PARISBABYARBITRATION

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French and foreign courts' decisions

International arbitral awards and decisions

Interview with Monica Labelle

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Paris Baby Arbitration is a Paris-based society and a networking group of students and young practitioners in international arbitration. Our aim is to promote accessibility and knowledge of this somewhat lesser-known field of law and industry within the student sphere.

Every month, our team publishes the Biberon. The Biberon is our newsletter in both English and French, designed to review and facilitate comprehension of the latest decisions and awards rendered by national and international courts, as well as arbitral tribunals.

In doing so, we hope to participate in keeping our community informed on the latest hot topics in international arbitration from our French perspective.

Dedicated to our primary goal, we also encourage students and young practitioners to actively contribute to the field by joining our team of writers. As such, Paris Baby Arbitration is proud to provide a platform for its members and wider community to share their enthusiasm for international arbitration.

To explore previously published editions of the Biberon and to subscribe for monthly updates, kindly visit our website: parisbabyarbitration.com (currently undergoing maintenance).

We also extend an invitation to connect with us on LinkedIn, and we welcome you to follow/share our latest news on LinkedIn and beyond.

Enjoy your reading!

Sincerely yours,
The Paris Baby Arbitration team

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Paris Court of Appeal, 3 October, n° 22/06903, *State of Cameroon*

On 22 September 2021, an arbitral award was rendered in Paris under the rules and aegis of the International Chamber of Commerce (hereinafter "ICC"). On 30 March 2022, the State of Cameroon lodged an action for annulment against the final award with the Paris Court of Appeal on the grounds of irregularity in the constitution of the tribunal and breach of international public policy.

On 14 November 2001, Belgian Company Project Pilote Garoubé and the State of Cameroon concluded a leasing contract by virtue of which the latter granted the former the right to exploit protected areas in northern Cameroon for wildlife, livestock, and agricultural exploitation for an initial period of five years with a possible extension of a renewable period of thirty years. The dispute stemmed from the aforementioned leasing contract, which contained an arbitration clause. The arbitral tribunal rendered three awards, two of which were partial and one was final. In the first partial award, the tribunal recognised that it had jurisdiction to hear Garoubé's claims. On 20 October 2016, it handed down its second partial award declaring that the State of Cameroon has wrongfully breached the leasing contract, adding that the amount of compensation to the Claimant would be determined in the final award. The final award ordered the State of Cameroon to pay Garoubé EUR 17,880,000 with interest until the full payment of the sums awarded, plus the costs of the arbitration and representation costs.

The State of Cameroon lodged an action for annulment against this award, notably on the ground that the Chairman of the arbitral tribunal was lacking independence and impartiality for having a pro-investor profile.

In particular, the State of Cameroon based its allegations upon the fact that the Chairman of the arbitral tribunal was repetitively appointed by private parties against States and state entities in several ICSID arbitrations. To establish his pro-investor orientation, the State of Cameroon adduced evidence of previous ICSID arbitrations, and in particular four dissenting opinions that the Chairman had issued, all in favour of the private investor and to the detriment of the State. In this particular case, the State of Cameroon argued that on several occasions throughout the proceedings, the Chairman showed hostility towards the State of Cameroon and bias towards the Garoubé company, which manifested on the following occasions:

1. The Chairman refused to disclose the origin of his previous appointments in arbitrations where states were involved;
2. He refused to grant to the State of Cameroon the same period of time to respond to the statement of the claim filed by Garoubé;
3. He rejected its request to rearrange the procedural timetable, placing the State of Cameroon in a disadvantageous position as to its defence, forcing it to conclude three parallel proceedings; and
4. He tried to take away one hour of Cameroon's closing argument during the cross-examination of Garoubé's financial expert.

All these elements, according to the state of Cameroon, created a reasonable doubt in the mind of the parties as to his independence and impartiality, as well as violated French international public policy due to a violation of the principle of equality of arms between the parties.

First, the Paris Court of Appeal invoked article 1456 paragraph 2 of the French Code of Civil Procedure (hereinafter "CCP"), applicable to international arbitration (by virtue of Article 1506 of the CCP), according to which *"*[b]*efore accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate."*

The appellate court then decided upon the grievance concerning the lack of information of previous arbitrations. To this end, pursuant to Article 1466 of the CPC, also applicable in international arbitration by virtue of Article 1506-3 of the CCP, "[a] *party who knowingly and without legitimate reason fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity*". In the case at hand, the State of Cameroon had invoked the irregularity of the tribunal's constitution only before the institution itself (the ICC) and not the arbitral tribunal. Therefore, the Court rejected the first grievance as inadmissible.

Regarding the merits, namely the alleged irregularities affecting the proceedings, the Paris Court of Appeal reminded the parties that it has jurisdiction to rule upon the arbitrator's independence and impartiality. With regard to the procedural timetable, the arbitral tribunal had rebalanced the deadlines by granting to the State of Cameroon an extension. As for the words "*dragging its feet*" said by the president concerning the State of Cameroun's behaviour during the arbitral proceedings, the Court found that the this pertained only to the procedural aspects of the proceedings, namely to the interim change of counsel, so that it cannot be said to presuppose a bias regarding the merits of the case. This is even more so true in light of the transcript of the final hearing which established that both parties had been given equal time to plead their case. Consequently, as the State of Cameroon failed to demonstrate the existence of a reasonable doubt regarding the independence and impartiality of the Chairman of the tribunal, its plea was rejected by the appellate court. Following the same reasoning the Court rejected the ground for annulment based upon a violation of French international public policy.

As for Garoubé, it had accused the State of Cameroon of systematically and abusively commencing proceedings to set aside the awards since 2008, and of refusing to comply with them, and claimed damages as a result. However, the Court of Appeal dismissed this claim on the ground that Garoubé did not establish the abusive nature of the present proceedings, which concerned an application for annulment that was based upon three serious grounds.

Contribution by Stavros Tsiovolos

Paris Court of Appeal, 19 October 2023, n° 21/11112, *Supreme Judicial Council of Libya*

In a decision dated 19 October 2023, the Paris Court of Appeal ruled that the State of Libya's agent, which had appealed against an order declaring an arbitral award enforceable in France, did possess the capacity to take legal actions and the authority to represent it by virtue of a Libyan law, despite a lack of legal personality from the agent.

