PARISBABYARBITRATION

BIBERON

Monthly Arbitration Newsletter – English version

DECEMBER 2022, No. 57

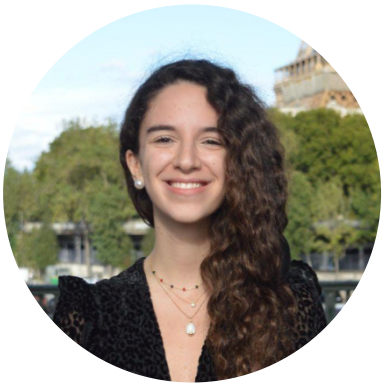
French and foreign court decisions

International court decisions

Interview with EZZINE ANDOULSI

Our partners:

PARIS BABY ARBITRATION TEAM

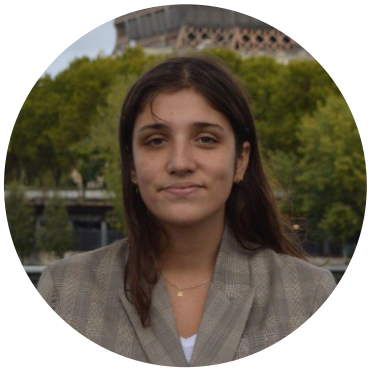


ANDY HADDAD
Secretary General

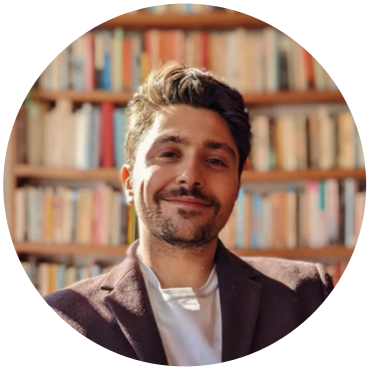
LINA ETTABOUTI
President

CÉSAR HASSON
Treasurer

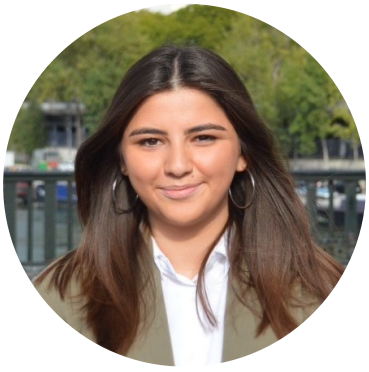
EDITORIAL TEAM



MANON GUILLON
General Manager



ANTHONY AL NOUAR
Contributor Manager



DILA AYNAR
Editor

TIMOTHEE HAYS
Editor

THIS MONTHS' CONTRIBUTORS

SEDA DUNDAR

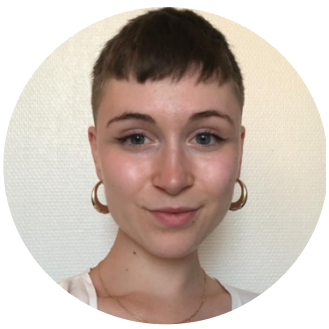
JORGE HIDALGO

PAUL GOBETTI

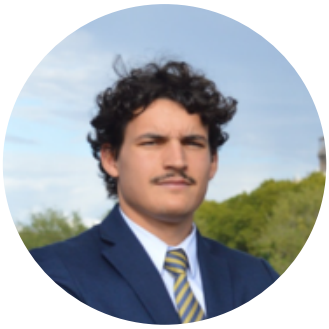
VANESSA PATERSON DE CARVALHO PONTES

ROMI GRUMBERG

SARAH AMEDRO



LOUISE NICOT



GHAÏS GHEDJATI

OUR PARTNERS

THREE CROWNS

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

LAW PROFILER

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

TABLE OF CONTENTS

FOREWORD

Paris Baby Arbitration is a Parisian society and a networking group of students and young practitioners aiming the promotion of International Arbitration practice, as well as the accessibility of this field of law, still little known.

Each month, its team works on editing the Biberon, an English and French newsletter, intended to facilitate the understanding of the latest and the most prominent decisions given by states and international jurisdictions, and the arbitral awards.

By doing so, Paris Baby Arbitration hopes to encourage the contribution of students and junior lawyers.

Paris Baby Arbitration believes in work, goodwill and openness values, which explains its willingness to permit younger jurists and students to express themselves and to communicate their passion for arbitration. The values that drive Paris Baby Arbitration are openness and goodwill, which is why we want to allow students and junior lawyers to express their passion for the practice of International Arbitration.

You can find all the previously published editions of the Biberon and subscribe to receive a new issue each month on our website: parisbabyarbitration.com/

We also invite you to follow us on LinkedIn and Facebook and become a member of our Facebook group.

Enjoy your reading!

FRENCH COURTS

COURT OF CASSATION

Court of Cassation, commercial chamber, October 5, 2022, No. 20/22409

Contribution by Jorge Hidalgo

On October 5, 2022, the French *Court of Cassation* issued a decision ruling that the time-limit provided for in Article R. 624-5 of the French commercial Code is interrupted by transmission of the request of arbitration to the International Court of Arbitration.

In 2009, a company under Ethiopian law, Hydro Construction & Eng Co Ltd (hereinafter "Hydro"), entered into a contract with a French law company (hereinafter "Vergnet") in the framework of a construction project in Ethiopia. The latter unilaterally terminated the contract. Hydro, relying on an arbitration clause providing for the settlement of disputes before the International Court of Arbitration, filed a request for arbitration on April 18, 2013, before the secretariat of the ICC. On May 6, 2014, the arbitration proceedings were suspended.

On August 30, 2017, the Orléans Commercial Court initiated judicial reorganization proceedings against Vergnet. Subsequently, Hydro declared its claim concerning compensation for early termination to the bankruptcy proceeding but Vergnet challenged this claim.

On September 12, 2018, the bankruptcy judge rendered an order suspending the proceedings on this claim pending a decision by a judge with jurisdiction. The order was notified to Hydro on September 24, 2018. On October 10, 2018, Hydro requested the reopening of the ICC arbitration proceedings, and a sole arbitrator was appointed on November 28, 2018. On October 2, 2019, an order of the bankruptcy judge pronounced the foreclosure of Hydro, and its claim was excluded from the proceedings.

