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BIBERON

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French and foreign courts' decisions

International arbitral awards and decisions

Interview with Lisa Stefani

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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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FRENCH COURTS

COURT OF APPEALS

Paris Court of Appeal, 5 December 2023, n° 22/11002, *Raiya Group*

On 5 December 2023, the Paris Court of Appeal rejected a request of annulment of a final award relating to the ordering of one party to compensate the other for its contractual breaches.

An Iraqi company, RAIYA GROUP, had concluded a series of framework contracts (7), with another company, CREST FOOD, aimed at the regional development for the opening of coffee shops operating the Nestlé and Coll House brands in Iraq. The dispute arose in the execution of these contracts. Therefore, RAIYA GROUP initiated arbitration proceedings which resulted in the tribunal rendering a final award on 18 January 2022, which ordered RAIYA GROUP to pay USD 2,098,268.68 to CREST FOOD for the violation of its obligations arising from one of the contracts.

The company contested the award by filing a request of annulment before the French Court of Appeal on the ground of Article 1520 4° of the French code of civil procedure.

The claims were based on four grounds for annulment. RAIYA GROUP claimed that the principle of due process was violated by the tribunal, which had excluded some documents produced by the claimant from the proceedings.. The tribunal awarded the amount of compensation on the basis of an invoice that was never submitted for debate. Indeed, the procedural position of the parties would have been violated, since the tribunal did not allow the claims in order, with due regard to the standing of the parties. It therefore considered that the tribunal failed to comply with the Terms of Reference by failing to give reasons for its award in accordance with the arbitration agreement.
In this matter, CREST FOOD, as respondent, asserted that the claimant's objective was to secure a thorough review of the dispute on the merits before the French annulment judge. It argued that this request should be rejected on the basis that it exceeds the court's jurisdiction to decide on the admissibility or inadmissibility of documents submitted during arbitration. According to CREST FOOD, it is solely within the purview of the tribunal to determine the relevance of such documents, and the annulment judge is not tasked with assessing requests for document production. Therefore, it contended that there has been no violation of the principles of adversarial proceedings and principle of equality of arms. Additionally, CREST FOOD maintained that the documents deemed unnecessary by the tribunal were actually relevant to a separate arbitration proceeding, and sought to forestall any further claims by RAIYA GROUP.

The question at hand was whether the Paris Court of Appeal is empowered to nullify an award pursuant to Article 1520 4° of the French Code of Civil Procedure if the tribunal deviated from the principles of procedural fairness and equity by rendering its decision without considering all submitted documents? Moreover, does French arbitration law mandate the provision of rationales for awards? Finally, can a unilateral imposition of moratory interests on arbitration fees by one party occur without explicit consent from both parties?

The Court responded negatively to the first question. However, in this instance, it dismissed the appeal by confirming that the annulment judge does not have jurisdiction to assess the tribunal's decision to deem certain documents inadmissible during the arbitration process.

The principles of adversarial proceedings and equality of arms had not been violated, given that the tribunal did not refer to all the documents produced by the plaintiff at the time of rendering the award.

Furthermore, the annulment judges observed that there are no rules requiring the reasoning behind awards in French arbitration law, in addition to what is provided by the arbitration agreement and the ICC Arbitration Rules. Therefore, this grievance did not appear well-founded.

The Court issued a reservation by specifying that an arbitral tribunal cannot, at its discretion, apply moratory interests on arbitration fees without one of the parties expressly requesting it. In this case, the Court held that the defendant's broad and general statement in its post-hearing memorandum justified the application of such interests on the amounts unpaid by the Plaintiff as decided by the tribunal.

Therefore, the Court determined that the tribunal did not rule *ultra petita*, and the objections raised by RAIYA GROUP regarding the tribunal's purported failure to fulfill its obligations also lacked substantiation.

Contribution by Adel Al Beldjilali-Bekkairi

Paris Court of Appeal, 19 December 2023, n° 22/03773, State of Libya

The International Commercial Chamber of the Paris Court of Appeal (CCIP-CA) has dismissed an action for annulment brought by Güri' against a final award rendered on 23 November 2021, rejecting its claims for damages against the Libyan State.

In this case, Güri' Insaat Ve Muhendislik A.S. (Güri'), a company incorporated under Turkish law, was awarded a series of contracts by the State of Libya to build a public park. In a decision dated of 18 March 2015, the Libyan authorities finally abandoned the project. The land on which the public park should have been built was reallocated. After some of its employees were attacked by armed militia, Güri' initiated arbitration proceedings against the Libyan government on 21 July 2016. The company complained that the Libyan government expropriated it through its decision dated 18 March 2015. It also alleged that the Libyan State failed to fulfil its security obligations under the Bilateral Investment Treaty (BIT) concluded between the current Libyan State and Turkey. The proceedings were brought under the Rules of Arbitration of the International Chamber of Commerce (ICC).

In a partial award dated 4 February 2020, the arbitral tribunal partially upheld the claims made by the claimant company. Damages were awarded in principle, but were to be determined in a subsequent award, at which time the parties would "*have further opportunity to set out their positions with respect to these claims*". It was therefore in a final award, made on 23 November 2021, that the arbitral tribunal ruled on the quantum of the damages suffered. Unfortunately, the award rejected the claim for damages and the alleged breach of the BIT. The decision was based on the insufficient amount of evidence provided by the parties. Güri' was finally ordered to cover the costs incurred by the Libyan State in the arbitration proceedings.

On 18 February 2022, Güri' requested the Paris Court of Appeal to set aside the award dated of 23 November 2021. The appellant company relied on three grounds for annulment based on the provisions of Article 1520 of the French Code of Civil Procedure (CPC).

In its first plea, the company complained that the arbitrators failed to comply with the attributions the parties gave them (Article 1520 3° of the CPC). As the illegality of the decision of 18 March 2015 had been found in the earlier partial award, the award of 23 November 2021 should have been limited to assessing the loss suffered by Güri'. Güri' also complained that the decision was insufficiently reasoned and took the view that the tribunal did not make a final award on the dispute, thereby, denying justice.

