Kluwer Arbitration Blog

## 2023 Year in Review: Arbitration-Related Developments in France

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This post provides a recap of notable arbitration-related developments in France in 2023. Far from being an exhaustive account, it focuses on French court decisions in the areas identified below.

Overall, French courts have not only consolidated their approaches on recurring topics—as was the case in 2020, 2021, and 2022—but have also taken a slightly more restrictive than usual stance towards international arbitration.

**Annulment of Investment Awards: Old Names and Recurring Issues**

Year after year, Paris continues to be a leading venue for the annulment of non-ICSID investment arbitration awards. Together, the Paris Court of Appeal (the "CoA") and the Court of Cassation ruled on at least 10 known treaty-based awards, many of them coming under the French courts' scrutiny not for the first time. Two awards were set aside (Komstroy v. Moldova and Agarwal v. Uruguay, both discussed on the Blog here and here), and two awards were partially annulled in the long-running Serafin Garcia v. Venezuela saga (see here and here), reflecting a slightly lower success rate of set-aside applications this year in comparison to each year from 2016 to 2022.

French courts continue to exercise full control over tribunals' jurisdictional decisions under Article 1520(1) of the French Code of Civil Procedure (the "CCP"). However, 2023 saw a trend towards the restriction of the scope of this control.

French judges consider issues that are not directly related to the parties' consent to arbitrate, such as the applicable definitions of "investment" or "investor", as matters of either admissibility or for the merits, which are, therefore, not subject to their control:

- In Air Canada v. Venezuela, the CoA recalled that (i) the Bilateral Investment Treaty's ("BIT") limitation period (in line with Rusoro Mining) and its parallel litigation waiver requirement, as well as (ii) the alleged illegality of the investment are matters of admissibility (in line with e.g. Cengiz and Nurol), and thus cannot be reviewed at the annulment stage;
- In Agarwal, the CoA found that the date of completion of the investment is a substantive issue (in line with its recent ruling in Oschadbank). Accordingly, it concluded that the claimants' eventual acquisition of their investment sufficed to uphold jurisdiction, although the dispute preceded this

acquisition;

- In Etrak v. Libya, the CoA refused to rule on the claimant's assertion that a settlement agreement underpinning a claim to money relating to an investment was invalid and therefore declined to conclude that there was no underlying investment. This was considered a substantive issue, "*independent of that relating to the scope of the Libyan State's consent to arbitration*".

In line with this approach and as recently reported on the Blog, the investor's dual nationality remained under the spotlight of French courts, which continued to interpret the absence of any express exclusion of dual nationals as inclusion. The Court of Cassation endorsed this approach for the France-Senegal BIT (Aboukhalil v. Senegal), the Spain-Venezuela BIT (Serafin Garcia v. Venezuela), and the US-Vietnam Trade Relations Agreement (Dangelas v. Vietnam).

At the same time, it was also confirmed that the intra-EU BIT controversy extends to intra-EU arbitrations under the Energy Charter Treaty ("ECT"). In Komstroy, the Court unsurprisingly followed the views of the CJEU that a supply contract was a commercial transaction and that the resulting debt was not an investment within the meaning of the ECT, which resulted in the annulment of the award for the second time since the 2016 CoA decision.

On a separate note, in 2023, a number of French investors lodged investment claims against Spain, Morocco, Qatar, and Senegal.

**Arbitrators' Duty to Disclose: What Room for the "Public Knowledge Exception"?**

Over the years, French courts have developed case law under which arbitrators are not under the duty to disclose "well-known" circumstances (the so-called "public knowledge exception"), thus requiring parties to broadly and actively investigate information about arbitrators before their appointment (the parties' duty of curiosity). Some decisions rendered in 2023 appeared to question the clarity of this regime.

In Douala International Port v. the Autonomous Port of Douala, the CoA held that a presiding arbitrator's written eulogy to the lead counsel who had appeared before him revealed close personal links that should have been disclosed. The CoA concluded this gave rise to justifiable doubts as to the presiding arbitrator's independence and impartiality. Conversely, the CoA did not explicitly tackle the question whether the "public knowledge exception" covered such circumstances.

In MBI, the CoA dismissed the annulment application on the ground that the undisclosed circumstances were "well-known." The Court of Cassation upheld this decision. But instead of concluding that the allegedly well-known fact had not triggered the duty to disclose, the Court of Cassation held that the arbitrator had no obligation to disclose the circumstances in question, which "*could not generate in the parties' mind reasonable doubt*". This line of reasoning suggests that, for the Court of Cassation, it is the parties' perception of a fact rather than the fact it is "well-known" that defines the scope of the duty of disclosure.

