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Towards the End of the 'Sultan de Sulu' Case in France: The Hidden Influence of the New York Convention on French Law on Enforcement of Arbitral Awards?

Caroline Kleiner (Université Paris Cité) · Tuesday, February 25th, 2025

The famous saga *Sultan de Sulu* is coming to an end in France with the French Cour de cassation (Cass. Civ. 1re 6 November 2024, hereinafter the "Ruling") upholding the Paris Court of Appeal's decision to refuse the enforcement of the preliminary award whereby the sole arbitrator affirmed his jurisdiction and determined the seat of the arbitral proceedings in Madrid in the dispute between Malaysia and the heirs of the Sultan of Sulu. The historical factual background of the case is described in a previous post authored by Gordon Nardell here.

However, the Ruling is not the final French chapter. Indeed, readers of this blog will remember that two awards had been rendered in these proceedings: the first award affirming jurisdiction of the sole arbitrator (which is the object of the Ruling) and the second award on the merits, where Malaysia was ordered to pay the claimants $14,92 billion for the breach of the 1878 the agreement between the Sultan of Sulu – former ruler of parts of the Philippines and the Malaysian State of Sabah – and two European individuals. The Sultan ceded or leased the right to exploit territory in return for annual payments ("Agreement"). Under the Agreement, disputes were to be "brought for consideration or judgment of [the British] Consul-General in Borneo". Sovereignty over the former Sultanate passed to the British crown and then became Malaysia. Until 2013, the Malaysian government maintained annual payments to Filipino nationals identified as heirs of the last Sultan. Malaysia also seeks the annulment of the award on the merits before the Paris Court of Appeal, which stayed its proceedings until the decision of the French Court of cassation is rendered. Given the Ruling of 6 November 2024, there is no suspense concerning the future decision of the Paris Court of Appeal to annul the second award.

This case illustrates the discrepancies that can arise between national jurisdictions concerning the interpretation of an arbitration agreement and the lack of *universalism* regarding the application of the New York Convention ("Convention") and its core concepts. Indeed, the decision of the Tribunal in Madrid to appoint an arbitrator means that it considered, *prima facie*, that the arbitration clause at hand *existed* (and it should be recalled that the reasons for which the Madrid decision has been repealed are not related with the clause itself, but with the irregularities concerning the notification of the decision to a sovereign state). In Luxembourg, the claimants succeeded to have both awards enforced. However, in the Netherlands, the Dutch Supreme Court upheld an earlier ruling that refused to enforce the award on the merits. Now the dispute is exported in the United States.

However, our observations shall be limited to the French aspects of this saga. Among the several issues that could be discussed, only one is tackled by the Court of Cassation, whose role is limited to decide whether the Paris Court of Appeal was right in reversing the decision of the first instance judge that enforced the jurisdictional award.

Although France is a party to the Convention, French jurisdictions apply continuously, and usually without justifying it, the provisions of the French Civil Procedural code ("CPC") (by virtue of Article VII of the Convention) to actions contesting the enforcement of foreign arbitral awards. According to French arbitration law, the enforcement procedure is a non-adversarial procedure, where the claimant only needs to present the award and the arbitration agreement translated into French to obtain the *exequatur*. An appeal against that decision is always possible according to Article 1525 of the CPC, but only on the five grounds to annul an award rendered in France enumerated in Article 1520 of the CPC.

Malaysia invoked all five grounds to revoke the enforcement delivered by the first instance judge. Although no hierarchy exists between those grounds and claimants may present them in the order they deem fit, the Paris Court of Appeal considered that:

> "Since the arbitrator's jurisdiction is the source of arbitrator's jurisdictional power, it is necessary, before examining whether the arbitral tribunal was properly constituted, to determine whether the parties intended to have recourse to arbitration and under what conditions."

Article 1520(1) to which Article 1525 of the CPC refers to is stingier in words than the Convention. It merely says that enforcement of an arbitral award may be refused when "[t]he arbitral tribunal has wrongly declared itself competent or incompetent". This ground addresses the same issue as the one provided in Article V(1)(a) of the Convention but in a different way, since it does not refer to any applicable law governing the arbitration agreement. This is one of the most distinct features of the French arbitration law and its application by the French courts, which have, for decades, decided that "the validity of the international arbitration agreement, its existence and effectiveness shall be interpreted without reference to the law of any State" (See *Dalico* case, Cass. Civ. 1re December 20, 1993, Case no. 91-16828).

