PARISBABYARBITRATION

BIBERON

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Teynier Pic

Founded in 2004, Teynier Pic is an independent law firm based in Paris, dedicated to international and domestic dispute resolution, more specifically with a focus on litigation, arbitration and amicable dispute resolution.

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FOREWORD

Paris Baby Arbitration is a Parisian society and a networking group of students and young practitioners aiming the promotion of International Arbitration practice, as well as the accessibility of this field of law, still little known.

Each month, its team works on editing the Biberon, an English and French newsletter, intended to facilitate the understanding of the latest and the most prominent decisions given by states and international jurisdictions, and the arbitral awards.

By doing so, Paris Baby Arbitration hopes to encourage the contribution of students and junior lawyers.

Paris Baby Arbitration believes in work, goodwill and openness values, which explains its willingness to permit younger jurists and students to express themselves and to communicate their passion for arbitration. The values that drive Paris Baby Arbitration are openness and goodwill, which is why we want to allow students and junior lawyers to express their passion for the practice of International Arbitration.

You can find all the previously published editions of the Biberon and subscribe to receive a new issue each month on our website: parisbabyarbitration.com/

We also invite you to follow us on LinkedIn and Facebook and become a member of our Facebook group.

Enjoy your reading!

FRENCH COURTS

COURT OF CASSATION

Court of Cassation, Commercial, Financial and Economic Chamber, November 23, 2022, No. 21/10614

Contribution by Sarah Lazar

On May 27, 2022, the French *Court of Cassation* reminded that it results from article 1447 of the French Code of Civil Procedure that the arbitration agreement is independent of the contract to which it relates.

On July 6, 2012, a franchise agreement was concluded between Vacama, a restaurant operator, and the Spanish law company, Pastificio Service SL. This agreement contained an arbitration clause. The franchise agreement was assigned by Pastificio to La Tagliatella. However, Pastificio remained the exclusive supplier of all foodstuffs used by the chain's restaurants.

In 2016, Vacama initiated arbitration proceedings to cancel the franchise agreement, claiming that it had been abused due to a loss-making concept. The International Chamber of Commerce was appointed by the parties in the franchise agreement to settle their disputes. However, on March 22, 2018, the International Chamber of Commerce relinquished its jurisdiction, as it had not received the full advance on arbitration costs from the parties.

The Tagliatella company gave a judicial representative notice to take a decision on the continuation of the franchise agreement. The administrator considered that the contract included two autonomous agreements, on the one hand, the franchise contract stricto sensu and on the other hand, the arbitration clause. The administrator therefore decided to terminate the arbitration clause with immediate effect, allowing the matter to be referred to the commercial court.

On September 18, 2018, Vacama and its judicial representative summoned Tagliatella and Pastificio before the commercial court with the aim of cancelling the franchise agreement, for fraud and for lack of transmission by the franchisor of exploitable economic know-how and compensation for the damage suffered.

On October 19, 2018, the court declared itself incompetent to hear the dispute by virtue of the arbitration clause attached to the franchise agreement of July 6, 2012. The commercial court invited the parties to bring the matter before the competent court. The Vacama company therefore appealed to the French Supreme Court.

The French Court of Cassation rejected the appeal lodged by Vacama. According to the Court, it follows from article 1447 of the French Code of Civil Procedure that the arbitration agreement is therefore independent of the contract to which it relates.

The purpose of this agreement is to provide for the right of action in respect of the obligations arising from the contract and not to create, modify, transfer or extinguish these obligations. The termination of the arbitration clause by the administrator with immediate effect could not produce any effect. The clause would have to be manifestly null and void and unenforceable. Therefore, because of this arbitration agreement, the state courts do not have jurisdiction to hear the dispute.

Court of Cassation, First civil chamber, September 7, 2022, No. 20/22-118

Contribution by Floriane Bared

On September 7, 2022, the *Court of Cassation* holds that the violation of substantive international public policy cannot be subject to the parties' behaviour before the arbitral tribunal, and maintains that the annulment tribunal was able to check whether the partial arbitral award had been obtained through corruption, even when the arbitral tribunal had not been seized of the matter.

The Libyan government and the "*Société orléanaise d'électricité et de chauffage électrique*" (hereinafter "Sorelec") reached an agreement to set the amount of the debt owed to the company, in an attempt to put an end to their dispute regarding the performance of a construction contract. Based on the bilateral investment treaty between France and Libya, Sorelec initiated arbitration proceedings before the International Chamber of Commerce (ICC) to recover their debt. In the course of proceedings, Sorelec requested the issuing of a settlement agreement. The request was granted through a partial award, dated December 20, 2017, and Libya was ordered to pay their debt. However, the partial award was not enforced within the given deadline and the arbitral tribunal rendered a final award ordering the State of Libya to pay an increased sum. The State of Libya brought an action for annulment against the partial award.

