

PARISBABYARBITRATION

BIBERON

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French and
foreign courts
decisions

International
arbitral awards
and decisions

**Interview with
Sarah Schröder**

Our partners:



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Founded in 2014, Three Crowns is a law firm specialising in international arbitration and international law. With offices in Paris, Washington D.C., London and Singapore, lawyers from Three Crowns have acted on behalf of leading companies and states in large international disputes with a reputation of securing positive outcomes for their clients and obtaining groundbreaking awards, allowing a development of international arbitration and public international law rules.

LAW PR FILER

Law Profiler, founded in 2019, is an organisation aiming to grant an easier access to the legal employment market. Law Profiler lists over 80,000 members and assists thousands of lawyers and aspiring practitioners to find jobs free of charge.

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, First civil chamber, April 13, 2023, n° 21-50.053

Contribution by Lina Ettabouti

On April 13, 2023, the French Court of Cassation rendered a decision regarding the opportunity to invoke inadmissibility of a request for enforcement of a foreign arbitral award.

The decision arose out of a dispute concerning the request for enforcement of a foreign arbitral award rendered in the United States. The petitioner was seeking to enforce such an award against a company (*Citigroup Global Markets*) and a private person for the payment of damages, which was subsequently granted. Respondents lodged an appeal against the order of enforcement before the Paris Court of Appeal and later went on to seek an appeal in *cassation* against the judgment.

Respondents alleged that the Paris Court of Appeal should have examined their claim relating to the inadmissibility of claimant's request for enforcement pursuant to Article 1525 paragraph 1 of the French Code of civil procedure. They argued that the judge should have done so as respondents submitted such a claim, without being at prejudice of acting *ultra vires*. Respondents also alleged that the enforcement of the award should not have been granted.

The Paris Court of Appeal decided that appealing to an enforcement order is only possible within the frame of Article 1520 of the French Code of civil procedure, which restrictively lists instances in which seeking annulment is possible. The only exception to that rule being acting *ultra vires* or violation of an essential procedural principle.

The French Court of Cassation annulled the enforcement order rendered by the Paris Court of Appeal. It was decided that Article 1520 of the French Code of civil procedure only covers for annulment of the award. Therefore, Respondents can claim inadmissibility of the request for exequatur when appealing to the enforcement order as long as it was brought before the judge by the party and as the parties did not seek annulment.

Court of Cassation, First civil chamber, April 13, 2023, n° 21-21.148

Contribution by Paul Gobetti

On April 13, 2023, the Court of Cassation was seized of an appeal alleging non-compliance with the arbitral tribunal's mission.

In the context of the execution of two lots of a public market/contract, a private person operating as a sole proprietorship under the trade name Electra (hereinafter "defendant" or "sole proprietor") entered into a subcontract with the company Ferroviol Agroman (hereinafter "claimant" or "Ferroviol company"). A dispute arose between the parties and an arbitration award was rendered in Tunis between the parties. Subsequently, the sole proprietor applied in France for the exequatur of the award rendered in Tunis.

Ferrovial company opposed the enforcement of the award by lodging an appeal before the Court of Cassation. It alleged that the Paris Court of Appeal's decision dated April 13, 2021 granted the enforcement, whereas the arbitrator is bound to respect the mission entrusted to him by the parties and must comply with the procedural rules provided for in the arbitration agreement. Claimant maintained that the arbitration clause provided for the applicability of the Tunisian legislation and in particular the provisions of the Tunisian Arbitration Code defined in the law No. 93-42 of April 26, 1993, whose Article 75-3 imposes that the award mentions the date on which it was given as well as the place of arbitration.

Claimant alleged that failure to mention the date and place of the rendering of the arbitral award did not qualify as a breach of the mission of the arbitral tribunal, the Court of Appeal had not drawn the consequences that legally followed from its findings in light of Articles 1520-3° and 1525 of the Code of Civil Procedure.

The Court found that the award did not include an indication of the date and place where it was rendered, whereas these mentions are prescribed by the Tunisian Arbitration Code to which the parties had submitted their arbitration by virtue of the arbitration clause. However, the Court stated that “it is not for the Court of Appeal, seized of the grievance of non-compliance with the mission under Article 1520-3° of the Code of Civil Procedure, to control the compliance of the procedure followed with the applicable procedural rules.”

The Court of Cassation dismissed the appeal filed by claimant, ordered it to pay the costs and rejected its claims under Article 700 of the Code of Civil Procedure.