On the facts, following the Libyan revolution and in the context of reorganisation and development in Libya, five commercial contracts for the import of equipment and provision of services (the "Contracts") had been concluded in 2012 between an Italian company and a Libyan public entity. These Contracts had then been amended, which allowed the Italian company to assign all its rights and obligations under the Contracts to a Tunisian company.

Due to an alleged breach of contract on Libya's part, the Tunisian company started arbitral proceedings by virtue of an arbitration clause added by the amendments. In a 2014 award, the arbitral tribunal welcomed all of the Tunisian company's claims. After an order declaring the award enforceable in France, it conducted attachments upon some of Libya's emanations' bank accounts. Libya, which acted via its Supreme Judicial Council, decided to appeal against the order.

On the one hand, the Tunisian company asserted that Libya's statement of appeal was null and void due to substantive irregularities, arguing that the Supreme Judicial Council lacked legal personality, so that it was bound to also lack the capacity to take legal actions and the authority to represent Libya in these proceedings. On the other, Libya put forward the idea, whereby the existence of a capacity to take legal actions should pertain to the appellant, and not its agent. In addition, it argued that the Supreme Judicial Council did possess the authority to represent Libya by virtue of a 1971 Libyan Law, which provides that it shall have the authority to represent the Libyan government before any courts at all.

The Court of Appeal needed to determine whether the absence of legal personality of an agent of a state which is party to civil proceedings necessarily implies that the agent lacks the capacity to take legal actions on its behalf and to represent it, despite those being provided under the law of this state.

The Paris Court of Appeal answered this question in the negative, and ruled that the mere fact that the 1971 Libyan law confers upon the Supreme Judicial Council the authority to "*represent the Government, the public authorities and institutions, whether as a claimant or defendant, before courts of any nature and any level*" is enough to find an authority to represent within the meaning of Article 117 of the French Code of Civil Procedure. Additionally, it said that the provisional nature of the Libyan government flowing from the revolution was irrelevant, due to the principle of continuity of state. Finally, it clarified that the Supreme Judicial Council's lack of legal personality was indifferent too, since it could rely upon the 1971 Libyan Law which explicitly bestows upon it a self-standing capacity to take legal actions and authority to represent Libya in and of themselves.

Contribution by Yoann Lin

Paris Court of Appeal, 24 October, 2023, n° 19/13396, *Bolivarian Republic of Venezuela*

On 24 October 2023, the International Commercial Chamber of the Paris Court of Appeal ("ICCP-CA") partially annulled a final arbitral award rendered in Paris on 26 April 2019, under the aegis of the Permanent Court of Arbitration, pursuant to the UNCITRAL Arbitration Rules of 15 December 1976, for violating international public policy.

The dispute arose as a result of retention and confiscation measures taken in 2010 by Venezuelan authorities against Alimentos Frisa C.A. and Transporte Dole C.A., two Venezuelan companies operating in the food distribution sector in which Spanish investors (the "Z consorts") had acquired shares in 2001 and 2006. These measures followed the alleged participation of these companies in money laundering and tax evasion operations in Venezuela and Chile.

Claiming that Venezuela had infringed their investment by taking such measures, the Z consorts initiated arbitration proceedings on 9 October 2012, under the bilateral investment treaty concluded on 2 November 1995, between Spain and Venezuela, in order to obtain compensation for the loss suffered.

On 15 December 2014, the arbitral tribunal rendered a partial award in which it asserted jurisdiction over the claims of the Z consorts against Venezuela.

On 26 April 2019, the arbitral tribunal rendered a final award in which it found that Venezuela had breached the BIT and ordered it to, *inter alia*, compensate the Z consorts in the amount of USD 214 million for the indirect expropriation of their shares and the loss of the security deposits granted to the suppliers of Alimentos Frisa C.A.

Claiming that such an award violated international public policy by legitimising a double evasion of the law resulting from tax fraud to the detriment of Chile and fraud against the Venezuelan exchange control system, the Bolivarian Republic of Venezuela lodged an action for annulment with the Paris Court of Appeal on 1 July 2019.

Relying upon article 1520 5° of the French Code of Civil Procedure, the Court highlighted that its review was limited to determining whether the implementation of the provisions adopted by the arbitral tribunal was in clear breach of the principles and values contained within French international public policy.

The ICCP-CA stressed that although it did not have jurisdiction to rule upon a case covered by the arbitration agreement between the parties, it had to ascertain whether recognition or enforcement of the award was compatible with French international public policy. The Court specified that the fact that the arbitral tribunal has already ruled on the facts relied upon before it did not deprive it of its right to re-examine them to ensure that there was no breach of international public policy.

The Court of Appeal considered that Venezuela had not sufficiently demonstrated that there was a fraud against the exchange control system. However, the ICCP-CA noted that the existence of tax fraud committed in Chile was proven and insisted that the fight against such fraud is one of the principles whose violation cannot be tolerated by the French juridical order, even in an international context.

The Court recalled that the damages awarded by the arbitral tribunal related to two types of investments: the shares held by the Z consorts and the security deposits granted to the suppliers of Alimentos Frisa C.A. In this respect, it found that the deposits paid enabled fraudulent exports to be conducted.

The Court of Appeal concluded by saying that in awarding compensation for an investment that contributed, at least in part, to the implementation of a large-scale tax fraud which was judicially established, the award violated concretely and in a characterised manner French international public policy.

As a result, the Paris Court of Appeal partially annulled the final award rendered on 26 April 2019, insofar as it ordered Venezuela to compensate the Z consorts for the loss of security deposits paid to suppliers of goods to Alimentos Frisa C.A. and to pay interest on these sums. In addition, the Court dismissed the remainder of the action for annulment, noting that such dismissal conferred exequatur on the non-annulled part of the arbitral award.

Contribution by Valentine Menou

Paris Court of Appeal, 23 November 2023, n° 22/05055, *Libyan Investment Authority*

On 23 November 2023, the Paris Court of Appeal welcomed the application by Kuwaiti construction company Al-Kharafi against the sovereign wealth fund Libyan Investment Authority ("LIA") for release of an attachment levied upon frozen assets without prior authorisation to unfreeze by the competent national authority.

