Kluwer Arbitration Blog

2020 in Review: Arbitration-related Developments in France

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The pandemic did not prevent French courts from bringing their share of arbitration-related developments, although they remained almost inactive from March to June. This post succinctly reviews some of 2020's noteworthy developments.

Important Decisions of the Paris Court of Appeal's International Section

Operational since March 2018, the International Chamber of the Paris court of appeal ("ICCP-CA") now hears all annulment proceedings of Paris-seated international arbitral awards.

Dommo: French Courts Continue to Examine Arbitrators' Most Tenuous Connections

In *Dommo*, the ICCP-CA was called to rule on links between a law firm affiliated with the arbitrator's former firm and a party's shareholder.

Although the decision makes clear that these links are to be disclosed as per Article 1456(2) of the French Civil Code of Procedure ("CCP"), annulment was denied on the ground that such failure to disclose did not raise in the parties' mind "*a reasonable doubt as to the independence and impartiality*" of the arbitrator.

The ICCP-CA relied on the fact that (i) the undisclosed link was indirect, (ii) the controversial relationship had stopped two years before the start of the arbitration, and (iii) it was not established that the arbitrator had ever acted as counsel nor assisted the shareholders, thereby confirming French courts' well-balanced assessment of the issue, although the links under scrutiny are more and more tenuous (*see recently*, links between an arbitrators' firm and a party's affiliate in the 2019 *Volkswagen* case).

The ICCP-CA attempted to define each of the three criteria on which French courts traditionally rely (*i.e.* the well-known ('notoire') nature of the circumstance, its link with the dispute, and its impact on the arbitrator's judgment), but the applicable test would deserve further clarification. The lack of clarity as to the determination of a "*reasonable doubt*" is not specific to French courts, as illustrated by the recent UK Supreme Court decision in the *Halliburton* case (see discussion

here).

Samwell: Arbitrators' Power to Assess Corruption Allegations

After having strengthened its control of arbitral awards involving corruption in both the 2017 *Belokon* and 2018 *Alstom* cases, the Court further clarified its approach in *Samwell*.

Although corruption is most often addressed on public policy grounds, the challenge was raised under the violation of the arbitrator's mandate (Article 1520(3) CCP). It was contended that the arbitrator erred in exercising its mandate to apply French law by relying on other corruption criteria than those previously endorsed by French courts.

The Court denied the request, ruling that the application by the arbitral tribunal of other criteria, be they inspired from the 1977 FCPA red flags, did not indicate that it had applied US law. The Court added that the *Alstom* criteria were not exhaustive under French law.

While preserving the arbitrators' freedom in their assessment of corruption, this decision also suggests that corruption should be exclusively assessed on the basis of the applicable law as determined by the parties' agreement.

TCM v. NGSC: Economic Sanctions and International Arbitration

Frustration at the recent Court of Cassation's ruling in *Finmeccanica* – where the Court failed to take a clear stance on whether implementation measures for the UN embargo against Iraq formed part of international public policy under Article 1520(5) CCP – resulted in high expectations on the impact of international sanctions on the validity and enforcement of awards issued by French-seated arbitral tribunals.

In *TCM v NGSC*, the ICCP-CA rejected TCM's claim that the award was contrary to international public policy based on the arbitrators' failure to consider the impact of international sanctions against Iran upon the termination of the contract.

For the first time, the Paris Court ruled that UN and EU sanctions – which aimed at "*contributing to the maintenance or restoration of international peace and security*" – were mandatory rules integrated into the French conception of international public policy. This was contrasted with US sanctions, which could not be regarded "*as an expression of international consensus*", especially considering EU and French opposition to their extraterritorial reach.

Stay of Enforcement: Towards a More Restrictive Approach?

Since the 2019 *Oschadbank* case, the Paris CA relies on an *in concreto* restrictive approach and tends to focus on economic arguments to assess whether enforcement is "*likely to seriously infringe upon one party's rights*" under Article 1526(2) CCP. It remained unclear, however, whether the Court could take into account non-economic criteria. Decisions rendered in 2020 have not clarified the issue.