The second plea alleged a breach of the adversarial principle (Article 1520 4° of the CPC). Güri' complained that the court dismissed its claims on the grounds of insufficient evidence. Güri' maintained that it offered to provide the arbitral tribunal with more evidence on several occasions. As a result, Güri' said that the arbitral award was de facto made on the basis of its own deficiencies.

In a third plea, based on the inconsistency of the recognition or enforcement of the award with French international public policy (Article 1520 5° of the CPC), Güri' alleged a breach of article 6§1 of the European Convention on Human Rights (ECHR). The arbitration award was insufficiently reasoned in its rejection of compensation for the losses alleged by the company, which constituted a denial of justice. Moreover, in refusing to rule on the quantum of compensation for the loss suffered, the award was made in disregard of the res judicata effect of the earlier partial award.

The Court of Appeal did not uphold any of Güri"s arguments.

On the first plea, the Court noted that the arbitrators had not refused to rule but had rejected Güri"s claims on the grounds of insufficient evidence. They did so on the basis of its assessment of the evidence presented in front of the court. The Court considered that Güri', in challenging the grounds on which the award was based and the manner in which it was made, was raising matters that did not fall within the remit of the judge hearing the annulment. In the Court's view, the fact that an applicant may submit new documents and present its views in subsequent proceedings is not such as to call into question the final nature of the award.

On the ground of insufficient evidence, the arbitral tribunal was free to refuse to award damages to the claimant, even though an earlier partial award had recognised the existence of the damaging facts. The court did not have to "make up for the failure of the parties to provide evidence". Accordingly, since it is not for the Court to review the manner in which an arbitral tribunal decides a case, the second plea based on infringement of the adversarial principle was not accepted by the judges either.

The Court also rejected the third plea, reiterating the reasons for rejecting the first two. The judges emphasised that as only the final award was subject to the action for annulment, criticism of that award could not be based on the partial decision, as it was not the one presented before the Court. The judges noted, however, that the partial award declared that the decision of 18 March 2015 made by the State of Libya constituted a breach of the BIT, but also that it amounted to expropriation. However, by deciding that these breaches could give rise to a right to compensation, the partial award couldn't force the arbitral tribunal to order the State of Libya to pay a sum in a subsequent decision. The contested decision could therefore, after examination and analysis of the evidence provided, conclude in a final award rejecting Güri''s claims without infringing upon French international public policy. This was done without disregarding the authority of res judicata attached to the partial award. The third plea was therefore also rejected.

All of the three pleas put forward by the company seeking the annulment being rejected by the Court, the action for annulment was dismissed. Güri' was ordered to pay the costs of the annulment procedure, according to Article 700 of the French Code of Civil Procedure.

Contribution by Théo Pineda y Vincens

Paris Court of Appeal, 9 January 2024, n° 21/14563, *Sew Infrastructure*

On 9 January 2024, the International Commercial Chamber of the Paris Court of Appeal (the "CCIP-CA") dismissed the applications to set aside a final and an additional arbitral award rendered on 27 July and 29 October 2021, respectively, under the Arbitration Rules of the International Chamber of Commerce (the "ICC").

The dispute arose from delays in the performance of a contract for the construction of a road in Ethiopia, entered into on 30 November 2012 between the Indian company Sew Infrastructure Ltd ("Sew") and the Ethiopian Roads Authority (the "ERA"). As part of this agreement, Sew was required to provide a number of bank guarantees to the ERA.

Alleging a breach of essential terms of the contract by Sew, the ERA terminated the contract and called in the bank guarantees. In response, Sew initiated ICC arbitration proceedings on 7 December 2017.

On 27 July 2021, the arbitral tribunal rendered a final award ordering each of the parties to pay various sums. Sew then filed an action for annulment of this award and a request for its correction, the latter of which was rejected in an additional award dated 29 October 2021. Sew also brought an action for annulment against the additional award.

In addition to the joinder of the two annulment proceedings, Sew invoked, regarding the annulment of the final award, the five grounds set out in Article 1520 of the French Code of Civil Procedure, including that the recognition or enforcement of the contested award was contrary to international public policy. Sew argued that enforcement of the final award would enable the ERA to collect the bank guarantees and use them to finance human rights violations, particularly in the context of "*the civil war in which the Ethiopian government is engaged*".

The ICCP-CA began by pointing out that the fight against violations of human rights and international humanitarian law is a principle which the French legal system cannot allow to be disregarded, even in an international context. It added that this principle falls within the scope of international public policy, which is the basis for the review carried out by the annulment judge.

Given that an arbitral award's compliance with international public policy is assessed at the time of the court's decision, "*hypothetical future circumstances*" linked to the presumption that the sums obtained would be used in breach of international public policy are not subject to the annulment judge's review because this would "*involve anticipating future events and would relate to acts which, although reprehensible, are not linked to the recognition or enforcement of the award itself*". Consequently, the Paris Court of Appeal dismissed the action for annulment.

Contribution by Valentine Menou

Paris Court of Appeal, 9 January 2024, n° 22/04007, *Sultan of Sulu*

On 9 January 2024, the Paris Court of Appeal gave a positive answer to the question of whether proceedings to set aside an arbitral award could be suspended pending a decision by the French *Cour de cassation*.

The prominent case revolved around a dispute concerning the execution of an agreement signed in 1878 by the Sultan of Sulu, which stipulated annual payments to the Sultan and his heirs. In 2013, Malaysia ceased making the annual payments, leading the heirs to initiate arbitration proceedings. The arbitrator appointed by the Spanish courts recognized its jurisdiction in a partial award before issuing a final award condemning Malaysia to pay $14.92 billion to the heirs.

The partial award, executed in France, was annulled on 6 June 2023, by the Paris Court of Appeal. The heirs contested the decision, and the case is currently pending before the French Court of Cassation (it is worth noting that in the meantime, Malaysia has sought the annulment of the final award before the Paris Court of Appeal).

In this context, the heirs requested the stay of the annulment proceedings until the Court of Cassation rules on the enforcement of the partial award. They argued that Article 110 of the French Code of civil procedure granted the judge discretionary power to suspend the annulment proceeding when a decision subject to appeal before the High Court is invoked, and that it is "*in the interest of the proper administration of justice to stay proceedings when the solution given to an ongoing cassation appeal is likely to have a direct impact on the resolution of the dispute brought before the judge*".