On November 5, 2020, the Orléans Court of Appeal dismissed the request of Vergnet for a ruling on the foreclosure of Hydro. Vergnet decided to appeal this decision before the French Court of Cassation.

The claimant argued that, concerning the bankruptcy judge order suspending the proceedings on the claim pending a decision by a judge with jurisdiction in a time-limit of a month, that an arbitral tribunal is seized of the dispute only from the moment when it is composed. Furthermore, the claimant argued in its appeal that the statutory time-limit before foreclosure is mandatory even if the notification of the order addressed to the defendant does not mention this time-lapse.

The claimant also invoked the indivisibility of the disputes. Consequently, the fact that Hydro did not implicate all the insolvency practitioners, such as the court-appointed receiver, at the time of the referral to the arbitral tribunal, shall have an impact on the regularity of the referral.

In this decision dated October 5, 2022, the commercial chamber of the French Court of Cassation dismissed the claimant's appeal.

Firstly, concerning the main argumentation, the Court ruled that following articles 4.1 and 4.2 of the ICC Arbitration Rules, the date to be considered as the one commencing the proceedings should be the moment when one of the parties submits its request of arbitration to the secretariat of the ICC, and not the date when the arbitration tribunal is constituted. The Court confirmed the Orléans Court of Appeal's ruling, which considered that the defendant did not have the capacity to directly appoint the arbitrators. Thus, since the request of arbitration had been submitted in the statutory time-limit, there shall not be foreclosure.

Secondly, concerning the argument on the indivisibility of the disputes. The Court ruled that although this indivisibility supposed that the defendant would have implicated the insolvency practitioners at the time of the referral to the arbitral tribunal, the omitted parties could still be called *a posteriori* within the arbitration procedure. Consequently, the Court rejected the appeal and ordered the claimant to pay the costs.

Court of Cassation, First civil chamber, November 9, 2022, No. 21-17203

Contribution by Ghaïs Ghedjati

On November 9, 2022, the French *Court of cassation* ruled on two issues: the principle of equality of the parties in the constitution of the arbitral tribunal and the duty to disclose.

On December 15, 2000, Vidatel, PT Ventures, Mercury and Geni, then equal partners in Unitel, entered into a shareholders' agreement including under the auspices of the International Chamber of Commerce. The terms were as follows: each of them to choose an arbitrator, then the four would appoint the chairman of the tribunal. If a difficulty arose, the arbitration institution would resolve it.

Believing that it had been excluded from the management of Unitel by its partners, PT Ventures filed a request for arbitration, dated October 13, 2015, with the ICC Secretariat, asking for a change in the modalities for appointing the arbitrators. Indeed, the claimant considered that, in view of the converging interests of its opponents, the arbitral tribunal should comprise only three arbitrators instead of the five provided for in the clause, in particular because of the principle of equality of the parties in the constitution of the tribunal. As the difficulties in appointing arbitrators persisted, the ICC appointed four arbitrators and a chairman.

On 20 February 2019, the arbitral tribunal recognised the liability of the defendant companies and ordered them to pay damages resulting from the loss suffered by PT Ventures as well as the defence costs incurred by the latter. In an addendum dated April 30, 2019, the quantum of damages was reduced by the Court.

One of the companies, Vidatel, filed an action for annulment of this award and its addendum on the basis of Article 1520 2° of the French Code of Civil Procedure the irregular constitution of the arbitral tribunal

The claimant company considered that the principle of equality of the parties in the constitution of the arbitral tribunal as well as the principle of independence and impartiality of the arbitrators, in view of the non-disclosure of a litigious fact by one of the arbitrators who rendered the award, were grounds for setting aside the award.

In a judgment dated January 26, 2021, the International Commercial Chamber of the Paris Court of Appeal (*CCIP-CA*) dismissed this action for annulment while ordering the claimant to pay the sum of 300.000 euros under Article 700 of the French Code of Civil Procedure. The company *Vidatel* then appealed to the Court of Cassation.

In support of its appeal, Vidatel presented two pleas in law focusing on the irregular constitution of the arbitral tribunal.

Firstly, it criticised the Parisians judges for not having identified an infringement of the principle of equality of the parties in the constitution of the arbitral tribunal. This principle is derived in particular from Articles 11(6) and 12(8) of the ICC Rules of Arbitration and from Article 1453 of the French Code of Civil Procedure, applicable in international matters by virtue of Article 1506(2). In the words of *Vidatel*, this principle "*postulates only that the parties have the same rights in the process of appointing arbitrators*". This was not the case in the present situation, according to the company, in view of the facts set out above. The appellant therefore alleged a violation of the above provisions by the Paris Court of appeal.

Secondly, the appellant company argued, on the basis of Article 1456 paragraph 2 of the French Code of Civil Procedure, that the principle of independence and impartiality was not respected. In particular, because of a failure on the part of one of the arbitrators to comply with the obligation of disclosure imposed on him when he accepted his assignment and which continued throughout the duration of the assignment. Indeed, Vidatel accused one of the arbitrators of having several links with one of the shareholders of the company Oi, itself the parent company of one of the companies involved in the dispute: PT Ventures.

The first plea by Vidatel was rejected by the Court as unfounded. The Court reasoned that since there was "*a disagreement on the modalities of constitution of the arbitral tribunal, which justified that the arbitration centre itself appointed all the members of the arbitral tribunal, so that all the parties were deprived of the right to choose their arbitrator, the equality between them was preserved*". The infringement of the principle of equality of the parties in the constitution of the arbitral tribunal was not, therefore, characterised according to the Court.

The second plea did not meet with the Court's approval either, in that it considers that the judges of the Court of first instance legally justified their decision. Indeed, they sovereignly deduced that, in light of the facts at issue, "*there was not a sufficiently close and intense link*" between *PT* Ventures and the firm of one of the arbitrators "*to raise a reasonable doubt in the minds of the parties as to the independence of the arbitrator*". Therefore, due to the low intensity and proximity of the links between one of the parties and one of the arbitrators, the Court of cassation considered that these facts did not fall within the scope of the arbitrator's obligation to disclose. Moreover, it is worth noting that the Court chose not to rule on the notion of "known fact" resulting in the "*notoriety exception*".