The dispute stemmed from an arbitral award issued on 22 March 2013, which ordered the Libyan Government and several national entities to pay an amount of nearly USD 1 billion to Al-Kharafi. The latter, benefitting from an arbitral award declared enforceable in France in 13 May 2013, conducted several attachments in 2013 and 2016. The company requested the French Ministry of Economy and Finance to unfreeze LIA's assets during an attachment initiated on 13 August 2013 at the bank Société Générale.

The LIA initiated legal proceedings against Al-Kharafi before the enforcement judge of the Paris Judicial Court to challenge the attachment dated 13 August 2013. On 28 February 2022, pursuant to Article R. 211 of the Code of Civil Enforcement Procedures, the enforcement judge ruled that the LIA's challenge was time-barred. As a consequence, the LIA lodged the present appeal against this first-instance judgment asking the Paris Court of Appeal to declare its challenge against the attachment conducted by Al-Kharafi admissible and to release the seized assets. The LIA argued that there was a serious infringement of its fundamental right of access to a judge as well as a violation of the principle of primacy of European Union law, since the attachment was implemented without any prior unfreezing authorisation.

Regarding the admissibility of the challenge to the attachment, the Court noted that the notification of the contested seizure had been duly delivered to the Libyan Ministry of Foreign on 10 November 2013. The Court considered this notification to the Ministry as a notification made to the Libyan State. Concerning the irregularity of this notification, the Court maintained that the time limit for challenging, as defined by Article R. 211-11 of the Code of Civil Enforcement Procedures, can only start from the date of actual delivery of the notification to the recipient.

However, the Court highlighted that the LIA had not received notification of the denunciation and the enforcement judge erroneously considered that the challenge period had started running on 10 November 2013 for the LIA. The Court added that the LIA is entitled to contest the attachment which the Court deemed admissible in accordance with its fundamental right of access to justice.

With regard to the nullity of the challenged seizure, the Paris Court of Appeal found that LIA's funds in France had been subject to freezing since 2011. Furthermore, the LIA was an entity explicitly listed in the Annex of EU Regulation No. 2016/44 of 18 January 2016 concerning restrictive measures in view of the situation in Libya. In France, obtaining a prior authorisation from the General Directorate of the Treasury at the Ministry of Economy and Finance is a prerequisite to be able to circumvent these measures. In the case at hand, the Court declared that Al-Kharafi had not received any authorisation from the relevant national authority.

The Paris Court of Appeal therefore overturned the judgment rendered on 28 February 2022 by the enforcement judge of the Paris Judicial Court, and declared as null and void the attachment conducted upon the frozen assets belonging to the Libyan Investment Authority.

Contribution by Élisa-Marie Goubeau

Paris Court of Appeal, 14 November 2023, n° 23/04518, *Nicolas Plescoff Gallery*

In a decision rendered on 14 November 2023, the Paris Court of Appeal ruled upon the applicability of an arbitration clause contained in the articles of association of a partnership company to its partners in the event of a dispute arising during the liquidation of said company.

On 20 November 2012, two French companies (hereinafter "SARL Galerie") and an American company (hereinafter "Fine Art LLC") established a partnership company. Due to a disagreement among the partners, they decided by mutual agreement to terminate their partnership and liquidate the company.

In 2019, a liquidator was appointed following a dispute among the partners concerning the regularity of the company's financial statements and filed a report in which he determined that Fine Art LLC had an outstanding debt owed to SARL Galerie. In 2021, the French company filed a lawsuit challenging this debt before the Paris Commercial Court, which rendered a decision on 24 February 2023. It ruled that it lacked jurisdiction to hear the case due to the existence of an arbitration clause in the articles of association of the partnership. Consequently, the French company appealed this ruling.

In its submissions, the French company requested the Paris Court of Appeal to overturn this decision and declare that the Paris Commercial Court it had jurisdiction. It argued that the arbitration clause in the partnership's articles of association was inapplicable, because the liquidation of the partnership rendered its articles devoid of any legal object and effectiveness.

In the present ruling, the Paris Court of Appeal confirmed the decision of the Paris Commercial Court. Firstly, it considered that the conditions for the applicability of the arbitration clause were met. Thus, the Court noted that the closure of the liquidation of the partnership company had not occurred, as Article 18 of the articles of association stipulated that the decision to close the liquidation only becomes effective after approval of the final liquidation accounts. Additionally, the Court explained that the principle of independence of the arbitration clause, as provided for in Article 1447 of the French Code of Civil Procedure, further justified this reasoning. Therefore, the Court confirmed the judgment rendered at first instance and referred the parties to the arbitral tribunal for further proceedings.

Contribution by Jorge Hidalgo

High Court of Justice (King's Bench Division) of England and Wales, 9 October 2023, *JOL and JWL v. JPM* [2023] EWHC 2486 (Comm)

In a judgment dated 9 October, the English High Court dismissed an application for urgent interim relief on the basis that the requirement of urgency under section 44(3) of the Arbitration Act 1996 had not been satisfied.

On 13 December 2017, the claimants (hereinafter the "Owners") entered into charter agreements for two vessels with the defendants (hereinafter the "Charterers"). The Charterers then sub-chartered the vessels to GHH (hereinafter the "Sub-Charterers") under simple charter. The sub-charterers then sub-sub-chartered the vessels to PPM (hereinafter the "Sub-Sub-Charterers"). The charter contracts for both vessels contained a list of termination events, enabling the Owners of both vessels to terminate the main charter contracts upon the occurrence of one of these events, and to require the vessels to be returned to a safe port at the charterers' costs. A termination event occurred on 2 September 2023. The Owners stated that they had served a notice of termination on the Charterers on 5 September 2023. As such, the Owners believed that they had a contractual right to the return of the vessels under the charter agreements.

