Kluwer Arbitration Blog

2021 in Review: Arbitration-Related Developments in France

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Following a fruitful 2020, 2021 also brought some noteworthy developments in France, that this post proposes to review on a general level. Overall, the Paris Court of Appeal ("**the Court**") seems to have taken a slightly more exigent approach towards arbitration this year, while the *Cour de cassation* has overturned regrettable decisions.

Admissibility and Waiver of Arguments in Annulment Proceedings

Important judgments were delivered in relation to the principle of waiver under Article 1466 of the French Code of Civil Procedure ("**CCP**"), which provides that parties are deemed to have waived their right to subsequently rely on any irregularities which they knowingly refrained from raising before the tribunal in a timely manner. This rule has continued to generate litigation as it applies differently depending on the ground of annulment raised under Article 1520 CCP.

In the *Pharaon* case, the Court applied the principle of waiver more carefully when ruling under Article 1520(2) CCP (irregular constitution of the tribunal), making clear that it was not enough for a litigant to challenge an arbitrator before the arbitral institution, it must then "*at least expressly formulate reservations before the arbitral tribunal*" in order for the argument to be admissible. Similarly, it is not enough to simply complain during the hearing of the arbitrator's behavior without seeking his disqualification, as ruled in *Aboukhalil* .

The Court also ruled in *Pharaon* that an annulment request was not admissible because the requesting party, that had properly challenged the impartiality and independence of an arbitrator within the time limit set forth under the ICC Rules, had failed to restate its objection before the arbitral tribunal after rejection of the challenge. It is highly questionable whether such Court's ruling would resist the European Court's review as performed in *Beg* (discussed here and here).

One exception is of course when the impartiality results from the award itself (see the *Rotana* case), which is to be established on the basis of "*precise elements as to the structure of the award and its own terms*". This strict application of Article 1466 CCP to some of annulment grounds is counterbalanced by the large scope of issues that can be reviewed under other.

Since last year's *Schooner* case (discussed here), the Court reviews the Tribunal's jurisdiction, allowing for new legal and factual arguments to be raised, provided that jurisdiction has been challenged to some extent before the arbitral tribunal. This approach has been routinely endorsed through the year, including when assessing jurisdiction based on a BIT.

The Court simply required in *Pharaon* that the claimant object to the jurisdiction of the tribunal before the annulment proceedings, including through a mere objection to the tribunal's power to enforce decisions of a dispute board – as in *Ukravtodor* – or a through a simple letter sent raised by a party that refused to appear before the tribunal, challenging its jurisdiction (see *Oschadbank v Russia*).

In the same vein, the Court reiterated in *Grenwich* that the principle of waiver does not apply to public policy grounds, even though the matter was not raised during the arbitral proceedings as clarified in *Webcor v Guinea*. It is worth noting that in both the *Pharaon* and the *Fiorilla* cases, the Court reviewed a claim for lack of independence and impartiality not under Article 1520(2) CCP (irregular constitution of the tribunal), but under Article 1520(5) CCP (review on public policy grounds) as a breach of due process. One could hope that the Court will limit this diversion to exceptional circumstances.

Investment Arbitration

2021 has been a very prolific year with regards to the number of investment arbitration cases that came under the review of French courts.

Relevant developments first concern dual nationality. In *Aboukhalil*, the Court upheld the award granting the BIT's protection to an investment made by a dual national despite the BIT being silent on the issue. The Court's previous judgment in *Garcia Armas v Venezuela* endorsed the opposite view on the ground that the investor did not hold the relevant nationality at the time of the making of the investment. However, this judgment was overturned by the *Cour de cassation*, which considered that this approach wrongly adds a requirement to the BIT. These cases therefore herald a welcome consistency, though the issue remains controversial in arbitral practice.

In 2021, the Court held that questions relating to attributability, the legality of the investment, corruption and compliance with a cooling-off provision are not to be reviewed by the Court under Article 1520(1) CCP. This is a welcome development as it prevents issues that are not related to jurisdiction to benefit from the broad review allowed under the *Schooner* approach.

Several decisions were also rendered in relation to temporal issues, the Court ruling in *Oschadbank* that a BIT provision relating to its temporal scope is a matter of jurisdiction, not admissibility. In *Rusoro*, the *Cour de cassation* rejected the Court's view that a BIT's statute of limitations goes to jurisdiction and rather qualified it as a matter of admissibility.

The Court also recalled that a State cannot escape its contractual obligations by invoking parliament's lack of ratification of a contract or the breach of a domestic law on public markets (even if qualifying as a foreign mandatory law), nor "*a general climate of corruption within its administration*".

