PARISBABYARBITRATION

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French and foreign court decisions

Interview with Amélie-Lou Blouin and Valentin Rougier

Our partners: 3C Teynier Pic

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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, First Civil Chamber, February 1, 2023, n° 21/25024

Contribution by Isabella Alonso de Florida

The French Court of Cassation held in its judgement rendered on February 1, 2023 that the breach of a mediation clause stipulated in a contract containing at the same time an arbitration clause is a problem resolved in terms of admissibility and not of jurisdiction of the arbitration tribunal.

A contract containing both an arbitration and a mediation clause was concluded by Etablissements Moncassin's shareholders. An arbitration proceeding was requested, and the arbitration tribunal rendered a partial award on September 10, 2018 by which it confirmed its competence regarding the case. The annulment of the partial award was sought by one of the parties, which was confirmed by the Court of Appeal of Paris in a decision of November 23, 2021 who pronounced the annulment of the award on the grounds that a mediation clause was stipulated in the contract.

Therefore, the adverse party lodged an appeal in cassation considering that the partial award should not have been annulled because the claim based on the breach of the mediation clause, which instated a mandatory and preliminary procedure, did not affect the arbitration tribunal's competence but was rather a question of admissibility of the claims that are presented to the arbitrator.

Instead, the Court of Appeal held that the arbitration tribunal could not declare itself competent if the mediation procedure had not been initiated. Therefore, the breach of the mediation clause could not be raised as a plea of inadmissibility but constituted a circumstance used to assess the violation of article 1492, 1° of the Code of Civil Procedure Furthermore, the Court of Appeal added that, even if both parties invoked the mediation clause before the arbitration tribunal, the arbitrator stated himself that the dispute belonged to the scope of mediation and therefore encouraged the parties to initiate a mediation procedure in parallel to the arbitration one.

In its judgement of February 1, 2023, the Court of Cassation overruled the decision of the Court of appeal in accordance with article 1492,1° of the Code of Civil Procedure. The Court recalled that an action for annulment against an arbitration award is opened when the arbitration tribunal declares itself wrongfully competent or incompetent and added that the review practised by the judge of annulment is based on judicial or factual elements used to assess the arbitration clause and excludes any review as to the substance of the award. Based on these reminders, the Court held that the argument related to the breach of the mediation clause stipulated in the contract containing the arbitration clause falls under the scope of admissibility instead of the tribunal's competence.

Court of Cassation, Commercial, Financial and Economic Chamber, February 8, 2023, n° 21/15771

Contribution by Jorge Hidalgo

On February 8, 2023, the French Court of Cassation confirmed a previous ruling of the Paris Court of Appeal. The latter had reversed an exequatur order granting enforcement of an award rendered by an arbitral tribunal which had ruled on a counterclaim filed after the initiation of insolvency proceedings in France.

On October 1, 2010, a company incorporated under French law (hereinafter "Sharmel"), entered into a contract with an Italian law company (hereinafter "Mirato"). Due to the unilateral termination of the contract by Mirato, the French company Sharmel, relying on an arbitration clause, filed a request for arbitration before the International Court of Arbitration on September 26, 2016.

In a decision dated May 15, 2017, a French Court opened a court-supervised administration procedure against Sharmel. Subsequently, Mirato argued that its company was the creditor of an amount owed by the French law company. On July 5, 2017, the Italian law company lodged the claim in the debtor's insolvency state and on September 29, 2017, the same company filed a counterclaim before the arbitral tribunal so as to order the payment of the debt.

The arbitral tribunal rendered an award on September 17, 2018. The award dismissed Sharmel's request for compensation and ordered this company to pay the amount of the counterclaim, the arbitration fees, and costs.

On March 18, 2019, the president of the Paris High Court issued an order that enforced the award. This order was reversed by the Paris Court of Appeal on September 15, 2020. Mirato decided to appeal this decision before the French Court of cassation.

The petitioner argued that the Paris Court of Appeal should have ordered the exequatur of the award so as to grant its effectiveness in the bankruptcy proceedings. Thus, Mirato would have been able to lodge its claim in the list of admitted claims to the debtor's insolvency state.

In this decision, the French Court of Cassation dismissed the petitioner's appeal. The Court ruled that, due to the international public policy principle concerning the prohibition of proceedings against a debtor in bankruptcy, such a principle prohibits the creditor whose claim originated prior to the opening of insolvency proceedings to file a counterclaim in arbitral proceedings to obtain the payment of his debt. Furthermore, the public policy principle obliges the creditor to lodge its claim in the debtor's insolvency state and follow the procedure provided for the verification of claims. Thus, it was held that the order granting enforcement to this arbitral award violates the French understanding of international public policy.