On November 17, 2020, the Paris Court of Appeal set aside the partial award and ordered Sorelec to pay to the State of Libya 150.000 euros in compensation, under Article 700 of the French Procedural Code. The Court of Appeal noticed that preventing the violation of international public policy entailed for the state judge to "a*ssess the plea for infringement of international public policy even though it had not been raised before the arbitral tribunal*," nor previously invoked**.**

The Court of Appeal also established that although it had been possible for Libya to raise before the arbitral tribunal the matter based on issues of corruption, despite its late occurrence, the annulment tribunal was able to assess whether the partial award that allowed for the settlement agreement had been obtained through corruption.

Sorelec appealed to the Court of Cassation.

Claimant asserted, through a first plea, that the Court of Appeal should have sought if by not relying on allegations of corruption when allowed to do so, the Libyan State had not acted against the principle of procedural loyalty throughout the arbitration proceedings, which would challenge the right for an action for annulment based on allegations of corruption.

Sorelec also claimed that the duty of an annulment tribunal was to either approve or deny the enforcement of arbitration awards in France. The annulment tribunal could not serve as a "*judge of the dispute for which the parties had concluded an arbitration*", and as a result could not proceed with an investigation on the merits of the case without violating Article 1520.5 of the French Procedural Code. The Court of Appeal having relied on evidence that had not been submitted to the arbitral tribunal, the court would have revised the arbitration award, thus violating Article 1520.5 of the French procedural code.

On September 7, 2022, the First Civil Chamber of the Court of Cassation rejected the Claimant's appeal.

Regarding the first plea, the Court of Cassation highlighted that *"the violation of substantive international public policy could not be subject to the parties' behavior before an arbitral tribunal.*" The Court of Cassation approved the Court of Appeal's decision, stating that the latter was not required to determine if the State of Libya had followed procedural loyalty when omitting to seize the arbitral tribunal of the following matter: "*the enforcement of the award had the effect of allowing Sorelec to reap the benefits of the settlement agreement obtained through corruption.".*

Additionally, the second plea did not meet the Court of Cassation's approval since the latter rules that even if the duty of the Court of Appeal was limited to the grounds listed by Article 1520 of the French Procedural Code, it was allowed to investigate, in law and in fact, all elements related to these grounds.

Thus, the Court of Cassation rejected the appeal and ordered the Claimant to bear the costs of the proceedings as well as to pay 3.000 in compensation, in favour of the State of Libya, under Article 700 of the French procedural code.

Court of Cassation, First civil chamber, December 7, 2022, No. 21/15-390

Contribution by Louise Nicot

On December 7, 2022, the First Civil Chamber of the Court of Cassation Chamber allowed the appeal filed by Joint Stock Company "State Savings Bank of Ukraine" (hereinafter, "the Bank") against the judgment rendered on March 30, 2021 by the Paris Court of Appeal regarding the dispute between it and the Russian Federation and partially reversed Court of Appeal's decision.

On January 20, 2016, the Bank, incorporated under Ukrainian law, filed an action for compensation before an arbitral tribunal on the basis of the bilateral investment protection treaty (hereinafter, "BIT") between the Russian Federation and the Republic of Ukraine that entered into force on January 27, 2000. The arbitral tribunal found the Russian Federation in breach of the BIT. The Russian Federation appealed to the Paris Court of Appeal, which upheld the Russian Federation's claim and ordered the Bank to pay compensation to the Russian Federation. The Bank has appealed the decision of the Paris Court of Appeal.

Article 1 of the BIT defines the concept of "investments" and Article 9 of the BIT provides that any dispute between a Contracting Party and an investor of the other Contracting Party arising in connection with investments, including disputes concerning the amount, terms or procedure for the payment of compensation (…) or the procedure for the transfer of payments (…) may be submitted to arbitration after an attempt at amicable settlement. Article 12 of the BIT states that this Agreement shall apply to all investments made by investors of a Contracting Party in the territory of the other Contracting Party on or after January 1, 1992.

On the basis of the definition of "investments" contained in Article 1 of the BIT and on the offer of arbitration applicable to disputes concerning the said investments contained in Article 9 of the BIT, the Bank considers that the Paris Court of Appeal went beyond the limits of its jurisdiction to set aside the arbitral award by ruling that Articles 1 and 9 of the BIT contained a restriction ratione temporis and that its Article 12 set out a condition of consent to arbitration on which the jurisdiction of the arbitral tribunal depended.

The Court considers valid the Bank's argument that the scope of review of the Paris Court of Appeal's decision as the judge of the annulment of the arbitral tribunal's decision is limited to the jurisdiction of the said tribunal, on the ground of annulment based on the violation of its jurisdiction by the Paris Court of Appeal, and that by ruling that the BIT contained a limitation of jurisdiction ratione temporis so that the Bank's claim could not be based on the treaty, the Paris Court of Appeal reviewed the merits of the arbitral award and thus went beyond its jurisdiction as an annulment judge. In sum, the Court held that Article 12 of the BIT set forth a substantive rule that the Court of Appeal violated.