Whereas a focus on economic arguments was suggested in CSPI, the ICCP-CA expressly stated in Sanofi and EPPOF that Article 1526 CCP "*does not only limit its benefit to an assessment of the sole economic consequences of the enforcement*". Yet, these decisions confirm the preponderance of economic considerations, such as:

– the creditworthiness of the debtor (*CSPI*, *Sanofi*, *EPPOF*) and the creditor (*CSPI*, *Sanofi*);

– the creditor categorization as a foreign offshore company without employees and infrastructures (*CSPI*);

– the uncertainty arising out of the fact that the parties successively prevailed in two awards (*CSPI*).

On the contrary, the Court deemed as irrelevant: the debtor's absence of cash flow (*EPPOF*); difficulties relating to (i) the singularity of the debtor's activity and revenues, and (ii) the Covid-19 crisis (*EPPOF*); the debtor's alleged fraudulent conduct; the debtor's location abroad; as well as legal uncertainty arising out of enforcement (*Sanofi*).

PwC: Balancing *Compétence-Compétence* with Consumer Protection

As previously described, the Court of Cassation upheld a CA ruling that declined, in a dispute involving a consumer, to refer the parties to arbitration based on the arbitration agreement's characterisation as an unfair term. The Court held that the appeal judges did not breach Article 1448 CCP – enshrining the *compétence-compétence* principle – by ensuring "*the full effectiveness of European consumer protection law*".

In doing so, the Court remarkably departed from its previous case law – set out in the *Jaguar* and *Rado* case – according to which the *compétence-compétence* principle was equally applicable in disputes involving a consumer. Consumers were accordingly required to initiate arbitration to challenge the validity of the arbitration agreement.

The Court of Cassation thus introduced a new exception to the negative effect of the *compétence-compétence* when the dispute involves a consumer and EU law is applicable. It remains to be seen whether this solution will be extended to non-EU consumers disputes.

(Only) Two Annulments of Investment Arbitration Awards

While 2019 proved to be a turbulent year with regard to investment arbitration (6 decisions rendered over a total of 20 since the first one in 2008), 2020 remained moderate.

The first case is the last episode of the *Garcia Armas* saga. In this new decision, the CA upheld its prior interpretation of Article 1(2) of the Spain-Venezuela BIT – *i.e.* the investor's nationality at the time of its investment is relevant for jurisdiction *ratione materiae* – while setting aside the jurisdictional award in its entirety. By doing so, the French annulment judge confirmed that a special meaning is to be drawn from the definition of protected investments as assets "*invested by investors*".

The same reasoning was applied in *Pugachev v Russia* to interpret Article 1(2) the France-Russia BIT for jurisdiction *ratione personae* purposes, holding that the treaty required the investor to have held French nationality at the time of the making of his investments in Russia.

In *Sorelec v Libya*, the CA annulled a partial award that recorded a settlement between the parties, based on circumstantial evidence that enforcement of the award would give effect to a transaction tainted by corruption. Remarkably, the corrupt scheme had not been alleged by the parties before the arbitral tribunal.

The evidence of corruption upheld by the Court is as much exogenous – the political context in Libya – as endogenous to the disputed agreement, namely the Minister's non-compliance with Libyan administrative procedures, the lack of evidence of negotiations preceding its signature, and its very favourable terms for the foreign investor.

Interestingly, the ICCP-CA had found two weeks earlier in *Benin v Securiport* that there was no sufficient evidence of corruption, notably because the contract at stake had been negotiated for almost three years.

This decision further confirms the Court's willingness to tackle corruption by using the "red flags" methodology as in the *Alstom* case – already discussed in a previous post –, allowing heightened scrutiny of awards on public policy grounds, including the review of all relevant facts.

Finally, the Court of Cassation made clear in *Schooner v. Poland* that the waiver under Article 1466 CCP did not preclude investors from presenting new arguments on jurisdiction before the annulment judge, as long as the issue of jurisdiction had been argued before the arbitral tribunal.

This certainly is an important ruling, as it makes plain that the annulment judge's *de novo* review of jurisdiction as per Article 1520(1) CCP is to be conducted even with new arguments, and not only within the boundaries of what had been argued before the arbitral tribunal.

