TFEU. Moreover, following Article 4(1) of the Agreement for the termination of BITs between the EU Member States, from the date of accession of the Republic of Poland to the European Union, Article 9 of the BIT could no longer serve as the basis for arbitration proceedings between an investor and that Member State.

The Court held that allowing a Member State to submit such dispute to an arbitration body having identical characteristics as the body referred to in an invalid arbitration clause contained in an international agreement by concluding an ad hoc arbitration agreement with the same content as that clause, would in fact entail a circumvention of the obligations arising for that Member State under the Treaties. Such an ad hoc arbitration agreement would in fact produce the same effect as those resulting from a clause. Upholding the allegations made by PL Holding may establish a precedent allowing the parties to a multitude of other disputes which touch on application and interpretation of EU law to adopt a similar position, thus leading to a situation where the autonomy of EU law would be repeatedly undermined. Moreover, per Articles 267 and 344, the validity of the legal basis of an arbitration body's jurisdiction cannot depend on the conduct of the parties to the dispute concerned, namely that of the Member State.

Therefore, the Court held that any attempts of a Member State to remedy the invalidity of an arbitration clause by means of a contract with an investor from another Member State would be contrary to its obligation to challenge the validity of the arbitration clause thus becoming liable to render the actual legal basis of that contract unlawful since it would be contrary to the provisions and fundamental principles governing the EU legal order. Finally, the Court ruled such ad hoc arbitration agreements as being incompatible with the EU legal order; Articles 267 and 344 preclude Member States from negotiating ad hoc arbitration agreements which would allow continuation of arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement and is contained in an international agreement concluded between those two Member States.

United Kingdom Supreme Court, 27 October 2021, Kabab-Ji SAL v Kout Food Group, No. [2021] UKSC 48

By Ana Maria Sanchez Silva

On 27 October 2021, the United Kingdom Supreme Court ("**UK SC**") refused the recognition and enforcement of an award issued by an arbitral tribunal referred under the rules of the International Chamber of Commerce ("**ICC**") with a seat in Paris, France.

Kabab- Ji SAL ("**Appellant**"), a Lebanese company entered into a Franchise Development Agreement ("**FDA**"), dated 16 July 2021, with Al Homaizi Foodstuff Company ("**Al Homaizi**"), a Kuwaiti company, granting a licence to operate a franchise in Kuwait for ten (10) years.

Under the FDA, the Appellant and Al Homaizi entered into ten (10) additional Franchise Outlet Agreements ("**FOAs**" and collectively with the FDA, the "**Franchise Agreements**") with the aim of opening outlets in Kuwait.

In 2005, the Al Homaizi Group underwent a corporate restructuring and a new holding company resulted: Kout Food Group ("**KFG**"). Then, Al Homaizi became a subsidiary of KFG.

A dispute arose under the Franchise Agreements and the Appellant referred to arbitration under the ICC rules, with the arbitral tribunal's seat in Paris, and KFG as the respondent in the arbitration proceedings.

The arbitral tribunal rendered a decision on the basis of the French law as the applicable law to the arbitration agreement (and from which KFG was considered a party to the arbitration agreement), but the English law to determine if KFG acquired rights and obligations under the Franchise Agreements (under the "novation by addition" doctrine). The arbitral tribunal concluded that KFG was in breach of the Franchise Agreements and awarded fees, damages, and costs against KFG for US$6,734,628.19 (the "**Award**").

KFG brought an annulment action to set aside the Award before the French courts on the grounds of the arbitral tribunal's lack of jurisdiction over KFG, whilst the Appellant filed a petition in England to enforce the award.

The annulment action was dismissed in a decision dated 23 June 2020 by the Paris Court of Appeal. Subsequently, KFG has lodged an appeal against the Paris Court of Appeal's decision before the Court of Cassation.

In regards to the English proceedings, the Commercial Court adjourned further hearings until the Paris Court of Appeal had decided KFG's petition of annulment. In such a sense, the Appellant and KFG appealed against the judge's decision. On 20 January 2020, the Court of Appeal dismissed the Appellant's appeal and allowed KFG's cross-appeal.

Previous decisions of the lower courts and claimant's arguments

In the Commercial Court proceedings, the judge reformulated the issues of the trial as follows: (1) Does the law governing the arbitration agreement also govern the question of whether KFG became a party to the arbitration agreement?; (2) what is the law?; (3) Under English law KFG become a party to the FDA, and if differently does it become a party to the arbitration agreement?; and (4) What is the law governing the capacity of KFG to join the arbitration agreement?.

The analysis, according to the judge, rendered that (1) the law governing the validity of the arbitration agreement governs, in fact, the question of whether KFG became a party to the arbitration agreement; (2) the law governing the arbitration agreement is the English law; and (3) at English law, KFG did not become a party either to the FDA or the arbitration agreement contained in the FDA. Notwithstanding, the judge decided to adjourn the decision until the Paris Court of Appeal issued its determination.

As both, the Appellant and KFG appealed, by the Court of Appeal analysis it was concluded that: (1) the terms of FDA expressly choice English law to govern the arbitration agreement; (2) KFG could not have become a party to the FDA and consequently to the arbitration agreement; (3) the Commercial Court judge should have not granted an adjournment and should have made a final determination that KFG was not a party to the FDS and/or the arbitration agreement. Hence, the Award is not enforceable.

The Appellant appealed the decision of the Court of Appeal on the following grounds: (1) the law governs that governs the validity of the arbitration agreement; (2) if English law governs it, there is a real prospect that a court might find that KFG became a party to the arbitration agreement in the FDA, (3) the Court of Appeal was not justified to summary judgement refusing the recognition and enforcement of the Award. These are the questions-issues that the United Kingdom Supreme Court will address in its judgement.

Legal findings of the decision

Approaching the first issue analysis, the Court states that the question of whether KFG became a party to an arbitration agreement must be analysed under article V(1)(a) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The Convention) *i.e.,* section 103(2)(b) of the 1996 Arbitration Act (the "1996 Act") (para 25). Such a provision establishes "two uniform international conflict of laws rules. The first (…) rule is that the validity of the arbitration agreement is governed by the "the law to which the parties subjected it" (…). The Second, default rule, which applies where no choice has been indicated, is that the applicable law is that of "the country where the award was made". (para 26).

The country where the award was made has been understood, says the UK SC, as the place of the seat, in particular, if the parties have chosen the seat of arbitration. This, even, is especially provided as such in the 1996 Act (section 100(2)(b)). However, under the view of the Court, the current case does not follow the same logic because the rules to be applied are the ones stated in the Convention itself and not the conflict of laws rules of the English law.

In the present case, the UK SC, appealing to the wording of the contract, mentions that the governing law clause stated in article 15 of the FDA, and equally reflected within the FOAs provisions, applies to all the clauses incorporated in the agreement, including article 14 of the FDA *i.e.,* the settlement of disputes clause. Further, there is no reason to infer that the arbitration agreement is not governed by the English law, especially, if the agreement definition in the FDA, article 1, spelt that "this Agreement consist of (…) the terms of agreement set forth herein below (…)".

