Kluwer Arbitration Blog

Decisions of the Paris Court of Appeal and French Supreme Court in 2019

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Although some might have considered 2019 a bit "lackluster",[1)] a number of noteworthy decisions by the Paris Court of Appeal and French Supreme Court have come to refine on the now well-established French case law on international arbitration.[2)] Beyond the issue of claims brought by dual nationals discussed elsewhere on this blog, French courts have also dealt with the distinction between jurisdiction and admissibility (*Rusoro*), evidence allegedly obtained through prior representation of the other party by counsel (*Oxus*), asking prejudicial questions to the CJEU (*Komstroy*), the propriety of enforcing awards not rendered at the seat where fraud is alleged (*Alstom*), State immunities (*Al-Kharafi*), as well as the ongoing duty of an arbitrator to disclose potential conflicts of interest (*Audi Volkswagen*).

Venezuela v. Rusoro (Paris Court of Appeal, 29. Jan 2019) – Statutes of limitations under a BIT go to the jurisdiction of the tribunal, not the admissibility of the claim

2019 started off with yet another installment of the long-running battle between Canadian mining group Rusoro and the Republic of Venezuela over the nationalization of Rusoro's assets, culminating with the 2012 take-over of Rusoro's plants and exploration sites. Shortly before Venezuela's withdrawal from ICSID, Rusoro commenced arbitration on the basis of the Canada-Venezuela BIT, under the Additional Facility Rules of ICSID.

In an award rendered on 22 August 2016, the Arbitral Tribunal held *inter alia* that (i) certain actions of Venezuela from 2009 were outside the jurisdiction *ratione temporis* of the Tribunal as the BIT provided for a three-year statute of limitations, (ii) Venezuela's actions in 2012 amounted to expropriation, making it liable in the amount of USD 966 million for violation of the BIT, and (iii) Venezuela's restrictions on gold exports in 2010 were also in violation of the BIT, ordering the payment of an additional USD 1.2 million to Rusoro.

Venezuela filed an action to set aside on 19 October 2016, and on 29 January 2019, the Paris Court of Appeal partially set aside the award on the ground that the Tribunal

had wrongfully extended its jurisdiction *ratione temporis* in taking into account events pre-dating the three-year statute of limitations of the BIT for the computation of damages relating to the expropriation claim. To reach this decision, the Court looked at "all elements, in fact and at law, allowing it to ascertain the scope of the arbitration agreement". In doing so, while seemingly applying its own traditional standard of review for jurisdictional challenges, the court engaged in a far-reaching inquiry into the Tribunal's quantum analysis, perhaps more akin to a review of the merits of the award.

Oxus Gold v. Uzbekistan (Paris Court of Appeal, 14 May 2019) – Evidence that should have been produced in document production is admissible, no matter its origin

Contrary to what *Rusoro* and *Garcia* might have suggested, the Paris Court of Appeal upholds awards more often that it sets them aside. With *Oxus*, the Paris Court of Appeal confirmed its pro-arbitration stance by upholding a Tribunal's common-sense solutions to surprising issues encountered in discovery.

On 31 August 2011, Oxus, a UK-based company specializing in exploration and exploitation of precious and base metals, initiated arbitration against Uzbekistan, a Uzbek State-entity, and a Uzbek State-owned enterprise on the basis of the UK-Uzbekistan BIT, alleging that their actions were notably in breach of the expropriation and fair and equitable treatment provisions of the BIT. On 17 December 2015, the Tribunal dismissed the brunt of Oxus' claims (initially quantified at over USD 1.3 billion), while still awarding it USD 10 million on the ground that certain changes in tax law amounted to treaty breaches.

Oxus applied to the Paris Court of Appeal for a partial set aside of the portion of the award dismissing its expropriation claim, arguing that the Tribunal had considered (i) documents that had not been discussed in the context of this claim and, strikingly, (ii) documents that had been illegally obtained by the Respondents through prior representation of Oxus' parent company by Respondent's counsel. The Court reiterated its classic holding that a Tribunal need not discuss in advance with the parties the reasons for making certain findings. As to the question of allegedly illegally obtained documents, the Court endorsed the Tribunal's reasoning that since the documents should ultimately have been disclosed in the discovery process as responsive to a specific Redfern document request from Respondent, it saw no issue admitting the document in the record. Accordingly, the Court declined to set aside the award on the ground that enforcement would be in breach of French public policy.

Moldova v. Komstroy (Paris Court of Appeal, 24 Sept. 2019) – CJEU to advise on language of the ECT to ascertain jurisdiction of an arbitral tribunal

As it will surely be the object of much further debate, we will only mention this case in passing. In a long-running UNCITRAL ECT dispute relating to agreements entered into between Komstroy and Moldova for the sale of Ukrainian electricity to Moldova,

the Court of Appeal, on remand, queried what the Court of Justice of the European Union understood to be the scope of "contribution" in the definition of the term "investment" per the ECT. As we wait for the CJEU's answer, we are left to wonder at the process that leads to the CJEU opining on the definition of the term "investment" where – subject of course to review of a set aside court – this should always be first and foremost a question for the arbitral tribunal to decide.

Alstom v. Alexander Brothers (Paris Court of Appeal, 28 May 2019) – Strong circumstantial evidence of corruption warrants set aside of an award

Alongside detailed inquiries as to the jurisdiction of arbitral tribunals (*Rusoro*, above), the Paris Court of Appeal's recent case law confirms that it is also willing to "meticulously review" of awards where fraud is alleged (See Belokon v. Kirghizistan, Paris Court of Appeal, 21 February 2017).