The Court of Appeal aligned with this stance. According to the Court, since the argument leading to the annulment of the enforcement of the partial award was also raised in the annulment proceedings of the final award, the outcome of the cassation would directly impact the annulment proceedings, immediately challenging the decision.

The Court added that continuing the proceeding would not ensure "*simplification, promptness, and lightening in the definitive handling of the case*". On the contrary, the stay will make it possible to draw all the legal conclusions from the Court of Cassation's ruling, thus avoiding a second appeal and ensuring savings for all parties.

Finally, the Court noted that a refusal to stay the proceedings could prove counterproductive and lead to a lengthening of the annulment procedure. Moreover, the risk of contradictory decisions on the merits, in the event of a referral after cassation, cannot be considered serious either.

Therefore, in the interest of proper administration of justice, the Court ordered the stay of the annulment proceeding.

Contribution by Elena Andary

Paris Court of Appeal, 23 January 2024, n° 21/01507, *Ustay*

The Paris Court of Appeal is continuing to contribute to the attractiveness of Paris as an arbitration venue, like in this case involving a dispute between a Turkish investor, the company Üstay, and the Libyan State (Paris Court of Appeal, 23 January 2024, n° 21/01507).

Dating back to 1990, the case featured all the twists and turns one might expect from a foreign investment that turned sour. On the facts, Üstay had secured a contract for the construction of interurban roads from the Libyan State in 1990. However, this contract was withdrawn a few years later in 1994. Subsequently, Üstay pursued legal action against the Libyan State before its national courts and obtained a decision in its favour in 2010, that the Libyan State challenged before its own courts.

Meanwhile, Üstay managed to secure two other construction contracts from other Libyan public entities distinct from the Libyan State. These two other contracts, concluded respectively in 2006 and 2010, were suspended first during the civil war of 2011 and then again when hostilities resumed in 2014. This context of both material and legal insecurity prompted Üstay to leave Libya without the contracts being fully performed.

Three years after leaving Libya, Üstay initiated an arbitration procedure under the aegis of the ICC rules in Paris, pursuant to Article 8 of the BIT concluded between Turkey and Libya in 2009 (hereafter the "BIT"). In response, the Libyan State challenged the arbitral tribunal's jurisdiction over the dispute based upon several arguments. On 30 November 2020, the tribunal rendered its award, whereby it ruled that it had "*jurisdiction to hear* [Üstay]*'s claims which were based upon the* [BIT]*, the umbrella clause and contractual claims arguably qualified as claims falling under Article 8 of the* [BIT]".

The present decision by the Paris Court of Appeal concerned annulment proceedings started by Libya against the award. The applicant argued that the tribunal wrongly upheld its jurisdiction over the present dispute (Article 1520 1° of the French Code of Civil Procedure).

An appeal for annulment initiated by Libya led to the judgment of the Paris Court of Appeal herein summarized. The appeal was based on a single ground that the arbitration tribunal had wrongly declared itself competent, developed in two branches.

On one hand, Libya challenged that the arbitral tribunal's jurisdiction could be found in the BIT, on the basis that said BUT had actually never entered into force.

According to Libya, Turkey had not validly notified its ratification of the BIT to it, upon which the entry into force of the BIT depended pursuant to Article 12. Indeed, Turkey's notification made on 22 April 2011 had been addressed to Colonel Gaddafi's regime. However, this regime "*could no longer represent the Libyan people*", so that Turkey "*should have made its notification to the NTC, which has become the only legitimate authority since 2 March 2011*". Although the NTC was only recognized by Turkey in September 2011, this recognition arguably had "*retroactive effect*", according to Libya. Following this reasoning, Turkey should have made a new notification (§20), since the irregularity of the notification could not be covered by a joint policy declaration signed in 2014 by Libya that expressly referred to Article 8 of the BIT, devoid of any normative effect (§20).

This argument was rejected by the Paris Court of Appeal, which held that "*the text of the [BIT] does not mention one or several authorities within each contracting party to which the notification of ratification should have been addressed*" (§31).

Objectively, the Libyan State's reasoning was unlikely to be compelling, as the Court had already decided the very question of the entry into force of this BIT in a previous recent case, as Üstay aptly reminded. As such, the Libyan State's counsel's strategy was presumably based upon "*new arguments derived from the lack of normative effect of the [2014] declarations and the retroactive effect of the UN's recognition of the NTC*" (§30).

However, these arguments were not sufficiently convincing for the Court (§§36-41), which on the contrary appeared to attach great importance to the fact that Libya had never previously contested that the BIT had entered into force, including during two other cases previously heard by the Court (§§29, 31, and 37-39).

On the other hand, Libya argued that the arbitral tribunal wrongly upheld its jurisdiction, given that Üstay could not rely upon the arbitration offer enshrined in the BIT.

To this end, Libya put forward several arguments that have become relatively classic in the context of investment arbitration: an argument challenging the ratione temporis applicability of the BIT, challenging the qualification of the disputed contracts as investments, challenging the scope of the most-favoured-nation clause as a way to invoke an umbrella clause from another BIT, and challenging the arbitral tribunal's jurisdiction based upon the choice-of-court clause stipulated in the 1990 contract in favour of Libyan courts.

Bearing in mind Paris Court of Appeal's concern for the protection of investors in an international context, these arguments were rejected one after another by the Court, which followed a teleological interpretation of the BIT.

Contribution by Rayan Fadel

Paris Court of Appeal, 23 January 2024, n° 22/16431, *GBO*

On 23 January 2024, the Paris Court of Appeal had to rule on whether an arbitration award could be set aside on the grounds of a breach of European Union competition law.

CA International (hereafter "Respondent" or "CAI") manufactures shoes bearing the licensed trademarks in Asia, which it resells in the countries wherein it holds a license, through wholesalers such as GBO Gesellschaft für Betrieborganisation mbH (hereafter "Claimant" or "GBO"), to which it invoices, in addition to the products, design fees and remuneration for the trademarks. On 21 February 2017, CAI entered into a contract with GBO, known as the "Framework Agreement", for the exclusive distribution of these shoes in Germany, Austria and Switzerland. The contract concerned the marketing of children's footwear by Claimant through licenses granted by Respondent. Article 16 of the contract contained an arbitration agreement under which disputes would be finally settled by an arbitral tribunal. Difficulties arose between the parties, leading GBO to suspend payments. On 20 November 2018, GBO notified CAI of the termination of the contract, accusing it of numerous breaches of undertakings causing financial losses.