Paris Court of Appeal, January 24, 2023, n° 22/00733

Contribution by Rola Makke

On January 24, 2023, the Paris Court of Appeal rejected the referral brought by the State of Cameroon ("Claimant") against the order of the Pre-Trial Counsellor ("PTC").

The Claimant filed an action for annulment against an arbitral award rendered on May 20, 2021 under the ICC Rules. These proceedings followed a pre-trial. The companies Sogea Satom and Soletanche Bachy International ("Respondents") raised objections to the claims made by the Claimant against the arbitral award. In their submissions, the Respondents erroneously referred to "the court" instead of "the pre-trial counsellor". No motion to dismiss was made by the Claimant regarding this mistake. In two orders, the PTC declared itself competent to hear pleas of inadmissibility raised by the Respondents and dismissed the Claimant's claims.

The Claimant asked the Court to set aside the order made by the PTC, to find that he made a manifest error of assessment (obvious misinterpretation) and that, as a result, abused of his power, to declare the Respondents' pleas inadmissible for not having been raised *in limine litis* and to order Respondents to pay damages for abuse of process and to pay all costs.

In response, the Respondents asked the Court to declare the claim inadmissible and, in the alternative, to dismiss it as unfounded, the Claimant having raised the question of the validity of the PTC request only orally.

The Court observed that, on the abuse of power, the Claimant did not file inadmissibility of PTC request by written filings. Claimant only raised this point orally. As the PTC can only be requested by written filings, it is without manifest error of assessment or abuse of power that the PTC did not rule on the request.

Regarding the admissibility of inadmissibility pleas, the Court said that Claimant did not argue, before the PTC, that these pleas have not been raised *in limine litis*. Therefore, it held that they do not fall within the scope of this referral. Regarding the jurisdiction of the PTC to rule on pleas of inadmissibility based on Article 1466 of the Code of Civil Procedure, the Court observed that the PTC has rightly declared itself competent to hear pleas of inadmissibility.

The Court dismissed the referral brought by the Claimant against the order of the PTC, dismissed all the claims brought by the Claimant, and those of the Respondents regarding the one for the compensation for abuse of process. The Court ordered the Claimant to pay the Respondents a compensation of 20,000 euros pursuant to Article 700 of the Code of Civil Procedure and ordered the Claimant to pay the costs of the proceedings.

Paris Court of Appeal, January 31, 2023, n° 21/07383

Contribution by Andy Haddad

On January 31, 2023, the Paris Court of Appeal refused to grant the annulment of an arbitration award rendered by the International Chamber of Commerce (ICC) on the grounds that the award did not settle a dispute falling within the exclusive jurisdiction of the court of the insolvency proceedings.

AMT Cameroon was 10% owned by Ms. W and 90% owned by AMT Switzerland, a wholly owned subsidiary of Necotrans Holding, which held one share in AMT Cameroon. The latter was placed in judicial redress on June 29, 2017. Takeover offers for the assets of Necotrans Holding were submitted to the Paris Commercial Court, including that of Bolloré Africa Logistics and that of Privinvest on July 17, 2017. Ms. W then exercised her statutory right of pre-emption on the transfers of AMT Cameroon shares. These two offers were combined into the "Bolloré Consortium". On August 18, 2017, Ms. W exercised her pre-emption right.

By judgment dated August 25, 2017, the Paris Commercial Court approved the sale plan presented by the Bolloré Consortium. This court then ordered (i) the transfer of all the shares of AMT Switzerland and (ii) the transfer of the single share of AMT Cameroon, held by Necotrans Holding, to the benefit of Privinvest. It was specified that the shares of Necotrans Holding were not within the scope of the companies in judicial redress and whose sale plans are being examined, and that Privinvest would deal with the consequences of a possible refusal or the exercise of a right of pre-emption. Two deeds were concluded on October 20, 2017, the first one concerning the single share of AMT Cameroon and the latter concerning the shares of AMT Switzerland. Ms. W requested the transfer of the shares for which she exercised her right of pre-emption. She initiated arbitration proceedings on August 17, 2018.

The final award was rendered on March 31, 2021. AMT Cameroon, AMT Switzerland and Privinvest have initiated a procedure seeking the annulment of the award. They argued that by ruling on the existence of Mrs. W's right of pre-emption and on the nullity of the first transfer deed, the arbitral tribunal wrongly declared itself competent to rule on a non-arbitrable dispute. They argued that the award settled a dispute falling within the exclusive jurisdiction of the court of insolvency proceedings and violated the property rights of AMT Suisse, while disregarding the principle of the independence of the latter's legal personality.

