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France

France

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A. Legislation and rules

A.1 Legislation

There have not been legislative changes affecting arbitration in 2018.

A.2 Institutions, rules and infrastructure

There have not been any significant developments in the past year.

B. Cases

B.1 The obligation on arbitrators to disclose: the exception not to disclose a "notorious fact" applies only to facts which occurred before the beginning of arbitral proceedings

In a decision dated 27 March 2018,[13] the Paris Court of Appeal held that the arbitral tribunal was wrongly constituted on the ground that one of the arbitrators failed to disclose after the arbitral proceedings have been initiated, a fact that he considered as "notorious."

In the case at hand, ICC arbitration proceedings were brought by Saad Buzwair Automotive ("SBA"), a distribution company incorporated under Qatari law against Audi Volkswagen Middle East Fze ("Volkswagen"), a company incorporated under Emirati law, when the latter terminated two commercial agreements entered into between the parties. Paris was elected as the seat of arbitration by the parties.

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[13] Paris Court of Appeal, 27 March 2018, 16/09386.

The arbitral tribunal, composed of a panel of three arbitrators, ruled in favor of Volkswagen in 2016.

SBA brought an action to set aside the award before the Paris Court of Appeal, alleging that the arbitral tribunal was wrongfully constituted since one of the arbitrators failed to disclose all the circumstances likely to affect his independence and impartiality. The reasoning was based on the following arguments:

Before accepting his appointment, the arbitrator in question indicated to the ICC in 2013 that to his knowledge and after having duly inquired, there were no facts or circumstances, past or present, likely to affect his independence in the mind of one of the parties.

However, the arbitrator in question was a partner in a law firm which, according to the 2010/2011 edition of a famous German lawyers' directory, had represented a company of the Volkswagen group in another dispute (namely, the Porsche company).

Moreover, the same client, Porsche, was also mentioned as a client of the same firm in which the arbitrator was still a partner according to the 2015/2016 edition of the above-mentioned directory.

Volkswagen argued in its turn that the mention made to Porsche in the 2015/2016 edition was made by mistake; however, the Paris court of appeal considered that Volkswagen failed to establish said mistake.

This decision attracted a lot of attention amongst arbitration practitioners because the Paris court of appeal has provided a valuable guide as to the methodology under which a "notorious" fact should be disclosed by the arbitrators.

Before the beginning of arbitral proceedings, the parties must inquire about the arbitrators, who have no obligation to disclose "notorious." This was the case with regard to the representation of Porsche by the arbitrator's law firm as displayed in the 2010/2011 edition of the German lawyers' directory.

However, and this is the particular interest of this decision, the Court of Appeal considered that the arbitrator had to reveal the fact that Porsche had become again a major client of the law firm in which he was a partner, as indicated in the 2015/2016 edition of the directory. Although this fact could be considered as a "notorious" fact, the Paris court of appeal held that the parties no longer had an obligation to continue inquiring about the arbitrators once the arbitration proceedings had been initiated. The award was consequently set aside.

Indeed, under French law,[14] the arbitrators are required to disclose any circumstances which are likely to affect their independence and impartiality. However, French case law traditionally considers that the arbitrators do not have to disclose any information that is publicly available to the parties, which is known as the exception of "notorious facts" ("*faits notoires*").

In its decision of 27 March 2018, the Paris Court of Appeal appears to provide an exception to the exception: the "notorious facts" must be disclosed by the arbitrators if they occur after the beginning of the arbitration proceedings.

This decision could be the first of a new line of case law. Particular attention should, therefore, be paid to future decisions regarding the obligation of the arbitrators to disclose notorious facts. In particular, the position of the French Supreme Court is awaited.

B.2 The French mechanism of a repurchase of disputed debts applicable to international arbitral awards

By two decisions rendered on the same day,[15] which have drawn considerable comment, the French Supreme Court held that the mechanism known as "repurchase of a disputed debt" ("*retrait litigieux*") applies to international arbitral awards, whether rendered in France or abroad.

[14]Article 1456 paragraph 2 of the French code of civil proceedings applicable to international arbitration under article 1506 of the same code.
[15]Cour de Cassation, 28 February 2018, n° 16-22.112 and n° 16-22.126.

A "*Retrait litiguex*" is a mechanism whereby a debtor repurchases his/her disputed debt at the price at which the initial creditor sold it to a third party

In the case at hand, two contracts were entered into between the Democratic Republic of Congo and a company named SNEL for the construction and financing of a high-voltage power line. A dispute arose and two ICC arbitral tribunals were constituted, one in Paris and the other one in Zurich. The two awards ordered the Democratic Republic of Congo to pay to SNEL an amount of USD 11,725,844.96 and an amount of USD 18,430,555.47.

However, in the meantime, while both arbitrations were still ongoing, SNEL had assigned its two disputed claims to a third company, Energoinvest, for a total amount of USD 3,618,232.28.

The Democratic Republic of Congo brought an action to set aside the award rendered in Paris and appealed against the enforcement order of the award rendered in Zurich. It has also requested the Paris court of appeal to apply article 1699 of the Civil code allowing to repurchase its disputed claim at the amount of USD 3,618,232.28, i.e. a total amount of USD 30,156,400.30 under both awards.