The Court partially reverses and sets aside the judgment of the Paris Court of Appeal of March 30, 2021, except insofar as it rejects the objection raised by the Bank on the ground of the arbitral tribunal's lack of jurisdiction in time. On this last point, the Court refers the parties to the Paris Court of Appeal. As for the remainder, the Court dismisses the Russian Federation's claim and orders it to pay the costs of the arbitration and the sum of 3,000 euros to the Bank pursuant to Article 700 of the French Code of Civil Procedure.

FOREIGN COURTS

Supreme Court of Western Australia, November 10, 2022, Power and Water Corporation v ENI Australia BV [2022] WASC 376(S)

Contribution by Axel Audren

On November 10, 2022, the Supreme Court of Western Australia rendered a decision in the context of an arbitration agreement enabling parties to seek urgent reliefs before the court instead of referring to arbitration.

Two energy firms, namely the statutory corporation Power and Water Corporation (hereinafter "PWC") and ENI Australia BV (hereinafter "ENI") concluded a gas sale agreement on June 1, 2006, subsequently amended and varied. This agreement is subject to an arbitration agreement but also provides that either party may seek relief from the court, provided that this action is urgent on the one hand, and "necessary to protect that Party's rights" on the other hand.

PWC claimed that ENI breached the contract which resulted in disruptions of gas supply. In this framework, PWC requested the court to grant urgent reliefs pertaining to the further access and inspection of ENI's documents regarding the supply of energy. Conversely, ENI requested a stay in favour of arbitration.

In the dispute at hand, parties mainly presented arguments and evidence towards the urgent nature of the sought reliefs. In other words, the judge had to rule over whether or not the requested relief was urgent, and, by extension, if the case could not be handled quickly enough in arbitration proceedings, which would then require the court to intervene.

The court observes that evidence presented by PWC was not sufficient to establish that the sought reliefs were urgent and that arbitration would not be fast enough to grant urgent reliefs. Finally, the court rejected PWC's request and referred both parties to arbitration, which demonstrates the Australian judicial deference to arbitration.

Supreme Court of Canada, November 10, 2022, Peace River Hydro Partners v. Petrowest Corp [2022] (SCC) 41,

Contribution by Marilena Tsiantou

On November 10, 2022, the Supreme Court of Canada, ruled that an arbitration agreement does not preclude a lawsuit from being filled in the context of one of the parties receivership.

The case concerned the development of a hydroelectric project in northern British Columbia. In 2015, Peace River Hydro Partners, through a partnership with different companies, subcontracted part of the construction to Petrowest Corporation. The contract for this project contained clauses

claiming that any disputes arising between the parties in the future would be resolved through arbitration.

Shortly after the construction began, Petrowest faced some financial issues, and receivership was ordered by the Court to manage its resources. On August 29, 2018, the receiver filed a claim against Peace River to recover losses for the work already performed under the subcontract.

In response, Peace River submitted a request for a stay of the civil case, to which the other party objected, and delivered a notice of arbitration under s. 15 of the *Arbitration Act*. It argued that, following the terms of its agreement with Petrowest, the matter should be resolved through arbitration.

The Receiver opposed Peace River's effort to dismiss the lawsuit. It claimed that according to the *Bankruptcy and Insolvency Act* ("BIA") the court should exercise judicial review rather than sending the case in several forums of arbitration. The judge of the Supreme Court of British Columbia ruled that the litigation should continue. Following that, Peace River challenged the ruling to the British Columbia Court of Appeal, which dismissed the appeal. Finally, Peace River filed an appeal to the Supreme Court of Canada.

The Supreme Court of Canada was called to shed light on the interplay between arbitration and Canada's insolvency law. The chambers judge unanimously dismissed the appeal and ruled that the stay of the proceedings should be dismissed. Justice Côté's majority position was supported by four justices, while Justice Jamal's concurring opinion was supported by three.

The majority's main argument was that the arbitration agreement is inoperative. Justice Côté started her analysis by acknowledging that although according to the principle of competence-competence a court must refrain from deciding whether an arbitration agreement is valid, a court may consider challenging an arbitration agreement when it must deal with the question of law or with the combination of fact and law. In this case, the interplay between the *Arbitration Act* and the BIA concerning the arbitration agreements falls within the last category.

Thus, Justice Côté examined the underlying principles of the *Arbitration Act* and the BIA. She observed that, although at first sight, the two statutes seem diametrically opposite, both encourage the quick and efficient resolution of disputes. Based on s. 15 (2) of the *Arbitration act*, Justice Côté stated that a court may permit litigation to proceed if the party seeking to avoid arbitration demonstrates that the arbitration agreement "is void, inoperative or incapable of being performed." Under ss. 183(1) and 243(1)(c) BIA Justice Côté ruled that courts have the legal authority to declare arbitration agreements inoperative. Within the context of a receivership, an arbitration agreement can be considered inoperative "*if enforcing it would compromise the orderly and efficient resolution of the receivership*".Based on the foregoing analysis, Justice Côté concluded that Peace River's request for a stay of proceedings would lead to multiple arbitral proceedings since in this case there were several overlapping arbitration agreements. This would imply the increase of extrajudicial expenses and would present a significant risk of conflicting decisions that would weigh on Petrowest and its affiliates. This approach taken would be detrimental only to the creditors and go against the

purposes of the *Bankruptcy and Insolvency Act*. Justice Côté concluded that the arbitration agreements are inoperative and the civil case against Peace River must be heard by the British Columbia Supreme Court.