Moreover, and as a matter of response to the Appellant's argument to apply the principles of law generally recognised in international transactions *i.e.*, UNIDROIT principles (contained in the clause 14 of the FDA – dispute settlement clause), to determine the validity of the arbitration agreement, the UK SC conclude that such principles should be exclusively applied by the arbitrators to the merits of the dispute, not to the arbitration agreement itself. Further, Article V(1)(a) of the Convention and section 103(2)(b) of the 1996 Ac, when providing the expression "the law applicable" to the arbitration agreement, is exclusively referring to national law and not supplementary principles of interpretation such as the UNIDROIT principles.

By addressing the second issue from the grounds of the Appellant, this is if English law governs, is there any real prospect that a court might find at a further hearing that KFG became a party to the arbitration agreement in the FDA; the UK SC points that the Appellant did not prove the existence of any agreement in writing between itself and KFG, in particular, due to the personal nature of the rights granted under the Franchise Agreements (see clauses 3.1., 17, 19, 24, and 26 of the FDA). These contractual provisions, according to the FDA wording, prescribe that they "(…) may not be amended save in writing signed on behalf of the parties" (para 54), *i.e.*, No Oral Modification clauses.

In respect to the application of assignment and novation rules under English law, the UK SC concludes, after clarifying the differences between those legal institutions, that the novation *i.e.*, the existence of a new agreement, required a writing and signed agreement entered into and between the Appellant and Al Homaizi, as it is stated in clause 24 of the FDA. However, such a document does not exist. In any event, even those where it has been argued a parallel agreement between the Appellant and KFC, Al Homaizi's signed writing document is required, as it was demanded by the agreement itself. And thus, "(…) an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights". (para 66).

Then, the Court determines the No Oral modifications clauses as an insuperable obstacle to applying a novation by addition in the present case.

To conclude, the UK SC addresses the procedural issue which refers to the Court of Appeal decision of giving summary judgement refusing the recognition and enforcement of the Award. First, the Court rejected the view by which the courts of the place where an award is planned to be enforced only do a review of the arbitral tribunal's decision. Indeed, the Court considers it could find useful to analyse how the arbitrators dealt with the jurisdiction question. Then, it is a matter to be determined by the Court how the ordinary judicial

determination should be made in such a sense. This, in fact, also implied the possibility to apply a summary approach since it could mean saving in time and costs.

Furthermore, the Court holds that "It may be that, as happened in this case, that a party is able to show that, on the material before the court, it has a good defence on one of the relevant grounds, in which case the evidential burden shifts to the claimant to indicate what evidence would or might be available at a further hearing which could enable its to succeed." (para 82). Therefore, a summary decision is plenty valid in the present circumstance, even the proceedings were for the trial of preliminary issues.

The UK SC insists on the lack of relevancy of the French court decisions with respect to the questions that the English courts should need to manage.

For the above reasons, the Court of Appeal was correct in "(…) overturning the judge's decision to grant an adjournment and giving summary judgment refusing recognition and enforcement of the award." (para. 92).

The decision of the jurisdiction

The United Kingdom Supreme Court dismiss the appeal on the following grounds: (1) the law governing the validity of the arbitration agreement is English law; (2) the Court of Appeal was justified to conclude that there is no real prospect that a court might find at a further evidentiary hearing that KFG became a party to the FDA and the arbitration agreement.; and (3) the Court of Appeal was also right in giving summary judgement refusing recognition and enforcement of the Award.

ARBITRAL AWARDS

ICSID, No. ARB(AF)/15/2, 20 September 2021, Lion Mexico Consolidated L.P. v. United Mexican States

By Jorge Escalona

On 20 September 2021, the Tribunal in the ICSID Case No. ARB(AF)/15/2 ("Tribunal") between Lion Mexico Consolidated L.P. ("Lion" or "Claimant") v. the United Mexican States ("Mexico" or "Respondent") rendered its award. Lion requested arbitration against Mexico, under Articles 1116, 1120, and 1122 of the North American Free Trade Agreement ("NAFTA"), entered between the United States, Canada, and Mexico, which entered into force on 1 January 1994. The case was governed by the ICSID Additional Facility Rules and dealt with real estate projects.

The award decided over Lion's claims regarding alleged breaches by Mexico to its obligations under Arts. 1110 (Expropriation and Compensation) and 1105 (Minimum Standard of Treatment) under NAFTA. Particularly, Lion alleged that the cancellation by Mexican courts of mortgages that

guaranteed its loan-based investments in Mexico constituted a denial of justice as a failure to provide fair and equitable treatment under NAFTA Art. 1105.

Lion is a limited partnership constituted under the laws of Quebec (Canada) with its principal place of business in the United States. It is managed by a real estate investment company, which on February, June, and September 2007 granted three loans through credit agreements respectively ("Loans") to Inmobiliaria Bains, S.A. de C.V. and C&C Ingeniería, S.A. de C.V. (collectively the "Debtors"). Both of these companies were owned by Mr. Héctor Cárdenas Curiel ("Mr. Cárdenas"), and the purpose of the Loans was to fund the development of two real estate projects in Mexico: the "Nayarit Project" and the "Guadalajara Project."

Lion agreed to the Loans, as long as the Debtors (1) granted mortgages to Lion over the land acquired by Mr. Cárdenas and the subsequent improvements made on that land, and (2) issued promissory notes as unconditional commitments to repay the money owed to Lion. Eventually, Lion was granted three promissory notes to secure its debts and three mortgages over the real estate projects. The total amount of the Loans consisted of US $17,805,479.

None of the initial deadlines for the repayment of the Loans were met by Mr. Cárdenas and the Debtors. Consequently, on 17 February 2012, Lion served the Debtors a formal request demanding payment of the amounts owed plus interest under penalty of initiating foreclosure proceedings.

At around the same time, the Debtors filed a fraudulent lawsuit against Lion ("Cancellation Lawsuit" or "Cancellation Proceeding") seeking to obtain judgment ordering the cancellation of the three mortgages registered in the Public Registry of Jalisco and Nayarit in favor of Lion. This, to legally extinguish the mortgages and make any foreclosure proceeding impossible.

In this proceeding, the Debtors requested judicial enforcement of an alleged settlement agreement ("Settlement Agreement") entered with Lion, in which both parties (1) accepted the cancellation of all pending debts, (2) the cancellation of the three mortgages, and (3) the return of the promissory notes to the Debtors. In exchange, the Debtors had undertaken to issue Lion participation in Mr. Cárdenas's companies. Lion never took part in the Settlement Agreement, and it had consistently argued through all judicial instances that the document was a forgery.

Due to a complex fraudulent scheme by the Debtors, Lion was never notified of the Cancellation Lawsuit and thus never participated in it. Consequently, it was declared in default, carrying as a result under Mexican Law that the procedure continued, but Lion was announced to have accepted the facts as stated in the Cancellation Lawsuit. Naturally, the judge in the Cancellation Lawsuit rendered its judgment, declaring the Loans settled and ordering Lion to cancel the mortgages and return the promissory notes ("Cancellation Judgment").