The Paris Court of Appeal first ruled on the jurisdiction of the arbitral tribunal. It referred to the terms of the arbitration clause and the right of pre-emption contained in the articles of association of AMT Suisse. The arbitration clause provides that disputes between the shareholders would be settled in accordance with the arbitration rules of the International Chamber of Commerce. Moreover, the court recalls that the right of pre-emption is a conventional right provided for by articles 771-2 and 771-3 of the Uniform Act (OHADA). Taking these elements into account, the court of appeal held that the dispute fell within the scope of the arbitration clause.

The Court of Appeal then ruled on the *rationae materiae* jurisdiction over the dispute concerning Mrs. W's right of pre-emption. (i) The shares belonging to AMT Switzerland are not the property of Necotrans Holding: their transfer was not included in the scope of the companies in judicial redress. Therefore, it is a contractual dispute governed by AMT Cameroon's articles of association and by the rules of the Uniform Act (OHADA). Their transfer did not fall within the exclusive jurisdiction of the court in charge of the insolvency proceedings. (ii) The dispute concerning the right of pre-emption exercised on the single share of Necotrans Holding is also of contractual

nature, although it originated in the decision which adopted the transfer plan. The Paris Commercial Court had made it clear that the buyers would be responsible for the consequences of the possible exercise of a right of first refusal.

The Paris Court of Appeal held that the appellant relied on the same argument to invoke both the violation of international public policy and the lack of jurisdiction of the arbitral tribunal, alleging that the dispute fell within the exclusive jurisdiction of the court of insolvency proceedings. Therefore, this argument was also rejected.

Finally, the Paris Court of Appeal recalled that, as a judge of control, it cannot endorse the role of arbitrators and re-examine the merits of the dispute, unless it establishes a clear violation of international public policy, which is not the case here. The Court noted that the pleas challenging the arbitrators' reasoning on the exercise and validity of the right of first refusal and the failure to respect the legal personality of AMT Switzerland were aimed at obtaining a review of the merits of the arbitral award. Those arguments have been rejected.

Paris Court of Appeal, February 7, 2023, n° 21/19243

Contribution by Juliette Leterrier

On February 7, 2023, on the occasion of an action for annulment against a final arbitration award rendered on September 28, 2021 under the aegis of the International Chamber of Commerce (ICC), the Paris Court of Appeal ruled on the institution of proceedings for h an action that may be brought under Articles 1520(1), 1520(3) and 1520(4) of the Code of Civil Procedure.

On May 2, 2017, the Swiss company Swiss Re Direct Investments Company Ltd (hereinafter "Swiss Re") entered into an acquisition agreement with an entrepreneur (hereinafter "Mr M") to acquire an interest in the capital of company H, the parent company of the Nouvelle Société Interafricaine d'Assurances group headed by Mr M.

Following difficulties with the conversion of convertible bonds held by Swiss Re under the acquisition agreement, and despite attempts to reach an arrangement, Swiss Re filed emergency arbitration proceedings before the ICC on March 25, 2019, followed by merits arbitration proceedings on April 4, 2019.

In this regard, the arbitral tribunal issued its final award on September 28, 2021, while rejecting the M Parties' (Mr M, members of his family, and associated companies) request for a stay of proceedings due to their concurrent referral to the arbitral tribunal of the Court of Arbitration of Ivory Coast (CACI).

Thus, under the terms of the award, the court determined that the conditions for the conversion of the convertible bonds were met and ordered company H to issue and allocate 36,392 new shares to Swiss Re within 45 working days of notification of the award to the parties, with the latter taking all necessary steps to accomplish this. It should be noted that the H and M Parties were jointly and severally ordered to pay Swiss Re CFA 8,295 billion for the repayment of convertible bonds that were not converted into H shares.

The M parties then appealed against this award and put forward six pleas to obtain its annulment.

The first plea claimed that the arbitral tribunal is without jurisdiction. In this regard, the Court noted that the arbitration clauses inserted I in the acquisition agreement signed on 2 May 2017, (ii) in the "Terms and Conditions of the issuance by H of bonds convertible into ordinary shares" in Appendix II, and (iii) in the shareholders' agreement in Appendix III gave the arbitral tribunal established under the auspices of the ICC jurisdiction. The Court dismissed this plea because it could not base its review of the arbitral tribunal's jurisdiction on a review of the merits of the award and also because the tribunal had not drawn any legal consequences from asserting its jurisdiction. The following three legal arguments are based on the tribunal's failure to carry out its mandate.

On the one hand, the court noted that the M parties incorrectly claimed that the court had declared one of the disputed resolutions null and void, when in fact the court had refrained from declaring the resolution null and void because it had not been seized of an application to annul the resolution. The parties M, on the other hand, based the court's mission violation on their joint and several condemnations with company H to reimburse 8,295 billion CFA francs. In this regard, the Court held that Swiss Re's reimbursement claim was made only against company H and thus accepted the plea, holding that the court had ruled ultra petita, thus exceeding the terms of its mandate.