On 28 November 2018, contesting the wrongful non-performance of the contract attributed to it by GBO, CAI, after unsuccessful formal notice, initiated arbitration proceedings to recover the sums it claimed were still due under their agreement. In an award rendered on 13 June 2022, the arbitral tribunal ruled that early termination was unjustified and ordered GBO to pay CAI (i) USD808,597.46 with interest from December 2, 2018; (ii) USD 6,942 with interest from December 2, 2018; and (iii) EUR 25,000 with interest from the date of the award. On 20 September 2022, GBO filed an action for annulment of this award in a dispute with CAI in the presence of CA Finance (hereafter the "CAF"), CAI's French parent company, which holds licenses for popular brands (children's cartoons such as Disney) that it licenses to CAI for use in the apparel sector. In its pleadings, Claimant asked the court to rule that (i) the February 2017 framework agreement concluded between the parties and its execution constituted an anti-competitive infringement and (ii) that the recognition and enforcement of the arbitral award of 13 June 2022 insofar as it condemned GBO on the basis of this agreement constituted a flagrant, effective and concrete infringement of French public policy.

In response, Respondent asked the Paris Court of Appeal to rule that (i) the contract of 21 February 2017 did not contain any provision likely to defeat the exemption from the application of Article 101§1 of the Treaty on the Functioning of the European Union (hereafter the "TFEU") provided for by EU regulation 330/2010 of 10 April 2010 and (ii) that the contract of 21 February 2017, to which the arbitration award of 12 June 2022 gives effect, did not contain any provisions in clear breach of international public policy, in particular by failing to comply with the provisions of Article 101§1 and 2 of the TFEU and Article 420-1 of the French Commercial Code.

The Paris Court of Appeal pointed out that under Article 1520 5° of the French Code of Civil Procedure, the annulment of an award may be sought when its recognition or enforcement is contrary to international public policy. It also stated that "[it] *is up to GBO to demonstrate concretely how the disputed framework agreement, to which the award gives effect, constitutes an unlawful agreement within the meaning of the provisions of the aforementioned article 101§1*" (§34).

The Court then analysed the contract in detail, noting that "[i]*t is clear from the terms of the contract that its sole purpose is to grant GBO an exclusive right to acquire, enjoy, use and distribute under license the contractual products in a specific territory, in this case children's shoes bearing trademarks corresponding to television films or cartoons manufactured in Asia*" (§39). The Court therefore ruled that the contract did not contain any stipulation restricting the buyer's ability to determine his selling price (§40), nor any restriction concerning the clientele to which GBO could sell the products purchased from CAI in Germany, Austria and Switzerland (§43). The Court held that in these circumstances, "*it has not been demonstrated that the award would give effect to an anti-competitive agreement, and that its enforcement or recognition would be contrary to international public policy*" (§45).

In its ruling of 23 January 2024, the Paris Court of Appeal dismissed GBO's action for annulment of the arbitration award rendered in Paris on 13 June 2022, and ordered GBO to pay CAI the sum of 15,000 euros and CAF the sum of EUR 5,000 under Article 700 of the French Code of Civil Procedure.

Contribution by Paul Gobetti

Paris Court of Appeal, 30 January 2024, n° 22/16683, *Petrosantander Romania*

Can a party be compelled to produce documents in its possession in an action to set aside an international arbitration award? This was the question put to the Paris Court of Appeal, which issued its ruling on 30 January 2024.

The case originally concerned a contract for the production and optimization of oil fields entered into by two oil companies, PetroSantander Romania and OMV Petrom, on 11 August 2010. A dispute arose concerning the inclusion of Administrative Overhead costs in the operating expenses of the contract. This dispute was settled by arbitration.

During the arbitration, PetroSantander Romania alleged that Petrom had provided an incomplete version of the "Petrom Economic Model", specifically excluding the part of the document showing how these Administrative Overhead costs were calculated and treated. PetroSantander Romania therefore asked the arbitral tribunal to declare the document incomplete and order the production of the complete original. In the final award issued on 8 August 2022, the majority of the arbitral tribunal rejected the request for production of the documents and concluded that PetroSantander Romania's claims should be dismissed.

PetroSantander Romania (hereafter the "Claimant") lodged an action for annulment of this award. On this occasion, the Claimant lodged an incidental application with the *conseiller de la mise en état* (a pre-trial judge of the Court, hereafter the "CME"), seeking an order for the production of these documents and the appointment of an expert to inspect their authenticity.

The CME answered in two steps: (1) firstly, it ruled on the competence of the CME for such requests, and (2) secondly, it ruled on the requests made.

First, with regard to the CME's competence, OMV Petrom (hereafter the "Respondent") opposed these claims on the grounds that the Arbitral Tribunal has exclusive jurisdiction over all such matters, and that the Court and the CME do not. The defendant also argued that this measure had already been requested from the arbitral tribunal and had been the subject of an adversarial debate. Finally, it was argued that to admit such a request would be to proceed with a review of the merits of the arbitral award.

The CME began by pointing out that it had all the powers necessary to communicate, obtain and produce documents, pursuant to Article 788 of the French Code of Civil Procedure. However, when it comes to annulment proceedings, the powers of the Court, and by extension of the CME, are limited, in that they cannot review the merits of the award. Moreover, the CME specified that any incident of forgery falls within the jurisdiction of the arbitral tribunal. The CME noted that in the present case, it was not seized of an incident of forgery and concluded that it was competent to order the production of documents or to order an expert appraisal, within the limits set out (§§15-18).

Next, concerning the requests made, the Claimant argued that the question of the authenticity and content of the document sought was central to the pursuit of the annulment claim and, above all, to establishing procedural fraud. It was argued that the arbitral tribunal made its decision based on elements external to the contract and that if the tribunal had this document in its possession, its decision would have been different. In response, the Respondent argued that the document was not decisive for the solution adopted by the arbitral tribunal, and that for procedural fraud to be sanctioned, the fraud must have an impact on the outcome of the proceedings.

