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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.

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Enjoy your reading!

FRENCH COURTS

COURT OF CASSATION

Court of Cassation, First civil chamber, April 13, 2023, n°18-20.915

Contribution by Romi Grumberg

On April 13, 2023, the First Civil Chamber of the French Court of Cassation ruled that a State's express waiver of its immunity from enforcement is sufficient for assets, provided they are not used or intended to be used in the exercise of diplomatic or consular missions, to be subject to a measure of enforcement.

In this case, Commisimpex, wishing to enforce two arbitration awards against the Republic of Congo, turned to the tax debts owed by an EDF subsidiary to the State of Congo. The company relied on the State's express waiver of immunity for these non-diplomatic assets. Both the trial judges and the Paris Court of Appeal decided to authorize them, as the enforcement measures predated the entry into force of the Sapin II law. The Republic of Congo filed an appeal to the French Supreme Court, claiming that there had been no specific waiver.

The Court of Cassation rejected the Republic of Congo's argument based on the immunity of States from execution. The reasoning of the Court addresses three points. Firstly, the Court noted that the assets in question were not diplomatic. Consequently, the "*principles of customary international law*" are applicable. The 2004 United Nations Convention on State Immunities reflects the content of these principles. In conclusion, an express waiver of immunity is sufficient for the seizure of non-diplomatic assets.

The Court of cassation then rejected the State's argument against the possibility of carrying out enforcement procedures on tax claims. It followed a multi-stage reasoning. Firstly, it considered that the principle of unicity of patrimony set out in article 2284 of the French Civil Code means that debts arising from the activities of a branch may be pursued at the place where the company has its registered office. This principle also applies to a tax debt arising from the activity of a branch located in a foreign country, even though the company's registered office is in France. Moreover, the Court of Cassation specified that tax assessment and collection are the prerogative of the public authorities of the sovereign state. The principle of territoriality of enforcement does not prevent a State from recovering, on its own territory, tax debts held by a foreign State that has waived its immunity from enforcement.

Court of Cassation, First civil chamber, April 13, 2023, n°22-14.708

Contribution by Nadine Fares

The Court of Cassation overturned a decision of the Court of Appeal which set aside the arbitral tribunal's jurisdiction on the basis that the contract at issue did not exist. The Court of appeal should have examined whether the performance of previous contracts entered into in writing between the same parties in accordance with a standard form stipulating an arbitration clause with a reference to the Rules and Practices for the Trade in Dried Vegetables (RULEGS) was such as to reflect consent to arbitration.

Leplatre & Cie and Etablissement Trescarte concluded thirteen contracts between 2011-2017, all of which expressly included an arbitration clause with a reference to the Rules and Practices for the Sale of Dried Vegetables (RULEGS).

In 2017, Etablissement Trescarte challenged its consent to a sale of green lentils from the Val de Loire, and Leplatre & Cie brought an action before the International Arbitration Chamber of Paris (CAIP) seeking an order for payment of various sums.

The arbitral tribunal established its jurisdiction and upheld Leplatre & Cie's claims for payment in an award dated July 23, 2019, issued under the aegis of the CAIP.
Etablissement Trescarte lodged an appeal before the Paris Court of Appeal to have the award set aside.

The Court of Appeal decided to set aside the arbitration award, holding that the arbitral tribunal did not have jurisdiction on the grounds that the seller could not invoke the existence of an arbitration clause against the buyer, which would have been necessary in view of their past contractual relations, and that there was no evidence of a contract for the sale of Val de Loire green lentils.

Leplatre & Cie lodged an appeal before the French Supreme Court, arguing that, in any event, the arbitration agreement is independent of the contract to which it relates and is not affected by the ineffectiveness of the latter. They criticised the Court of Appeal for not having verified whether, outside any contract, even at the negotiation stage, the parties' disputes should be submitted to the RULEGS and, at the very least, to arbitration by the International Arbitration Chamber of Paris, even given their usual business relations which had been conducted in the same way for thirteen years. In this way, the Court of Appeal would then have deprived its decision of a legal basis in the light of Articles 1442, 1443 and 1492 of the French Code of Civil Procedure.

On the basis of Articles 1443 and 1447 of the French Code of Civil Procedure, the Court of Cassation censured the Court of Appeal's decision to set aside the arbitration clause, stating that the Court of Appeal had deprived itself of a legal basis for its decision by making the existence of the arbitration clause dependent solely on the formation of the main contract at issue without investigating, independently of the formation of the main contract, whether the company, which had previously performed several contracts concluded in writing between the same parties in accordance with a standard form stipulating an arbitration clause with a reference to the Rules and Practices for the Trade in Dried Vegetables (RULEGS), had not agreed to submit their dispute to an arbitration tribunal.