Finally, the parties M contended that the arbitral tribunal had ruled in part as "amiable compositeur", despite contractual provisions requiring the application of French law. Furthermore, the Court rejected this plea, noting that the tribunal explicitly stated in its reasoning that it was ruling 'in law and not in equity,' and that its reasoning was based on French law principles such as contract binding force and good faith.

The final two grounds for appeal are based on a breach of the adversarial principle. The parties M contended that the court had not discussed the application of an article or the calculation formula used. The Court rejected these arguments, stating first that the article in question was only a non-decisive reference in the said award, and second, that the elements on which the calculation method was based had been discussed between the parties.

Finally, the Court noted that the debates and transcripts of the hearing were properly conducted, as the elements invoked by the M parties did not demonstrate any decisive character.

As a result, in the decision discussed, the Court partially annulled the arbitral award presented to it because the arbitral tribunal exceeded one of its terms of reference.

England and Wales Court of Appeal (Civil Division), December 19, 2022, *S3D Interactive Inc v Oovee Ltd* [2022] EWCA Civ 1665

Contribution by Louise Dyens

S3D Interactive, Inc v Oovee Ltd [2022] EWCA is a case relating to the rights and obligations arising out of the development of a video game, between the Claimant ('S3D'), and the Respondent ('Oovee'). On December 19, 2022, the English Court of Appeal rejected arguments that, where there is a pending challenge to the tribunal's jurisdiction, the Court must first determine that point before it can make an order for compliance with a peremptory order under section 42 of the Arbitration Act 1996.

The Claimant claimed infringement of intellectual property rights against the Respondent. Under their Licence Agreement, the Respondent granted the Claimant a right to develop 'enhancements' to the game in return for which the Claimant was required to pay the Respondent a royalty. In case of a dispute between the parties, their agreement contained an arbitration agreement providing for arbitration in London in accordance with the London Court of International Arbitration Rules ('the LCIA Rules').

The Respondent filed a first request for arbitration in January 2020, claiming for royalties according to the Licence Agreement, and for breach of intellectual property rights. The tribunal competence was contested, which was then denied by the arbitrator in an email, and by a Mid-Stream Case Management Conference (MSCMC) on March 3, 2021. On March 31, 2021, the Claimant issued an arbitration claim form, claiming an order setting aside the 'Award as to jurisdiction', made at the MSCMC and/or in the Arbitrator's email.

Meanwhile, the Claimant mentioned in its Statement of Defence and Counterclaim filed on January 15, 2021, that it sold all its assets in April 2020 to another company. Accordingly, the Respondent's lawyers asked the Claimant to confirm how it intended to fund any financial award or costs award if made against it at the end of the arbitration. Having received no response, the Respondent applied to the Adjudicator for an order for security for the amount in dispute and for the Respondent's legal and arbitration costs.

On April 16, 2021, the Claimant said it would not be paying its contribution to the costs of the arbitration. On August 25, 2021, the Arbitrator issued a Security Order. He ordered that the Claimant should by September 8, 2021 issue a bank guarantee in favour of the Respondent or make deposits of money, as security for any future award issued in favour of the Respondent in the arbitration; and for the costs of the counterclaim.

On September 8, 2021, the Claimant stated to the Arbitrator that it would not be able to make payment of the cash deposits or obtain the bank guarantees. The Claimant also failed to pay its share of the costs due to be paid to the LCIA. On October 11, 2021, the Arbitrator ordered that the Claimant's counterclaims be withdrawn.

On March 29, 2022, the Respondent sought from the Arbitrator another peremptory order, to ask the Claimant to issue a bank guarantee or a deposit, which was granted by the Arbitrator on June 16, 2022. The Arbitrator stated that the Claimant's financial situation was not a sufficient cause for failure to comply with the Arbitrator's order. The security was not provided by the deadline, the

Claimant claiming a repudiatory breach to the arbitration agreement by the disclosure by the Respondent of documents and information which are confidential to the arbitration proceedings to third parties, breaching the confidentiality's obligation. On July 26, 2022, the Claimant sent a letter to the Claimant saying that those actions terminate the arbitration agreement, bringing the arbitration to an end, and divesting the Arbitrator of any jurisdiction in the reference. The Peremptory Order required the security to be provided by July 27, 2022.

Then, the Claimant made an application to the Arbitrator for permission from the tribunal to make an application to the Court declaring that the jurisdiction of the tribunal had been extinguished by the letter of July 26, 2022 accepting the Respondent's breaches of confidentiality as repudiatory. At the same time, the Respondent also made an application to the Arbitrator to grant it permission to make an application to court to require the Claimant to comply with the Peremptory Order.