Versailles Court of Appeal, March 14, 2023, n° RG 21/06191

Contribution by Sarah Lazar

In a judgment dated March 14, 2023, the Versailles Court of Appeal confirmed the order dated March 30, 2016 granting exequatur to the award rendered on January 29, 2016 and ordered Alstom to pay legal fees.

S.A Alstom Transport and Alstom Network UK LTD (hereinafter "Alstom") entered into three consultancy contracts with Alexander Brothers Ltd (hereinafter "ABL") to assist them in bidding for the supply of railway equipment in China. The first two contracts consisted in tenders from the Chinese Ministry of Transport for the supply of electric locomotives. The third contract was a tender from a Chinese state-owned company for the supply of rolling stock for the extension of line 2 of the Shanghai metro. Alstom was awarded all three contracts. It paid the first terms of the first two contracts but did not pay the balance nor anything under the third contract.

On December 20, 2013, ABL filed a request for arbitration with the International Chamber of Commerce based on the arbitration clauses stipulated in the three contracts, which provided for an arbitration seated in Geneva with the applicability of Swiss law to the merits of the dispute. ABL requested the balance of its invoices for the three contracts and damages for the harm caused by Alstom's improper behaviour and incessant audits.

On January 29, 2016, the arbitral tribunal issued an award in which it ordered Alstom to pay ABL for the findings and costs of the arbitration. Indeed, the arbitral tribunal had considered that Alstom had not provided sufficient evidence of their allegations of corruption. Moreover, mere suspicions could not release them from their contractual obligations. On March 30, 2016, ABL requested the exequatur of the arbitral award by order of the President of the *Tribunal de Grande Instance of Paris*.

On May 18, 2016, Alstom appealed this order on the grounds that the award violated international public policy due to allegations of bribery against ABL and lack of respect of the adversarial principle. On May 28, 2019, the Paris Court of Appeal finally overturned the enforcement order and consequently rejected ABL's request for exequatur. According to the Court of Appeal, all the elements of the case file showed serious, precise, and concordant evidence of corruption committed by ABL.

On July 19, 2019, ABL lodged an appeal in *cassation* against the judgment of the Court of Appeal. In a ruling dated September 29, 2021, the Court of Cassation overturned the ruling and condemned Alstom. It considered that the Paris Court of Appeal had made a manifest erroneous assessment of the elements that it had considered as indicative of corruption. The case was then referred back to the Versailles Court of Appeal (the referring court) on October 12, 2021, to set aside the award.

The Versailles Court of Appeal rejected Alstom's arguments. According to the Court, Alstom had failed to demonstrate that the award's exequatur order was contrary to international public policy and that the arbitral tribunal had failed to guarantee the adversarial principle. Indeed, it was found that the evidence put forward by Alstom cannot be qualified as serious, precise, and concordant. The enforcement of the arbitral award in France does not affect the French concept of public

policy. The Versailles Court of Appeal also rejected all the other grounds put forward by Alstom relating to the lack of respect of public policy and the adversarial principle.

Therefore, according to the Versailles Court of Appeal, the order of March 30, 2016, granting the exequatur of the arbitral award of January 29, 2016 rendered between the parties, must be confirmed and Alstom's claims must be dismissed.

Paris Court of Appeal, April 4, 2023, n° RG 20/07777

Contribution by Louise Dyens

The decision n° RG 20/07777 was rendered by the Paris Court of Appeal on April 4, 2023. The Swiss company Bunge Geneva is claimant in this case and the French company BZ Grains is respondent.

On April 4, 2023, the Paris Court of Appeal annulled the award rendered by the Court of the International Arbitration Chamber of Paris (IACP) on March 18, 2022, on the basis of Article 1520 1° and 4° of the French Code of Civil Procedure, on the grounds that the arbitrators had correctly ruled on their jurisdiction and that they had not violated the principle of contradiction.

In this case, a sales contract was concluded between claimant (the Swiss company) and respondent company (the French company). Their contract referred to two documents which both contained an arbitration clause, thus providing for arbitration in case of a dispute arising from the performance of the contract. In 2021, a dispute arose following a delivery incident. The Swiss company-initiated arbitration proceedings before the IACP. The Swiss company objected to the arbitral tribunal's jurisdiction, challenging the validity of the arbitration clauses and reserving its right to bring the dispute before the French courts instead of arbitration.

On March 18, 2022, an IACP tribunal rendered a partial award in which the arbitral tribunal upheld its jurisdiction. It also stated that the issue of the costs of the arbitration proceedings, not settled by claimant, will be decided in a final award.

On April 12, 2022, the Swiss company lodged an appeal against the partial award before the Paris Court of Appeal.