The CME noted that the inclusion of Administrative Overhead costs as an operating expense was the subject of strong opposition between the two parties during the arbitration proceedings, and that it was an issue essential to the resolution of the dispute. Accordingly, the purpose of the request for document production was to invite the judge to rule on a substantive issue, which did not fall in the scope of its review (§§23-24). Consequently, the request for communication of documents and the related request for expert appraisal did not fall within the CME's powers and were rejected.

Finally, the CME considered that the factual elements in the Court's possession were sufficient to assess the alleged fraud.

Contribution by Iulian Chetreanu

Judgment of the High Court of England and Wales, 7 December 2023, *Palmat NV v. Bluequest Resources AG* [2023] EWHC 2940 (Comm)

The hearing before the High Court arose due to an LCIA award in which Bluequest (hereafter after the "Defendant") sought payment for a quantity of liquid caustic soda (LCS).

In December 2016, Palmat signed a Tripartite agreement, for the exchange of LCS against aluminum. The parties signed two agreements, the LCS agreement and the Aluminum Agreement. The former defined Palmat as the "Buyer" and Bluequest as the "Seller", while the latter defined the parties vice-versa. Both of the agreements contained arbitration clauses in providing for LCIA arbitration alongside choice-of-law clauses in favour of English law and the Arbitration Act 1996.

On 10 June 2017, Bluequest shipped the LCS in accordance with the terms set out in the LCS Agreement. The documents relevant to the shipment were apparently supplied by or on the orders of Palmat to Bauxilum on or around 16 June.

On 21 June 2017, Bluequest issued an invoice in respect of the shipment for an amount of USD 3,214,827.40.

On 23 June 2017, it was suggested on behalf of Palmat that shipment of the aluminum could be delayed, and 30 June 2017 came and went without shipment of the aluminum or production of a bill of lading relating to such a shipment.

On 21 September 2017, Palmat advised Bluequest that the Venalum plant had ceased manufacturing aluminum due to a power issue and that all shipments of aluminum had been suspended. No part of that sum was ever paid, nor was any part of the aluminum ever offered.

Bluequest initiated arbitration against Palmat Venezuela for payment by reference to the arbitration agreement contained in the LCS Agreement. The tribunal decided that it had no jurisdiction because Bluequest's counterparty under the LCS Agreement was Palmat. On 13 March 2020, Bluequest referred its claim against Palmat for payment to arbitration under the arbitration agreement contained in the LCS Agreement. Bluequest's claim succeeded. In the jurisdictional phase, Palmat argued that the two agreements should be viewed as one and could not qualify as a contract of sale. Bluequest could not qualify as "buyer" and "seller" in the two contracts accordingly, and therefore that neither the standard terms incorporated into the LCS agreement, nor the arbitration agreement were applicable. The jurisdictional challenge was rejected.

English courts interpret contracts in light of the natural and ordinary meaning of the provisions of the contract, the facts and the circumstances known or assumed to be known by the parties, disregarding subjective evidence of any party's intentions. In addition, courts can only consider facts or circumstances known or reasonably available to both parties. The most important tool is the wording used by the parties.

The challenge was based on sections 33 and 68 of the Arbitration Act 1996. Pursuant to the former the tribunal shall act fairly and impartially between the parties and adopt suitable procedure, while according to the latter, a party may challenge the award on the grounds of serious irregularity of the proceedings.

To succeed, an applicant must show: a breach of section 33 that amounted to a serious irregularity and gave rise to substantial injustice. The threshold is high, because of the Arbitration Act's aim to limit the intervention of courts in arbitral proceedings. The applicant must show that "*had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome*".

The first challenge refers to a tribunal's decision to consider a prior arbitration proceeding between the parties without any of the parties to the present arbitration invoking it in their submissions. Palmat argued that the paragraph pre-judged the substantive issue concerning whether there was one unitary contract rather than two separate binding agreements, or asserted that the issue was to be resolved by reference to what happened in the first arbitral proceedings. However, the judge rejected this argument, because the issue was addressed in detail by the tribunal which didn't just rely on the previous arbitration. The judge could not address the merits of the decision if the tribunal assessed the dispute on the merits, and concluded that the tribunal did.

The second challenge referred to the tribunal's view that pursuant to the LCS contract, a clear obligation existed to ship the aluminum by a specific date. The words underlined were said by the claimant to be objectionable because neither party had contended that this was so. The notion that it did so by reference to a point not argued was unmaintainable and the court thereby rejected this argument too. The claimant also argued that the tribunal failed to deal with all the issues put before it. Even if the claimant could prove this, it is also necessary to prove that the serious irregularity has caused or will cause it a substantial injustice.

The final substantive issue concerned interest. Claimant challenged the award on the basis that interest was awarded on arbitration and legal cost when the defendant had not sought interest on either. On this point the court ruled that interest was not in play in the relevant sense in the final hearing.

The claimant submitted that due to the above-mentioned reasoning, the court should remit the award back to the tribunal, whereas the defendant argued that if the court decided that interest on cost was outside of the arbitration claims, it should set aside only this part of the award leaving the other part untouched. The court basing its reasoning on section 68 of the Arbitration Act ("*a court has the power to set aside all or part of the award*"), set aside the award only on the part of "interest" and dismissed the claimant's claim.

Contribution by Stavros Tsiovolos

Judgment of the High Court of England and Wales, 19 January 2024, *Border Timbers Ltd v. Republic of Zimbabwe* [2024] EWHC 2940 (Comm)

In a decision dated 19 January 2024, the High Court ruled that an argument based upon sovereign immunity from jurisdiction may not be relied upon by a state at the stage of registration proceedings for an ICSID arbitral award, yet may arise later in relation to further steps towards execution.

On the facts, Swiss companies Border Timbers Ltd and Hangani Development Ltd (hereafter the "Claimants") initiated investor-state arbitration against the Republic of Zimbabwe (hereafter the "Defendant"). In an ICSID award dated 28 July 2015, the Defendant was ordered to pay USD 125 million of damages to the Claimants, as compensation for the expropriation of Claimants' land in Zimbabwe. Zimbabwe tried to set aside the award before an *ad hoc* ICSID committee, who dismissed the application for annulment in 2018.