When the Cancellation Proceeding constituted res judicata, the judge deprived Lion of launching an ordinary appeal against it. The previous, due to the judge's reasoning precluding any further appeal, since the amount claimed in the procedure was less than MEX 500,000 (approximately USD 25,000). Consequently, when the Cancellation Judgment was enforced, it ordered the Public Registry of Jalisco and Nayarit to cancel the mortgages. On 19 October 2012, the three mortgages became extinct for all legal purposes. Subsequently, the Debtors initiated another fraudulent scheme to prevent the Cancellation Judgment from being reversed.

The Debtors filed an amparo trial (a challenge procedure, which aims to revert violations of human rights as afforded by citizens and aliens under Mexico's Constitution) against the Cancellation

Judgment. By a person falsely alleging to be a legal representative of Lion ("False Amparo"). After submitting it, the person would abandon it. The purpose of this scheme was to prevent Lion, when it eventually obtained knowledge of the Cancellation Judgment, from presenting a proper amparo trial. Mexican Law provides that one of the causes for the finding of inadmissibility of an amparo trial, includes when the amparo is based on the same facts as a previously abandoned one.

The Debtors abandoned it, and on 17 August 2012, the amparo judge dismissed the False Amparo and a few days later declared it final and not subject to appeal.

Still unaware of the Cancellation Judgment and the False Amparo, Lion initiated foreclosure proceedings. Nonetheless, the mortgage at dispute had already been extinguished by the Cancellation Judgement. Hence, Lion filed a proper amparo trial against it when it became aware of it ("Proper Amparo"), particularly against the lack of appropriate notification to the Cancellation Proceeding.

In the Proper Amparo, Lion was made aware of the Settlement Agreement. Nonetheless, all the new evidence Lion tried to include when filing a complement writ to its initial amparo lawsuit to prove that the Settlement Agreement was a forgery, was dismissed by the amparo judge due to procedural defects incurred. Lion was not given an opportunity to cure the alleged procedural defect, even when the inclusion of evidence aimed to prove that Lion had been the victim of an elaborate procedural fraud scheme. Hence, the Proper Amparo did not deal with the issue of whether the Settlement Agreement had been forged and reduced on whether Lion's summon to the Cancellation Proceeding had or not been appropriately executed under Mexican Law.

Naturally, on 4 December 2013, the amparo judge denied Lion protection against the Cancellation Judgement, primarily due to the Settlement Agreement's alleged execution ("Amparo Judgment"). Unsatisfied with it, Lion filed an appeal (recurso de revision) before the collegiate court, arguing that the Cancellation Lawsuit and related acts were null and void. Nevertheless, the collegiate court remanded the case back to the amparo judge, to determine whether Lion's Proper Amparo proceeding was inadmissible since a different amparo trial relating to the same facts had been filed at an earlier date and after that abandoned. Evidently, the False Amparo resurfaced.

After three years of judicial battling, when Lion still had no decision confirming the forgery of the Settlement Agreement and now fighting to prove that it should not be deprived of the amparo trial, it waived its Proper Amparo. In this context, Lion decided on 11 December 2015 to submit a request for arbitration against Mexico.

Primarily, Lion argued that Mexico breached its obligation to treat it fairly and equitably by denying its pursuit of legal remedies against the Debtors. Lion argued that (1) it was denied the chance to defend itself in the Cancellation Proceeding because it was never properly summoned, (2) then limited in its pursuit of justice before local Courts because it was barred from bringing an ordinary appeal against the Cancellation Judgment, and (3) denied access to justice through Mexican Courts due to their failure to scrutinize the authenticity of the forged documents.

Mexico argued that Lion was not denied access to justice as it was given the proper opportunity to be heard and exercise its right of defense. Additionally, it argued that there was no unreasonable delay in the Courts' proceedings, and it stated that by failing to follow the applicable procedural rules, Lion and not Mexico is responsible for its inability to present evidence and defend its case before Mexico's Courts. Ultimately, Mexico argued that its courts decided Lion's claims within a

reasonable time, arguing that nothing in the duration of the proceedings amounted to a willful disregard of due process of law, which shocks a sense of judicial propriety.

The Tribunal finds that Lion was indeed denied procedural justice since (1) it was, without its fault, never given the opportunity to defend itself in the Cancellation Proceeding, (2) it was, denied the right to appeal the Cancellation Judgment, and (3) it was denied the right to allege in the Proper Amparo that the Settlement Agreement had indeed been forged, and to present evidence to prove this claim.

The Tribunal observes that Lion was denied access to justice since the Cancellation Proceeding was procedurally faulty. In its reasoning, the Tribunal observes similarity of the facts to the Cotesworth & Powell case. Where the Tribunal decided that claimants had been denied justice because of the failure of the judge to summon the absent creditors in a bankruptcy proceeding, and later also failing to notify them of the sentence of classification. Same case here, Lion was not allowed to appear before the judge of the Cancellation Lawsuit nor made aware of its judgment.

The Tribunal concludes that depriving Lion of its right to appear before the judge of the Cancellation Lawsuit, "amounts to an improper and egregious procedural conduct by the local courts, which does not meet the basic international accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety" (cited from the award – para. 421).

The Tribunal further considers that the decision of the judge of the Cancellation Proceeding granting res judicata status to the Cancellation Judgement, patently disregards the amount in dispute in the Cancellation Proceeding and shuts down one of Lion's routes of accessing justice before local Courts.

Finally, the Tribunal admits that Lion was also denied justice through the local Court's consistent denial for Lion to present material and relevant evidence to defend its case. Ultimately, the Tribunal finds Lion excused from continuing the Proper Amparo in light of its apparent futility in the sense of its lack of any reasonable prospect of reversing the cancellation of the mortgages.

Given all of the above, the Tribunal (1) declares that Mexico has breached NAFTA Article 1105 because of denial of justice and a failure to provide Lion with fair and equitable treatment, (2) orders Mexico to pay Lion as compensation the amount of USD 47,000,000 plus interest, (3) orders it to reimburse Lion the legal fees arising out of the withdrawal of the foreclosure proceeding, and (4) orders it to pay a proportional part of the costs of the procedure plus interest. The Tribunal dismisses all other claims and requests from the parties.

American Arbitration Association (AAA), No. 01-18-0003-0751, 24 September 2021, Donald J. TRUMP FOR PRESIDENT, INC v. Omarosa Manigault Newman

By Facundo Marcone

On 24 September 2021 a sole arbitrator granted a summary judgment motion dismissing a claim on the grounds that the confidentiality provisions in the non-disclosure agreement fail as vague and indefinite and therefore void and unenforceable under the New York Contract law.

Donald J. Trump for President, Inc. ("Claimant") pursued an arbitration against Omarosa Manigault-Newman ("Respondent").