The French Supreme Court thus rejected the appeal lodged by *Vidatel*.

Court of Cassation, Commercial Chamber, November 9, 2022, No. 20/13805

Contribution by Sarah Amedro

On November 9, 2022, the French *Court of Cassation* handed down a decision concerning the principle that the judge must rule only on what is asked of him and cannot modify the subject-matter of the dispute.

In this case, the X consorts entered into a deed of assignment with a guarantee of assets and liabilities with Société générale de commerce de la Réunion (hereinafter "Sogecore") providing for the transfer of 70% of their shareholdings in five companies for a final amount to be determined on November 30, 2006. These deeds of assignments contained arbitration clauses.

Subsequently, a dispute concerning the determination of the transfer price arose between the parties. Sogecore therefore set up an ad hoc arbitration. The arbitral tribunal issued four awards (on December 9 and December 30, 2008, June 26, 2009 and October 29, 2009). Sogecore filed an application for annulment of the awards rendered on December 30, 2008 (hereinafter "award No. 2") and October 29, 2009 (hereinafter "award No. 4") with the Court of appeal.

The Paris Court of Appeal, in a judgment dated November 14, 2017, annulled Award No. 2 and partially annulled Award No. 4 only in its provisions ruling on the costs of the arbitration proceedings and in those taking into account the condemnation in Award No. 2. This decision was annulled by the First Chamber of the Court of Cassation on December 3, 2014 No. 13-10.567 and then on March 18, 2015 No. 13-21.059.

The Paris Court of Appeal, in a judgment dated July 2, 2019, declared that the X consorts are debtors of the sum of 553,709.12 euros towards the company Sogecore after compensation and subject to interest and periodic penalty payments. In this decision, the Paris Court of Appeal also ordered Sogecore to pay each of the X consorts the sum of 100,000 euros in damages as compensation for their professional loss. The X consorts requested a judicial review (cassation) of this decision and Sogecore cross-appealed.

In their main appeal, the X consorts argued that, on the basis of Articles 4 and 5 of the Code of Civil Procedure, the judge is bound by the submissions of the parties and must rule only on what is requested of him. The plaintiffs in cassation therefore argued that the judges of the Paris Court of Appeal should only take into account the amount claimed by Sogecore, i.e. 9,25,315.51 euros in its pleadings, and therefore could not order them to pay the sum of 1,091,464.63 euros.

In its cross-appeal, Sogecore argued, on the basis of Article 4 of the French Code of Civil Procedure, that the judge cannot change the subject matter of the dispute. Sogecore argued that the Court of Appeal had modified the subject matter of the dispute by stating that the delays in payment for which it was condemned by an arbitration award that was subsequently annulled had caused the X consorts a professional prejudice by depriving them of the possibility of having the necessary funds to carry out professional projects.

The high court held, first of all, that the Court of Appeal could not include the partial restitution of the final price of the transfer of 70% of the shares in its calculation of the sum corresponding to the condemnation of the X consorts against the Sogecore company, when this price was not included in the condemnations pronounced by the arbitration awards under appeal.

The Court of Cassation also considered that, with regard to the incidental plea, the judge cannot order the company Sogecore to pay damages and interest as compensation for the prejudice caused by the delay in payment of the awards made in arbitration awards No. 1 and No. 3, whereas the X consorts stated in their pleadings that the prejudice was caused by the delay in payment of the awards made in arbitration awards No. 2 and No. 4.

On these grounds, the Court of Cassation quashed the judgment of July 2, 2019 on these two grounds only.

Paris Court of Appeal, May 31, 2022, No. 20/06119

Contribution by Louise Nicot

On May 31, 2022, the International Commercial Chamber of the Paris Court of Appeal dismissed the annulment appeal filed by Hydro S.R.L. (hereinafter "Hydro") against the international arbitral award on the application for review rendered under the aegis of the International Chamber of Commerce (ICC) on February 11, 2020, regarding the dispute between Hydro and the Republic of Albania.

Hydro, an Italian company, had substituted itself for a party to a concession agreement entered into in 1997 for the construction and operation of a hydroelectric power plant in the Kalivaç region of Albania (hereinafter "Kalivaç project"). The Kalivaç project was granted by the Albanian government for a period of 30 years, however the works which started on November 30, 2003 stopped in June 2014 following the occurrence of disputes between the parties. In May 2017, the Republic of Albania launched a new tender for the continuation of the Kalivaç project.

Following the cessation of work, Hydro filed a first claim for compensation with the ICC in 2014 based on the alleged violation of the obligations contained in the concession agreement and which was rejected on January 8, 2018. On June 30, 2017, Hydro had filed a second application with the ICC for breach of the concession agreement and compensation for the facts of direct expropriation, caused, according to Hydro, by the tender issued by the Republic of Albania. This second claim was rejected on June 4, 2019 by a final arbitration award against which Hydro filed an application for review which was itself rejected by an award on review issued on February 11, 2020.

On April 23, 2020, Hydro filed an annulment appeal with the Paris Court of Appeal against the February 11, 2020 award issued by an ICC arbitral tribunal (hereinafter, "Review Tribunal"). In this latest appeal, Hydro raised three grounds of appeal against the award rendered by the Review Tribunal on February 11, 2020, including violations of the tribunal's mission, of the adversarial principle and of international public policy.

The Court considered that, with regard to the ground for annulment based on the Review Tribunal's violation of its mission, Hydro's arguments that the statement of reasons for the Tribunal's decision was incomplete and insufficient, and that the mission statement of the arbitral tribunal hearing the claim on the merits on which the final award of June 4, 2019 was based, were violated by the Review Tribunal, are not admissible arguments insofar as they concern facts established by the arbitral tribunal that made the final award of June 4, 2019, which were not contested by Hydro and which were beyond the control of the Review Tribunal.

The Court observed that the Review Tribunal ruled within the limits of the claim and rejected this plea in full. As to the admissibility of the plea for annulment based on the violation of the principle of contradiction, the Court observes that Hydro, which alleges a procedural irregularity in the proceedings before the Arbitral Tribunal that rendered the Final Award of June 4, 2019, is in fact criticising the examination of the merits of that same tribunal rather than the reasoning of the decision of the Review Tribunal.