In 2021, the Claimants made an *ex parte* application before the High Court for registration and entry of judgment on the award pursuant to CPR part 62.21, meaning that they applied to the court to ask that the award have the same force and effect as if it had been a judgment of the High Court as concerns the pecuniary obligations which it imposes, under section 2(1) of the Arbitration (International Investment Disputes) Act 1966 (hereafter the "1966 Act"). After the application was granted by Cockerill J and the award recognised, the Defendant applied to challenge her order, arguing that it enjoyed sovereign immunity from jurisdiction based upon the State Immunity Act 1978 (hereafter the "1978 Act"). The Claimants counter-argued by saying that the exceptions to immunity from jurisdiction under sections 2 and 9 of the 1978 Act were applicable on the facts.

Dias J first looked at whether the Defendant had waived its immunity under sections 2 (when the state has initiated the proceedings, intervened or taken steps therein) and 9 (when the state has agreed in writing to submit a dispute to arbitration).

- Regarding the 'section 2' exception, Dias J first considered, in light of Articles 54(3) and 55, that Article 54(1) of the ICSID Convention constituted a waiver of state immunity only in relation to the recognition and enforceability of awards, but not in relation to enforcement thereof by way of subsequent execution steps on assets [at [45]-[46]). She then turned on to the question as to whether the waiver enshrined in Article 54(1) could amount to a waiver of immunity within the meaning of section 2. Given the scheme of the ICSID Convention and in light of its *travaux préparatoires*, she refused to recognise such a thing, on the basis that the former provides for a blanket general immunity of jurisdiction save in some exceptional cases (at [66]), whereas the latter is concerned with specific proceedings before a specific court so that the waiver must concern the jurisdiction of the court before which the proceedings are initiated (at [68]). As such, it was held that the Defendant had not waived its jurisdiction under section 2 based upon Article 54.

- Regarding the 'section 9' exception, Dias J recalled that, following *PAO Tatneft v. Ukraine* [2018] EWHC 1797 (Comm), she was not bound by an arbitral tribunal or an ICSID *ad hoc* annulment committee regarding jurisdiction when ascertaining whether the state gave a valid consent to arbitration under section 9 [at [87]). While she considered that section 9 applied equally to ICSID and non-ICSID awards (at [89]), she ruled that on the facts the Claimants simply failed to establish that a valid agreement in writing to submit the dispute had been concluded (at [90]).

After ruling that the Defendant had not waived its immunity from jurisdiction, Dias J went on to tackle whether it did apply on the facts or not. She held that one is not concerned by the question of sovereign immunity from jurisdiction at the registration phase because the rules applicable to the registration of ICSID awards are different from those applicable to the registration of non-ICSID awards. Her reasoning was that when hearing an application for registration of ICSID awards, the High Court is to perform an "*essentially ministerial act in compliance with the UK's international obligations under the ICSID Convention [incorporated into UK law by the 1966 Act]*", *i.e.* to recognise them as binding (at [106(b)]). As such, and contrary to non-ICSID awards and Fraser J's reasoning in *Infrastructure Services Luxembourg Sarl v. Spain* [2023] EWHC 1226 (Comm), "*no exercise of the court's adjudicative jurisdiction is required when registering an ICSID award*", as the "*1966 Act confers an entitlement on the applicant to have the award registered which is unqualified save in respect of purely procedural requirements*" (at [106(a)]. Simply put, the reason why state immunity from jurisdiction may not be invoked at the registration stage of an ICSID award is because English courts have no discretion in that matter pursuant to the 1966 Act. To our knowledge, this is the first time that such "*novel approach*" is followed, for which "*there is no direct authority*" (at [111]).

Last but not least, Dias J recalled that since it is an "*overriding duty of the court to give effect to state immunity even if the state does not appear*", it follows that it creates a positive duty of full and frank discloure upon the applicant which "*names a state as respondent to address the question in order to allow the court to satisfy itself that immunity is not engaged*" (at [115]). While this means that the Court had some discretion to set aside Cockerill J's order, she decided that it would be inappropriate to do so on the basis of the Claimants' sole failure to comply with such duty, given the applicant's prerogative to have the ICSID award registered (at [118]).

Contribution by Yoann Lin

Judgment of the Hong Kong Court of First Instance, 29 December 2023, *G v. N* [2023] HKCFI 3366

In a decision dated 29 December 2023, the Hong Kong Court of First Instance decided to remit an arbitrated matter to the arbitrator, rather than set the award aside despite the fact that enforcement of the awards were deemed to violate public policy, in the context of a change in the law regarding the doctrine of illegality which occurred only a few days before – and had a significant impact upon – the arbitrator's decision.

On the facts, G (hereafter the "Claimant") was a shareholder in British Virgin Islands company N (hereafter the "Defendant") which was listed on the New York Stock Exchange. They concluded a securities purchase agreement (hereafter the "SPA"), whereby the Claimant would increase their shareholding from approximately 23,9% to 43,9% in consideration of USD 147 million. The agreement was governed by Hong Kong law and contained an HKIAC arbitration clause. It allowed the Claimant to become the company's biggest shareholder and to defeat a requisition by another shareholder called IsZo Capital for a shareholder meeting purporting to change the Defendant's board's composition.

Before British Virgin Islands' first instance and appellate courts, IsZo Capital managed to avoid and set aside the SPA on the ground that it was in illegal for breaching British Virgin Islands' company law. However, the Defendant was not ordered to restitute the consideration monies back to the Claimant, so that the latter commenced arbitration, seeking restitution thereof. The arbitrator rendered two partial awards on 6 April 2023 and 28 July 2023 which respectively ordered that the Claimant retain the USD 147 million consideration after finding that the SPA was illegal on the basis of the English case of *Tinsley v. Milligan* [1994] 1 AC 340, but also to pay the Defendant USD 13 million in damages following the Defendant's claim to be paid "*consequential, special or punitive damages*".