Claimant alleged that Respondent had breached a non-disclosure agreement ("the Agreement") signed when Respondent was an employee of Claimant. Claimant alleges that Respondent breached the Agreement by disclosing confidential information, by making disparaging remarks in statements on the media, by releasing a recording, and by statements made in Respondent's book.

Respondent challenged the validity of the Agreement and denied liability.

Respondent filed a motion for summary judgement under four grounds. The first was based on arbitrability related to the subject matter of the dispute. The second based on arbitrability on the First Amendment. The third under the whistleblower protection regime. The fourth is based on the Southern District of New York Ruling. Respondent relies upon the reasoning of the 30 March 2021 Memorandum Opinion and Order in Denson v. Donald J. Trump for President, Inc., 2021 WL 1198666, which held unenforceable the confidentiality and non-disparagement provisions of a similar agreement.

The Arbitrator renders its decision by analyzing the fourth ground raised by Respondent. The Arbitrator holds that the confidentiality provisions on the Agreement fail as vague and indefinite and therefore void and unenforceable. Such indefiniteness did not allow to form the terms of a binding contract.

The Arbitrator considers the decision on Denson v. Donald J. Trump for President, Inc., 2021 WL 1198666, which held the confidentiality and non-disparagement provisions of a similar agreement unenforceable. The Arbitrator found the decision persuasive and in line with principles of New York contract law.

The Agreement defined confidential information as "all information (whether or not embodied in any media) of a private, proprietary or confidential nature or that Mr. Trump insists remain private or confidential". The Arbitrator notes the definition as indefinite and to be impossible to stipulate what information should be kept confidential under the Agreement. Thus, the arbitrator considers that it was unfeasible to determine whether a breach has occurred, since the determination of whether there is breach was left to the sole determination of Mr. Trump.

The Arbitrator mentions that a court may "fill in the gaps" of a contract which contains an indefinite term if there is some objective method of doing so, such as industry standards, that can be readily ascertained. For this case, the tribunal observes that there was no objective standard that could be inserted to make the meaning clear to the parties. However, for this case, the Arbitrator points out that the information that is supposed to be protected under the Agreement is left to the subjective determination of Claimant. Consequently, the Arbitrator held that Respondent could not have known if she was in breach of the Agreement.

Further, The Arbitrator rejects Claimant's argument that it was reasonable that certain sensitive information necessarily involved in the operation of a political campaign would be the subject of a nondisclosure agreement. The Arbitrator agrees that a more narrowly drawn agreement may have

been enforceable on those grounds, yet the Arbitrator found the provisions of the Agreement overbroad and indefinite. For the Arbitrator, it was impossible to save the provisions absent substantial rewriting of the Agreement. An action outside the power of the Arbitrator.

The Arbitrator considers Respondent's statements as general. Therefore, the Arbitrator hold that Respondent could not have known that her statements would be considered "confidential information" under the terms of the Agreement. Also considered that the statements did not disclose hard data such as internal polling results or donor financial information. Contrary, the Arbitrator found the statements as simply expressions of unflattering opinions. Statements only deemed "confidential information" based solely upon the designation of Mr. Trump.

Moreover, the Arbitrator considers the terms to go far beyond what would be reasonably expected to protect. Thus, the Arbitrator held that the Agreement effectively imposed on Respondent an certainly unreasonable obligation to never say anything remotely critical of Mr. Trump, his family, or his or his family members' businesses, for the rest of her life.

Regarding the other three summary judgment motions filed by Respondent on arbitrability grounds based upon subject matter, the First Amendment, and federal whistleblower statutes. The Arbitrator denies the motions of arbitrability under First Amendment and the federal whistleblower statutes for the same reasons set forth in the 20 April 2020 Decision and Order. As the subject matter motion, the Arbitrator holds the issue moot and refuses to engage in such an analysis.

American Arbitration Association (AAA), No. 01-20-0014-8647, 1 October 2021, Smartsky Networks v. Wireless Systems Solutions et al.

By Juan Pablo Gómez

On 1 October 2021, an arbitral tribunal constituted under the auspices of the American Arbitration Association ("AAA") issued an award for more than US$ 12 million in favor of a US company dedicated to the development of disruptive communication services to increase network connectivity in the aviation sector. Dispute was brought by Claimant under an arbitration clause in one of the contracts entered into by the parties, which subjected disputes to an arbitral tribunal in Mecklenburg County, North Carolina under the commercial arbitration rules of the AAA. The dispute was to be decided following the laws of the State of North Carolina.

Main parties of the arbitration are SmartSky Networks, LLC ("Claimant") and Wireless Systems Solutions, LLC ("Respondent"). However, there were additional parties associated with Respondent such as DAG Wireless LTD, DAG Wireless USA, LLC, Laslo Gross, Susan Gross, and David D. Gross (jointly with Respondent, "Respondents"). The parties engaged in a contractual relationship set forth in numerous documents such as statements of work ("SOW"), purchase orders ("PO"), terms and conditions ("T&C"), and a Teaming Agreement, all enacted for Respondent to assist Claimant with its air-to-ground ("ATG") wireless communications network, aimed at providing broadband ATG communications services to aircraft using certain technology ("ATG System").

The case involved numerous different claims. These included: (i) Respondent's breach of its written agreements with Claimant; (ii) its use of alter ego companies as mere instrumentalities of Respondent in his role as the main debtor; (iii) breach of a non-disclosure agreement; (iv) misappropriation of trade secrets; (v) engagement in unfair and deceptive practices; (vi) false advertising; and (vii) conversion. Additionally, Claimant asked the tribunal to decide on pre-judgement interest or monetary recovery, costs of arbitration, (x) attorney's fees and expenses, and (xi) sanctions against Respondent. All claims and counterclaims presented by Respondent were withdrawn, but the party continued to assert affirmative defenses.

On contractual breach claims, the tribunal considers that there is no discussion that Respondent did not complete the development of the ATG System and that the only outstanding issue is whether Respondent is excused of performance due to Claimant's failure to provide adequate assurances of payment considering an alleged financial distress. In this regard, the tribunal finds that Respondent did not carry its burden of demonstrating that it had reasonable grounds for insecurity, that assurances demanded by Claimant are commercially reasonable, and that assurances received from Respondent are not adequate. Consequently, the tribunal decides that Respondent breached the Teaming Agreement, as well as the SOWs and POs applicable to this claim.

As to IP and proprietary rights breaches, the tribunal finds that Respondent breached the contractual documents governing IP matters by marketing and passing off ATG products as if they were its own. Further, the tribunal rules that Respondent did not prove that these products were primarily based upon and/or mere improvements of its pre-existing IP. Additionally, the tribunal finds that Respondent breached confidentiality obligations by offering ATG products developed as part of the contractual relationship with Claimant to several private contacts.