Paris Court of Appeal, March 28, 2023, n°21/12319

Contribution by Louise Nicot

On March 28, 2023, the International Commercial Chamber of the Paris Court of Appeal dismissed the action for annulment brought by the Nigerian company Mrs Holdings LTD (hereinafter "MRS") against the arbitral and partial awards made under the aegis of the International Court of Arbitration of the International Chamber of Commerce (hereinafter "ICC") on February 12, 2019 and March 24, 2021 in the dispute between MRS and the Ivorian company Petroci.

In this case, in 2008, MRS and Petroci acquired assets and subsidiaries from Chevron Africa Holding Ltd, including local companies (hereinafter, "Corlay Group"), which entered into a contract on April 17, 2008 entitled "Consortium - Creation and Operation Contract" (hereinafter: "Consortium Contract") by which they created the company Corlay Global. This company, in which MRS and Petroci are 50% shareholders, acquired all of the shares held by Chevron in the Corlay group, before MRS and Petroci failed to reach an agreement on the operation of the group and entered into conflict. MRS considered that it had made a significantly greater contribution than Petroci to the acquisition costs of the group, while Petroci considered that it had been prejudiced by potential breaches by MRS of its obligations under the consortium agreement.

On November 13 and 14, 2017, Petroci and MRS each submitted a request for arbitration to the Secretariat of the ICC International Court of Arbitration, which joined the two proceedings. In a partial award dated February 12, 2019, the arbitral tribunal declared that it had jurisdiction to hear the claims of both companies. By final award of March 24, 2021, it ordered MRS to instruct the Corlay group to appoint new directors and administrators and to pay the sum of USD 25,496,560 as damages to Petroci, and ordered Petroci to pay MRS the sum of USD 34,029,629 in respect of its share of the Acquisition Costs. On April 12, 2021, Petroci submitted a request for rectification of the award to the secretariat of the ICC International Court of Arbitration, which the tribunal granted by an *addendum* to the final award issued in Paris on June 21, 2021, which rectifies the amount awarded to MRS to the sum of USD 14,413,697.50. By declarations dated July 5, 2021, MRS brought the action for annulment which is the subject of this decision, and which is against the partial award rendered on February 12, 2019, the final award rendered on March 24, 2021 and the *addendum* to the final award of June 21, 2021.

Firstly, MRS raised a complaint alleging that the arbitral tribunal lacked jurisdiction, arguing that "Petroci's claims actually related to compensation for the loss suffered by the Corlay subsidiaries and concerned the governance of those companies, which were third parties to the arbitration agreement". On this plea, the Court held that whether or not Petroci's loss was personal did not raise a question of jurisdiction but of substance, namely the determination of the loss. It dismissed the complaint and held that Petroci's claims were indeed directed against MRS and that therefore the dispute between Petroci and MRS over compensation for the loss fell within the jurisdiction of the arbitral tribunal.

Secondly, MRS submits that "the award made in favour of Petroci as compensation for the losses suffered by Corlay Global and its subsidiaries corresponds to sums that should have accrued to those entities and that, in that respect, the payment measure ordered infringes the principle of the autonomy of legal persons enshrined in French international public policy". With regard to this plea alleging breach of international public policy, the Court stated that it is in fact intended to call

into question the arbitral tribunal's reasoning regarding the calculation and determination of the loss. However, these elements are part of the debate on the merits, which it is not for the annulment judge to review, and the Court rejected the second complaint raised.

Rejecting both pleas, the Court dismissed MRS's claim and dismissed its action for annulment of the partial award made on February 12, 2019 and the final award made on March 24, 2021, before ordering MRS to pay the costs and the sum of EUR 50,000 to Petroci under Article 700 of the Code of Civil Procedure.

Paris Court of Appeal, April 4, 2023, n°20/15087

Contribution by Sarah Lazar

On April 18, 2023, the International Commercial Chamber of the Paris Court of Appeal dismissed the appeal filed by CNIM Groupe (hereinafter "CNIM") against the exequatur order issued by the Paris Court of First Instance declaring enforceable in France an arbitral award rendered on January 7, 2020 under the aegis of the International Court of Arbitration of the International Chamber of Commerce (hereinafter "ICC") in a dispute between CNIM and the Kingdom of Bahrain.