One should note that case law in Hong Kong on the doctrine of illegality had changed a few days before the first partial award had been rendered. Indeed, the decision of *Monat Investment Ltd v. All Person(s) in Occupation of Part of The Remaining Portion of Lot No. 591 in Mui Wo D.D. 4 No.16 Ma Po Tsuen, Mui Wo, Lantau Island & Anor* [2023] HKCA 479 ruled that the House of Lords *Tinsley* decision was no longer good law (which established the 'reliance' test for illegality, whereby a claimant is to be denied a remedy if they had to *rely* in any way upon the underlying illegal transaction), and preferred to follow the now established 'range of factors' test as set out in the UK Supreme Court case of *Patel v. Mirza* [2016] UKSC 42.

The Claimant made an application before the Hong Kong Court of First Instance to set aside the awards, or alternatively to remit the dispute to the sole arbitrator. Their first argument was that the arbitrator's decision not to order the restitution of consideration monies – based upon an incorrect application of Hong Kong law on illegality – was so disproportionate and led to such a harsh and manifestly unjust result that it would be contrary to public policy to enforce the two partial awards.

In response to that first argument, Mimmie Chan J first held that the arbitral award could have been set aside on the ground of public policy. Indeed, she recalled that the doctrine of illegality involves a two-stage test. First, an illegality in law must be found, based upon the jurisdiction's application of the law to the facts. Second, one must determine, based upon a range of factors (*i.e.* the underlying purpose of the prohibition which has been transgressed and whether the purpose would be enforced by the denial of the claim, any other relevant public policy on which the claim's denial may have an impact, and whether the claim's denial would be a proportionate response to the illegality bearing in mind that punishment is a matter for the criminal courts), whether the consequences of the illegality are such that the claimant should be denied their remedy (at [33]). Following the Privy Council case of *Betamax v. State Trading Corp* [2021] UKPC 14 that she deemed as "*highly persuasive*" authority for arbitration law in Hong Kong [at [35]), she found that the doctrine of illegality could only be applied at the second stage to ascertain whether the consequences of the illegality were such as to cause the enforcement of the awards to be in conflict with public policy, but not at the first stage (at [36]). By doing so, the finality of the award is not called into question, as the courts are simply asked to "*decide whether there is any conflict between public policy and the award, on the findings of law and facts made by the arbitrator which are not renewed*" (at [38]). After asserting that one should focus upon the meaning of public policy at the date that the courts render their decisions, she applied the doctrine of illegality – this time not to the SPA and the question of restitution of the consideration monies – but to the question of enforcement of the awards, and ruled that the awards could be set aside on the basis that it was manifestly unjust and contrary to public policy to uphold the awards (at [41]). This makes sense as the SPA had been declared void by the British Virgin Islands courts, but the consideration monies not restituted to the Claimant. However, she preferred to remit the matter to the arbitrator for them to ascertain whether their award would remain unchanged or not in the light of the *Monat* decision (at [42]).

The Claimant then put forward the idea whereby the arbitrator lacked authority when ordering the Claimant to pay USD 13 million in damages in contravention of the arbitration agreement which takes away from the arbitrator any "*authority to award consequential, special or punitive damages*".

Minnie Chan J responded by saying that this argument made before the Court actually qualified as claiming that the arbitrator lacked jurisdiction over the dispute (at [44]). As such, the Claimant was estopped from relying upon it, as they had not already done so on the very basis of a lack of jurisdiction during arbitral proceedings (contrary to Article 16 of the UNCITRAL Model Law) (at [45], [47]). She added that the argument made before the arbitrator was to be analysed as a challenge to admissibility of the Defendant's claim (at [50]). Since the arbitrator already ruled on that claim, she held that the Court had no power to review the arbitrator's decision on that matter as it would amount to being able to review awards for errors of law, which is not permitted (at [53]).

Contribution by Yoann Lin

INTERVIEW WITH LISA STEFANI

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

I came to France to study at university. I read a law degree at Paris I University and was immediately fascinated by the module in international relations during my first year which was taught at the time by a professor who was speaking passionately about his activities as an arbitrator and/or counsel in cases involving states, which led me to direct my studies towards international law, in particular in order to give myself the opportunity to travel and live elsewhere than in France while being a foreigner myself. When it came to choosing a specialisation to practice as a lawyer, I naturally opted for international arbitration.

2. **You worked at Herbert Smith Freehills as a trainee before joining them as an associate. What advice would you give to trainee lawyers who hope to be hired after their *stage final*?**

Not to focus on being hired as an associate, but rather to think about how this *stage final*'s opportunity can be used towards improving their skills, whatever the tasks they are asked to complete. To be extremely rigorous, to strive for excellence and, of course, to show that they know how to work as part of a team. And, of course, to take pleasure in discovering this wonderful profession.

3. **Can you tell us about a case that you worked on that made a particular impression on you?**

One of the cases that has particularly struck me was an investment arbitration based upon a bilateral investment treaty, and more specifically the phase concerning jurisdiction. The proceedings forked so as to first deal with a question relating to the tribunal's jurisdiction – the tribunal already had jurisdiction to rule on the expropriation clause, but the question arose as to whether it also had jurisdiction to rule on the fair and equitable treatment clause by dint of the application of the most-favoured-nation clause. We represented the claimant and the legal issues were complex, novel and legally challenging. It was an intellectually rewarding experience.

4. **You worked as a lawyer on secondment at Air France for about a year and a half. How does the work of a lawyer on secondment differ from that of a lawyer in a law firm? And what do you think are the specific features of arbitration in the transport sector?**

I was seconded to Air France from July 2021 to early May 2022. A lawyer on secondment essentially does the work of an in-house lawyer.

As for the specificity of the transport sector, it does not lie as much in the arbitration procedure as in the sector of activity. Just like in commercial litigation, each sector possesses its own economic, technical and financial features, etc., and both counsel and the arbitral tribunal need to understand the sector in question in order to grasp the issues at stake in the dispute; that is one of arbitration' great intellectual appeals: from one case to another, the sectoral field in question varies.

5. **You co-authored an article in the *Lettre des Juristes d'Affaires* regarding transparency in international arbitration. This requirement in the business world seems to stem from an impetus initiated by Jus Mundi, and recently reasserted by the ICC's decision in November 2023 to publish awards and terms of reference concerning arbitrations involving Brazilian public entities. Do you think this trend that will increase or decrease over time?**

I believe that it will increase over time, particularly for cases involving States and/or public entities, given the public interests involved.