In September 2023, the parties both appointed an arbitrator, initiating arbitration proceedings under the rules of the London Maritime Arbitrators Association (LMAA). The Charterers believed that the Owners had failed to give timely notice of termination, and that there were in fact no grounds for termination of the charter agreements. As the arbitral tribunal did not have the power to order interim relief, the Owners, during the proceedings, applied to the English Court for interim relief under section 44(3) of the Arbitration Act 1996. This section allows that an urgent application be made to the English High Court for interim relief in order to safeguard the alleged contractual rights. The aim for the Owners was to obtain the return of the two vessels, without the need for an arbitration award and by means of an interim relief.

The main question was whether the English High Court should order an interim relief measure under section 44(3), so as to allow the immediate return of the vessels to the Owners.

The English High Court refused to grand interim relief on the grounds that the Owners had failed to demonstrate the urgency of the application. Indeed, according to the Court, the purpose of the measure is to facilitate arbitration or the enforcement of an arbitral award, and not to usurp the functions of the arbitral process. In other words, if the vessels had been returned now, this would have interrupted the arbitration proceedings, even though the parties had agreed that these matters covered by the arbitral tribunal's jurisdiction. According to the Court, there was no sufficient urgency to justify an emergency measure under section 44(3). Indeed, in principle, the arbitrators could reach a final decision in a relatively short space of time, without there being any demonstrable risk to the vessels.

Contribution by Sarah Lazar

High Court of Justice (King's Bench Division) of England and Wales, 3 November 2023, *Renaissance Securities (Cyprus) Ltd v. Chlodwig Enterprises Ltd and others* [2023] EWHC 2816 (Comm)

On 3 November 2023, the Commercial Division of the England and Wales of the High Court of Justice rendered a decision, in which it issued an anti-suit injunction and an anti-anti-suit injunction to restrain Russian proceedings brought by sanctioned entities.

Renaissance Securities Ltd (hereinafter the "Claimant") was an investment services company. Its customers included the following companies: Chlodwig, Adorabella, Gekolina, Dubhe, Owl, Perpecia (hereinafter the "Defendants"). The last three Defendants were subsidiaries of the first and second ones, and their beneficial owner was Mr. Andrey Guryev. On 6 April 2022, British authorities designated Mr. Guryev as a sanctioned person. Further, on 2 August 2022, he became a U.S. sanctioned individual, and on 14 November 2022, the two first Defendants became U.S. sanctioned entities as well.

Each of the Defendants concluded an Investment Services Agreement (hereinafter the "ISA"). These ISAs were in materially identical terms and contained governing law and dispute resolution clauses, which read as follows: "*43.1 This Agreement* (…) *shall be governed by and interpreted in accordance with the laws of England and Wales. 43.2 If any dispute should arise in relation to the (Agreement)* (…), *such dispute shall be referred to and finally resolved by arbitration under the rules of the London Court of International Arbitration* (…)".

The dispute arose from the fact that the Claimant held substantial sums and securities from each of the Defendants, and that after the two first Defendants were sanctioned, the Claimant took the decision to freeze their assets. On 26 June 2023, the last three Defendants requested that their assets be transferred to bank accounts in Russia. The Claimant did not comply with these demands. Identical demands were once again made in July 2023. In August 2023, the Claimant received letters before claim from all six Defendants asking that their assets be transferred, failing which, the Defendants would initiate legal proceedings "*in the appropriate forum*". The Claimant understood that the Defendants would not abide by the arbitration clause and started monitoring Russian courts' websites. On 13 October 2023, the Claimant discovered that each of the Defendants had commenced proceedings before Russian courts seeking damages in the amount of the blocked assets. The Claimant has not been served with notice of any of the proceedings. Six preliminary hearings were scheduled in November 2023, December 2023, and May 2024.

Under these circumstances, the Claimant sought an anti-suit injunction (hereinafter "ASI"), as well as an anti-anti-suit injunction (hereinafter "AASI").

First and foremost, Dias J began by describing the content of Russian law. According to Article 248.1 of the Russian Commercial Procedure Code (hereinafter "CPC"), Russian sanctioned parties, and non-Russian entities against whom restrictive measures are taken based upon restrictive measures imposed in relation to Russian entities, may submit disputes to the jurisdiction of Russian courts. This Article confers exclusive jurisdiction to the Russian courts. Russian case law has adopted a very broad interpretation thereof, whereby the mere fact of being sanctioned is sufficient to trigger its application. Also, Russian courts have jurisdiction to grant anti-suit relief to restrain foreign proceedings or arbitration (Article 248.2 of the CPC), but also power to proceed in the absence of the defendant. In these circumstances, Dias J noted that there was a real risk that the Defendants applied for their own ASIs.

Dias J granted anti-suit relief under section 37(1) of the Senior Courts Act 1981. She recalled that, under English law, where proceedings are brought in breach of an arbitration clause, an ASI will ordinarily be granted, provided that the applicant is able to demonstrate that there is a high probability that there is an arbitration clause. On the facts, the ISAs were governed by English law, which was also deemed to be the governing law of the arbitration agreements. The arbitration clause applied to disputes arising "*in relation to*" the ISAs and the Defendants themselves relied upon the terms of the ISAs when they demanded the transfer of their assets. Dias J concluded that the proceedings in Russia were initiated in breach of the Defendants' obligation to refer the dispute to LCIA arbitration.

Furthermore, Dias J made two observations. First, the particular problem that English courts faced in *Deutsche Bank AG v. RusChemAlliance LLC* [2023] EWCA Civ 1144 (*see the following contribution*) did not arise, as the arbitration was seated in England. Thus, these two cases' rationes decidendi are to be distinguished. Second, it was irrelevant that the Russian CPC gives exclusive jurisdiction to Russian courts. As a matter of private international law, every court is to determine the competent jurisdiction based upon its own conflict-of-jurisdiction rules, irrespective of the assessment made by foreign courts. Moreover, if the Defendants could rely upon Russian law and the exclusive jurisdiction it gives to its courts in this case, the Defendants could bypass the sanctions regime.

Dias J stated that there was no undue delay in bringing the application (between July and November 2023). Although it was possible to predict the behaviour of the Defendants as of mid-July 2023, the first explicit threat of proceedings in Russia was to be found in the letters before claim sent in August 2023. As such, if an application for an ASI was made in August, the Court opined that it might have taken the view that the application would have been premature, unless one could find that there was some more concrete indication that proceedings were to start in Russia at that time. Thus, the Claimant could not be criticised for applying only after finding out that proceedings had effectively been started in Russia.