A first contract, named "*Waste disposal Contract relating to Waste to Energy Plant in Bahrain*" (hereinafter "WDC"), was signed on June 24, 2010, between the Ministry of Works, Municipal Affairs and Urban Planning of the Kingdom of Bahrain (hereinafter "MOMA") and CNIM. A second contract was signed on July 26, 2011 between the Electricity and Water Authority (hereinafter "EWA") and CNIM. Finally, a third contract was signed on July 26, 2011 between the Ministry of Finance (hereinafter "MoF") and CNIM. The second and third contracts were attached to the first contract. Furthermore, the first contract was subject to the fulfilment of conditions precedent before June 30, 2012.

On May 14, 2014, MOMA terminated the WDC contract and the annexed contracts due to the alleged non-fulfilment of the conditions precedent, which CNIM disputed, arguing that the delivery of an environmental permit by the Directorate General of the Environment (hereinafter "GDE") was a precondition that had not been fulfilled by the Kingdom of Bahrain.

On December 29, 2015, CNIM filed a request for arbitration against the Kingdom of Bahrain on the basis of the arbitration clauses in the WDC contract and annexed contracts.

On January 7, 2020, the arbitral tribunal declared itself competent to rule on the case and rejected by a majority all the claims made by CNIM. On September 14, 2020, the Paris Court of Appeal issued an exequatur order giving the award enforceability.

On October 22, 2020, CNIM appealed against this exequatur order. CNIM is asking the Court to declare the arbitral tribunal incompetent and to declare the recognition and enforcement of the award contrary to international public policy. It puts forward two grounds for reversal, one relating to the arbitral award's breach of international public policy, and the other to the lack of jurisdiction of the arbitral tribunal which made the award.

The Court of Appeal rejected this argument, declaring that the acceptance of the Arbitration Agreements by MOMA, MOF and EWA was also binding on the Kingdom, according to a strict analysis of constitutional law. The Court also rejected the second plea alleging breach of international public policy. CNIM maintains that the Arbitral Tribunal, in rejecting CNIM's claims

relating to the Kingdom of Bahrain's breach of its obligation to provide assistance and cooperation under the WDC contract, split the responsibility of the State and thereby effectively and concretely violated the principle of the unicity of the State, a principle derived from international customs. The Kingdom of Bahrain does not contest this principle, but argues that it is in any case irrelevant in the present case, since the arbitral tribunal did not apportion the liability of the State and its organs. In fact, the tribunal rejected CNIM's claims on the grounds of the latter's failure to comply with its own obligations.

In the Court's view, the lack of jurisdiction of the arbitral tribunal and the violation of international public policy invoked by CNIM have not been established. Consequently, the order issued on September 14, 2020 by the Paris Court declaring the arbitral award enforceable should be confirmed.

Swiss Federal Tribunal, March 17, 2023, case 5A_406/2022

Contribution by Zacharie Pierre

The enforcement of an ICSID award against a foreign state is subject to the existence of a relevant connection with Swiss territory, says the Swiss Federal Supreme Court. On April 4, 2022, two Swiss companies applied to the Cantonal Court of Bern for authorization to attach several assets of the Spanish State located in Switzerland, citing an ICSID award of September 6, 2019, issued in their favor, as a definitive ruling within the meaning of Article 271(1)(6) of the Federal Debt Enforcement and Bankruptcy Act (SchKG). The Cantonal Court declared the application inadmissible because the investors had not sought the recognition of the award prior to their application for attachment, and because the case had no relevant connection with Switzerland. This reasoning was confirmed by the Higher Court of the Canton of Bern. On May 30, 2022, the two companies appealed to the Federal Supreme Court, asking it to declare their application for attachment admissible.

As the application for attachment was a provisional measure, the investors had to prove that the contested decision violated their constitutional rights to obtain its annulment as per Article 98 of the Federal Supreme Court Act. Constitutional rights are violated when the contested decision is arbitrary, i.e. when its reasoning and outcome are untenable.

The investors first contested the need to have the award recognized prior to their application for attachment, and then the requirement of a relevant connection with Swiss territory from which the admissibility of their application would follow.

The Federal Supreme Court agreed with the investors on the first point. Article 54 paragraph 1 of the ICSID Convention provides that the contracting States shall recognize any ICSID award as if it were a judgment rendered by one of their national courts. On this point, the contested decision is wholly arbitrary, as it requires the award to be recognized prior to the application for attachment, in disregard of the express provisions of the Washington Convention.