In 2004 and 2009, two Alstom entities entered into three consultancy agreements with Alexander Brothers, a Hong Kong company, in order to submit bids for railway projects in mainland China. Alstom made limited payments under the first two contracts in 2006 and 2008. Alexander Brothers commenced ICC proceedings in Geneva on 20 December 2013, seeking the balance of payments allegedly due by Alstom. On 29 January 2016, the Tribunal ordered payment of the balance of sums due under the first two contracts. Alstom initiated a set aside action with the Swiss Federal Supreme Court, and opposed enforcement of the award in France. In the French proceedings, Alstom argued that making such payments would be in violation of the ethics and compliance requirements included in the contracts. As a result, Alstom argued, enforcement of the award would result in giving effect to a contract entered into or obtained through corruption and kickbacks, which would be in violation of the principles of French international public policy.

In a first decision of 10 April 2018, the Court held that in order to determine whether enforcement of the award would result in giving effect to corruption, it could look into all relevant elements of fact and at law without being bound by the underlying arbitral decision or potentially relevant provisions of the law governing the merits of the case, effectively granting itself wide investigative powers. The Court held that strong circumstantial evidence (a "faisceau d'indices") was enough to deny recognition or enforcement, even in the absence of criminal proceedings regarding the same underlying fact, or indeed if those facts did not meet the burden of proof that would be required in criminal proceedings. According to the Court, relevant circumstantial evidence could include: limited evidence of actual work-product, limited human resources devoted to the project, an imbalance between work ostensibly performed and the total amount paid or to be paid, a percentage fee structure, incomplete or insincere bookkeeping by a consultant, and the fact that the country in the project was to take place (or certain industries in that country, or the consultant retained for the project) was notably corrupt.

Having requested detailed submissions from the parties on these points, the Court held on 28 May 2019 that there were indeed sufficient circumstantial evidence that

enforcement of the award would give effect to a corrupt transaction. On that basis, the Court went on to refuse enforcement of the award. This decision is particularly interesting as it provides a roadmap for future challenges on grounds of corruption, and perhaps even on other grounds, including where the award might not even be set aside at the seat of arbitration.

Al-Kharafi v. Libya (Paris Court of Appeal, 5 Sept. 2019) – State immunity not necessarily a bar to enforcement

Protection of a State's diplomatic assets has become a hot button issue in France since the enactment of the so-called Sapin II statute in December 2016 (see here, here and here on this blog). Fortunately, 2019 saw the Paris Court of Appeal articulate a clear, step-by-step, test to getting to (or indeed resisting) enforcement in the *Al-Kharafi* case.

In 2006, Al-Kharafi, a Kuwaiti company, and a Libyan entity entered into a 90-year contract for the development of a tourist project approved by the Ministry of Tourism of Libya. The contract contained an arbitration agreement referencing the Unified Agreement for the Investment of Arab Capital in the Arab States, and when Al-Kharafi initiated arbitration, the Tribunal decided to apply the CRCICA Rules of arbitration. On 22 March 2013, the Tribunal rendered an award ordering Libya, the Libyan Investment Authority, the Ministry of Economy and the Ministry of Finance to pay USD 936 million dollars to Al-Kharafi. Libya challenged the award with the Arab Investment Court, unsuccessfully. Al-Kharafi then sought enforcement of this award in France. After various challenges before French courts (including the refusal by the Versailles Court of Appeal to authorize enforcement on different assets), the case for enforcement against Libya's assets got to the Paris Court of Appeal.

The Court outlined a clear three-point test for enforcement: (i) whether the party against whom enforcement is sought is a Libyan State-entity, (ii) whether that party has waived State-immunity, and (iii) in the absence of waiver, whether the targeted assets were purposed for public service, non-commercial, use and are somehow linked to the entity party to the arbitration. In a classic manner, the Court went on to hold that the targeted entity lacked the necessary independence and was therefore indeed a State-entity. Clarifying prior case law however, the Court went on to hold that, *per* customary international law as enshrined in the Sapin II statute, consent to arbitration was not, in itself, constitutive of a waiver of arbitration. Finally, the Court went on to hold that since the targeted assets were linked to the entity party to the arbitration (even though that party might not be a signatory to the arbitration agreement itself), and were not manifestly dedicated to non-commercial public service use, enforcement was therefore permissible. The Court therefore authorized enforcement over the targeted assets.

Saad Buzwair Automotive v. Audi Volkswagen (Supreme Court, 3 Oct. 2019) – The arbitrator's duty to disclose information relating to his independence and

impartiality continues for the pendency of the arbitration

To close off this year in review, on 3 October 2019, the Supreme Court confirmed a 27 March 2018 Paris Court of Appeal decision (discussed here on this blog) setting aside an award on the ground that an arbitrator had failed to make certain disclosures which the French courts deemed material enough to suggest a lack of independence and impartiality. This decision is material in that it places additional weight on arbitrators to keep updating their disclosures as the arbitration progresses, even, it seems, where the arbitrator might not even be aware of the potential for conflict.

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References

↑1 Th. Clay, Panorama – Arbitrage et modes alternatifs de règlement des litiges: novembre 2018-décembre 2019, Dalloz, 26 December 2019.

↑2 For a more exhaustive review of 2019 case law: J. Jourdan-Marques, Droit de l'arbitrage interne et international: panorama 2019, Dalloz, 20 January 2020.

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