Claimant argued that the arbitral tribunal lacked jurisdiction to settle the dispute on two grounds. Firstly, the Swiss company stated that, under Article 1520 1° of the French Code of Civil Procedure, the court wrongly established jurisdiction. According to the Swiss company, the contract did not contain any arbitration clause because the mere mention of two arbitration clauses does not constitute a reference to one of the clauses or an expression of the parties' intention to be bound by them. Moreover, claimant argued that the accumulation of two competing and incompatible arbitration clauses constitutes a pathological situation. Claimant argued that it brought the case before the arbitral tribunal in order to comply with the principle of “competence-competence”, according to which the arbitral tribunal must first rule on its own jurisdiction.

Secondly, Claimant, under Article 1520 4° of the French Code of Civil Procedure, alleged that the arbitral tribunal violated the principle of contradiction. According to this principle, the parties must be able to make known their factual and legal claims and discuss those of their opponent in such a way that nothing that served as a basis for the arbitrators' decision escaped their adversarial debate. According to Claimant, the principle of contradiction was violated because the court established a

common intention of the parties to submit to an ad hoc arbitration without having it submitted to and discussed by the parties.

Respondent contested both pleas, considering that the common intention of the parties to settle their dispute by arbitration due to the reference to the arbitration clauses can be established. Furthermore, Respondent considered that the principle of contradiction has been respected because the question of the parties' common intention has been at the heart of the dispute from the beginning, and the parties were able to discuss the jurisdiction of the IACP.

In its decision dated April 4, 2023, the Paris Court of Appeal dismissed the Swiss company's appeal and confirmed the partial award rendered on March 18, 2022 by the IACP. Firstly, the Court of Appeal found that the arbitration clauses were valid and established the common will of the parties to be bound by them due to their incorporation by reference in the contract, the principle of good faith, and the useful effect. The Court recalled a material rule of French international arbitration law according to which "the arbitration clause is legally independent of the main contract which contains it directly or by reference. Its existence and effectiveness are to be assessed, subject to the mandatory rules of French law and international public policy, according to the common will of the parties, without it being necessary to refer to a state law". Secondly, the Court found that the principle of contradiction had been respected as the only question posed to the arbitral tribunal concerned its jurisdiction and that this had been discussed by the parties. Regarding the challenge to the ad hoc arbitration, the Court stated that this question was not decisive in answering the question asked and therefore only enriched the award without changing the decision. Thus there was no violation of the principle of contradiction.

Paris Court of Appeal, April 4, 2023, n° RG 20/00408

Contribution by Louise Nicot

On April 4, 2023, the International Commercial Chamber of the Paris Court of Appeal dismissed the action for annulment brought by the Port Autonome de [...] (hereinafter "PAD") against the partial award rendered by the International Court of Arbitration of the International Chamber of Commerce (hereinafter "ICC") on December 21, 2020. The dispute arose between the PAD and a Belgian company, Jan de Nul (hereinafter "JDN") alongside the autonomous Belgian public institution Ducroire (hereinafter "Credendo").

On April 30, 2008, the PAD and JDN entered into a public work contract for which JDN took out an insurance policy with Credendo covering the risk of termination and default by the PAD. The latter refused to honour all payments, contesting part of the invoices issued by JDN insofar as they did not include a breakdown of the sums deducted directly from it by the Cameroonian State in respect of the 15% special tax on income introduced in 2010. On November 22, 2019, JDN and its insurer Credendo filed a request for arbitration before the ICC, on the basis of an arbitration clause inserted in Article 40 of the contract, which stated that: "Any dispute (...) shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce". By partial award dated December 21, 2020, the arbitral tribunal rejected the two objections to its jurisdiction raised by the PAD: the first according to which the pathology of the arbitration clause referring to a non-existent institution rendered the composition of the arbitral tribunal irregular, and the second relating to the non-arbitrable nature of the dispute. On December 16, 2021, the PAD lodged an appeal for annulment against this award, which is the subject of the decision by the Paris Court of Appeal.

Regarding the pathological nature of the arbitration clause, while the Court observed that the wording of the clause at issue raised a difficulty of interpretation by referring to a non-existent institution, it held that the mere interchanging of the terms “commerce” and “international” was a “drafting error”. This could therefore not lead to questioning the parties' clear intention to rely on an ICC arbitration procedure. On the arbitrability of the matter in dispute, the Court recalled that disputes regarding the implementation of an agreement by which the parties share between them the burden of taxes generated by their legal relationship may be submitted to arbitration. In the present case the dispute covers only the question of the economic burden of this tax with regard to the disputed market, and that it therefore falls within the scope of the arbitrable matter.