Justice Jamal came to the same conclusions as Justice Côté, but on the grounds that the Receiver was permitted to reject the arbitration agreements according to the Receivership Order. As a result, when the Receiver brought a legal lawsuit before the British Columbia Supreme Court, it renounced the arbitration agreement. In response to Justice Jamal, Justice Côté claimed in her reasons that she thought the Receivership Order was vague and agreed that there were a number of possible interpretations. Considering this, she deferred the interpretation of the order to another day.

Both Justices Côté and Jamal both addressed a crucial but less significant question in the case: whether a receiver qualifies as a party to an arbitration agreement and takes the place of the debtor who consented to it. In theory, an arbitration agreement between a debtor and a third party binds a receiver.

Manitoba Court of Queen's Bench, September 12, 2022, Pokornik v. SkipTheDishes Restaurant Services Inc., No. 2022 MBKB 178

Contribution by Vanessa Paterson de Carvalho Pontes

On September 12, 2022, the Manitoba Court of Queen's Bench dismissed the defendant's motion for a stay in favour of arbitration, finding that there was no arbitration agreement and, even if there was an arbitration clause it would be invalid due to unconscionability and a lack of consideration.

The dispute originated from a contract of adhesion between a restaurant delivery corporation, SkipTheDishes (hereinafter "Skip"), and one of its individual couriers, Charleen Pokornik (hereinafter "Pokornik"). On July 25, 2018, Pokornik filed an action against Skip seeking amongst other things a declaration that she is an employee of Skip and not an independent contractor, as well as an order certifying the proceeding as a class action proceeding. Defendant Skip moved for an order staying the action in favour of arbitration.

The parties entered into a courier agreement in 2014 (hereinafter the "original agreement"), pursuant to which plaintiff would complete food delivery orders made on the SkipTheDishes App. The original agreement contained no arbitration clause, both parties having agreed to the jurisdiction of the Manitoba Court of Queen's Bench over the dispute.

The defendant first notified the plaintiff on July 19, 2018, by email that it was implementing a new courier agreement (hereinafter the "new agreement") which would take effect a week later, on July 26, 2018. In this email, the defendant indicated that if the courier does not agree to sign this new agreement, she would no longer be allowed to continue to work. The new agreement contained an arbitration agreement.

In return, the plaintiff replied to the defendant by email and accepted the new terms of the new agreement pp but stated that she did so under protest. Skip did not reply to this email.

Plaintiff filed and served the Statement of Claim in this matter on July 25, 2018, before the coming into force of the new agreement. On the motion, the plaintiff argued that her action was commenced pursuant to the original agreement which contained no arbitration clause; and, in any event, the arbitration clause in the new agreement was unenforceable and thereby invalid by virtue of either unconscionability or lack of consideration.

The Court agreed with the plaintiff. First, the Court found that, although the new agreement purported to supersede previous agreements, it did not state that it would apply to existing actions. Accordingly, the new agreement did not apply retroactively to the action, which was commenced before the effective date of the new agreement. The original agreement, which contained no arbitration clause, applied.

Further, the Court stated that the plaintiff had not accepted the terms of the new agreement. Any agreement in the SkipTheDishes App was expressly made under protest, an indication to the defendant that the plaintiff was rejecting the new agreement. Having deliberately chosen not to respond to plaintiff's protest email, the Court found that defendant acquiesced to plaintiff's rejection. Accordingly, there was no arbitration clause in effect at the time of the action, and no stay available. In the alternative, if the arbitration clause under the new agreement applied, the Court would still have refused to stay the proceeding, finding that the arbitration clause in the new agreement was invalid due to unconscionability and an absence of consideration.

The Court noted that, pursuant to the framework of previous case law, the issue of the validity of the arbitration clause was able to be resolved based on a superficial review of the record. That record established a clear inequality of bargaining power in the facts and evidence and that in the circumstances the arbitration agreement constitutes an improvident bargain. The relevant factors included that this was a contract of adhesion between an individual and a large corporation, plaintiff and defendant had significantly different degrees of sophistication, and it was made clear to plaintiff that she had to agree to the terms of the agreement, or her relationship with Skip would be terminated. And given the test for unconscionability set out in previous case law, the fact that the plaintiff was not dependent on the defendant was not determinative. In addition, the Court found that the case presented a situation of inequality of the respective situations of the parties. Plaintiff's action should not be rendered void by the new agreement, which was expressly designed by the defendant to remove her access to the courts. The Court was also troubled by the fact that the new agreement included terms designed to remove the potential for a class action, noting that this could possibly be the only effective means to bring some claims.

For these reasons, there is no consideration for the new agreement. The defendant's motion for a stay is dismissed.

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406, October 27, 2022

Contribution by Louise Dyens

On October 27 2022, the Court of Appeal of England and Wales rendered a decision in the dispute between two companies, *MUR Shipping BV* and *RTI Ltd,* dealing with the force majeure clause in a contract of affreightment in the case of international economic sanctions.