Turning to alter ego claims, the tribunal determines that companies DAG Wireless LTD and DAG Wireless USA are alter egos of Respondent therefore bound by the same IP and confidentiality obligations and that Claimant is entitled to injunctive relief. Regarding a joint non-disclosure agreement signed by the parties, the tribunal interprets that it protects the use of information exchanged by the parties for purposes different to the development of agreed ATG products. Then, the tribunal finds that Respondent breached this agreement as well because it used the information for illegitimate purposes, including developing ATG products to compete with Claimant rather than designing and manufacturing such deliverables for its benefit.

The tribunal then goes on to decide on issues related to trade secrets and deceptive practices. The tribunal finds that natural persons Laslo Gross, Susan Gross, and David D. Gross maliciously misappropriated Claimant's trade secrets by marketing its ATG products as their own before competitors and customer prospects. It also considers that there is sufficient evidence that Respondent caused confusion in the marketplace, adversely impacted Claimant's ability to access the capital markets, and caused prospective customers of Claimant to proceed with the company.

Lastly, on the issue of false advertising, the tribunal rules that Respondent acted contrary to the Lanham Act on trademarks by representing false information to aircraft manufacturers on the state of development of the ATG System. On Claimant's argument regarding conversion, which refers to Respondent's failure to return equipment and materials, the tribunal finds that Claimant did not prove that this was a result of wrongful retention rather than Respondent's misplacing of the objects and that, in any event, such a claim would be duplicative to the one on contractual breaches.

The tribunal recognizes US$ 10 million on breach of contract claims, in addition to a permanent injunction against Respondents prohibiting them from conduct violating Claimant's rights under contract provisions and applicable laws. It also determines that Claimant is entitled to recover its costs of arbitration for an amount of approximately US$525 thousand and its legal fees and expenses for around US$ 1,9 million. Finally, for the violation of previous orders of the tribunal on restrictions over Respondents regarding the use of confidential information for purposes different to those of the arbitration, it orders Respondents to pay Claimant US$ 60 thousand.

INTERVIEW WITH ANDREA ROSADO URIBE

1. Hi Andrea, thank you for agreeing to be featured in this month's edition of the Biberon. Could you briefly introduce your background to our readers?

I was born and raised in Barranquilla, Colombia and completed my legal studies both in Colombia and the United States (I am currently admitted to practice in both jurisdictions).

I started my professional career doing internships as in-house counsel in big local companies, and I secured my first job as an associate at one of Colombia's biggest law firms shortly after. My first experience within a law firm was within the firm's Tax, Customs & International Trade team, as I was very drawn towards this field of practice very early on in the beginning of my studies. After nearly two years of what I believe was an enormously valuable law firm foundation, I decided it was time to pursue my LL.M and went to Georgetown University to do so.

Throughout my LL.M in International Business and Economic law, I undertook various courses, which allowed me to have exposure to different areas, which ultimately led me to pursue a career in this field. I was able to find a job with White & Case's Washington office in their International Arbitration practice, which was in many respects the place-to-be in this line of work. I realized very early on in my time with White & Case that there was so much more to International Arbitration, and that there was a big professional path in the field of international disputes that I really felt drawn to.

For personal reasons I decided to move to Paris even though I knew very little of this market in France and had a very limited knowledge of French. I arrived in Paris and worked for White & Case's team here for some time, and shortly after, I made the big move into the world of funding which was very much unknown to me in many respects.

2. Can you tell us more about your experience in Colombia and the United States?

As I mentioned before, working in Colombia at Posse Herrera Ruiz was really the first opportunity I had at a law firm to understand the dynamics of big law and of course, the wonderful world of billable hours! My time in Colombia was extremely formative and I had some amazing mentors along the way. Even though I was practicing in a field that is not necessarily the one I am working at now, I felt as if I learned how to be a lawyer and was shaped professionally by my first job there. There is a certain rigor and organization that I believe working in law provides you with very early

on, and I was very happy to have been shaped under that mold as I find it tremendously useful in my professional life today.

Working in big law in the US was honestly an unparalleled experience. Not only was I surrounded by an exceptional team that stands out in its field from which I was able to learn a lot, but it truly made me want to pursue a career in the field of international disputes. Working for a law firm in the US, especially one as big as White & Case meant having exposure to certain matters that involved some of the most high-profile and interesting legal issues. Another point that I felt made my experience there so enjoyable was how they have every imaginable resource to make your life as a lawyer exclusively about the law. Truly my experience in the US was one that I will always appreciate.

3. What motivated you to leave your role as an International Associate to join Profile Investment in Paris?

I was able to stay working in the US under a specific employment authorization granted to former students (OPT), meaning not an employment visa as we know it. This authorization had a limited amount of time, and my job offer was limited to the duration of my employment authorization.

As to what motivated me to come to Paris and not pursue anything beyond my OPT in the US, that would have to be my then boyfriend (now husband!) who is French and was living in Paris at the time.

Though it may have seemed a questionable decision to come try my luck in a different jurisdiction, in which I barely spoke the language and in which I had no serious prospects of permanent employment, I would have to say I was reassured by the fact that at the end of the day, no matter how hard the transition would be, Paris was still the home of international arbitration and it was just a matter of time before I found my place in this city as a professional in the field of arbitration.

Having been formed with an entirely American education and after having been myself in the US legal market, I admit it wasn't an easy decision, however, fast forwarding 4 years after the big move, I must say that Paris is truly a place that has so much to offer for those who are keen on this area of practice.

4. Could you explain to us what the biggest differences between the work at a law firm and the work for a third-party funder such as Profile Investment are?

Well for starters funders are not counsels. Funders source cases and evaluate them in terms of their prospects of success, to determine if these are fit for non-recourse financing. In order to be able to make these assessments, a funder needs to understand the process and the legal issues extremely well, as well as to have a deep understanding of the financial aspects of the investment world. In a way the job of a third-party funder means being able to speak the lawyers' language and understand the cases in the same capacity without having to take the case all the way through.

As counsel, you don't really (unless you are in a very high place in the hierarchy) look in depth at many of the issues that we funders look at. Counsels tend to have at times a very merit driven focus whereas funders tend to analyze cases as a whole. We look at a reasonable quantum, we look at enforcement in depth, and, in some respects our process tends to be the same as counsel's process

but looking at it backwards. Will we be able to touch monies from the return in case of a successful award? Will the quantum be proportional to the amounts invested? If so, are the merits of the case strong enough?

Funders and counsels are constantly paying attention to the same legal issues and reviewing the same type of documents in order to make their assessments; however the way we interpret or consider these is what varies.

Funders are also exposed to a significantly larger number of cases, which is something that I personally truly appreciate of this experience as it gives you a very big understanding of cases as a whole that you would not necessarily get in your first years at a law firm.

5. Could you tell us what the main challenges are that you face every day and how the law firm - third party funder relationship works in practice?

The relationship between counsel and funder is a very cooperative one. Counsels that have worked closely with funders will be able to confirm the extent of depth which a funder will reach when analyzing a case for funding, and the degree to which a funder invested in a case could propose some valuable strategic suggestions. Investing on an arbitration tends to be a long-lasting process and both funder and counsel should work to ensure that the relationship flows very well on both ends.