In what is thought to be the first decision of its kind, the Paris Court of Appeal had to rule on the application of the repurchase of a disputed debt in the course of an action to set aside an international arbitration award.

The Court of Appeal dismissed the claim of the Democratic Republic of Congo on the grounds that it did not have the power to apply the mechanism of "*retrait litigieux*" in the course of an action to set aside the arbitral award.

According to the court of appeal, only five cases allow the award to be set aside and the "retrait litigieux" is not among them. In addition, an action to set aside the award does not allow the court to review the arbitral award on its merits.

The French Supreme Court, however, disagreed with the Court of Appeal and considered that application of the repurchase of a disputed debts does not imply a review of the arbitral award but its enforcement and should, therefore, be allowed.

The implications of this decision are quite important:

As a consequence of the application of the repurchase of the disputed debt, the awards rendered by the two arbitral tribunals will never be applied. Indeed, the Democratic Republic of Congo may buy back its debt from EnergoInvest for an amount of USD 3,618,232.28. i.e. the purchase price of the disputed claim from SNEL, rather than paying a total amount of USD 30,156,400.30 under the two arbitral awards.

Moreover, the decision raises questions regarding the international scope of its consequences. Indeed, the French Supreme Court issued the decision although the second award was rendered in Zurich and the dispute governed by Swiss law, which does not include such a specific mechanism. As one author points out,[16] the mechanism could thus be used as a means to hinder enforcement of arbitral awards abroad by simply enforcing the French decision allowing the mechanism of the "*retrait litigieux*."

B.3 The consideration of foreign police laws in the judicial review of an arbitral award

A decision rendered by the Paris Court of Appeal on 16 January 2018[17] has been one of the noteworthy decisions of the past year in France, particularly with regards to the possibility to set aside an arbitral award rendered in contradiction with foreign public policy laws.

In the case at hand, a Laotian company, Dao Lao had been constituted between a Russian company, MK group, owner of 70% of capital and

[16]Philippe PINSOLLE, Journal du droit international (Clunet) n° 4, October 2018, 19.
[17]Paris Court of Appeal, 16 January 2018, 15/21703.

another Laotian company, Lao Geo Consultant, owner of the remaining 30% of shares in order to operate a gold mine in Laos.

In 2010, MK group assigned 60% of the shares of Dao Lao to Onix, a Ukrainian company. In 2011, a memorandum of understanding was signed between MK Group, Onyx, Lao Geo Consultant and the Laotian Ministry of Natural Resources confirming the assignment previously agreed between by MK Group and Onyx.

In 2014, MK Group initiated ICC arbitration proceedings considering that the shares in Dao Lao that it detained have not been effectively transferred to Onyx since the latter failed to provide the agreed financing. The issue in dispute was thus concerned to determine whether or not the financing to be provided by Onyx was considered by the parties as a condition precedent. Indeed, a discrepancy existed between the Laotian and the English versions of the 2011 Memorandum of Understanding: according to the Laotian version, the financing was a condition precedent to the transfer of the shares, whereas the English version did not mention it.

In its award rendered in Paris, the arbitral tribunal ruled that, since the 2010 shareholder agreement did not provide for any condition precedent, the Ukrainian company did own the disputed shares of the Laotian company.

An action to set aside the arbitral award was filed by MK Group with the Paris Court of Appeal. The court considered that there had been a violation of international public order in the present case, since the difference between the Laotian and English versions was intended to mislead the Laotian Ministry of Natural Resources in order to obtain administrative authorization for the transfer of shares in the Laotian company. Indeed, the Laotian legislation provided for the exploitation of its natural resources to be subject to specific prior administrative authorization. To take into account this foreign legislation, the Court of Appeal relied on the existence of a Resolution of the General Assembly of the United Nations dated 14 December 1962 expressing an international consensus on the right of states to make the

exploitation of natural resources located on national territory subject to prior authorizations. The court concluded that there was, therefore, a violation of international public policy, which is one of the five cases of article 1520 of the French code of civil proceedings[18] entitling the court of appeal to set aside the arbitral award.

With this ruling, the court of appeal provided a full review of the compliance of the award with the international public policy rules, whereas previously, it only applied a "minimalist" control of this requirement.

In addition, while controlling the compliance of the award to international public policy rules, the Paris court of appeal takes into account for the first time to our knowledge a foreign public policy law.

It should be noted that under French case law, an award may not be set aside on the grounds of a mere violation of foreign public policy law. It may, however, be the case if the foreign law is part of the international public policy, as reflected here by the 1962 United Nations General Assembly resolution on the exploitation of natural resources.

[18] Article 1520 of the French Code of Civil Procedure:
"The action for annulment is only available if:
1° The arbitral tribunal has wrongly declared itself competent or incompetent; or
2° The arbitral tribunal was improperly constituted; or
3° The arbitral tribunal has ruled without complying with the mission entrusted to it; or
4° The principle of contradiction has not been respected; or
5° The recognition or enforcement of the award is contrary to international public policy."
Translated from French (emphasis added).