Similarly, Dias J granted the anti-anti-suit injunction. She noted that when a foreign ASI may be obtained in a vexatious or oppressive manner (in this case, the hypothetical ASI from Russian courts granted in breach of the arbitration clause under Article 248.2 of the CPC), English courts can react by countering it by way of an AASI, which prohibits a party from obtaining an ASI from a foreign court.

Contribution by Iulian Chetreanu

Court of Appeal (Civil Division) of England and Wales, 11 October 2023, *Deutsche Bank AG v. RusChemAlliance LLC* [2023] EWCA Civ 1144

This decision from the Court of Appeal of England and Wales involved Deutsche Bank AG ("DB") and RusChemAlliance LLC ("RCA"). The dispute arose from a guarantee issued by DB in favour of RCA. Following the Russian invasion of Ukraine and the imposition of sanctions by the EU, Linde, a company involved in the contract, suspended work. RCA terminated the contract and demanded a payment of €238,126,196.10 from DB under the guarantee.

DB applied to the Court for an anti-suit injunction ("ASI") against RCA, who had started proceedings in Russia in apparent breach of the arbitration agreement. The question before the Court of Appeal was whether the English court should grant an ASI to restrain the Russian proceedings when no such injunction could be obtained in France, where the arbitration was seated.

The Court considered the evidence presented and concluded that the Russian proceedings had been initiated in breach of the arbitration agreement. It also found that DB had acted promptly and that delay was not a factor. The Court noted that agreements should generally be honoured, and that if the court seised has jurisdiction, it will support a party seeking to ensure agreement compliance. The Court further stated that it was not necessary to go into more detail regarding the evidence adduced as to French law's content.

DB had argued that the power to grant an ASI can be found in section 37 of the Senior Courts Act 1981 (SCA 1981) and not in section 44 of the Arbitration Act 1996 (AA 1996). The Court accepted this argument and held that the source of the power to grant such an injunction in this case was section 37 of the SCA 1981.

The Court also considered whether England was the proper place to bring the claim. DB relied on Civil Procedural Rules (CPR) rule 6.36, which required it to show that England and Wales is the proper forum to bring the claim. The Court found that DB had not provided any evidence of French law but saw no reason to doubt that England was the proper forum based on what was said by Lord Mance in *Ust-Kamengorsk Hydropower Plant JSC v. Kamenogorstk Hydropower Plant LLP* [2013] UKSC 35 . Indeed, it explained that the reason why French courts do not order ASIs is not because of a hostility towards them, but rather a lack of domestic procedural rules permitting them.

In addition, and contrary to what Bright J had ruled, there was no such a thing as a "*clash*" between English and French courts in case the former was to order an ASI, as the latter could very well recognise it within French legal order if (i) it was not contrary to French international public policy both in its substantive and procedural aspects, (ii) was issued by a foreign court that had sufficient links to the case, and (iii) was not acquired by fraud pursuant to French case law (French Cour de cassation, 1st Civil Chamber, 20 February 2007, n° 05-14.082, *Cornelissen*) . In light of these reasons and particularly of French courts' inability to grant ASIs, the Court held that it was the appropriate forum to bring the case.

In conclusion, the Court of Appeal overturned Bright J's decision not to grant an ASI in *SQD v. QYP* [2023] EHWC 2145 (Comm) and allowed the appeal. It confirmed English courts' ability to order an ASI to bar a party to an arbitration agreement from pursuing proceedings abroad, even when the courts of the arbitration's seat do not have the party to order such injunction. The Court emphasized that the source of the power to grant such an injunction was section 37 of the SCA 1981.

Contribution by Soukaina El Mouden

Federal Court of Australia, 24 October 2023, *CCDM Holdings LLC v. Republic of India (No. 3*) [2023] FCA 1266

In a decision dated 24 October 2023 concerning an Mauritian investor against India, the Federal Court of Australia welcomed the application of the former for enforcement of an award ordering the latter to financially compensate the former in the amount of USD 740 million, and dismissed India's argument based upon its immunity from jurisdiction. During the proceedings, India argued that the Federal Court of Australia lacked jurisdiction to hear the case, owing to its immunity from jurisdiction, which prevented India from being subject to its jurisdiction. However, the Court considered that the Republic of India had waived its immunity from jurisdiction when it became a contracting party to the 1958 New York Convention, whose Article III makes the enforcement of awards mandatory.

On the facts, a final award rendered in 2020 by an ad hoc arbitral tribunal applying the UNCITRAL Arbitration Rules ordered India to financially compensate a Mauritian investor.

On the one hand, the investor considered that the arbitration agreement had been concluded with India, and that the arbitral award satisfied the conditions under Australian law for recognition and enforcement in accordance with section 11 of the Foreign State Immunity Act 1985. This section provides that a state shall not claim immunity from jurisdiction in proceedings for the enforcement of an award "to the extent that the award involves a commercial transaction". On the other, the Republic of India challenged the applicability of the arbitration agreement as resulting from the offer to arbitrate contained within the 1998 India-Mauritius bilateral investment treaty, as it relied upon its immunity from jurisdiction.

As such, the question that the Court had to answer was whether or not the mere fact of being a Contracting State to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards necessarily implies that Contracting States waive their immunity from jurisdiction when faced with an application for recognition and enforcement of arbitral awards.

The Court replied in the affirmative to this question, and dismissed India's claim of immunity from jurisdiction. Indeed, it explained that when a state becomes party to the 1998 New York Convention, it consequently waives its right to rely upon its immunity from jurisdiction to challenge the jurisdiction of another Contracting State's courts with regard to the recognition and enforcement of arbitral awards. The Court also considered that this immunity waiver applies not only to commercial arbitration, but also to investment arbitration.

Finally, after referring to the Australian High Court case of *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l* [2023] HCA 11, the Court held that a state does not necessarily have to expressly accept the jurisdiction of another State's courts, if the latter is party to the 1998 New York Convention. Indeed, the Mauritian investor had complied with the provisions of the Foreign State Immunity Act by transmitting a copy of the arbitral award and a prima facie arbitration agreement. India was consequently subject to Australian jurisdiction and could not claim immunity from jurisdiction.