In support of their second point, the investors argued that the purpose of the ICSID Convention is to promote foreign direct investment by providing effective legal protection. Accordingly, the ICSID Convention would imply immediate and effective enforcement of awards. Contracting States should not restrict their obligation to enforce.

In this respect, the requirement of a relevant connection with Swiss territory as a condition for the admissibility of the attachment application would constitute a breach of the Washington Convention. The investors pointed out that the contracting States had waived their immunity from jurisdiction in the context of ICSID arbitration, and the requirement of a domestic connection would protect the State against which the award was invoked in the enforcement proceedings.

In response, the judges recalled the three cumulative conditions set by case law for obtaining the attachment of a foreign State's assets in Switzerland: 1) the State must act as a private actor in the legal relationship that gave rise to the claim, 2) a domestic connection must exist, assessed as the existence of "circumstances that link the legal relationship to Switzerland to such an extent that it is justified to engage the liability of the foreign State before the Swiss authorities", 3) assets allocated for sovereign purposes are excluded from the application for attachment.

Regarding the enforcement of an ICSID award against a foreign State, the Federal Supreme Court referred to Article 55 of the ICSID Convention, allowing each contracting State to apply its own law relating to the immunity from enforcement of foreign States. According to most legal writers, an arbitral award is enforced in accordance with the rules applicable to enforcement in Switzerland, subject to the law on State immunity developed by the case law referred to above. The condition of a relevant connection with Swiss territory is thus transposable to the enforcement of an ICSID award.

Alternatively, the investors argued that the place of performance of the claim for damages awarded by the arbitral tribunal was their domicile in Switzerland under the federal law of obligations, which meant that there was a connection with Swiss territory.

However, the Federal Supreme Court rejected this argument. The arbitral tribunal had to rule in accordance with the rules of law chosen by the parties, in this case the provisions of the Energy Charter Treaty and the applicable rules and principles of international law. It was in the light of these rules that the arbitral tribunal and the Higher Court were able to determine that the place of performance of the claim was in Spain.

The contested decision was properly reasoned regarding the requirement of a sufficient domestic connection, and its absence was evidenced in the case in point. The Federal Supreme Court dismissed the appeal and ordered the investors to pay the legal costs.

Swiss Federal Tribunal, March 30, 2023, case 4A_420/2022

Contribution by Ghaïs Ghedjati

In its judgement of March 30, 2023, which was made public on May 9, the First Civil Court of the Federal Supreme Court of Switzerland (hereinafter "FSCS"), ruled on the outcome of an appeal to set aside an award made under the aegis of the Court of Arbitration for Sport (hereinafter "CAS") in the case of the transfer of the late Italian-Argentinian footballer Emiliano Sala.

The dispute arose between two professional football clubs, Cardiff City Football Club (hereinafter "CCFC") and Football Club de Nantes (hereinafter "FCN"), regarding the transfer of professional football player Emiliano Sala. On January 19, 2019, the parties entered into a transfer agreement (hereinafter the "Agreement") for a total amount of 17,000,000 EUR spread over three payments. An initial instalment of 6,000,000 EUR was to be paid within five days of the player's registration with CCFC, followed by a further instalment on January 1, 2020 and the final instalment on January 1, 2021. On that date, the two clubs publicly announced the player's transfer. A few days after the announcement, the player who was the subject of the transaction died.

On February 26, 2019, FC Nantes summoned the Bluebirds club before the FIFA Players' Status Committee (hereinafter the "PSC"), in compliance with the arbitration clause of the Agreement, in order to obtain payment of the first instalment. In response, the CCFC argued that the claimant had committed faults and thus set off the FCN's claims. On September 25, 2019, FIFA's jurisdictional authority found in favour of FCN and held that it lacked jurisdiction over the claim for set-off raised in defence. Cardiff has appealed the decision to CAS.

In an award issued on August 26, 2022, the arbitral tribunal formed under the auspices of the CAS dismissed CCFC's appeal. In its award, the panel concluded that: (i) CCFC is procedurally precluded from availing itself of the alleged set-off claim, and (ii) in answer to question no. 3 of the Bifurcated Issues, the substantive prerequisites for a set-off are not fulfilled. " (Point no. 189 of the

CAS 2019/A/6594 award). The arbitral tribunal therefore adopted the same position as the PSC in confirming its lack of jurisdiction to rule on Cardiff's alleged set-off claim.