Kout Food: French Courts' Centred Approach as to the Law Applicable to the Arbitration Agreement

As previously described, the Paris CA upheld an ICC award after ruling that absent an express choice as to the law applicable to the arbitration clause, the *lex arbitri* applies to issues relating to the extension of the clause to non-signatories. The Court ruled so despite the fact that the relevant contracts all provided for the application of English law to the contract and an appeal court in London had previously refused enforcement of the award precisely because English law applied to the arbitration agreement, thereby confirming its centred approach on the issue.

Noteworthy Enforcement-Related Decisions

Enforcement proceedings arising out of the *Commissimpex* saga continue to generate interesting developments with regards to the application of the 2016 Sapin II statute, and especially Article L.111-1-3 of the French Civil Enforcement Code granting immunity from execution to assets "*used or intended to be used in the exercise of the functions of the diplomatic mission of foreign States*"

or assets "*assigned to a diplomatic protection*".

The Court considered that the Congolese presidential aircraft, temporarily in France for maintenance purposes, could not fulfil these conditions, since (i) the on-board personnel and maintenance of the aircraft were carried out by third parties, (ii) the flight log listed only one international flight unrelated to diplomatic activity and (iii) the president routinely used another aircraft, thereby confirming a pragmatic assessment of this condition.

More recently, the Court of Cassation endorsed the position that enforcement measures served on a foreign bank's French branch towards funds located abroad have no effect where the debtor has no accounts at the French branch. In other words, the seized third-party shall have a registered office or a branch in France able to pay the sums owed by the debtor.

Conclusion

The developments outlined in this post remain in line with the French courts' approach towards international arbitration which, ten years after the last reform of French arbitration law, remains liberal despite the strengthening of their intervention.

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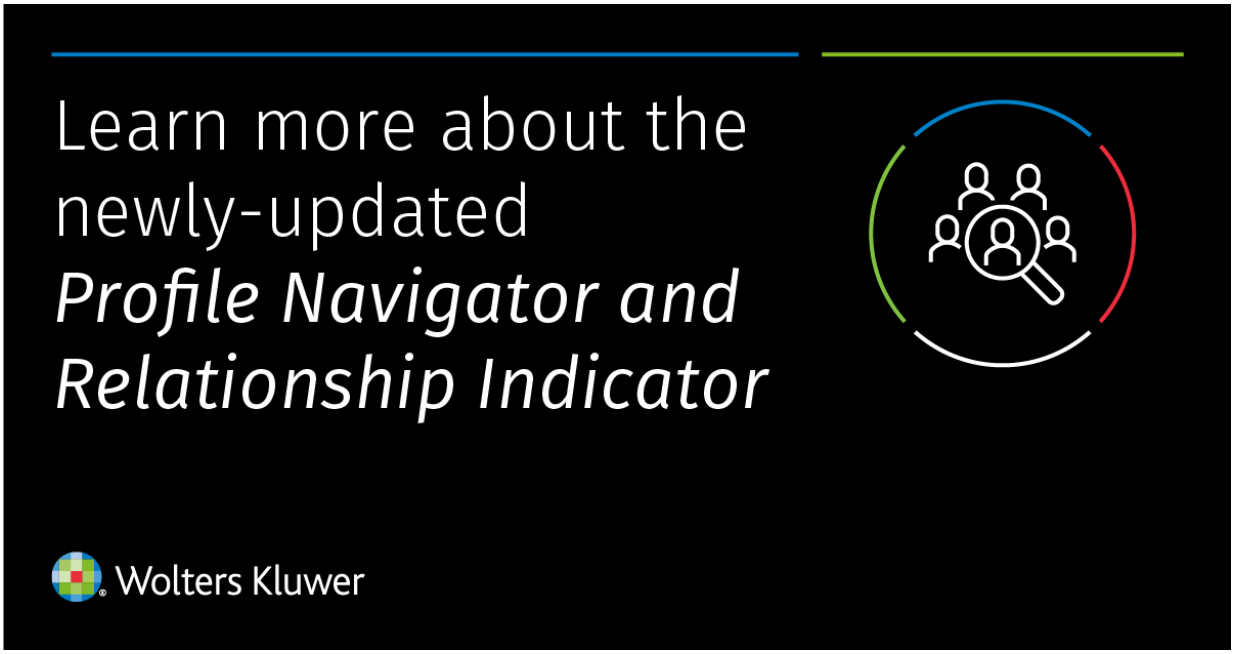

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