I wouldn't say there are many challenges per se in a relationship that is in its essence one that is meant to be in both counsel's and funder's best interest, however I would say that most challenges arise when there is a failure to have proportionate, balanced, and realistic terms both from the funder as well as from Counsel (specifically when it comes to budget plans). Being able to define quite clearly the conditions from the get-go is key in not encountering challenges along the life of the process. When lawyers put forth unrealistic budgets in the contracts and must constantly increase or decrease, this could have a dramatic impact in the client's ultimate return, and it puts strains on the relationship with both the client and the funder.

Communication is important and communicating well is essential.

6. If you could travel back in time, what advice would you give to your younger-self?

To a much younger version of myself I would say: "Learn as many languages as you possibly can". In this field of law languages matter so much, and not just having notions but truly being able to speak to them fluently.

I would also tell myself not to close my head to other job prospects and ways of practicing law. I think as students we are shown so little of what's out there that by the time, we are exposed to the professional world, we have these fixed ideas of what we want without allowing ourselves to explore anything beyond.

And lastly, I would say that I have realized from my experience moving around countries and finding new opportunities, how much building good relationships with employers and peers matters. I would definitely tell my younger self to invest more in real relationships with the people I work with.

COMMENTARY BY JEAN-BAPTISTE MEYRIER

Confirmation of the admissibility of a third-party opposition to a recognition order in international arbitration.

Decision of the French Court of Cassation, 1st Civil Chamber, 26 May 2021, n° 19-23.996 (n°382 FS-P)

Summary:

For the first time, by this decision of the First Civil Chamber, the Court of Cassation confirmed the admissibility of a third-party opposition lodged against a decision having granted recognition of an arbitral award rendered abroad.

Decision appealed against: Paris Court of Appeal, Pôle 1, ch. 1, 28 May 2019, n° 16/21946 (cassation)

Texts applied: Articles 585 and 1425, paragraph 1 of the Code of Civil Procedure

In this judgment, which has already been commented on elsewhere[1], the Court of Cassation answered in the affirmative the question of whether a third party opposition initiated against a judgment confirming a recognition order of an award rendered abroad was admissible.

In order to understand the solution and the controversy surrounding it, it is necessary to specify the context in which this case arose (§I), before outlining its analysis (§II).

I. Context of the case

On 22 March 2013, an award was rendered in Egypt by an arbitral tribunal constituted under the aegis of the Cairo Regional Centre for International Commercial Arbitration, directing the Libyan State Government, the Libyan Ministries of Economy and Finance as well as the General Council for the Promotion of Investment and Privatisation to pay a certain sum to a foreign private operator (the company Al-Kharafi & sons, "Al-Kharafi") in damages for non-performance of a contract entered on 8 June 2006, which included an arbitration clause providing that any dispute would be submitted to arbitration in accordance with the provisions of the Unified Convention for the Investment of Arab Capital in Arab Countries signed on 26 November 1980.

On 13 May 2013, the President of the Paris district court (*Tribunal de grande instance* – TGI) granted recognition to this award, in accordance with the provisions of Article 1516 (1) of the Code of Civil Procedure ("*The arbitral award is only enforceable by virtue of an exequatur order issued (...) by the Tribunal de Grande Instance* [NB: henceforth, "*by the Tribunal Judiciaire*" (TJ) since Decree No. 2019-

[1] D. Actu., 18 juin 2021, obs. Jourdan-Marques.

966 of 18 September 2019 - art. 8] *of Paris when it was issued abroad*") and the applicable case law establishing that the competent judge within this Court is, to the exclusion of all others, the president of the TGI (now, of the TJ) ruling as a single judge, by order on an *ex-parte* application[2].

On 28 October 2014, the Paris Court of Appeal confirmed the order.

An appeal against this ruling was rejected on 8 June 2016.

On 11 March 2016, Al-Kharafi proceeded to the attachment of an account held at the Crédit Agricole in Courbevoie belonging to the Central Bank of Libya, and credited with approximately 100 million euros.

The latter then lodged a challenge on 11 April 2016 before the enforcement judge of the Nanterre district court on the grounds that it was not a party to the arbitration proceedings, nor consequently to the award rendered, and at the same time initiated a third-party opposition against the judgment of 28 October 2014 by summons of 17 October 2016.

Its third-party opposition is deemed inadmissible following a judgment of 28 May 2019[3] in which the Paris Court of Appeal essentially developed the following reasoning: if, in domestic arbitration, article 1501 of the Code of Civil Procedure opens the way for third-party opposition against the award, on the other hand, article 1506 of the same Code, applicable in international arbitration, does not expressly refer to this provision, so that such recourse is not allowed against the award made abroad; the absence of such an appeal against such an award must therefore extend to the order granting it recognition (or, in this case, to the judgment confirming it), since admitting the contrary would be tantamount to allowing the third party to invoke arguments relating to the award itself, even though no appeal is available to it in this respect; only an appeal, provided for by Article 1525 of the Code of Civil Procedure, and reserved *per se* to the parties alone, is therefore permitted in international arbitration against the recognition order on the sole grounds referred to by Article 1520 of the same Code, which refer to the award itself, and not to the exequatur order, which as such is not subject to any appeal.

Logically, the Court of Cassation overturned this decision with a very simple syllogism based on Articles 1525, paragraph 1 and 585 of the Code of Civil Procedure: after recalling that the second of these provisions states that "*any judgment is subject to third-party opposition if the law does not provide otherwise*", it held that "*in so ruling, whereas third-party opposition against the judgment of the Court of Appeal having granted recognition constituted an ordinary legal remedy against, not the arbitral award, but only the recognition decision of the award rendered abroad, the Court of Appeal violated the above-mentioned texts*".

II. Analysis

1. The Court of Cassation in fact criticises the appeal judges for having confused the award with the recognition order, whereas each of them has its own autonomous regime.

Admittedly, Article 1501 of the Code of Civil Procedure, which provides that the award may be challenged by way of third-party opposition, is not applicable to international arbitration; however,

[2] Civ. 1ère, 9 December 2003, n° 01-13.341 P: D. 2004. 1055, note Weiszberg; D. 2004. Somm. 3186, obs. Clay; RTD com. 2004. 258, obs. Loquin; RTD civ. 2004. 547, obs. Théry; JCP 2004. II. 10029, note Mahinga; JCP 2004. I. 119, n° 8, obs. Béguin; *ibid*. 2004. I. 133, n° 11, obs. Cadiet; Rev. arb. 2004. 337, note Bollée.
[3] CA Paris, Pôle 1, Ch. 1, 28 May 2019, n° 16/21946: D. Actu., 23 July 2019, obs. Jourdan-Marques.

the issue here is not that of challenging the award, but rather the court decision granting recognition to it, and more specifically in this case, the judgment confirming the recognition order.

Now, like any other French court decision, this judgment could, in the absence of any provision to the contrary, be the subject of a third-party opposition, in perfect keeping with the letter of Article 585 of the Code of Civil Procedure, which an older judgment had appeared to accept favourably, albeit implicitly[4], as did a much more recent decision, this time explicitly, in the context, in both cases, of a third-party opposition to the recognition order[5].