CCFC therefore lodged an appeal seeking to have the award set aside based on paragraph 2 of Article 190 of the LDIP. In support of its appeal, the Welsh club presented four pleas to the Swiss court: (1) The arbitral tribunal's refusal to accept jurisdiction over the claim for set-off; (2) An infringement of the principle of equality of the parties. (3) Various violations of the right to be heard; (4) The award is contrary to public policy.

In its decision, the FSCS focused on the first plea put forward by the appellant. The main question was whether the PSC, and subsequently the CAS on appeal, had jurisdiction to hear the Cardiff City Football Club's claim for compensation.

As a preliminary point, the Court emphasised that "the CAS, when seised by way of appeal, can only examine the counterclaim if the judicial body called upon to rule on the dispute at first instance, in this case the FIFA PSC, was itself empowered to do so". (Point 5.3.2). It is thus clear that the two jurisdictional authorities are closely linked, notwithstanding their structural independence.

Secondly, it should be noted that the first paragraph of Article 377 of the Swiss Code of Civil Procedure, relating to set-off, provides that:

"The arbitral tribunal shall have jurisdiction to rule on a set-off objection even if the claim on which it is based is not covered by the arbitration agreement or is the subject of another arbitration agreement or an extension of the forum".

However, in line with its case law, the Supreme Court noted that "[...] the PSC FIFA is neither a state authority nor an arbitral tribunal but solely the jurisdictional body of a private law association". (Point 5.5.4). Consequently, in her view, it is not possible to "simply transpose a principle of Swiss civil procedure [...] to disputes submitted to the dispute resolution authority of a private association." (Ibid). Article 377 of the Swiss Civil Procedure Code would therefore not be applicable to disputes before the PSC.

In the light of its decision, the Court also pointed out that "an association under Swiss law enjoys, by virtue of the principle of the autonomy of the association guaranteed by art. 63 CC, a large measure of autonomy in the establishment and application of the rules governing its social life and its relations with its members" (point 5.5.5). Furthermore, according to the Court's established case law, "the statutes of a major sports association such as FIFA, in particular the clauses relating to questions of jurisdiction, must be interpreted in accordance with the rules of statutory interpretation" (point 5.5.5.1).

Consequently, as the rules laid down by FIFA did not specify the fate of a request for compensation submitted to the PSC, the PSC was right to decline jurisdiction over the CCFC's request during the first instance proceedings. Accordingly, the FSCS rejected this first plea in so far as it validated the decline of jurisdiction by the PSC, and then by CAS, to hear the application for compensation.

On the second plea, the appellant argued that the principle of equality of the parties had been infringed since one of its experts had not been able to be heard before the arbitral tribunal. The Court noted, however, that apart from the "procedural vicissitudes" encountered with the expert, "the breach of the principle of equality of the parties complained of by the appellant had no influence on the outcome of the proceedings" (Point 6.3) and therefore did not allow this argument to prosper.

On the third plea, relating to an alleged breach of the right to be heard, the CCFC reiterated the arguments it had developed in its first and second pleas, and the FSCS therefore logically rejected this plea, referring to its previous submissions.

Finally, on last plea, relating to the award's incompatibility with public policy, the FSCS gave its interpretation of this complaint: "An award is incompatible with public policy if it disregards the essential and widely-recognised values which, according to the prevailing conceptions in Switzerland, should form the basis of any legal order" and takes the opportunity to recall the distinction between procedural public policy and substantive public policy (Point 8.1 et seq.).

However, this argument did not convince the Supreme Court, which went so far as to make the scathing remark that "the plea based on art. 190 para. 2 let. e of the LDIP, whose admissibility is more than doubtful, cannot succeed" (point 8.2.1).

The Federal Supreme Court therefore dismissed Cardiff City Football Club's appeal against the CAS award dated 22 August 2022. The Court ordered the appellant to pay the legal costs and to pay the costs incurred by FC Nantes.

Infracapital F1 v. Spain, 2 mai 2023, ICSID n°ARB/16/18, award

Contribution by Francisco Hernández Martínez

On May 2, 2023, an ICSID tribunal rendered an award on the determination of the amount of damages in the arbitration proceedings between Infracapital and Spain. The dispute arose from an alleged breach of the Energy Charter Treaty (the "ECT") by Spain, as a result of the amendment of the regulatory framework for renewable energy projects (the "Disputed Measures" or "New Regulatory Regime"). On September 13, 2021, the Tribunal decided on jurisdiction and liability (the "Decision"). In the Decision, it was concluded that Article 10(1) of the ECT was breached: the clawing back of past remuneration and the failure to ensure a reasonable rate of return to the Claimants' investments signified a breach of the obligation to ensure stable, equitable, favourable, and transparent conditions for Investors.