On September 30, 2022, the Arbitrator refused the Claimant's application on the grounds that he would himself determine the question of jurisdiction pursuant to his power conferred by the Arbitration Act and the LCIA Rules. Then, the Arbitrator granted the Respondent permission to make an application to the court. Therefore, on October 6, 2022, the Respondent issued a claim to the tribunal seeking the enforcement order under section 42 of the Arbitration Act. On October 21, 2022, the Claimant issued an application for two orders, particularly for an order declaring that the court had no jurisdiction to hear the Respondent's application for a section 42 enforcement order because the arbitration agreement had been terminated and challenged the tribunal's jurisdiction.

On November 14, 2022, the Claimant's application was rejected at first instance. The Claimant appealed. The parties settled their disputes prior to the hearing of the Claimant's appeal. However, as the appeal raised a point of general interest, the Court of Appeal issued its judgement explaining how it would have disposed of the appeal.

The Claimant argued that it was a condition of section 42 that an application must be made "by a party to arbitral proceedings" and that this condition could not be fulfilled if the tribunal has no jurisdiction. Also, the Claimant stated that section 42 only applies if the parties have not agreed otherwise and, as the arbitration process is consensual, if a court does not have jurisdiction, the parties do not agree to the enforcement of orders made by a court that they believe does not have jurisdiction over the disputes.

The question raised in front of the English Court of Appeal is whether there is a threshold requirement that the Court must first investigate and be satisfied of the jurisdiction of the tribunal over the substantive dispute referred to it before the Court can make an order requiring a party to arbitral proceedings to comply with a peremptory order of the tribunal (section 42 of the Arbitration Act).

The Court of Appeal rejected the Claimant's arguments. The Court explained that section 42 empowers the Court to make orders to support the arbitral process, without requiring the Court first to satisfy itself the tribunal's jurisdiction, as it is the tribunal's role. Then, the Court also explained that the "unless otherwise agreed" in section 42 is not a question of whether the tribunal has jurisdiction. It refers to a specific agreement to evict the jurisdiction of the Court to make an order under section 42. Finally, the Claimant's position is inconsistent with section 1 of the Act as it would require the Court, in case of a claim under section 42, to challenge the principle of minimum intervention, by firstly addressing the issue of jurisdiction, or to challenge the principle of the efficiency of the arbitral process, by declining to investigate the issue of jurisdiction, therefore refusing the application.

This case is a reminder of the importance of the principle of 'competence-competence', which is of international significance. It provides an indication of how English courts would deal with jurisdictional challenges in arbitration, in the sense that they do not favour such challenges disrupting the arbitral process.

England and Wales High Court of Justice, February 9, 2023, *DC Bars Ltd v QIC Europe Ltd* [2023] EWHC 245

Contribution by Elisa-Marie Goubeau

On February 9, 2023, the Commercial Division of the England and Wales High Court of Justice rendered a decision over an application to stay a claim arising under a pandemic-related business interruption policy (hereinafter 'BI') on the grounds that Parties had agreed that the claim would be arbitrated.

The dispute in this case arose between the owners of restaurants and bars, DC Bars Limited and Tutton's Brasserie Limited ('Claimants') and a Maltese insurer, QIC Europe Ltd ('Defendant'). The duration of the BI policy was from December 31, 2019 to December 30, 2020. Such policy provides, in the section related to 'infectious diseases extension', that the Defendant shall be liable for the loss and indemnify the Claimants on the basis of a maximum 3-month period following the first occurrence of a notifiable disease.

In this context, as a result of the Covid-19 pandemic surge and the national lockdown of March 26, 2020, the Claimants notified a claim amounting to £3,104,110 in accordance with the BI policy. The Defendant acknowledged its liability to meet the claim and paid a sum of £2,168,870. Additionally, on March 21, 2021, the Claimants sought an additional £4,030,250 under the BI policy extension as a result of the government's decisions to close hospitality businesses and to impose another national lockdown from November 2020. The Defendant argued that the Claimant was not entitled to claim this amount as the maximum indemnity period had expired.

One core issue in this case relates to whether the difference over the quantum between the Claimants and the Defendant falls within the scope of the arbitration clause enshrined in the BI policy. However, the Defendant argued that it cannot be held liable because the maximum indemnity period has been exhausted. The Court observed that there is also an underlying dispute relating to whether the Defendant is liable for the BI losses of the Claimants. It further declared that disputes as to liability shall not be submitted to arbitration but rather resolved in court.

In light of the foregoing, the Court decided to dismiss the application for stay in proceedings upholding that the arbitration clause is inapplicable as liability is not admitted. The Court therefore considered that the claim shall be first addressed in court.