Ship owner MUR Shipping (MUR) and charterer RTI Ltd (RTI) entered into a contract in 2016 for the carriage of monthly shipments of bauxite from Guinea to Ukraine. In 2018, the Office of Foreign Assets Control (OFAC), a financial oversight agency of the United States Department of the Treasury, added RTI's parent company (Rusal) to the SDN list. The SDN list is a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries, which is a United States government sanctions, embargo measure. Following this, when the US imposed economic sanctions against RTI's Russian owned-parent company, MUR invoked a force majeure clause in the contract, on the basis that it would be a breach of sanctions to continue performing the contract.

The force majeure provision could only be invoked where the relevant "*event or state of affairs*" could not "*be overcome by reasonable endeavours*" of the affected party. RTI responded to MUR's notification by maintaining that MUR had not used "*reasonable endeavours*". Firstly, RTI argued that the sanctions would not interfere with their cargo operations. Moreover, RTI claimed that payment could be made in euros. Finally, RTI pointed out that, as a Dutch company, MUR was not obliged to implement the US sanctions. MUR responded that the sanctions triggered the force majeure clauses because they restricted payment in US dollars as required by the contract.

In this case, the Court of Appeal considered whether obligations to mitigate force majeure events require a non-contractual performance. In other words, whether the force majeure event would have been overcome or not by 'reasonable endeavours' from MUR.

In a first decision rendered by the London Maritime Arbitrators Association (LMAA), the arbitrators held that MUR should have accepted payment in euros, as to do so would have caused them no detriment. MUR appealed to the English Courts on a point of law under the Arbitration Act 1996 to determine whether 'reasonable endeavours' included accepting payment in a non-contractual currency. The High Court allowed the appeal and held that a party is not required, by the exercise of reasonable endeavours, to accept non-contractual performance in order to circumvent the effect of a force majeure clause.

RTI appealed to the UK Court of Appeal on the question of whether the force majeure event could have been "*overcome*" by "*reasonable endeavours*" from MUR. On 27 October 2022, the Court of Appeal held that a party that called force majeure should have accepted payment in euros rather than in U.S. dollars (as provided by the contract) because that would have overcome the effect of the force majeure event and caused no detriment to it. Upon the appeal, the Court cancelled the judgement of the High Court, and restored the previous award of the arbitrators.

Deutsche Lufthansa AG v Bolivarian Republic of Venezuela, PCA Case No. 2022-03, Arbitrator Challenge Decision, October 10, 2022

Contribution by Nadina Akhmedova

On October 10, 2022, the Secretary-General of the Permanent Court of Arbitration (hereinafter "PCA") upheld a challenge to a party-appointed arbitrator in accordance with the UNCITRAL Arbitration Rules 1976 (hereinafter "UNCITRAL Rules"). Upon rendering his decision, he referred to Article 10(1) of the Rules, which determines the existence of "justifiable doubts" to the arbitrator's impartiality or independence as sufficient basis for accepting the challenge.

The present case concerns an arbitration between Deutsche Lufthansa AG (hereinafter "Claimant") and the Bolivarian Republic of Venezuela (hereinafter "Respondent", collectively referred to as the "Parties") under the Germany–Venezuela bilateral investment treaty which entered into force on October 16, 1998 (hereinafter "Treaty").

The proceedings were initiated by a Request for Arbitration dated June 21, 2021, following which on May 27, 2022, the claimant appointed Dr. Wolfgang Peter, a Swiss national and a partner of the law firm 'Peter & Kim' as the first arbitrator to the case. A letter of appointment issued by the claimant was accompanied by Dr. Peter's Declaration of Acceptance, Availability, Impartiality, and Independence dated May 23, 2022, in which he maintained that "*to the best of [his] knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to [his] impartiality and independence*". On June 13, 2022, Respondent submitted a Notice of Challenge against Dr. Peter, and later on, following the refusal of Dr. Peter to withdraw from the case, requested that the Secretary-General of the PCA decide its Challenge against the arbitrator. Both Parties filed their respective written comments and memorials concerning the challenge; Dr. Peter, in his turn, also submitted his comments with regards thereto. The respondent based the challenge on two separate grounds.

Firstly, the purported "*controversy*" between the respondent and Mr. Kap-You Kim, a partner of the same law firm 'Peter & Kim' stems from the fact that he acted as an *ad hoc* committee member in the ICSID case of ConocoPhillips. v. Bolivarian Republic of Venezuela from February 3, 2020 until his subsequent withdrawal on March 18, 2022. In this regard, the respondent argued that Mr. Kim's resignation from the case, came as the law firm Peter & Kim agreed to represent a client as co-counsel for Venezuela's opposing parties. Respondent submits that Dr. Peter failed to disclose these circumstances in his Declaration, thereby resulting in a violation of his duty to disclose under the UNCITRAL Rules and "*giving rise to justifiable doubts concerning his own notion of justice and due process, including his understanding of the necessary' requirements of impartiality and independence of an arbitrator".* Respondent also denies the assumption that Dr. Peter and Mr. Kim act solely within their "*personal capacity*" due to the fact that an arbitrator bears the identity of their associated law firm upon making the assessment of potential conflict of interest.