In other words, the Court considered that a state which is party to the 1998 New York Convention automatically waives its immunity from jurisdiction in the context of recognition and enforcement proceedings.

Contribution by Adel Al Beldjilali-Bekkaïri

Court of Appeal of Singapore, 1 December 2023, *CVV and others v. CVQ* [2023] SGCA(I) 9

On 1st December 2023, the Singapore Court of Appeal refused to set aside an arbitral award on the ground that the arbitral tribunal had not violated the rules of natural justice.

In this case, Singaporean company CVQ ("CVQ"), and its subsidiaries, which manage two funds based in Singapore, entered into two advisory contracts with CWB ("CWB"), acting as advisor for the management of these funds. Under the terms of these contracts, CVQ was to pay CWB an advisory fee. These fees consisted of fund management fees and performance fees. The arbitration clauses in the contracts referred to arbitration in Singapore under the rules of the Singapore International Arbitration Centre.

CVQ and CWB later terminated their contracts and CVQ initiated arbitration for various breaches of contract. CWB then claimed payment of the outstanding advisory fees. The arbitral tribunal rendered a final award in favour of CWB, rejecting all the claims of CVQ and upholding CWB's counterclaims. CVQ filed an application with the Singapore International Commercial Court ("SICC"), seeking to have the award set aside on the ground that it was made in breach of the rules of natural justice. CWB did the same, but rather to seek enforcement of the arbitral award and was granted permission to do so. CVQ subsequently filed another application to set aside the arbitral award.

The SICC judge refused to set aside the award because CVQ had not demonstrated that the arbitral tribunal had violated the its right to a fair. The court noted that the arbitral tribunal neither adopted a line of reasoning that the parties could not have expected, nor modified its reasoning. Nor did the tribunal favour CWB insofar as the evidence presented was not contested. CVQ then appealed this decision.

In the present decision, CVQ and its subsidiaries essentially argued that the arbitral tribunal violated their right to a fair hearing by lacking discernment and/or failing to give reasons for its decision on essential points of the award.

The Court of Appeal, citing *Soh Beng Tee & Co Ptd Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, highlighted that in order to challenge an award on the basis of a breach of the principles of natural justice, it is necessary to show (a) which rule was breached, (b) how it was breached, (c) in what way the breach was connected to the making of the award, and (d) how the breach violated its rights. The Court also explained that natural justice implies in part that the parties are being duly informed and given the opportunity to be heard.

CVQ also argued that the arbitral tribunal should have given reasons for its decision, as the SICC judge had ruled, referring to article 31(2) of the UNCITRAL Model Law. Firstly, the Court of Appeal stated that Singapore case law was uncertain, particularly with regard to the absence of adequate reasons for an award as a ground for setting aside an award. Relying on *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972, the Court of Appeal observed that the absence of adequate reasons expressly constituted neither a breach of the rules of natural justice, nor a basis for setting aside an award.

Secondly, the Court of Appeal stated that the question of the content of the arbitral tribunal's duty to give reasons for its decision was also unresolved. It asserted the principle that the standards of reasoning for a decision rendered by a state court contained in *Thong Ah Fat v. Public Prosecutor* [2012] 1 SLR 676, are inapplicable to arbitrators because the stakes are different.

Arbitral tribunals must therefore give reasons, which are sensitive to the nature of the case and its particular circumstances. In view of these factors, the Court of Appeal needed to decide whether the arbitral tribunal's failure to give reasons for its award violated principles of natural justice, and whether this caused damage to CVQ and its subsidiaries.

In its decision, the Court of Appeal ruled in favour of CWB, as it considered that the arbitral tribunal did not violate its right to a fair hearing when it rendered its award. With regard to the amount to be paid, it acknowledged that the arbitral tribunal had given reasons for its decision and addressed all the points contested by CVQ. With regard to the end-of-life date of one of the funds, the Court of Appeal once again found that the arbitral tribunal had given reasons for its decision and that its arguments were factually sound. With regard to the acceptance of CWB's expert's calculations of the outstanding amounts, the Court of Appeal noted that CVQ had not provided any evidence to invalidate them or presented an alternative. The absence of an express reference to any part of the cross-examination was not sufficient to prove that the arbitral tribunal had failed to give reasons for its decision. At most, the Court of Appeal qualified the arbitral tribunal's potential error as an error of fact, which was not sufficient to set aside the award.

Finally, the Court of Appeal addressed two other points, *i.e.* the question of the validity of the arbitration procedure in relation to the parties' agreement, and whether the arbitral tribunal had reasonably notified CVQ and its subsidiaries that it was going to rule on the sum of an amount due. It held that both arguments were groundless, and that the arbitral tribunal had not violated principles of natural justice. *In fine*, the Court of Appeal dismissed CVQ's application to set aside the arbitral award.

Contribution by Clémence Decarsin

Supreme Court of India, 6 December 2023, C*ox and Kings Ltd v. SAP India Private Ltd*, 2023 INSC 1051

On 6 December 2023, the Supreme Court of India resolved the legal uncertainty regarding the extent and applicability of the 'group of companies' doctrine (the "Doctrine") in India. It confirmed that non-signatory parties can be bound by arbitration agreements under the Doctrine, provided that specific conditions are met.

Cox and Kings Ltd (the "Petitioner") was made licensee of a software which was owned and developed by SAP India Private Limited ("Respondent No. 1"). Prior to trhis agreement, Respondent No. 1 and others (collectively referred to as "Respondents") recommended a software solution to Petitioner. In to execute the solution, an arrangement was created and divided into 3 transactions – one of which, the general terms agreement, containing an arbitration clause. Disputes arose and Respondent No. 1 invoked the arbitration clause under the general terms' agreement to start arbitration proceedings and to demand payment from the Petitioner. As one of the other Respondents was not part of these proceedings, the Petitioner sent a notice of arbitration to it, without any response on its part.

The Petitioner then filed a petition before the Supreme Court of India advocating for the extension of the clause to the other Respondent based upon the Doctrine. Petitioner contended that it is based upon the tacit or implied consent by a non-signatory to be bound by the arbitration agreement and argued that under section 7 of the Arbitration and Conciliation Act 1996 (the "Act"), a non-signatory could be bound by an arbitration agreement if it was demonstrated an intention to be so through written communication, even in a non-contractual relationship.