NEXT MONTH'S EVENTS

18 to 22 March: Paris Arbitration Week

Organised by Paris Arbitration Week

Website: https://parisarbitrationweek.com/event/

Selection of events during the week:

- **18 March**
    - **9am to 6pm: 8th ICC European Conference on International Arbitration**

Organised by the ICC Court of International Arbitration

Where? Hôtel Westin Paris Vendôme – 3 rue de Castiglione, 75001 Paris

Website: https://parisarbitrationweek.com/event/8th-icc-european-conference-on-international-arbitration (mandatory registration for a fee before 18 March)

    - **12:30pm to 2:30pm: Conference "*Costs as a barrier to accessign arbitral justice | A focus on Africa*"**

Organised by Reed Smith

Where? Reed Smith – 112 avenue Kléber, 75116 Paris or online (on request only)

Website: https://parisarbitrationweek.com/event/no-money-no-honey-access-to-arbitral-justice-a-focus-on-africa (mandatory registration before 18 March)

    - **5pm to 7:30pm: Conference "*All you need to now about Arbitration and Crypto Assets*"**

Organised by Queen Marie Universite of London, Sorbonne University Law School

Where? Room D306 – 17 rue de la Sorbonne, 75005 Paris or online

Website: https://parisarbitrationweek.com/event/all-you-need-to-know-about-arbitration-and-crypto-assets/ (mandatory registration before 16 March)

- **19 March**
    - **2:30pm to 4:30pm: Conference "*Innovating Justice: The Rise of AI in International Arbitration*"**

Organised by Reed Smith

Where? Reed Smith – 112 avenue Kléber, 75116 or online (on request only)

Website: https://parisarbitrationweek.com/event/innovating-justice-ais-role-in-reshaping-international-arbitration (mandatory registration before 19 March)

- **20 March**

    - **8:30am to 10:30am: Breakfast "*Mining Arbitration: Damages and the Valuation Multiplier, ESG Controls, and Other Sparkling Topics*"**

Organised by Hogan Lovells, French Compliance Society, Omni Bridgeway

Where? Hogan Lovells – 17 avenue de Matignon, 75008 Paris

Website: https://parisarbitrationweek.com/event/champagne-breakfast-on-mining-arbitration-damages-the-valuation-multiplier-esg-controls-and-other-sparkling-topics/ (mandatory registration before 20 March)

    - **2:30pm to 4:30pm: Conference "*Arbitration and public persons, French and European perspectives*"**

Organised by Teynier Pic

Where? Maison de l'Alsace – 39 avenue des Champs-Elysées, 75008 Paris

Website: https://parisarbitrationweek.com/event/larbitrage-et-les-personnes-publiques-perspectives-francaise-et-europeenne/ (mandatory registratiion before 11 March)

    - **4:30pm to 6:30pm: Conference "*Lusophones' Arbitration Meeting – Arbitration, Crime and Criminal Proceedings: What is Expected from Counsel and Arbitrators*" (in Portuguese)**

Organised by Derains & Gharavi

Where? Les Salons Hoche – 9 avenue Hoche, 75008 Paris or online (on request only)

Website: https://parisarbitrationweek.com/event/lusophones-arbitration-meeting-arbitration-crime-and-criminal-proceedings-what-is-expected-from-counsel-and-arbitrators-in-portuguese/ (mandatory registration before 8 March)

    - **8pm to 2am: PAW Young Arbitration Cruise 2024**

Organised by Paris Arbitration Week, CFA-40, ICC YAAF and Paris Very Young Arbitration Practitioners

Where? Le Paquebot – Port de Javel le Haut, 75015 Paris

Website: https://parisarbitrationweek.com/event/paw-young-arbitration-cruise-2024/ (mandatory registration for a fee before 14 March)

- **21 March**

    - **9am to 11am: GAR Awards**

Organised by Global Arbitration Review

Where? Hôtel du Collectionneur – 51 to 57 rue de Courcelles, 75008 Paris

Website: https://parisarbitrationweek.com/event/gar-awards-2024/ (mandatory registration for a fee before 21 March)

    - **7:30pm to 9:30pm: Networking Cocktail "*Arbitration Institutions in the Middle East and Gulf regions*"**

Organised by Teynier Pic

Where? Teynier Pic – 2 rue Lord Byron, 75008 Paris

Website: : https://parisarbitrationweek.com/event/arbitration-institutions-in-the-middle-east-and-golf-regions/ (mandatory registration before 20 March)

- **22 March**

    - **9am to 11am: Networking Breakfast "*The Tide is Rising? Arbitration in Eastern Europe: Navigating Cultural, Legal and Practical Considerations*"**

Organised by Nash Arbitrazh

Where? Sherman & Sterlin – 7 rue Jacques Bingen, 75017 (or online by request)

Website: https://parisarbitrationweek.com/event/breakfast-with-nash-arbitrazh-hosted-by-ankura-and-shearman-sterling/ (mandatory registration before 19 March)

    - **10am to 2:30pm: Conference "*Do awards against sovereigns even count?*"**

Organised by Archipel

Where? La Galerie Bourbon – 79 bis avenue Marceau, 75116 Paris or online (on request only)

Website: https://parisarbitrationweek.com/event/do-awards-against-sovereigns-even-count/ (mandatory registration before 15 March)

INTERNSHIP AND JOB OPPORTUNITIES

LAW PROFILER

INTERNSHIP
DECHERT LLP

TRIAL, INVESTIGATIONS
& SECURITIES
Start Date: January or July 2024
Duration: 6 months
Location: Paris

INTERNSHIP
NORTON ROSE FULBRIGHT

LITIGATION & ARBITRATION
Start Date: July 2024
Duration : 6 months
Location : Paris

INTERNSHIP
SQUIRE PATTON BOGGS

LITIGATION, INSURANCE
& ARBITRATION
Start Date: January 2025
Duration: 6 months
Location: Paris

INTERNSHIP
WATSON FARLEY
& WILLIAMS

LITIGATION & ARBITRATION
Start Date: January 2025
Duration: 6 months
Location: Paris