Secondly, the respondent submitted that Prof. Tercier, a senior associate at Peter & Kim law firm, acted as the president of the tribunal in Air Canada v. Bolivarian Republic of Venezuela (the "Air Canada Case"), and in this role expressed views on factual and legal issues of similar nature to those

raised by the claimant in the present case. Therefore, considering the above and the current professional relationship between Dr. Peter and Mr. Tercier, the respondent submitted that there are justifiable doubts on the capacity of Dr. Peter to act as an independent and impartial arbitrator in this case, since he might give undue deference or unjustified weight to Prof. Tercier's decisions in the afore-mentioned tribunal. The respondent also emphasized the existing factual similarities between Air Canada Case and these proceedings, including that both disputes derive from the alleged breaches of different investment treaties in relation to the currency exchange regime established in Venezuela in 2003.

As to the first submission, the claimant argued that the respondent has failed to establish the existence of any controversy with regard to Mr. Kim's withdrawal from the ConocoPhillips Case since Mr. Kim's actions in an unrelated case are immaterial for the purposes of assessing impartiality and independence of Dr. Peter. According to the claimant, the respondent failed to maintain the factual basis for the purported controversy between Mr. Kim's previous resignation and the present case, thus the respondent cannot invoke justifiable doubts with respect to Dr. Peter's impartiality and independence in the present proceedings as a sufficient ground for the Challenge. Furthermore, the claimant supported its line of arguments by the fact that IBA Guidelines on Conflicts of Interest in International Arbitration do not refer to this kind of circumstances.

Secondly, the claimant maintains that allegations with respect to the relationship between Dr. Peter and Prof. Tercier should be pronounced by the PCA as '*untenable*' since they are addressing not the actions of Dr. Peter, but concern those of another individual. Furthermore, according to Claimant, Respondent failed to establish any evidence showing that Dr. Peter was in any way engaged in the Air Canada case or may be influenced by its outcome. The claimant also submits that Dr. Peter would not breach his own obligations as arbitrator by discussing the previous case with Prof. Tercier. The claimant brings attention of the Secretary-General to the fact that as per the established practice, challenges to the arbitrator have been rejected on numerous occasions even when the same arbitrator was previously involved in cases with similar legal and factual background as the present one and that Respondent availed itself of the opportunity to appoint the same arbitrators in cases involving similar issues on expropriations. The claimant also contests the argument of the respondent on the extent of similarity of factual and legal issues between those raised in Air Canada case and the present proceedings.

After carefully considering arguments presented by both Parties, the Secretary-General of the PCA upholds the Challenge against Dr. Peter on the basis of Art. 10(1) of the UNCITRAL Rules, highlighting the fact that both Parties agree that the circumstances must be examined objectively, from the perspective of a reasonable, fair and informed third party with due consideration of factual background. The Secretary-General reached his decision based on the second ground and explained that, while the alleged conflict of interest is a narrow one basis for the challenge, the prime concern is that an arbitrator might unduly defer to the decisions previously taken by a colleague of his firm. Consequently, an arbitrator might resolve the dispute following the same factual and legal background. Further, both parties agreed that the appearance is enough to elicit justifiable doubts. Thus, considering the question of overlap between the Air Canada case and the present one, he concluded that there is a clear risk that Dr. Peter might be affected by factors other

than those put before him while adjudicating on the merits of the present case. Since the answer to this question is affirmative, the Secretary-General ruled in favour of the Challenge raised by the respondent.

Amir Masood Taheri v. United Arab Emirates, ICSID Case No. ARB/21/19, Award of the Tribunal, November 28, 2022

Contribution by Jorge Escalona Galvez

On November 28, 2022, an ICSID Tribunal composed of Prof. Juan Fernández-Armesto (chair), Mr. Klaus Reichert SC (arbitrator), and Prof. Raúl Vinuesa (arbitrator), rendered an award encompassing the Parties' settlement agreement. The Parties included a Swedish-Iranian national (Mr. Amir Masood Taheri) ("Claimant") against the United Arab Emirates ("Respondent") (both collectively the "Parties"). The dispute arose from Respondent's refusal to renew Claimant's residency permit in the UAE.

The claimant argued that such refusal was based on "*national security grounds*" and violated the Agreement between the Government of the United Arab Emirates and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments of November 10, 1999 ("BIT"). In particular, the claimant described his investments in the UAE consisting of trading of general commodities, and two companies, Epoch Trading (UAE) and Reezmouj (Iran) that executed business in the field of import and export, production and distribution of optical discs. Naturally, due to the UAE's refusal, the claimant alleged he had to leave the country with no possibility of keeping running his investment in Epoch.