The Respondents argued that section 7 required a written arbitration agreement to apply, and thus could not be so if one was to rely upon a non-signatory's implied consent. They also maintained that the Doctrine could not be traced to the phrase "*any person claiming through or under* [a party to an arbitration agreement]" as provided under sections 8 and 45 of the Act.

In a previous landmark Indian decision, *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.* (2013) 1 SCC 641, the Supreme Court was faced the same legal problem and interpreted the statutory phrase "*any claiming through or under* [a party to an arbitration agreement]" contained in sections 8 and 45 of the Act, as allowing the extension of the applicability of arbitration clauses beyond the immediate signatories, and to include those who were integral to the transaction but may not have explicitly consented to the arbitration agreement.

In the present case, the Supreme Court clarified the applicability of the Doctrine, by saying that an arbitration agreement must be in a written form but need not be signed by the parties. Under section 7(4)(b) of the Act, a court or arbitral tribunal must decide whether a non-signatory is part of an arbitration agreement in light the agreement's language and the contract's surrounding circumstances (in particular, the contract's nature and object, and the parties' conduct during the formation, implementation and discharge thereof).

Importantly, the Doctrine includes additional factors to take account of, such as the non-signatory's relationship with the signatories, as well as the transaction's nature. Since both section 7(4)(b) and the Doctrine aim to ascertain the parties' common intention, the Doctrine can be included within section 7(4)(b) to help a court or arbitral tribunal determine whether the non-signatory did consent or not to arbitration.

However, the Court said that the phrase "*any person claiming through or under* [a party to an arbitration agreement]" in sections 8 and 45 of the Act is intended to provide a derivative right and does not enable a non-signatory to become a party to the arbitration agreement. As such, the Supreme Court of India found that the decision in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.* (2013) 1 SCC 641, tracing the Doctrine to the aforementioned phrase in sections 8 and 45 had been wrongly decided.

Contribution by Rola Makke

INTERVIEW WITH MONICA LABELLE

1. To begin with, could you tell us a little bit about your background and why you chose arbitration as a career option?

I am an international arbitration and litigation lawyer qualified to practice in Spain. Born in Madrid, raised in Barcelona, I hold a Spanish and French dual nationality. Growing up in a multicultural environment fostered my interest in understanding other cultures and learning new languages.

After obtaining my "*Baccalaureat*" in Economics and Social Sciences at the Lycée Français de Barcelone and passing the Spanish "*Selectividad*", I decided to study law. I obtained my law degree from ESADE Law School, Ramón Llull University in Barcelona, where I also completed the dual LLM master's degree, specializing in international business law and preparing for the national bar exam. As part of my university studies, I had the opportunity to attend a first exchange at the Luiggi Bocconi University (Milan), where I discovered international investment arbitration, and a second exchange at Sciences Po University (Paris), focused, among other subjects, on international commercial arbitration. It was during this Paris exchange that I had the opportunity of visiting the International Chamber of Commerce (ICC) for the first time. The experience was fascinating, and I dreamt of returning to ICC one day.

My decision to specialize in arbitration as a career option was driven by my desire to become an expert in international dispute resolution. My work experience as a litigation and international arbitration practitioner confirmed my vocation for this rewarding, challenging and continually changing practice.

2. You currently work as a Deputy Counsel at the International Chamber of Commerce in Paris. Could you explain what this position consists of and what your missions are?

I currently work as Deputy Counsel at the Secretariat of the International Court of Arbitration of the International Chamber of Commerce in Paris, which is the world's leading arbitral institution. Since 1923, the ICC International Court of Arbitration has been helping to resolve disputes in international commercial and investment disputes.

I am part of the Secretariat's ICA1 case management team, which oversees the administration of arbitration proceedings relating to the Latin American and Iberian regions.

My main responsibilities as Deputy Counsel include **(i)** reviewing and notifying requests for arbitration; **(ii)** preparing memoranda for the Court's decisions on jurisdiction, constitution of arbitral tribunals (including confirmation, appointment and replacement of arbitrators as well as any challenges made against them), scrutiny of decisions, addendums and occasionally awards, the financial aspect of the proceedings, emergency proceedings before the start of the arbitration and any other procedural decision required, **(iii)** reviewing Terms of Reference, and more generally, **(iv)** monitoring all aspects of the arbitration proceedings to make certain that it is performed properly under the ICC Rules and with the required speed and efficiency.

3. You have also worked in a law firm in Spain as a qualified Spanish lawyer for 4 years and a half. What would you say are the main differences between working in an arbitration institution and in a law firm?

As a lawyer in an international law firm, I had the opportunity to actively represent clients and provide legal advice advocating for clients' interests. During my time at Cuatrecasas, I participated in all kinds of civil and commercial disputes, particularly in sales contracts, real estate, tourism, energy and construction projects. My responsibilities included drafting claims, statements of defense, witness statements, appeals, applications for annulment of awards and exequatur, preliminary hearings and hearings, interim relief applications and all kinds of procedural writs before Spanish domestic courts and arbitral tribunals. I provided pre-litigation advice and negotiated settlement agreements and I had the pleasure to represent clients in court, my favourite part of the job.

Working in an arbitral institution gives you a broader perspective of international dispute resolution. One of our main responsibilities is to ensure proper application of the Rules of the ICC International Court of Arbitration, as well to assist parties and arbitrators in overcoming any procedural obstacle. It is a unique opportunity to master the application of the institutional rules and to learn about the different practices worldwide. It also means being exposed to the most procedurally complex issues that can arise in international cases.

4. Would you say that work experience in arbitration institutions is a useful complement to the practice of arbitration?

Undoubtedly. Working in arbitration institutions serves as a valuable complement to the practice of arbitration and litigation. It provides a unique perspective by exposing you to the procedural aspects of dispute resolution. This experience enhances one's understanding of the application and interpretation of arbitration rules, ensuring a thorough grasp of the intricacies involved in managing cases. Moreover, working in an arbitration institution allows you to interact with diverse cases, arbitrators and parties around the world, broadening your exposure to various industries and legal issues. The skills developed in efficiently administering arbitrations, assisting parties, and ensuring procedural compliance contribute significantly to becoming a well-rounded arbitration practitioner.