In these circumstances, the Court rejected this plea without ruling on its admissibility since it tends, according to the Court, "*to sanction an alleged misjudgement of the final award by confusing the arbitral proceedings*". As to the plea for annulment based on the violation of international public policy, the Court determined that it constituted a reformulation of the previous pleas and should therefore be rejected.

The Court thus declared the grounds for annulment inadmissible, dismissed the action for annulment brought by Hydro against the award on the application for review and ordered Hydro to pay the costs of the proceedings and compensation of EUR 60,000 to the Republic of Albania under Article 700 of the French Code of Civil Procedure.

Paris Court of Appeal, October 18, 2022, No. 21/2203

Contribution by Vanessa Paterson de Carvalho Pontes

On October 18, 2022, the Paris Court of Appeal annulled the arbitration award rendered on December 23, 2020, concerning a dispute between two investment companies, namely the French-law company Souleyas Investissement (hereinafter "Souleyas") and the Belgian-law company BDI, and Mr. [O] [E] (hereinafter "Mr. [E]") and the French-law holding company APYC.

These arbitration proceedings originated from a dispute between partners in the context of investments made by BDI and Souleyas in 2017 through the acquisition of shares of the simplified joint stock company Bien Sur la Route (hereinafter "BSLR"). The founder of BSLR, Mr. [E], was its president and its senior partner through the company APYC. By judgment of October 4, 2017, BSLR took over the business of Voitures Noires, a company in judicial liquidation, under the disposal plan approved by the Paris Commercial Court. Such takeover did not have the expected effects. As a result, BSLR was placed in judicial liquidation in July 2018.

BDI and Souleyas considered that Mr. [E] and APYC were responsible for the liquidation of BSLR and the loss of their investment. Thus, on July 31, 2019, BDI and Souleyas filed an arbitration request to the Secretary General of the French Arbitration Association (AFA), on the basis of the arbitration agreement resulting from the combined provisions of BSLR's articles of association and the shareholder's agreement.

The arbitral tribunal, in an award rendered on December 23, 2020, rejected the claims of BDI and Souleyas. On January 26, 2021, the investment companies brought an action for annulment against this award on two grounds.

First, they argued that the award should be annulled because of the tribunal's failure to comply with the principle of contradiction. They argued that their main claims were based on Mr. [E]'s failure to comply with his personal undertaking to finance BSLR in the event of default by the investors, as set out in the judgment of the Paris Commercial Court approving the disposal plan. They emphasized that the defendants did not challenge the personal nature of Mr. [E]'s commitment. They criticized the arbitral tribunal for having rejected their claim by holding on its own initiative that Mr. [E]'s commitment had been made in his capacity as legal representative of BSLR without examining his personal liability. They deduced that the court relied on a plea raised of its own motion from which it drew legal consequences different from those discussed, without ruling on the personal liability of Mr. [E], which was nevertheless agreed upon by the parties.

Secondly, the investment companies argued that this change of legal basis by the arbitral tribunal on a decisive point of the dispute constitutes a violation of its mission.

In response, Mr. [E] and APYC rejected the argument that the nature of Mr. [E]'s commitment was not part of the debate, arguing that while there was a consensus on the personal nature of the commitment, the subject was raised in plaintiffs' briefs and in defendants' pleadings, so that the issue was a matter for the arbitral tribunal to decide. According to them, the matter fell under the discretion of the arbitral tribunal, which was not required to follow the parties' proposals and its legal reasoning, nor to submit the latter to an adversarial debate. They added that, in any event, the arbitral tribunal had principally held that the undertaking had not been breached, regardless of its personal nature, hence they reject the claim.

The Court of Appeal declared admissible the plea alleging the violation of the principle of contradiction, recalling that such violation gives rise to an action for annulment under article 1520-4° of the French Code of Civil Procedure. The Court of Appeal noted that in order to assess Mr. [E]'s non-compliance with his commitment to finance BSLR, the arbitral tribunal relied on a legal characterization of Mr. [E]'s commitment that had not given rise to debate, since there was a consensus on the personal nature of this commitment, which was a fact expressly admitted by the parties. Considering that the arbitral tribunal, on the basis of the facts proposed to it by the parties by mutual agreement, ruled on the legal nature of Mr. [E]'s undertaking in order to base its decision, even though none of the parties had invoked it during the debates, and that it therefore, in order to reject the claim, raised of its own motion a plea that had not been considered by the parties, without requesting their observations on this point, the Court finds that the tribunal disregarded the principle of the contradiction.

For these reasons, the Court has annulled the arbitration award rendered on December 23, 2020, and ordered the company APYC and Mr. [E] to pay the costs of the proceedings.

Supreme Court of Nevada, June 2, 2022, *SR Construction, Inc. v. Peek Brothers Construction, Inc.*, No. 827/86

Contribution by Seda Dundar

On June 2, 2022, the Supreme Court of Nevada reversed the decision of the district Court denying a motion to compel arbitration and outlined the scope of application of an arbitration clause contained in a master subcontractor agreement and the scope of the presumption of arbitrability.

SR Construction, Inc. ("Contractor") and Peek Brothers Construction ("Subcontractor") entered into a master subcontract agreement ("MSA") to establish the general terms and conditions of their future work together. The MSA included an arbitration clause which set forth two prerequisites to initiate arbitration, namely, 1) the prime contract has an arbitration requirement and, 2) a particular dispute between the Contractor and the Subcontractor involves issues of fact or law which the contractor is required to arbitrate under the terms of the prime contract.

The Contractor later executed an agreement ("Prime Contract") with an affiliate of United Health Services of Delaware ("Project Owner") to construct a major medical center. The Prime Contract also included an arbitration agreement which permitted the Contractor to include subcontractors in arbitration of a claim. The Contractor executed a work order with the Subcontractor to complete the work for the Project Owner.

A dispute arose between the Contractor and the Subcontractor out of the execution of the contract. The Subcontractor sued the Contractor in district Court for breach of contract. On the other hand, the Contractor filed a request for arbitration with the American Arbitration Association ("AAA") naming the Project Owner and the Subcontractor as respondents and moved to compel arbitration in district Court.