Due to the above, the claimant initiated arbitration on 13 April 2021. In his request for arbitration, Claimant sought an order from the Tribunal ordering Respondent to *(i)* pay damages to the claimant; and *(ii)* bear the costs of the entirety of the proceedings. It is said that Mr. Taheri argued that the UAE breached the BIT's fair and equitable treatment obligation and protections against unreasonable and discriminatory measures. Later on, the claimant quantified its claim being of over USD $100 million dollars including for lost profits from a lucrative sale that was to happen of Epoch (which was conditional on him having a residency permit).

Interestingly, before submitting their Memorials, there was an issue concerning the claimant's third-party funder. Naturally, the claimant informed the Tribunal and Respondent that it had entered into a funding engagement with a third party. However, the respondent wanted to inquire more about the funder without surprise, the claimant rejected those requests as "*unreasonable and lacking any legal basis*". Nonetheless, after a series of written exchange by the parties providing their reasons on this matter, the tribunal issued an order on March 2022 refusing to order further disclosure on the funder and its investors but requiring Mr. Taheri to disclose the terms of specific clauses that applied if he was subject to an adverse costs order in the arbitration.

After the above matter was decided by the Tribunal, both parties submitted their memorials and exchanged their documents request. For instance, in response to the claimant's arguments, the UAE argued that the tribunal lacked jurisdiction under the BIT, since the claim concerned Mr. Taheri's personal immigration issues, which are matters outside the scope of the BIT and did not affect his investment in Epoch.

Interestingly, before the UAE submitted their Counter-Memorial, they challenged certain evidence presented by the claimant due to "certain incongruities and possible tampering or manipulation" that affected 6 exhibits consisting of emails appearing to demonstrate that the purchase of his shares in Epoch had been completed. According to the UAE, the evidence's authenticity affected "*the viability of the Claimant's entire claim, and in particular his entire request for damages*". In their challenge, the UAE asked the Tribunal to order the claimant to preserve all evidence pertaining to the emails and retrieve the original electronic communications. For this matter, the Tribunal did order Mr. Taheri to respond with original copies of the relevant emails.

Despite the above, on September 14,2022, the claimant presented the respondent with an offer to settle his claims, and informed the Tribunal that it would not be able to respond to the authenticity issue on time. For all the above, the Tribunal consider the Parties' settlement agreement and embodies it in its award as follows: *(i)* the claimant proposes to discontinue the proceedings, and the respondent agrees; *(ii)* the claimant withdraws all of his claims; *(iii)* the claimant shall pay the entirety of fees and expenses of the Tribunal; *(iv)* both the claimant and the respondent shall bear their respective costs and fees, and *(v)* both the claimant and the respondent agree that ICSID shall publish the award embodying their Settlement Agreement pursuant to Article 48(5) of the ICSID Convention.

INTERVIEW WITH KIMBERLEY BAZELAIS

1. Hello Kimberley, thank you for accepting our invitation and answering our questions for this edition. Can you briefly present your background?

Many thanks for this invitation!

I started my law studies in France, but I was always interested by the diversity and interaction of the various judicial and socio-political systems on a global scale. After a double bachelors in law and political sciences at Paris I Panthéon-University, I thus pursued a master's degree in international law, and it was in this context that I first discovered international arbitration, through a course taught by Professor Sylvain Bollée.

To broaden my knowledge of the subject, I then undertook an L.L.M. at the Washington University School of Law, with a specialisation in international arbitration and negotiation, then the Master 2 CIE at Paris-Nanterre, focused on arbitration and international litigation.

The internships I completed during my studies, first at the International Court of Arbitration of the ICC then in law firms at Jones Day and HMN & Partners, prompted me to practice as an attorney. I then simultaneously passed examinations for the Paris and New York bars – a dual qualification which is a reflection of my dual legal culture, and allows me to have a grasp on issues of both civil and common law.

Today, I practice in the field of international arbitration, and the proceedings I am confronted with entail procedural, legal and technical challenges so varied that no two days are alike.

2. You have been an associate at Signature Litigation for almost a year, can you tell us more about this firm and why you decided to join it?

Signature Litigation was founded in London in 2012 and is dedicated to complex commercial litigation and international arbitration, with the advantages of an international law firm, but without the disadvantages associated in particular with conflict-of-interest issues.

The Paris office, which follows this same philosophy, has grown exponentially since its launch in 2019 and now comprises four partners, two counsels and some fifteen associates practicing in various fields including international arbitration, complex commercial, banking corporate and post-M&A, insurance/reinsurance, product liability and environmental litigation, mass tort and class action litigation, as well as investigations by regulatory authorities, and criminal and regulatory/product safety matters.

Flore Poloni joined Signature in 2020 to head the Paris office's international arbitration practice, which has since been expanding rapidly. I am fortunate to have found in this collaboration an

opportunity to develop my legal skills as an associate, while participating in an entrepreneurial project aiming to contribute to the growth of a human-sized, yet ultra-dynamic practice.

It was very important for me to be empowered, trained and accompanied in a relationship of trust, but also to have the possibility to explore my legal interests such as commercial and investment arbitration in the Caribbean region, around which I am developing several projects in partnership with the firm (coming up at the next Paris Arbitration Week!).