Supreme Court of British Columbia (Canada), January 23, 2023, *3-Sigma Consulting Inc. v Ostara Nutrient Recovery Technologies Inc.*, 2023 BCSC 100

Contribution by Sarah Lazar

On January 23, 2023, a judge of the British Columbia Supreme Court ruled on a jurisdictional issue. According to the judge, if a shareholders' agreement includes an arbitration clause and there are sufficient links between the agreement and non-signatory shareholders, then those non-signatory shareholders are bound by the arbitration clause.

In this case, Ostara Nutrient Recovery Technologies Inc, its majority shareholders, directors, and senior management (hereinafter referred to as "Ostara" or "the defendants") were in dispute with the category D shareholders (hereinafter referred to as "the plaintiffs"). The defendants had carried out a sale of Ostara's shares to its largest shareholder, Wheatsheaf Group Limited (hereinafter referred to as "Wheatsheaf"). According to the plaintiffs, who are also shareholders of Ostara, this sale was carried out through an arrangement, which resulted in depriving their shares of any value.

The main issue before the British Columbia Supreme Court was whether shareholders who were not signatories to the shareholder agreement (in which the arbitration clause was contained) could be said to be bound by the arbitration clause.

The plaintiffs therefore filed a lawsuit in the state courts to declare the arbitral tribunal incompetent because some of the plaintiffs and defendants were not signatories to the shareholders' agreement and therefore were not bound by the arbitration clause. The defendants, on the other hand, applied for an order staying the claims because, in their view, the shareholders were indirectly bound by the arbitration clause and all of the plaintiffs' claims fell within the jurisdiction of the arbitral tribunal. The defendants' main argument was that, under the terms of the shareholders' agreement, the shareholders were those who signed the agreement and also all the security holders, and therefore indirectly agreed to be bound by the shareholders' agreement. The Defendants believed that all claims "arising out of or in connection with the Shareholders' Agreement" should be submitted to arbitration.

The judge of the British Columbia Supreme Court found that the defendants' argument had merit and granted the application for a stay so that the arbitral tribunal could take jurisdiction. According to the judge, the plaintiffs had successfully demonstrated that a link existed between the shareholders' agreement and the non-signatory shareholders.

Federal Court of Australia, December 22, 2022, *Guoao Holding Group Co Ltd v Xue No 2* [2022] FCA 1584

Contribution by Marilena Tsiantou

On December 22, 2022, the Federal Court of Australia rendered a decision on the enforceability of an arbitration award made by the Beijing Arbitration Commission, examining whether the award violates Australian public policy. In doing so, the Court reaffirmed the high threshold required to refuse the enforcement on the grounds of public policy and ordered the enforcement of a USD 27 million foreign arbitration award.

This case concerns a Chinese construction company against a Chinese national residing in Sydney and an Australian registered corporation. The dispute arose from a Cooperative Development Agreement between Guoao (the "Applicant") and Ms Xue, who wholly owned Tredmore Pty Ltd, an Australian registered corporation (the "Respondents"). Under the agreement, the Applicant provided funding for a joint venture company to develop an aged care facility, in which it held a 25% interest. However, the parties fell into a dispute, and the matter went to arbitration. The Arbitral Tribunal issued an award in favour of the Applicant.

The respondents argued that the enforcement of the award would lead to "manifest unfairness" and would be contrary to public policy. In addition to this, the Respondents also argued that the award lacked consequential orders restoring the parties to their pre-contractual positions and that the copies of the arbitration agreement and award were not properly certified or translated.

However, the judge, Justice Stewart, explained that international harmony and consistency requires that public policy must be interpreted in pursuance of the International Arbitration Act, 1974. Under the New York Convention, there must be "compelling reasons" to refuse an award's enforcement, and enforcement must be so fundamentally offensive to a jurisdiction's notions of justice that a court cannot reasonably be expected to overlook it. However, Justice Stewart found that there were no compelling reasons present in the case before him, and the respondent's complaints about the award did not rise to the level of being contrary to fundamental norms of justice and fairness in Australia within the context of international commercial arbitration.

Justice Stewart also noted that it is generally inappropriate for an enforcement court to second-guess the findings of the courts at the seat unless there is an obvious and serious disregard for basic principles of justice by the arbitrators. In this case, the respondent had been repeatedly rebuffed by the courts at the seat after applying to domestic courts and authorities in the People's Republic of China for the award's cancellation.

Justice Stewart also accepted the evidence of an academic expert in Chinese corporate law that there remained processes available to the respondent to pursue relief under Chinese law. As for the sufficiency of the documents produced by the award creditor, the Justice held that enforcement is the exercise of a judicial power, and where the party resisting enforcement does not dispute the copies of documents that are tendered by the award creditor, the court can be satisfied that the documents are what they purport to be. Based on these factors, all objections to the enforcement of the award failed, and Justice Stewart ordered that the award must be enforced.