The district Court denied the motion to compel arbitration holding that the Prime Contract required arbitration only of disputes between the Contractor and the Project Owner and that the dispute between the Contractor and the Subcontractor was not arbitrable under the MSA because it dit not involve the Project Owner and, therefore, could not involve common issues of fact or law that the Contractor must arbitrate under the Prime Contract.

The Contractor appealed the decision of the district Court arguing that the dispute with the Subcontractor involved issues of fact and law that must be arbitrated with the Project Owner under the Prime Contract and that the dispute was, therefore, arbitrable between the Contractor and the Subcontractor under the MSA. The Contractor also argued that the district Court ignored the presumption of arbitrability. Thus, the Supreme Court was asked to answer the question whether the parties dispute fit within the scope of the arbitration provision contained in the MSA.

The Supreme Court stated that to compel arbitration, a moving party must first establish that there is an enforceable agreement to arbitrate and that the dispute fit within the scope of the arbitration agreement. In this case, the Supreme Court specifically addressed the issue of whether the present dispute fits within the scope of the arbitration clause contained in the MSA since the parties agreed that the MSA included a valid and enforceable arbitration clause. The Supreme Court divided its reasoning into three parts to reach its decision.

Firstly, it discussed the question of the strong presumption of arbitrability where there is a valid and enforceable arbitration agreement between the parties. The Court observed that the presumption of arbitrability applies differently under a broad and a narrow arbitration clause. The Court found that the presumption of arbitrability applies under a broad arbitration clause, i.e., one that encompasses all disputes related to or arising out of an agreement and, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail". The Court held that, in this case, the MSA provision is not narrow because it did not limit arbitration to specific issues, subject matter, or dollar amounts. The Court further held that the MSA incorporated the Prime Contract's terms and since the Prime Contract is broad, the MSA is also broad. The Court thus ruled that the presumption of arbitrability applies.

Secondly, the Court held that even if the MSA provision is narrow, the dispute is arbitrable because it fits within the provision's terms. The Court stated that a narrow provision limits arbitration to specific issues or circumstances and indicates a weak presumption of arbitrability. It considered that, in this case, the weak presumption of arbitrability would not make a difference considering that the MSA provision covers the dispute between the Contractor and the Subcontractor because it raises issues of fact and law that the Contractor must arbitrate with the Project Owner under the Prime Contract.

Thirdly, the Court considered other provisions in the Prime Contract and the MSA that confirm the arbitrability of the dispute. In this case, the Court found that there are mutual consolidation-of-arbitration provisions in the Prime Contract and in the MSA and thus, the court has power to order arbitration. The Court also added that the outcome of the dispute between the Contractor and the Subcontractor implicates financial interests for the Project Owner justifying consolidation of the disputes.

The Supreme Court reversed the decision of the decision of the district Court denying the motion to compel arbitration holding that 1) the Prime Contract provision is broad and thus the presumption of arbitrability applies and the dispute is arbitrable, 2) even if the MSA provision was narrow, the dispute is arbitrable because it fits within the face of the arbitration provision and 3), the Prime Contract and the MSA both include consolidation-of-arbitration provisions and the Project Owner has a potential financial interest in the dispute permitting the consolidation of the disputes between the Contractor and the Subcontractor and the Contractor and the Project Owner.

High Court of England and Wales, September 16, 2022, EWHC No. 2470 Comm.

Contribution by Romi Grumberg

On September 16, 2022, the commercial High Court of England and Wales decided that arbitrators do not have the power to grant interim relief by way of award in UNCITRAL arbitration.

A dispute arose between EGF and HVF (and others) concerning the payment for wholesale power supply. A London-seated UNCITRAL arbitral tribunal issued an interim payment order based on article 34 of the UNCITRAL Rules (hereinafter the "Rules") under the form of a partial award. The respondent in arbitration was to pay the specified amount by the end of the next month. The partial award did not determine any merits at that stage of the arbitration.

The respondent in the arbitration proceedings (EGF) applied to the commercial Court seeking the removal of the arbitrators for apparent bias and procedural misconduct. Claimant (EGF) also

sought to set aside the partial award under section 67 of the Arbitration Act 1996 (hereinafter the "Act") for lack of substantive jurisdiction. Alternatively, the claimant alleged that the tribunal exceeded its powers by making such an order under section 68(2)(b) of the Act.

The alleged apparent bias and procedural misconduct applications were rejected by the Court. It considered that there is no objective appearance of a risk of bias. In fact, the procedural ruling that is challenged took place on the final day of the substantive merits hearing before the closing of oral submissions. This procedural ruling is a decision of case management and thus manifestly fair when evaluated in its context.

Regarding the challenge of arbitral powers, the Court found that there is no basis for the claim under section 67 of the Act. In fact, the application to set aside the interim payment order did not entail a challenge to the tribunal's jurisdiction which is proved notably by the arbitration agreement.

Furthermore, the Court specified the test for a successful challenge under section 68 of the Act. The serious irregularity needs to entail a potential or actual substantial injustice suffered by the claimant. This was not pleaded nor proved by the claimant. Therefore, the claim under section 68 of the Act was set aside by the judge.

However, the Court's obiter gave precisions on the possibility of challenging the partial award under section 68 of the Act if the conditions for a successful challenge under this section were met. The Court explained that an UNCITRAL arbitral tribunal has the power to make an order such as an interim payment order according to article 26 of the Rules. Nevertheless, article 34(2) of the Rules requires all awards to be final and binding upon the relevant parties. The tribunal does not have the power to grant such an interim relief by way of an award, so the tribunal did exceed its powers.

The Court rejected the different claims to set aside the interim payment order.

International Center for Settlement of Investments Disputes, September 14, 2022, No. ARB/15/23

Contribution by Paul Gobetti

On September 14, 2022, an arbitral tribunal issued a decision on jurisdiction, liability and quantum under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") regarding a case between the Kingdom of Spain and seventy-three German investors.