3. During your studies you were an intern at the ICC. How did this experience help you in your practice as an international arbitration lawyer?

I use the lessons learned from my internship at the ICC International Court of Arbitration on an almost daily basis. In my opinion, this type of opportunity is an excellent stepping stone into the field of arbitration, as it offers a very complete understanding of the institutional arbitration procedure, in particular via the appointment process of the arbitral tribunal, the management of the proceedings with the review of the Terms of Reference, but also the administration of the costs of the proceedings, etc., as well as the mechanism of scrutiny of the awards by the Secretariat and the Court of Arbitration.

The neutrality of the arbitral institution also allows for a more objective understanding of international arbitration best practices, and an extended perspective, by reason of the thousands of cases administered by ICC – more than 1,600 arbitrations were pending at the time of my internship, in 2018 – of the multiple challenges and issues, both procedural and substantive, that arise in arbitration practice.

In particular, I was able to observe first-hand the initial feedback from the expedited arbitration procedure, which had been introduced about a year earlier, as well as the initial amendments that the ICC had proposed, one of the many points that made my time with the institution a very rewarding experience.

4. You have also been secretary to the arbitral tribunal in several cases, what did you think of this experience and, more generally, of the possibility for certain lawyers to sometimes act as arbitrators?

It is true that I have been extraordinarily fortunate to have experience from all three main perspectives of arbitration: counsel, arbitral institution and arbitral tribunal.

My practice as secretary to the arbitral tribunal, more particularly to Christoph Liebscher who sat as chairman in the proceedings I worked on, was extremely valuable in terms of the experience and perspective it brought me. Participating in the arbitral proceedings, from the analysis of the parties' written submissions to the drafting of the arbitral award, including the oral hearings, some of which were filled with unexpected twists and turns, taught me a great deal about the expectations, methods of reasoning and diversity of approaches of arbitral tribunals.

In addition, the various cases in which I was involved led me to be confronted with arbitrators with extremely varied backgrounds, often lawyers, but also law professors, former judges or even engineers, with the advantages and disadvantages that each profile presents, and which all the more require excellent preparation and a great capacity for adaptation on the part of counsel.

For a non-lawyer arbitrator, it will be necessary, for example, to know how to "educate" the arbitral tribunal on the crucial legal points of the case, without giving in to the temptation to use the legal jargon often encountered in the counsel's submissions. On the contrary, where the arbitrator is a lawyer, and often an eminent legal specialist, it will be important to perfectly refine the legal analysis, while at the same time conserving the brain-teasing argumentation on technical points as complex and varied as the engineering standards relating to retaining walls, or the calculation of simple and compound interests at multiple rates, all in the same case.

The challenges are therefore continuous and constantly renewed in the practice of arbitration.

5. You have just recently announced that you are going to be seconded to the London office of Signature Litigation, what do you expect from this opportunity? How is secondment particularly interesting in international arbitration?

Because of its international structure, Signature is able to offer its clients the benefit of a cross-channel arbitration practice, in a fully integrated manner, whenever a case requires it. I have therefore already had frequent opportunities to collaborate with my colleagues in the London office on numerous transnational cases. I am currently spending a few months on secondment in Signature's London office in order to further develop and optimise this cooperation.

This is an excellent opportunity for me to contribute to the links between the different offices of the firm, to work in another cultural environment, in a jurisdiction with different procedural practices, to exchange perspectives on best practices in international arbitration, as well as to develop my common law practice.

It is an experience that I highly recommend to anyone who has the opportunity!

EVENTS OF THE NEXT MONTH

January 12, 2023: Inaugural conference – Increasing the legitimacy of international law - The role of parliaments

Organised by International Law Association

Where? *Webinar*

Website: https://na.eventscloud.com/ereg/index.php?eventid=694679&

January 27, 2023: Colloque Arbitrage et Procès equitable

Organised by Université Lumière Lyon 2

Where? At *Université Lumière Lyon 2 Palais Hirsch – Grand amphithéatre – 18 quai Claude Bernard, 69007 Lyon*

SIGNATURE LITIGATION

INTERNSHIP

Location: Île-de-France

Practice areas: Litigation/Arbitration

Starting date: 7-1-2024 or 1/1/2024

DLA PIPER

INTERNSHIP

Location: Luxembourg

Practice areas: Litigation and Regulatory

Starting date: 7/3/2023

BIRD & BIRD

INTERNSHIP

Location: Auvergne-Rhône-Alpes

Practice areas: Business litigation

Starting date: 7/3/2023

NORTON ROSE FULBRIGHT

INTERNSHIP

Location: Île-de-France

Practice areas: Litigation/Arbitration

Starting date: 7/3/2023 or 1/3/2024

ICADE

INTERNSHIP

Location: Île-de-France

Practice areas: Prevention and dispute resolution

Starting date: 7/1/2023

KING & SPALDING

INTERNSHIP

Location: Île-de-France

Starting date: 7/3/2023

BCTG AVOCATS

INTERNSHIP

Location: Luxembourg

Practice areas: Private law, Energy (corporate, Consulting, litigation)

Starting date: 7/3/2023