It would seem that the judges of the court of first instance misapplied, and in any case applied out of context, a precedent which had held that "*the only recourse available against a recognition order for an award rendered abroad is an appeal as provided for by* [former] *Article 1502 of the new Code of Civil Procedure* [now, 1520 of the Code of Civil Procedure]*, in cases where the award itself is involved, and not the enforcement decision, which is therefore not, as such, subject to any appeal, particularly as regards the jurisdiction of the court seised*"[6].

However, in this very particular case, the territorial jurisdiction of the court seised was at issue, at a time, prior to the entry into force of Decree No. 2011-48 of 13 January 2011, when no provision determined which recognition judge had territorial jurisdiction over awards rendered abroad (a question that is now resolved by Article 1516 (1) of the Code of Civil Procedure, which provides for the exclusive jurisdiction of the Paris district court for such matters).

Moreover, there was no question in this case of any third-party opposition, but of an appeal lodged by one of the parties to the arbitration against the recognition order.

And even so: in the absence of any applicable text in this area, the Court of Cassation nevertheless held in another judgment that a "*third-party opposition against a foreign arbitration award is exceptionally admissible when it seeks to have the award declared null and void on the grounds that the arbitrators have violated public policy and due process*"[7], a solution which it is not necessarily certain, given the exceptional nature of the two limited cases it covers, that it has been overturned by subsequent case law[8], even if it was handed down at a time prior to the entry into force of the 1981 decree – one of the aims of which was precisely to put some order into legal challenges which were deemed too numerous with regard to arbitration awards – when legal provisions on arbitration were very different from today.

This means that the foreign origin of the award did not, in the case under review, preclude a third-party opposition against the recognition decision handed down by the French court, and the scope of the statement that "*the recognition decision is therefore, as such, not subject to any appeal*", which was made in quite different circumstances in the precedent referred to above, could not be extended indefinitely to whatever recourse, and in particular to a third-party opposition, provided that this was certainly not the judge's intention in such precedent.

Holding otherwise was tantamount to a double error of interpretation of the provisions for, on the one hand, Article 1501 of the Code of Civil Procedure, which is inapplicable in international matters, relates only to the award itself, and not its recognition order, and, on the other hand, the

[4] Civ. 1ère, 12 March 1968, n° 65-11.899, Bull. civ. I, n° 93.
[5] TGI Paris, 25 April 2017, n° 15/17869, *SA Deleplanque et Cie c/ Sesvanderhave S.A.*: R. Dalloz 2017. 2572, obs. Clay; PLMJ Arbitration Review, n° 1. 131, obs. Ziegler.
[6] CA Paris, 1ère Ch. C, 10 July 1992, *société GL Outillage c/ société Stankoimport*, Rev. arb. 1994. 142, note Level.
[7] Civ. 2ème, 9 December 1981, n° 80-15.305: Bull. civ. II, n° 213: D. 1983. 238, note Robert; Rev. arb. 1982. 183, note Couchez.
[8] Civ. 1ère, 8 October 2009, n° 07-21.990, Bull. civ. I, n° 201; D. 2009. 2959, obs. T. Clay; JCP 2010. I. 644, § 6, obs. J. Béguin; Rép. dr. com., act. Nov. 2009, p. 6, obs. X. Delpech; C. Seraglini, *Les effets de la sentence*, Rev. arb. 2013. 705, n° 11.

principle laid down in Article 585 of the same Code is not subject to any exception in the context of recognition of an arbitral award rendered abroad.

The solution would perhaps be different in domestic arbitration where Article 1499 §1 of the Code of Civil Procedure states that "*the order granting the exequatur is not subject to any appeal*" (which should be interpreted, according to the Code Dalloz commentary on Article 585, as barring any third-party opposition), but this prohibition is compensated for by Article 1501 of the same Code, which opens up the way to a third-party opposition against the award itself; in international matters, a dichotomy exists: if the recognition order of the award rendered in France in international matters "*is not subject to any appeal*" by virtue of Article 1524 paragraph 1 of the Code of Civil Procedure, the texts remain silent as to the award rendered abroad (which, it is recalled, cannot be the object of an annulment proceeding in France).

Should we therefore infer, as the judges in the case under analysis did, that a third party opposition was, in this case, barred? No, the Supreme Court replied, pointing out on the contrary, in the light of Article 585 of the Code of Civil Procedure, that it is precisely in the opposite case where a provision excludes it that a decision may not be appealed, and that it is therefore admissible whenever it is not expressly excluded.

However, according to the above-mentioned case law of the Court of Cassation, an award rendered abroad may be subject to a third-party opposition if it results from "*a violation by the arbitrators of public policy and due process*", although in such cases, one would be more inclined to use the new route opened up by the judgment under discussion against the decision to enforce the award in question, in order to avoid any debate on the admissibility of such an action, which is the subject of the controversy referred to above.

2. The question remains as to whether the recourse of the third party opponent to the decision to enforce the award made abroad is then confined to the grounds listed exhaustively in Article 1520 of the Code of Civil Procedure, applicable by reference to Article 1525 §4 of the same Code.

It could be defended on the grounds that the generality of the terms of the latter provision does not distinguish according to the person or type of recourse, stating that "*the court of appeal may refuse to recognise or enforce the arbitration award only in the grounds provided for in Article 1520*" of the Code of Civil Procedure, and that Article 582 §2 of the same Code provides that third-party opposition "*calls into question in relation to its author the points of judgment which it criticises, so it be ruled de novo in fact and law*", even though the latter provision is interpreted as referring to the operative part, and not the grounds, of court decisions[9], it being specified, however, that the third party opponent is free to invoke in support of their claim the means that they could have presented if they had intervened in the proceedings before the decision was rendered[10].

[9] Civ. 2ème, 3 June 1970, n° 69-13.140.
[10] Civ. 1ère, 28 January 1997: Procédures 1997, n° 56, note Perrot | Civ. 2ème, 7 January 1999, n° 95-21.197 P: D. 1999. IR 42; RG proc. 1999. 630, obs. Wiederkehr | Civ. 2ème, 11 March 1999: RTD civ. 1999. 467, obs. Perrot | Civ. 2ème, 21 March 2013, n° 12-11.946: RTD Civ. 2013. 669, obs. Perrot.

However, this would be forgetting that Article 583 of the Code of Civil Procedure states that "*Any person who has an interest in the opposition may initiate a third-party opposition, provided that he was neither a party nor represented in the judgment he is challenging. However, creditors and other beneficiaries of a party may initiate a third-party opposition against a judgment rendered in fraud of their rights or if they invoke grounds of their own*".

It should be remembered that case law considers that only third parties may initiate such a challenge[11] and that parties who have been or are deemed by law to have been represented in court, whether the representation is conventional or legal, are therefore inadmissible to initiate a third-party opposition[12].