This case began in the 2000s, a time when the European Union ("EU") Member States, including Spain ("Respondent"), were striving to increase their use of renewable energy in order to comply with international commitments on climate change. In 2001, the EU Directive 2001/77/EC set targets for the proportion of energy each Member State should derive from renewable sources. Spain, was set a target to be achieved by 2020.

The Kingdom of Spain therefore introduced specific legislation in 2007 offering more advantageous remuneration mechanisms than previously foreseen in order to increase the attractiveness of investments in the renewable energy sector. This new regime had the intended effect of attracting German investors ("Claimants"), including Mr Mathias Kruck, specialised in the photovoltaic sector. New regulations were introduced in the following years and a new legal regime was introduced in 2014 (the "New Regulatory Regime") which ended the favourable regime created in 2007. This change had the effect of negatively impacting the investments made by the Claimants between 2008 and 2014, leading them to submit an ICSID arbitration claim against Spain on June 4, 2015, based on the 1998 Energy Charter Treaty ("ECT") and the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

The arbitral tribunal in the same case had already rendered other decisions prior to the one of September 2022. Following the constitution of the arbitral tribunal, the Respondent challenged the composition of the tribunal by requesting the challenge of an arbitrator appointed by the Claimants. The proposal to challenge the arbitrator was rejected but a few months later the latter submitted his resignation. A new arbitrator was appointed to replace him but he was also challenged by the Respondent with no success. The arbitral tribunal held a hearing on jurisdiction and merits in Paris from June 3, 2019 to June 7, 2019. Finally, on April 19, 2021, the arbitral tribunal issued a decision on jurisdiction and admissibility.

The dispute brought to light several legal issues which the court ruled. The first of these concerned the question of the applicable law to the dispute. The Claimants considered that the applicable law was the ECT itself and the rules and principles of international law. The Respondent argued that the norms referred to should be interpreted in a manner consistent with EU law, which is the applicable law as part of international law in accordance with Article 26 ECT and Articles 41 and 42 ICSID Rules. The tribunal explains that in the absence of a provision in the ECT admitting that EU law may modify the scope and content of rights and obligations established by the ECT, it will therefore decide the dispute in accordance with the ECT and the applicable rules and principles of international law.
The second point concerns the question of jurisdiction; the Court confirms that the investments made by the German investors fall under the definition given in Article 1(6) of the ECT and are within the jurisdiction of the Court.

The third point concerned the merits of the dispute, on which the Claimants considered that the main issue was whether Spain could be allowed to encourage foreign investments through a specific set of incentives and then, once the investments had been made, to fundamentally modify and abolish the incentive framework. The Respondent, on the other hand, argued that all the measures it had adopted were in accordance with the legal framework provided for in the ECT and in the Spanish legislation in force before the completion of the Claimants' investments and that, therefore, it had not committed a violation of the ECT. The Court came to rule on the issue of liability by deciding that the imposition of the new regulatory regime suffered by investors, who had already incurred significant initial capital expenditures necessary to build and commission photovoltaic plants and who had done so in reliance on Spain's commitment to offer fixed and predetermined feed-in tariffs over a 25-year period, amounted to a violation of their right to a fair and equitable treatment under Article 10 ECT.

Finally, the fourth issue addressed by the tribunal was the question of compensation for damages suffered by the Claimants.

On the question of *quantum*, the tribunal first referred to the *Chorzów Factory* decision (1928) of the Permanent Court of International Justice as a "matter of politeness" in investor-State arbitrations. It does not consider that reference to the value of the Claimants' investments is necessarily the "fair and appropriate" form of reparation. Accordingly, the Tribunal invited the parties to consult and submit a report to the Tribunal within 60 days of the date of this decision on an agreed amount of compensation payable to each of the seventy-three claimants.

As to the merits of the dispute, the Tribunal declared that the Respondent violated Part III of the ECT with respect to the Claimants' investments, and specifically the rights of German investors under Article 10 of the ECT to a fair and equitable treatment in establishing the New Regulatory Regime. The Respondent shall compensate the German investors for the damages suffered, the amount due to be decided by the Tribunal and set out in an award. Finally, Professor Douglas KC issued a partial dissenting opinion which has been annexed to this decision.

1. **Hello Ezzine, thank you very much for accepting our invitation to partake in this month's interview. Can you briefly recall your background for our readers?**

Hello to the whole team,

Thank you for your invitation; it is a pleasure to contribute to this beautiful newsletter.
About my background, it may be interesting to point out that I did not immediately choose to study law after obtaining my baccalaureate. As I was uncertain about what to do next in my curriculum, I followed the kind advice of a counsellor and decided to join the preparatory classes for top business schools ("*grandes écoles de commerce*") such as ECE – HEC. The goal was not necessarily to enter these well-known schools, but to receive an education of excellence in mind and in thinking.

I do not regret this choice which was for me the occasion of a true meeting with knowledge, discipline and curiosity; so many virtues essential for the studies of law that I carried out within the University of Paris 1 - Panthéon Sorbonne from the first year of Bachelor's degree (by distance via the CAVEJ) to the first year of a master's in International Law and the second year of the master's in International Economic Law.

It is for this reason that I suggest that young students follow their hearts in the Pascalian sense of the term and do not hesitate to inform themselves as much as possible about the possible academic paths.

It was during the last two years, between which I took and passed the CRFPA, that international arbitration made its appearance in my career. It would be an exaggeration to say that it was love at first sight, but I can't help but admit that this field immediately caught my attention.
In fact, in my opinion, international arbitration has succeeded in striking the perfect balance between the technicality that is sometimes pushed to its limits and the flexibility needed to resolve commercial or investment disputes; but I will come back to this later.

Finally, I attended the French Paris Bar School (EFB) in the second semester of my second year of my master's degree in International Economic Law, combining it with the PPI to catch up a little on the time not lost but usefully spent before my law studies.

It was thus the opportunity to carry out several internships in different structures, which I wanted to do, to make an enlightened choice at the end of the school.

I had the opportunity to discover the different fields of business law, including economic law, commercial law or corporate law applied to international litigation and arbitration.

For example, I had the privilege of being an intern in the Litigation, Arbitration and White-Collar team at August Debouzy, in the Economic Law team at Almain or in Dispute Resolution at BGB & Associés.