The above-mentioned decision ordered the parties to reach an agreement on the amount of compensation to be paid by the Respondent. As the Parties were unable to reach an agreement within the given timeframe, the present award decided on the final determination of damages due.

There are two main damages to be determined: 1) the "Retroactivity Damages", originated from the retroactive effects of the Disputed Measures and 2) the "Reasonable Return Damages", to compensate for the failure to maintain the reasonable rate of return that was ensured before the Disputed Measures.

Regarding the reasonable return, the reference return rate is 7% post-tax (as established in the "Old Regulatory Regime"). Parties agreed that only those PV Plants that fail to reach this target are entitled to Reasonable Return Damages. Parties also agreed that it is first necessary to convert the 7% post-tax rate of return into a pre-tax rate. The disagreement arose when Claimants argued that the tax shield benefit of the shareholder loans should not be taken into account in the conversion calculation, as shareholder financing can have a similar effect to external financing. The Tribunal, however, found that the regulator would make their calculations under the premise that the projects were "*financed 100% with own resources*". Furthermore, the Tribunal found in the Decision that only the failure to reach the 7% post-tax target was in breach of the ECT. Therefore, it concluded that there is no valid justification to exclude internal financing from the calculation.

Parties' positions also differ on the method to calculate the investment cost of each PV Plant. The Tribunal rejected Claimants' proposal to use the actual investment operation costs of each PV Plant because the reasonableness of these costs is put into question. Eventually, it followed the criterion that was established by the New Regulatory Regime: to group PV Plants in different categories according to their efficiency level and individual standard installation, "*making it possible to provide less remuneration to more efficient plants*".

However, Parties acknowledged that Reasonable Return Damages are incapable of avoiding the recovery of profits earned prior to July 2013 (the date of the entry into force of the New Regulatory Regime). As mentioned before, the Disputed Measures have a claw-back effect on past remuneration, having a similar effect to that which would have had if they had been in place from the beginning of the investments. The Retroactivity Damages should aim at eliminating this effect.

Claimants argued that the New Regulatory Regime uses pre-2013 revenues to reduce the Net Asset Value (the "NAV") of each PV Plant in two different ways. Therefore, both need to be neutralised

to eliminate the claw-back effect. Respondent agreed on eliminating the first deduction to the NAV, but disagreed on the elimination of the second. The first deduction uses the cash flow generated under the Original Regime in excess of the newly calculated stream of constant annuities, deducting the difference from the NAV; the second deduction assumes a constant annual remuneration before July 2023, resulting in an overestimation of the capital recovery until then. The ICSID tribunal agreed with Claimants' position and considered both deductions necessary to counteract the claw-back of past remuneration.

In light of these findings, the Tribunal rejected Respondent's contention that, "*since most of the New Regulatory Regime […] is deemed lega*l", the regulatory risk in the "But-for" scenario should not be very different from the "Current" scenario.

Finally, the Tribunal concluded that (i) the effective tax rate to apply to pre-tax should be 8.7%; (ii) the Reasonable Return Damages should be EUR 18.0 million; (iii) the discount rate should be 5.44%, as proposed by Claimants; (iv) and the Retroactivity Damages amount to EUR 6.9 million. Furthermore, the Tribunal awarded not only pre-award interests (based on Spanish Sovereign bond yields) but also post-award interests, as the latter helps to ensure prompt compliance by Spain with its payment obligation.

INTERVIEW WITH KARIM ZEIN

1. Hello Karim, thank you for accepting our invitation and answering our questions for this edition. Can you give us a brief outline of your career?

Many thanks to Biberon for the kind invitation! I was born and raised in Beirut, Lebanon, where I studied at the Lycée Français until the final year of high school. Upon graduation, I pursued a Bachelor of Laws degree in French and Lebanese Laws (with emphasis on Business Law) at Université Saint-Joseph de Beyrouth, before joining the Master 2 program in International Business Law directed and supervised by Professor Daniel Cohen, at Université Panthéon-Assas. Throughout my period of studies, I have received training in mediation, negotiation and arbitration in several countries, including Lebanon, India, the Netherlands, Germany and Austria. I then joined the international arbitration department of Quinn Emanuel Urquhart & Sullivan in Paris, where I worked for two years, and lectured in civil law at Université Panthéon-Assas (Paris) and Sorbonne-Assas International Law School (Dubai), before moving to the USA to pursue a Master of Laws (LL.M) at Harvard Law School. Since then, I have been admitted to the New York Bar and started practicing international arbitration as an associate at Simmons & Simmons in Paris.