It is interesting to note in this respect that the judgment under review, in admitting the third-party opposition brought by the Central Bank of Libya against the judgment to which the Libyan State was a party, implicitly but necessarily considered that in this case the conditions for representation were not met and that the petitioner was therefore indeed a third party within the meaning of the above-mentioned provision.

In any event, and in order to temper the consequences of representation, the second paragraph of the aforementioned text specifies that "*the creditors and other beneficiaries*" remain admissible in their action insofar as the contested judgment was given "*in fraud*" of their rights, which it is up to them to allege and establish[13], or if they invoke "*grounds of their own*", i.e. personal grounds[14].

Subject to this reservation, the opposing third party will then have complete freedom to assert the harm suffered[15] or the right invoked[16] which, as they solely affect the merits of the claim, are not a condition precedent to the admissibility of such action[17] and should not be confused with it[18].

In reality, to answer the question raised above as to the scope of the grounds that can be invoked by the petitioner, everything depends on the purpose of the third-party opposition: if it is limited to declaring the recognition decision unenforceable against the third-party opponent, there is no reason to confine the latter's action to the restrictive grounds set out in Article 1520 of the Code of Civil Procedure, especially since in this case a simple reversal of the contested decision, which is perfectly admissible under Article 591 §1 of the same Code, would solve the issue; on the other hand, if it seeks the revocation of the decision on the grounds that it was wrongly rendered[19], then the third-party opponent, who "*steps into the shoes*" of the original parties by requesting the denial of recognition, and thus the unenforceability of the award itself[20], can only invoke these same restrictive grounds as the effects of the judgment that will be ultimately rendered shall, by its

[11] Civ. 2ème, 16 May 1973, n° 72-11.019.
[12] Civ. 2ème, 16 June 1977, n° 76-10.076: in the case of a shareholder deemed to have been represented in court by the president of the company, who was none other than himself.
[13] Com., 15 July 1975, n° 74-12.308.
[14] Soc., 26 May 1965, n° 62-12.043.
[15] Civ. 2ème, 6 May 2004, n° 02-16.314 P.
[16] Civ. 3ème, 27 January 1999, n° 97-12.970 P | Civ. 2ème, 18 October 2007, n° 06-19.677: Procédures 2008, n° 2, note Perrot | Civ. 3ème, 23 June 2016, n° 15-12.158: JCP 2016. 1296, n° 4, obs. (crit.) Libchaber; Procédures 2016. 278, note Strickler.
[17] Civ. 1ère, 17 May 1993, n° 91-15.761 P | Civ. 1ère, 2 November 2005, n° 02-17.697 P | Civ. 3ème, 10 July 2013: Gaz. Pal. 8-10 Dec. 2013, p. 22, obs. L. Mayer.
[18] Civ. 1ère, 6 February 2008, n° 06-20.054: D. 2008. AJ 692; *ibid*. Chron. Cass. 638, obs. Chauvin & Creton; *ibid*. 2009. Pan. 53, obs. Douchy-Oudot; Gaz. Pal. 25-26 July 2008, p. 21, obs. Massip; RTD civ. 2008. 286, obs. Hauser.
[19] Com., 24 November 1965, n° 63-12.023, Bull. civ. III, n° 601, p. 540 : JCP A 1966. IV. 4796, obs. J. A.
[20] The latter would be inadmissible if it were requested by way of a principal claim, but remains perfectly admissible by way of an incidental claim: TGI Paris, 22 November 1989, *société Acteurs auteurs associés (A.A.A.) c/ société Hemdale film corp*. : Rev. arb. 1990. 693, note Moreau.

intrinsically indivisible character, which results from the sheer incompatibility of the two decisions of recognition and retraction[21], be binding against all (*erga omnes*)[22].

Jean-Baptiste Meyrier
Admitted to the bars of Paris, Luxembourg and New York

[21] Soc., 17 November 1960: JCP 1961. II. 19924, note R. L.; RTD civ. 1961. 564, obs. Raynaud | Civ. 2ème, 30 April 2003, n° 00-22.712 P: D. 2003. IR 1411; Gaz. Pal. 8-10 Feb. 2004, p. 28, obs. du Rusquec.
[22] Civ. 2ème, 19 March 2009 : Procédures 2009, n° 140, note Perrot | Civ. 2ème, 18 June 2009: Procédures 2009, n° 308, obs. Perrot.

NEXT MONTHS' EVENTS

From November 1st to November 13th, ICC Make Climate Action Everyone's Business Forum

ONLINE

This virtual forum will catalyse peer-to-peer discussions between business leaders from all around the world representing various sectors and jurisdictions on critical issues concerning climate change.

Website: https://2go.iccwbo.org/icc-make-climate-action-everyone-s-business-forum.html

November 2nd, International Construction Arbitration: Core Concepts for Arbitration Practitioners – Webinar 4: Delay, Disruption, and Acceleration

ONLINE

In the fourth part of this webinar series, construction experts from all around the world will address concepts young arbitration practitioners should understand when tasked with overseeing complex construction disputes.

Website: https://americanarb.zoom.us/webinar/register/WN_eLlL1s-RR7SQK2-y1n4NYA

November 4th, ICC Croatia webinar Learning from the Pandemic – Effects on FIDIC Contracts

ONLINE

In this webinar, the participants will address the most significant effects of the pandemic on the implementation of construction contracts.

Website: https://2go.iccwbo.org/icc-croatia-webinar-learning-from-the-pandemic-effects-on-fidic-contracts.html

November 4th, ICC YAF : Arbitration & Alternative Dispute Resolution

ONLINE

This webinar will address the process of ADR and present the services provided by the ICC.

Website: https://2go.iccwbo.org/icc-yaf-arbitration-alternative-dispute-resolution.html

November 5th, Arbitrations between Asia/Pacific and Latam Parties

ONLINE

Co-organized by ICC Argentina and the ICC International Court of Arbitration, this online conference will share knowledge on the arbitral activity between Asia/Pacific and Latin America.

Website: https://2go.iccwbo.org/arbitrations-between-asia-pacific-and-latam-parties.html

November 5th, ICC YAF: Innovations in Arbitration practice in times of COVID-19

ONLINE

Roundtable where professionals will share their experience in the arbitration practice since the outbreak of the pandemic, with discussions on the impacts and innovations COVID-19 brought on the practice of arbitration.

Website: https://2go.iccwbo.org/icc-yaf-innovations-in-arbitration-practice-in-times-of-covid-19.html

November 19th, Overview on the latest French cases on international arbitration

King & Spalding, 12 Cours Albert 1er, 75008 Paris

Through a selection of cases, law Professors Jourdan-Marques and de Fontmichel will present the latest evolutions on international and national arbitration and will detail these cases contributions on an academic and practical perspective.

November 27th, 4th ICC Indian Arbitration Day

ONLINE

Annual conference of ICC Indian, which discuss key issues in domestic and international arbitration with particular attention to Indian practice and experiences.

Website: https://2go.iccwbo.org/4th-icc-indian-arbitration-day.html