Being able to scan all the structures of a law firm to understand the different working methods was a determining factor for me to capture the different aspects of the legal profession such as research, drafting and procedure, but also management and communication, before embarking on international arbitration as an associate.

2. Why did you choose to focus on international arbitration? What are the aspects of the subject that challenge you the most on a daily basis?

I could summarize that choice and the aspects you mention in one sentence with a little provocation and above all a little bit of humor: choosing between tailor-made and ready-made.

More seriously, as I mentioned earlier, I chose international arbitration because of the aspects of this discipline that I found curious at first.

When I discovered this area, I found it curious and wondered how this field would cope with the obvious matter of its links with national legal system. I thus found it so brilliant to allow parties, sometimes a private investor facing a State, to face each other in parallel with State jurisdictions in the name of technicality and of the arbitrators who will be in charge of a complex dispute's settlement. And then, since appetite comes with eating - ask Rabelais - my interest in international arbitration increased when I discovered that other procedural or substantive state laws could be applied.

It may sound cliché to say so, but one must deal with it, as they are sometimes interesting, I could see myself when I was a kid, spinning that globe we all had in our bedroom and thinking that arbitration was a doorway to other parts of the world via the law. The subsequent serious study of international arbitration law only confirmed this instinctive impulse.

Now one of the most stimulating thing is the strategic interest for the party you represent. In fact, in all the cases I have had the opportunity to handle, the decision to go for arbitration has never been taken lightly.

In my opinion, this steams from two elements.

Firstly, there is the question of the cost of the procedure, which is rarely negligible, and which represents a significant financial, economic and accounting issue for the party you are defending. You are then aware that the outcome of the arbitration proceedings is of strategic interest to your client, which is very motivating.

On the other hand, I find that arbitration leads you to explore in depth various and interesting branches of the economy, which you may not be aware of at the start of the proceedings. In fact, the details in arbitration are fundamental and I believe that you have a duty to fetch/search in all the case material so as to find what can convince the arbitral tribunal, without ever taking an assumption or an argument for granted.

To do this, curiosity and discipline are required, and you have the opportunity to learn a lot about the workings of a specific industry or field. For example, I was able to work on arbitrations concerning the license and hotel management of world class/very large groups, the refining of certain precious metals, the manufacture of aircraft components or the textile industry. Thus, it has always been necessary and pleasant to immerse oneself scrupulously in the customs and rules of these sectors to have a perfect understanding of the case and adopt the best possible defense or attack.

In short, it is the strategic and technical aspects of arbitration that stimulate me the most on a daily basis at Komon Avocats that I have joined.

3. You recently joined Komon Avocats for your first collaboration. Can you tell us more about this firm and the reasons that led you to join it?

Komon Komon Avocats was found as a result of the meeting of the two founding partners, Olivier Fachin and Wissam Mghazli, in Japan during an international conference and a prospecting mission organized by the *Conseil National des Barreaux* and the France-Japan Chamber of Commerce and Industry.

The decision to join forces followed more than a year of privileged partnership. Since its creation, the firm has been growing, as we will soon have three associates covering not only arbitration and litigation but also business law advice. In addition, the presence of Jean de Hauteclocque, whose expertise is no longer in doubt given his former functions as head of the Litigation & Arbitration department at Freshfields Bruckhaus Deringer and Hogan Lovells, is a valuable asset.

In addition, Komon Avocats has recently recruited a Japanese associate who practiced for a long time in Tokyo in one of the Big Four of Japan, a country towards which the firm is resolutely turned for its development and the strengthening of links with other local law firms. As you will have understood, although the firm is on a human scale, it is clearly dynamic.

The firm is also distinctive in its positioning towards Japan, since the partners of the firm have founded the *Association des Avocats Japonophiles* ("AAJ"), which they regularly promote through events and professional meetings. Recently, the two founding partners went to Tokyo and Osaka on a professional trip to meet with several renowned Japanese law firms and to participate in a Franco-Japanese symposium on the links between JEFTA (Japan-EU Free Trade Agreement) and international arbitration.

It is for all these reasons, namely the obvious expertise between arbitration and dispute resolution as well as its international dimension, that I decided to honor the firm's trust.

4. You have had the opportunity to experience international arbitration in different structures. In your opinion, what are the advantages and disadvantages of a human-sized structure in practice within the field?

The difference is quite simple, but I will nuance my statement in a second step.

In my humble opinion, as my career is still in its modest beginnings, the main difference lies in your place in the chain of contributors and, consequently, in the tasks that are entrusted to you.

In a human-sized structure, you are more likely to be involved in elements that are less easily accessible in a department specialized in international arbitration and composed of a very large team of lawyers, which is quite logical.

I am here referring to the drafting of the various pleadings in the proceedings, such as memoranda, correspondence with the arbitral institution and the client, or observations on the constitution of the arbitral tribunal, such as requests for challenging arbitrators, etc.

At Komon Avocats, I have the privilege of taking an active part in the drafting of all the pleadings, from the simple report on the progress of the proceedings for the client to the statement of claim/defense, along with the procedures for appealing the annulment or enforcement of an arbitration award.

All this is under the supervision of Jean de Hauteclocque and Wissam Mghazli, who have extensive expertise in the field.

In addition, and it may not be thought of often enough, but in a human-sized firm, you may also have to meet directly with the parties you represent to discuss the strategy to be adopted and understand your client's expectations. This humanizes the procedure a little more, and allows you to have an even more precise picture of the case you are working on.

In contrast, the human size of the firm also leads to a truer sense of responsibility which, for some, may be considered a disadvantage of this type of structure.

Indeed, the direct consequence is your exposure to possible difficulties encountered during the drafting phase or the various assignments undertaken. Although the partners remain in the front line when it comes to reporting the results of the proceedings to the client, you are still closely involved in the outcome of the case and must also report on your work.

In my opinion, this is both a disadvantage and an advantage, as it is both a challenge and an additional motivation, depending on how you deal with it.

The other "disadvantage" is the lower probability of dealing with cases that require a very large team and considerable resources. I am thinking in particular of investment arbitration, which are not only time-consuming but also require huge human resources.

It must be admitted that in a human-sized organization, handling this type of file can affect the functioning of the entire firm, so that these procedures are reserved for larger firms.