On a separate note but rare enough to be mentioned, a second investment arbitration has been initiated against France in relation to its decision to abandon a gold mine project in Guyana.

Parties' Equality in the Constitution of the Arbitral Tribunal

Established in the *Dutco* case, the principle of the parties' equality in the constitution of the tribunal is part of French public policy as recalled by the Court in *Maessa v Ecuador*.

But can this principle justify overriding the terms and conditions of an arbitration agreement? In *Vidatel*, the Court answered positively and endorsed the ICC's decision not to stricty enforce an arbitration clause allowing each party to appoint one arbitrator of a 5-member tribunal.

The Court agreed that "*in the actual configuration*" (1 claimant vs 3 respondents with converging interests) and "*absent any better agreement*", the ICC's decision not to confirm the 4 party-appointed arbitrators but to appoint on its own the five arbitrators was compliant with this principle, which the Court expressly considered "*binding upon the parties despite the terms of the arbitration agreement*".

What matters is thus the equal position of the parties, even if equality means the non-involvement of all the parties in the constitution of the tribunal and overriding the terms of the arbitration agreement.

Arbitrators' Independence and Impartiality

In 2021, the Court again issued several decisions on disclosure obligations and independence and impartiality of arbitrators.

The Court first addressed the *source* of this duty. On this issue, it seems that French courts move towards a combination of both French law and arbitration rules, considering the arbitration rules and then the arbitrator's disclosure duty under article 1456 CPC, expressly stated that its content was not limited to what was foreseen under the arbitration rules chosen by the parties.

The Court found that an arbitrator had to disclose the previous 9 appointments by a counsel over 21 years, but considered that this failure to disclose did not create a reasonable doubt, which requires "*the systematic character of a designation by the party or the counsel as well as its frequency and its regularity over a long period in comparable contracts*".

One other controversial issue is the "*exception de notoriété*", which allows arbitrators not to disclose circumstances that are publicly well-known and should therefore have been known by the parties. If it may be understandable that, as the Court made it very clear, the information published in the GAR is to be deemed "*well-known*" despite not being a free-access website, other circumstances are more questionable. For example, the Court ruled that an information was "*well-known*" if it could have been found when constituting the tribunal, by applying German search terms.

The Tribunal's Duty to Respect its Mandate

The Court clarified that the failure by a tribunal to give reasons for its decision and the failure by an arbitrator to render an award within the prescribed time-period were to be reviewed under Article 1520(3) (failure to comply with the mandate conferred upon the tribunal).

In *Boralex*, the Court also stated that such a failure, when it relates to a procedural rule, can only lead to a set aside of the award if it caused a grievance to one of the parties. It is also the first decision of the Court that ruled and dismissed a covid-related request for the annulment of an award signed remotely and at different dates by the arbitrators.

Assessment of Corruption Issues

Corruption remained under the spotlight in 2021, but French courts appeared less permissive on this issue as well.

While the Court stuck to its well-established case law that circumstantial evidence needs to be "*serious, precise and consistent*" (see also the reinstatement of the arbitral award in the *Alstom* saga), it considered that neither a "*general climate of corruption*", a situation of revolution, nor the "*bad reputation*" of the investor, as such, evidence corruption. The Court also recalled that an alleged bribe which postdates the investment does not taint the making of the investment with illegality.

Along with an imbalance in the contract's economic model (as suggested last year in *Sorelec v Libya*), other decisive circumstantial evidence now apparently accepted by the Court includes a lack of legal proceedings initiated against alleged bribers or the State's "*manifest inaction*". The Court however also upheld an award that ordered Senegal to compensate an investor for deprivation of an investment following a domestic criminal ruling for illicit enrichment. The Court confirmed the tribunal's findings that the investor was deprived of his fundamental procedural rights, as the criminal proceedings did not comply with general principles of international law.

Procedural Fraud

The Court also ruled in *LMH* and *Cevikler* that the production of forged documents, including false witness statements or fraudulent dissimulation of documents, can constitute a breach of French public policy and are to be reviewed under Article 1520(5) CCP. The challenging party must establish that the other party was in possession of the document and the document was decisive to the resolution of the dispute.

Third-Party Challenges Against Enforcement Orders

The *Cour de cassation* allowed a third-party challenge against an enforcement order issued by French judges of an international arbitral award rendered abroad, clarifying that the third-party challenge against the decision of the Court granting the enforcement order constituted an ordinary legal remedy not against the arbitral award itself, but only against the decision to enforce the award rendered abroad.

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