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

Simmons & Simmons is a leading international law firm, founded over 120 years ago. The firm is present in all four corners of the world, through an integrated network of 22 offices in Europe, the Middle East, Asia and the Silicon Valley. The firm brings together more than 1,000 lawyers globally. The Paris office was established in 1988 and currently employs more than 130 lawyers.

Simmons & Simmons is a full-service business law firm. The teams are multidisciplinary and cover all areas of business law.

The international arbitration team is present in the world's leading arbitration hubs (including Paris, London, Singapore, Hong Kong, Amsterdam, Dublin, Milan, Madrid, Dubai and Doha). In Paris, the team is led by partner and global co-head of Simmons & Simmons' arbitration practice, Philippe Cavalieros. The team represents companies, states and state-owned entities in international investment and commercial arbitrations conducted under the rules of various arbitration institutions (ICC, ICSID, Swiss Arbitration Centre, DIAC, etc.). We represent clients in arbitrations across various industry sectors, including pharmaceuticals, energy, construction, oil and gas, natural resources and mining. We also represent clients in set-aside proceedings before the Paris Court of Appeal. Finally, Mr Cavalieros regularly sits as arbitrator. This also allows me to act as administrative secretary in a number of cases.

3. Last year you completed an LL.M at Harvard University. You were also called to the bar in New York. Can you tell us a bit about this experience?

The LL.M was an incredible experience for me – and this is not an understated word. First, the LL.M was very important in that it complemented my civil law training in Arab and French/European laws by familiarizing me with the Common law system. A good understanding and knowledge of both

these systems is undoubtedly important for anyone hoping to practice international arbitration. Second, I also seized the opportunity during my LL.M. to attend classes that are neither related to US business law in general nor related to US international arbitration law in particular. In fact, I had hoped to widen my intellectual horizons and explore new legal areas that I had not had the chance to study back in France or Lebanon. For instance, I attended classes and seminars on issues pertaining to gender equality and identity, racial equality, and strategies for using media and communication to achieve greater social justice. Finally, and to be perfectly honest, being part of a community made up of students with a wide variety of backgrounds, coming from over 80 different countries (and importantly, always ready to party!) was particularly memorable.

With respect to the New York Bar, the preparation is intense and requires total commitment, not to say dedication. In practical terms, a "serious" candidate would spend around 2 months studying no less than 12 hours a day. There is an enormous amount of information to learn. In addition to the Multistate Professional Responsibility Examination and the New York Law Exam, the New York Bar exam covers around 14 separate subjects in US law, including, for instance, contract law, constitutional law, criminal law, evidence, property law, tort law, civil and criminal procedure, company law, conflict of laws, family law, etc. It is therefore, in my humble opinion, an exam to be taken very seriously – but which, once passed, is very rewarding.

4. You are a member of Paris Very Young Arbitration Practitioners (PVYAP). Can you tell us about this initiative for young arbitration practitioners?

PVYAP is an informal organisation of young arbitration practitioners, founded in 2012. It is currently co-chaired by Nil Daver, Zélie Heran, Ernest Morales Tonda, Ekaterina Oger Grivnova, Florian Renaux and myself. The organisation is open to junior to senior-level arbitration associates and members of the academia with professional links to Paris.
Our primary objective is to provide a platform for young arbitration practitioners to meet each other, in particular by organising regular events and networking opportunities. We also aim to put young arbitration professionals in touch with more experienced professionals, so that the young arbitration community benefits from the experience and knowledge of more senior practitioners and stays on top of the latest trends in arbitration, both in France and internationally.

For instance, PVYAP recently organised two events, one on the practical and procedural aspects of set-aside proceedings, with speakers including Professor Jérémy Jourdan-Marques, Mr. Sacha Willaume and Ms. Asma Mze, and the other on the preparation of cross-examinations of witnesses, with speakers including Mss. Amy Frey, Diana Paraguacuto-Mahéo, and Juliette Fortin.

The next conference, "From administrative secretary to arbitrator", co-organised with ICC YAAF France, will be held on 14 June 2023. If you are interested in becoming an administrative secretary or an arbitrator, you only have a few days left to register for this conference, which promises to be rich in practical tips and advice (https://2go.iccwbo.org/icc-yaaf-pvyap-from-administrative-secretary-to-arbitrator.html--).