In conclusion, the Court's decision establishes that an Australian court will usually not reject the enforcement of an arbitral award on public policy grounds, except in cases where there has been a serious violation of fundamental principles of morality and justice in the jurisdiction. Additionally, the decision confirms that if a court in another jurisdiction has already ruled on the enforceability of an award, an Australian court will usually come to the same conclusion. The only exception is when it is demonstrated that the foreign court had limitations in reviewing the tribunal's process, or if corruption was involved.

INTERVIEW WITH AMÉLIE-LOU BLOUIN AND VALENTIN ROUGIER

1. Hi Amélie-Lou and Valentin, thank you very much for accepting our invitation and agreeing to answer our questions for this edition. Could you briefly tell us more about your background?

Valentin Rougier: Good morning, and thank you PBA for this invitation. I grew up in Morocco, India and Gabon before joining the undergraduate Europe-Africa program at Sciences Po in Paris in 2013. Then, I worked at the United Nations in New York and Bangkok for a year. When I came back to France, I graduated from a Master in Economic Law at Sciences Po and a Master 2 in Private International Law and International Commercial Law at Université Paris 2 Panthéon-Assas. I also had the opportunity to study arbitration and international law at Cornell and Columbia in the United States. In addition, I trained at several international litigation and arbitration law firms in Paris and Madrid, including Allen & Overy, Willkie Farr & Gallagher, Skadden, Arps, Slate, Meagher & Flom, and White & Case. I am currently an international arbitration associate at Jones Day, where I am lucky enough to share the same office as Amélie-Lou!

Amélie-Lou Blouin: After growing up in Ivory Coast, Ghana and Morocco, I undertook a four-year double degree in English Law and French Law at King's College London and the Sorbonne in Paris. Over those years, I studied international arbitration (both commercial and treaty-based), private international law and international commercial law. Keen to learn more, I decided to pursue a second double degree in Global Business Law and Governance – this allowed me to spend six months at City University of Hong Kong and another six months at the Sorbonne. I then decided to take a year out to gain work experience in international arbitration with an arbitrator in Hong Kong and Allen & Overy's International Arbitration team in Paris. As expected, these experiences only confirmed my interest for this area of law and made me want to practice it upon qualification. After passing the Paris Bar in 2020 and pursuing the legal practice course at the Paris Bar School, that's what I have been doing for the past six months at Jones Day in Paris.

2. Both of you are international arbitration associates at Jones Day. Can you tell us about your day-to-day work and how you work together?

Amélie-Lou Blouin: I would say that there really is no "typical" work week (which is probably true for most arbitration teams, if not for any legal team really)! – that's also what makes the job exciting and rewarding. That being said, on a daily basis I have been involved in handling a number of matters conducted mainly under the ICC Rules, which implies daily interaction with clients and drafting documents like research memoranda, statements or document production requests. In parallel, I also act as Tribunal Secretary for one of the partners' cases. Valentin and I have indeed also built common habits, notably through working together on a complex ICC arbitration in the construction sector. It was super helpful working hand in hand, especially as the case involved a substantial amount of factual evidence crucial to co-draft a witness statement. Since then, we work

together on a daily basis by discussing how best to approach certain tasks or legal questions. More generally, on a daily basis we are also lucky to be surrounded by more senior lawyers who take the time to train us, for instance by making sure to give us regular feedback on our work or sharing drafting techniques.

Valentin Rougier: I could not agree more with Amélie-Lou, each day has been different since we joined the firm. The first few months as an associate are challenging but also extremely rewarding, and our experience at Jones Day is no exception. For example, we are learning to assume new responsibilities by participating in the day-to-day work related to commercial and investment arbitration cases in which we are involved for the first time as associates. In this respect, I feel privileged to embark on this challenging journey with such an exceptional team. Last but not least, I try, with more or less success depending on the workload, to take some time off to explore my personal interests, travel or discover a new restaurant with friends!

3. You both pursued very international studies – could you tell us what your experiences in the United Kingdom, Hong Kong and the United States brought you?

Amélie-Lou Blouin: Absolutely! They certainly brought me a lot from a theoretical point of view. Starting my studies in London allowed me to approach law through common law concepts, which I was then able to compare to civil law upon my arrival in France. Then, I was able to reinforce my knowledge of international law in Hong Kong in an entirely different cultural context, for instance through lectures comparing private international law cultures across Southeast Asia and in Europe. Of course, these experiences were also very rewarding from a cultural and personal standpoint.