These rulings are notable because the CoA did not depart from its traditional approach in many other cases, finding, for example, that:

- Repeated appointments by claimants in investor-state proceedings are a "well-known"

circumstance and, accordingly, are not to be disclosed by the arbitrator (Garoubé v. Cameroon);

- The fact that an arbitrator (i) had been appointed by affiliates of one of the disputing parties, (ii) had drafted paid legal opinions for that party, (iii) was a member of that party's legal council for many years, and finally, (iv) that his wife had worked for that party for 20 years, was not of a "well-known nature" as these links were not disclosed at the time of his appointment (Halyvourgiki v. PPD);
- The parties' duty of curiosity applies until the moment the arbitrator accepts their appointment, and not during the subsequent proceedings, which means that certain circumstances, despite being widely disseminated, including on GAR, may not be deemed "well-known" (Trasta v. Libya National Oil Corp).

**(Non-)Arbitrability of Disputes Involving a French Public Entity**

Last year, a judgement of the Conseil d'Etat (the "Council"), the French highest administrative court, limited the arbitrability of disputes involving French public legal entities. In SMAC v. Ryanair, the Council found that disputes arising out of agreements concluded between such a public legal entity and a foreign party are not arbitrable, thereby overturning the landmark 1966 Court of Cassation decision in Galakis under which arbitration agreements concluded by French public legal persons for the purpose of international commerce were considered valid.

**Effectiveness of Arbitration Agreements**

Can an arbitration agreement be so precise as to undermine its effectiveness? This is the question the CoA tackled in the high-profile Sultan of Sulu case. In a nutshell, the CoA considered that an arbitration agreement concluded by the Sultan of Sulu and the founders of the British North Borneo Company in 1878, referring to "*arbitration by the General Consul of the Queen in Brunei*", was null and void and that an *exequatur* could not thus be granted.

The CoA reasoned that the post of General Consul was "*inseparable*" from the parties' consent to arbitrate. As a result, after the post had ceased to exist, the disputed clause became "i*napplicable, as it* [became] *null and void*". The CoA further found that, in 1946, the British government succeeded one of the parties to the arbitration agreement, with the result that "*a British consul could not be regarded as an independent third party.*"

Accordingly, wording an arbitration agreement to designate particular individuals or office holders as arbitrators creates a risk that, in France, the respective arbitration clause may be deemed inoperative. Although the CoA may have been influenced by the exceptional circumstances of the case (i.e. the legacy arbitration agreement with very particular terms, criminal proceedings against the Spanish arbitrator who issued the award and, as some suggest, acute diplomatic pressure), it remains a decision unfavourable to arbitration.

**Particularities of Enforcing Awards Against State Assets**

In 2023, the French courts rendered a number of judgments that turned the spotlight on the

potential difficulties of enforcing awards against States in France.

In Al-Kharafi v. Libya, the CoA confirmed that the applicant required a preliminary authorisation from the French Directorate General of the Treasury before it could obtain a freezing order against Libyan assets blocked under the EU sanctions regime.

In CBGE v. Equatorial Guinea, the investor failed to enforce the award against the proceeds from the sale of assets belonging to the son of the respondent State's President. In the CoA's view, under the 2021 law, once the proceeds became part of France's foreign aid fund, the respondent State no longer had a claim to the proceeds, and therefore, the investor could not enforce against them.

**French Approach to Anti-suit Injunctions: Debate Across the English Channel**

Although a French court cannot issue an anti-suit injunction ("ASI"), the French legal order is not fundamentally opposed to ASIs, and the French courts may even enforce them in certain cases.

As discussed on the Blog, in 2023, the debate about the French approach to ASIs featured prominently in English case law. In three cases, the London High Court and the English Court of Appeal grappled with the question of whether an English court could grant an ASI in support of a Paris-seated arbitration.

In two of the relevant cases, the ASIs were ultimately granted after the High Court and Court of Appeal judges found no good reason not to issue them, including because the French legal order does not, in principle, militate against such remedy. But in the third case, Teare J did not endorse this line of reasoning. Refusing to grant the ASI, he found that he could not follow the Court of Appeal judgment as the case had been decided on an *ex parte* basis. He further saw no grounds to say that "*substantial justice cannot be done* […] *in France merely because the remedy of an anti-suit injunction is not available there*".

**Conclusion**

In 2023, Paris remained a highly relevant seat of arbitration, driving practice developments and trends. While some of these were welcome, in particular, French courts maintaining a strict delimitation of the scope of courts' review under Article 1520(1) of the CCP, one cannot but notice, with regret, a share of developments unfavourable to arbitration. One of them, indicatively, purports to ban arbitration involving French public legal entities altogether. It is to be hoped that such anti-arbitration instances/outliers will not be maintained in 2024.

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