5. You've been a university lecturer on several occasions. Is this a professional experience that you would recommend?

It is a fascinating experience – and one that I will be pursuing for the 2023-2024 academic year by joining Professor Jean-Baptiste Racine's teaching team as a lecturer in International Commercial Law at Université Panthéon-Assas.

I have personally always been interested in academia and teaching. I find a sort of freedom, flexibility and intellectual honesty in teaching that is extremely stimulating – particularly in law, which, far from being a science of truth, remains a science of argumentation. This allows me to debate literally anything with my students, and I often say that I learn at least as much from them as they (*a priori*) learn from me. It is also a job that keeps me in touch with the youth and exposes me to their new and oftentimes innovative ideas and thoughts. It is also a job that encourages me (and I make no secret of the fact) to stay informed and keep abreast of all developments in case law and legislation in the subject area that I teach.

But teaching is also an experience that requires a great deal of work and an unfailing commitment throughout the year: as well as preparing and teaching the classes, you also have to grade papers (whether simple assignments or mid-term and final exams) and remain available to answer your students' questions outside class or office hours (often by email). You should also bear in mind that this is a job in which being humane is of paramount importance. You do not just show up for a lecture and then go home. It is essential to get to know each of your students individually so that you can support them personally and keep a close eye on their individual progress. In fact, students will often ask you for advice on their career choices and orientation, and you may even have to recommend some of them for admission into Master programs or law firms. This is an exercise that requires you to be quite familiar with the student's work and progress, otherwise no serious advice or reliable recommendation can be given. It is thus important to bear in mind that this is a job that requires a considerable amount of work, energy and patience - and one that adds to our daily lives as international arbitration lawyers, which are already very demanding and time-consuming on their own. It should also be noted that this is certainly not a job you do for money, as the remuneration is rather symbolic.

In short, it is certainly an experience that I cannot recommend enough, but only to those who are ready to take on such a challenge and who are genuinely passionate about teaching.

6. You write articles for various law journals. Can you tell us more about this practice? What current issues in international arbitration are of particular interest to you?

I regularly publish articles on arbitration topics – but I have also published on issues pertaining to LGBTQIA+ rights in the Middle East. I recently also published on the intersection between investment arbitration and LGBTQIA+ rights. The article, published with the American Review of International Arbitration of Columbia Law School, assesses the possibility of recognising a state's breach of the fair and equitable treatment standard when it is established that the latter has discriminated against LGBTQIA+ foreign investors because of their sexual orientation or gender identity, and against their investments because of the fact that they are LGBTQIA+-owned.

Writing is a practice I am particularly committed to. I am often careful to write only if I have a new issue to raise, without necessarily providing precise answers to that issue. Oftentimes, an article in which the author simply raises the right questions and opens up a debate is just as innovative as one in which clear-cut answers are given.

One of the current issues of particular interest to me is the progressive modernisation of arbitration law in the Kingdom of Saudi Arabia, which is increasingly strengthening the country's position as an arbitration-friendly jurisdiction, and which is undoubtedly pivotal for those wishing to do business and invest in Saudi Arabia.

EVENTS OF THE NEXT MONTH

June 6, 2023: « Un jour, un arrêt »

Organisé by: Sorbonne Arbitrage

Where? online

Website: https://lnkd.in/e7DsHtPx

June 7, 2023: Expert Series – Sanctions and Arbitration

Organised by: Comité Français d'Arbitrage – CFA40

Where? *Maison du Barreau, 2 Rue de Harlay, 75001*

Website: https://www.helloasso.com/associations/cfa40/evenements/expert-series-sanctions-et-arbitrage

June 14, 2023: « From administrative secretary to arbitrator »

Organisé by: ICC YAAF & PYVAP

Where? online

Website: https://2go.iccwbo.org/icc-yaaf-pvyap-from-administrative-secretary-to-arbitrator.html

18, 19 et 20 juin 2023: Symposium, 16 conferences on the practice of international law including « L'arbitrage est-il adapté aux différends de nature mixte ou asymétrique ? » co-organised by Paris Place d'Arbitrage

Organised by: International Law Association French Branch

Where? *Cité internationale universitaire de Paris, Maison internationale, 17 boulevard Jourdan, 75014*

NORTON ROSE FULBRIGHT

INTERN

Location: Île-de-France

Practice areas: Litigation and arbitration

Start date: 03/07/2023

ALEM & ASSOCIATES

INTERN

Location: Abu Dhabi

Practice areas: Litigation and arbitration

Start date: 03/07/2023