Valentin Rougier: As previously mentioned, I had the opportunity to spend some time studying in the United States. I was thrilled to discover the common law system, the Socratic method, and the practice-oriented culture of U.S. law schools. I must confess that the "cold calling" used by some professors kept me up late at night in the library preparing for classes! Yet, I have learned several invaluable personal and professional lessons from a number of these experiences. For example, I was involved in a legal clinic at Cornell providing legal representation to prisoners facing death penalty in Tanzania as part of their individual appeals to the African Court on Human and Peoples' Rights in Arusha.

4. Amélie-Lou, you notably trained with Vinci Energies International & Systems' legal department and were a research assistant to an arbitrator in Hong Kong. As for you, Valentin, you have been a research assistant for several professors at Columbia Law School. Could you tell us about these professional experiences?

Amélie-Lou Blouin: After finishing my studies, I was very curious to understand how arbitrators go about analysing the matters in which they are appointed - working with Kim M. Rooney – an arbitrator, mediator and Barrister practicing in Hong Kong – allowed me to observe the way she approached the parties' submissions, as well as to better understand how arbitration proceedings work in practice, in particular ICC and SIAC. I also wanted to grasp how a company handles its complex disputes in practice. Within Vinci Energies International & Systems' legal department,

that is what I did working alongside a former arbitration lawyer from White & Case. It also allowed me to observe how the company negotiates large infrastructure projects, which are often the subject matter of arbitration disputes.

Valentin Rougier: Unlike Amélie-Lou, I was still studying when I worked as a research assistant at Columbia. In France, academic research is not often assigned to non-PhD candidates. This is, however, more widespread in U.S. law schools where all students can apply for research assistant positions. For instance, I assisted Professors Amal Clooney and George A. Bermann for several months in their legal research on the right to a fair trial in international law and on anti-suit injunctions in international arbitration respectively. Thanks to these professors and their invaluable advice, I developed advocacy and writing skills that are now extremely useful in my daily practice as a lawyer.

5. Paris Arbitration Week is coming up. It is of course an important event for students interested in a career in international arbitration. Do you have any particular advice to give them?

Amélie-Lou Blouin: I believe that the most important thing is to get as much hands-on experience as possible. It does not have to be in arbitration from the outset. I feel that getting work experience with law firms very early on is an asset later – it means you have been exposed to the way a law firm works, and to contracts or topics more generally that are the subject matter of arbitrations. It can be IP, energy, real estate, you name it. I would also suggest trying to get exposure to how arbitration works in practice, for instance through internships at an arbitral institution or partaking in moots. Lastly, languages are a must in this industry – learn whatever language you can, or work on those you already know!

Valentin Rougier: Stay humble and help each other! This is one of the best pieces of advice I received during my studies and work experience. Although the arbitration field is very competitive and challenging in many ways in Paris, it is important to remember that being a lawyer is first and foremost about teamwork and that your fellow classmates are your future *consoeurs* and *confrères*!

EVENTS OF THE NEXT MONTH

27 to 31 March 2023: Paris Arbitration Week

Organised by Paris Arbitration Week

Where? Paris and online

Website: https://parisarbitrationweek.com

23 March 2023: Dinner debate "Investment arbitration before French courts"

Organised by CFA40 (Comité Français de l'Arbitrage)

Where? At *Les Tourteaux* – 86 rue la Boétie, Paris 75008

Website: https://www.helloasso.com/associations/cfa40/evenements/diner-debat-cfa40-9-mars-2023

ZABALDANO

SENIOR JURIST

Location: Monaco

Practice area: Commercial litigation

Starting date: Immediately

DESFILIS

INTERN

Location: Ile-de-France

Practice area: Litigation and commercial contracts

Starting date: 01/07/2023

KING & SPALDING

INTERN/ELEVE-AVOCAT

Location: Ile-de-France

Practice area: Contentieux

Starting date: 03/07/2023

ICADE

INTERN

Location: Ile-de-France

Practice area: Dispute prevention and resolution

Starting date: 03/07/2023

BIRD&BIRD

INTERN

Location: Lyon

Practice area: Business litigation and corporate crime

Starting date: 03/07/2023

OXYNOMIA AVOCATS

INTERN

Location: Ile-de-France

Practice area: Business litigation

Starting date: Immediately or 03/07/2023

ARAMIS

INTERN

Location: Ile-de-France

Practice area: Business litigation

Starting date: Immediately or 03/07/2023

MGPP AVOCATS

INTERN

Location: Ile-de-France

Practice area: Litigation and Arbitration

Starting date: 03/07/2023 or 01/01/2024

LANTOURNE & ASSOCIÉS

INTERN

Location: Ile-de-France

Practice area: Business litigation

Start date: Immediately or 01/07/2023 or 01/01/2024