Lastly, it is worth thinking about what you really want for your career, as each firm structure holds its own advantages.

5. Komon Avocats is a French law firm with an international focus, especially Japan. In your practice, do you observe any notable differences between this legal system and ours?

I do note some differences between the two systems, especially in terms of international arbitration. This is precisely what I was referring to earlier when I mentioned potential motivations for pursuing the direction of arbitration.

In particular, mediation-arbitration (Med-Arb) is a form of alternative dispute resolution that is popular with East Asian courts and litigants. Indeed, the influence of collectivism has ramparted a preference for conciliation and amicable dispute resolution processes in order to preserve social harmony. Particularly in Japan, disputes result in the disturbance of a relationship and are seen as a form of humiliation suffered by the defeated party. This is why the Med-Arb is a dispute resolution mechanism that is favored by this culture, in which companies play a central role and for which the Japanese are ready to settle amicably, even if the outcome is less favorable to them.

This can also be explained by the fact that the legal system is geared towards rationalizing procedures by seeking to be as effective and efficient as possible, without the separation of a judicial order and an administrative one, nor excessive costs for the parties. Consequently, it is customary in Japan to resort to mediation before venturing into arbitration in order to avoid direct confrontation between the parties.

Nevertheless, it should be pointed out that Japan is, contrary to popular belief, a country with a civil law tradition strongly influenced by the Civil Code and its German equivalent, so that commonalities also exist between these two orders.

Finally, your question also allows me to point out that arbitration is a meeting place for the various legal traditions, constituting a major appealing feature of this area of law which contributes to their reconciliation.

6. What do you think are the major challenges facing international arbitration today?

I believe that international arbitration is no more protected than other fields with regard to the major current issues such as climate changes, sovereignty and transparency.

As regards investment arbitration, I believe that today we must anticipate the arrival, if this is not already the case in reality, of claims relating to the possibility for States to implement public policies relating in particular to the preservation of the environment at the expenses of the protection of foreign investments in the name of a sovereignty that is often evoked in an opportune manner.

International investment arbitration will therefore have to arm itself with pedagogy and smartness in order to maintain the mechanisms operating in this very particular area of law, the durability of which could a priori be threatened.

However, I am firmly convinced that it has already been able to come up with appropriate responses (see, for example, the police powers doctrine or the applications of the Chorzów case in matters relating to expropriation).

Next, as regards commercial arbitration, I have the feeling that the thirst for transparency could lead the latter to be criticized for its confidentiality and its practice outside the State system. However, again, I would argue that commercial arbitration does in fact have close links with states. I am thinking, for example, of the jurisdiction of the supporting judge or the phase specific to the recognition and enforcement of arbitral awards.

In order to meet these challenges, it is therefore necessary to explain precisely what arbitration really is, beyond the preconceived ideas and caricatures to which it is sometimes subjected.

Finally, with regard to internal challenges, I remember discovering the procedures for the disclosure of documents and exhibits as an intern, and above all I found them to be slightly out of step with the times, or at least with the spirit of international arbitration, which is intended to be flexible and fairly efficient.

In any case, the existence of a forum such as yours contributes to overcoming the challenges ahead, since it makes it possible to inform curious and interested students about this discipline and to popularize an area of the law that is still insufficiently known. In other words, thanks in particular to initiatives such as this journal, our generation will be equipped to ponder on solutions for improving arbitration and to overcome its shortcomings.

EVENTS OF THE NEXT MONTH

December 15, 2022: 360 degree perspective on international arbitration

Organised by Paris Very Young Arbitration Practitioners

Where? At *Simmons & Simmons – 5 Bd de la Madeleine, 75001 Paris*

Website: https://www.eventbrite.fr/e/billets-qa-with-philippe-cavalieros-the-360-degree-perspective-on-ia-472515495567

January 17, 2023: Colloque arbitrage et devoir de vigilance

Organised by Université Paris-Panthéon-Assas

Where? At *Université Paris-Panthéon-Assas, Salle 4 – 12 place du Panthéon, 75005, Paris*

Website: https://www.u-paris2.fr/fr/evenements/arbitrage-et-devoir-de-vigilance

SIGNATURE LITIGATION

LEGAL INTERNSHIP

Location: Île-de-France

Practice area: Litigation/Arbitration

Start date: 1-7-2023 or 1-1-2024

MEDICI

INTERN

Location: Île-de-France

Practice area: Arbitration and Litigation

Start date: 1-1-2024

BERSAY

INTERN

Location: Île-de-France

Practice area: Litigation

Start date: 2023 or 2024

BIARD, BOUSCATEL ET ASSOCIÉS

ASSOCIATE

Location: Île-de-France

Practice area: Litigation

Start date: 15-2-2023

WATSON FARLEY & WILLIAMS

INTERN

Location: Île-de-France

Practice area: Litigation

Start date: 3-7-2023

DLA PIPER LUXEMBOURG

INTERNSHIP

Location: Luxembourg

Practice area: Litigation and Regulatory

Start date: 3-7-2023

FAIRWAY AARPI

INTERN M2/STUDENT-LAWYER

Location: Île-de-France

Practice area: Litigation

Start date: 2-7-2023

2BV AVOCATS

INTERN M2/STUDENT-LAWYER

Location: Île-de-France

Practice area: Litigation

Start date: 1-1-2023

KING & SPALDING

INTERN M2/STUDENT-LAWYER

Location: Île-de-France

Start date: Immediately or 1-1-2023

NORTON ROSE FULBRIGHT

INTERNSHIP

Location: Île-de-France

Practice area: Litigation, Arbitration and Business Ethics

Start date: 3-7-2023 or 3-1-2024

BIRD & BIRD

INTERNSHIP

Location: Auvergne-Rhône-Alpes

Practice area: Litigation and Corporate

Start date: 3-7-2023

ICADE

LEGAL INTERN

Location: Île-de-France

Practice area: Dispute prevention and settlement

Start date: 1-7-2023

BCTG AVOCATS

INTERNSHIP

Location: Île-de-France

Practice area: Private Energy Law (Corporate, Consulting et Contentious)

Start date: 3-7-2023