The Court thus dismissed the action for annulment brought by the PAD, ordered it to pay the costs pursuant to Article 700 of the French Code of Civil Procedure and to pay JDN and Credendo the sum of twenty thousand euros pursuant to the same article.

INTERVIEW WITH SARAH SCHRÖDER

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

With great pleasure! I am a French and German lawyer, registered at the Paris Bar. I started my studies on the French and German campus of Sciences Po Paris in Nancy. I then obtained a double Master's Degree in International Affairs from Sciences Po Paris (PSIA) and Columbia University New York (SIPA). I also hold a Bachelor's Degree in Law from the University of Lorraine. I then obtained a Master's Degree (Master 1) in International Law and a Master's Degree (Master 2) in International Economic Law from the University of Panthéon-Assas. Since October 2014 I am an associate specialized in International Arbitration in the Paris office of Cleary Gottlieb Steen & Hamilton.



2. You are an associate at Cleary Gottlieb Steen & Hamilton. Can you tell us more about this firm and your experience in the international arbitration team?

I joined Cleary Gottlieb's International Arbitration team over 8 years ago, and throughout my career with the firm I have worked on many diverse and fascinating cases. I have represented companies and government entities in French and English-speaking investment and commercial arbitrations, before various arbitral institutions. I also regularly work on set aside proceedings before the Paris Court of Appeal, and I advise companies on how to structure their investments to maximize their protections. I had the honor to represent the Republic of Côte d'Ivoire in an ICSID arbitration concerning a concession contract for waste management in Abidjan. I have also represented the Hellenic Republic in two ICSID arbitrations concerning, among other things, the handling by the State of its sovereign debt crisis. I work in a multicultural team of brilliant lawyers from whom I learn every day!

3. Your practice is mainly focused on investment arbitration. Why did you choose to focus your practice on public international law?

I would say that my practice was mainly focused on investment arbitration a few years ago, but I now work just as much on commercial arbitration and post-arbitration litigation. I really enjoy working on investment arbitrations because I am fascinated by public international law, an area of law that is constantly evolving, mostly detached from national legal systems, and directly linked to international relations. Investment law arbitration allows me to put special and general public international law into practice in high-stakes cases, which often turn around the question of the legitimacy of a State's exercise of its sovereign powers in an international setting, which I find fascinating.

4.You are (was?) group advisor for the Young ICCA Mentoring programme, can you tell us more?

Yes, I am still a Group Advisor in the Young ICCA Mentoring programme. In this context I meet regularly with young practitioners in international arbitration to exchange on current issues, practice points or to share career advice. Our group has a Mentor, Prof. Dr. Nayla Comair-Obeid, whose career as counsel and arbitrator is fascinating and who teaches us a lot! The Mentoring programme also provides a regular opportunity to meet and exchange with other young arbitration practitioners from around the world. I really recommend it!

5.You teach in the LL.M International Business Litigation at the University of Paris-Est Créteil. Can you tell us more about this programme and the opportunity to teach there?

The LL.M International Business Litigation at UPEC is a programme in French supervised by Professor Arnaud de Nanteuil, which is essentially aimed at people who already have a background in international law or international trade law and wish to deepen their knowledge. The teaching programme includes practical workshops and lectures on topical issues by legal practitioners. As part of this LL.M I taught a course last year on the relation between investment arbitration and environmental and human rights protections, and a lecture on international economic sanctions. I find the opportunity to teach and interact with students and young practitioners very rewarding, it allows me to test my own knowledge and gain another perspective. I hope to continue teaching there when I return from maternity leave!

EVENTS OF THE NEXT MONTH

May 2, 2023: « L'arbitrage est-il adapté au traitement des questions relatives aux droits de la personne humaine ? »

Organised by: *Arbitrage et Commerce International (MACI) Masters* (Versailles university) and *Droits de l'Homme et Union Européenne Masters* (Paris I Pantheon-Sorbonne university)

Where? *12 Place du Panthéon, 75005 Paris*

May 4, 2023: The preparation of cross-examinations

Organised by: Paris Very Young Arbitration Practitioners (PVYAP)

Where? *McDermott Will & Emery, 23 rue de l'Université, 75007 Paris*

Website : <https://www.eventbrite.fr/e/the-preparation-of-cross-examinations-tickets-618896876217>

INTERNSHIPS AND JOB OPPORTUNITIES

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Practice areas: International arbitration
Start date: Immediately

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Location: Ile-de-France
Practice areas: Arbitration and
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Start date: 07/01/2023

ALEM & ASSOCIATES

INTERN

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Practice areas: Litigation
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