Until the *Sultan de Sulu* decision, it seemed that it was not so relevant to determine under which rules of interpretation the international arbitral agreement should be construed. French case law had established a principle of validity of the arbitration agreement which let little room to conclude that the arbitration agreement was not valid (see the *Zanzi* case, Cass. Civ. 1re January 5, 1999, Case no. 96-21.430). In the present case, where the arbitration agreement seemed pathological, it became relevant to justify how the court should interpret the clause of the Agreement. In the *Sultan de Sulu* case, the Paris Court of Appeal in its decision added (although it had already done so in some previous cases: *BZ Grain* case, Paris Court of Appeal, April 4, 2023, Case no. 22/07777 and *Imagine* case, Paris Court of Appeal, May 16, 2023, case no. 21/21189) two rules of interpretation – the international arbitration agreement shall be interpreted in accordance with the "principles of

good faith and utility".

Those rules of interpretation are endorsed by the Court of cassation, which affirms that:

> "[A]n international arbitration agreement, the existence and effectiveness of which are determined by the common will of the parties, shall be interpreted in accordance with the **principles of good faith and utility**, without reference to the law of any State." (emphasis added)

The Paris Court of Appeal had juxtaposed various translations of the clause to conclude that the parties wished to appoint a third party to the contract to hear any dispute arising from the agreement between them or their successors and that the clause "could be regarded as an arbitration clause". However, the court noted that:

> "*the choice of the British Consul General posted in Brunei to hear any dispute was a decisive factor in the parties' willingness to have recourse to arbitration*".

Given the factual circumstances of the case, the designation of the Consul General posted in Brunei appears to be "inseparable from the wish to compromise, with which it forms a whole". Hence, the clause becomes "null and void" because the function (and the person in that position at that time) does not exist anymore. In other terms, the will of the parties to designate the Consul General posted in Brunei as the arbitrator was an essential part of the consent of the parties to arbitrate.

Some authors discuss the possibility for the parties to "essentialise" certain element of the arbitration agreement, i.e. the name or specific function of the arbitrator. If the will of the parties is to arbitrate, that will should be protected: if the nominated person cannot serve as arbitrator, the clause should be "saved" and another arbitrator should be nominated (see for instance Lilian Larribère, "Désignation 'intuitu personae' de l'arbitre et caducité de la convention d'arbitrage", Gazette du Palais, 23 October 2023).

In our view, if the parties have specifically determined the qualities of an arbitrator (for instance a specific expertise, knowledge of a language), as long as this choice respects the principle of non-discrimination, this essential element of the parties' consent to arbitrate should be respected. If the parties mentioned a specific status, so be it. If the status disappears (and the first appointing authority to have been contacted by the claimants was the British Ministry of foreign affairs, who declined to appoint an arbitrator), whatever are the reasons for its disappearance, the agreement to arbitrate does not exist anymore.

The Court of cassation approves the reasoning of the Paris Court of Appeal decision and gives the court a large margin of interpretation, as it does for any contract. The interpretation of contracts rests in the power of the judges who decide on the merits of the case and may be overturned only in exceptional circumstances, when the judges gave to the clause a meaning that it clearly could not

have (French: *denaturation*).

This is the first case where a foreign arbitral award cannot be enforced because the arbitration agreement became null and void after its conclusion, this consequence being led because of the disappearance of a specific diplomatic function.

Yet, French law on enforcement does not specifically mention the case of an arbitration agreement becoming "null and void" (*caduque*) as a ground to refuse enforcement (as mentioned above, the first ground to refuse the enforcement under Article 1520 of the CPC relates to the "wrong" decision of the arbitral tribunal to declare itself competent or incompetent). Of course, one of the reasons why the arbitral tribunal could not be competent is that the arbitration agreement was null and void. It can be easily argued that this ground is implicitly covered by French arbitration law. However, the mention of the arbitration agreement to be "null and void" exists in Article II(3) of the Convention.

Could It Be That the Paris Court of Appeal Starts a New Trend of Interpretation of the Grounds of Refusal of Enforcement Provided for by French Law, Inspired by the Convention?

We couldn't hope for better. Applying the provisions of the Convention rather than those under French law, where it is not proven that the latter is more favorable than the Convention, would enable French courts to participate in the development of the international law on the enforcement of foreign arbitral awards, in other words, to collaborate to the *universalist* approach rather than to remain fixed in the trend of *exceptionalism* (as argued in a recent conference held at the Université Paris Cité).

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