In other words, the insights gained from working in an arbitration institution complement and enrich the practical skills acquired through legal practice, making it a valuable and beneficial addition to one's arbitration career.

5. As someone who has had the opportunity of studying in three different countries and developing soft skills through your extra-curricular activities and education, what do you think are the most important skills to build in order to work in arbitration?

In my experience, I would say that key skills to develop include:

- Languages: given the international nature of arbitration, proficiency in multiple languages is essential for effective communication with diverse parties and understanding legal documents in in cross-border cases.
- Oral and written skills: proficiency in both oral and written advocacy is essential, as effective communication across diverse cultures plays a crucial role.
- Organization Strong organizational skills are required for managing case documentation, adhering to procedural requirements, and ensuring the smooth progress of arbitration proceedings.
- Critical thinking: the ability to analyze complex legal issues, assess evidence, and think critically is essential in arbitration.
- Research aptitude: conducting thorough legal research is a fundamental aspect of arbitration. The ability to navigate legal databases, stay updated on relevant case law, and synthesize information contributes to well-informed decision-making.
- Problem-solving mentality: developing problem-solving skills helps in addressing challenges that may arise during arbitration, fostering efficient and effective dispute resolution.

6. You have completed a module in public speaking and communication techniques while at ESADE University, but also volunteered as a memorial judge at the Spanish national rounds for the Philip C. Jessup International Law Moot Court Competition. Could you tell us about this latter experience, as well as pieces of advice you would give to someone struggling with oral advocacy?

Volunteering as a memorial judge at the Spanish national rounds for the Philip C. Jessup International Law Moot Court Competition was a very valuable experience in evaluating and providing feedback on students' advocacy skills. Participating in a Moot Court is an excellent way to gain confidence in oral advocacy, particularly for those aspiring to build a career in international arbitration. For those facing challenges in oral advocacy, I would recommend emphasizing consistent practice, as it is crucial for improvement. Additionally, seeking feedback from experienced advocates is the most effective way to receive constructive input and improve one's advocacy skills.

7. You have indicated on your LinkedIn profile that arbitration is a "continually changing practice". What do you think that is, and in your opinion what are the challenges that arbitration, as an international dispute resolution mechanism, is to face in the future?

The past decades have seen a radical increase in commercial and investment transnational disputes. Alternative dispute resolution mechanisms are increasingly taking centre-stage. Arbitration is a continually changing practice due to the evolving nature of international trade, commerce, and legal systems. As businesses become more globalized, disputes arise in diverse jurisdictions, leading to a constant need for adaptation in arbitration practices. In my opinion, some challenges that arbitration, as an international dispute resolution mechanism, may face in the future include:

- The integration of technology in dispute resolution such as artificial intelligence, which requires adapting traditional arbitration procedures to ensure efficiency, ethics and fairness.
- Striving for greater diversity among arbitrators and addressing issues of representation to ensure a more inclusive and representative dispute resolution process.
- Dealing with increasingly complex cross-border disputes involving multiple legal systems, industries, and parties, which demands arbitrators to possess specialized knowledge and skills.
- Ensuring the effective enforcement of arbitral awards across jurisdictions remains a challenge, especially in jurisdictions where enforcement may be difficult.
- Addressing the growing importance of sustainability and environmental considerations in arbitration cases, reflecting a broader shift in global priorities.
- Striking a balance between expeditious dispute resolution and maintaining due process, as prolonged and expensive arbitration proceedings can deter parties from choosing arbitration.

- By proactively adapting arbitration practices and providing innovative tools and procedures, arbitration will continue to be a dynamic and effective mechanism for resolving international disputes in an ever-changing global landscape.

NEXT MONTH'S EVENTS

9 January: Lecture "Arbitration and the Rule of Law" by Gary Born

Organised by Europa-Institut

Where? Europa-Institut, Lecture Hall, Building B2 1, Rooms 3.08/3.09 or via Zoom

Website: https://www.cfa-arbitrage.com/evenements/detailevenement/108/-/l-opportunite-et-la-recevabilite-des-recours-contre-la-sentence.html (sign-up is mandatory)

29 January: Arbitration Practice Workshop "The opportunity and admissibility of appeals against arbitral awards"

Organised by the *Comité français de l'arbitrage – CFA*

Where? Maison du Barreau, Salle Gaston Monnerville – 2 rue de Harlay, 75001 Paris

Website: https://www.cfa-arbitrage.com/evenements/detailevenement/108/-/l-opportunite-et-la-recevabilite-des-recours-contre-la-sentence.html (sign-up is mandatory)

30 January: Conference "Gathering evidence in international law"

Organised by *l'ACE – Avocats, Ensemble*, and *Les Echos*

Where? Auditorium Les Echos-Le Parisien Annonces – 10 boulevard de Grenelle, 75015 Paris

Website: https://kxo-solutions.com/app/#/public/ACE/formation-si-janvier-2024 (sign-up is mandatory)

INTERNSHIP AND JOB OPPORTUNITIES

LAW PROFILER

LUSOPHONE INTERN
HERBERT SMITH FREEHILLS

LITIGATION AND ARBITRATION
Start date: January 2024
Duration: 6 months
Location: Paris
Brazilian law diploma required

INTERN
DECHERT LLP

TRIAL, INVESTIGATIONS & SECURITIES
Start date: July 2024
Duration: 6 months
Location: Paris

INTERN M2/BAR SCHOOL
FAIRWAY AARPI

LITIGATION
Start date: July 2024
Duration: 6 months
Location: Paris

INTERN
HERBERT SMITH FREEHILLS

LITIGATION AND ARBITRATION
Start date: July 2024
Duration: 6 month
Location: Paris

INTERN
NORTON ROSE FULBRIGHT

LITIGATION AND ARBITRATION
Start date: July 2024
Duration: 6 months
Location: Paris

INTERN
SQUIRE PATTON BOGGS

LITIGATION, INSURANCE AND ARBITRATION
Start date: January 2025
Duration: 6 months
Location: Paris