Three Investment Treaty Awards Run the Gauntlet in the French Courts

April 19, 2021

The historic pro-arbitration stance of the French courts accounts for much of France's popularity as a seat for arbitrations, including for a growing number of non-ICSID treaty awards. Three recent decisions on applications to annul treaty awards illustrate the French courts' approach.

DS Construction v. Libya. On March 23, 2021, the Paris Court of Appeal set aside a 2018 partial award on jurisdiction against Libya under the OIC Agreement.[1] This was reportedly the first case in which the investor successfully argued that the OIC Agreement permitted recourse to the Secretariat of the Permanent Court of Arbitration ("PCA"), as appointing authority under the UNCITRAL Rules, where the respondent State had failed to appoint and the Secretary-General of the OIC had failed to act.

The Court found that the specific wording of Article 8 of the OIC Agreement, which it interpreted as an MFN clause, did not allow DS Construction to import the UNCITRAL Rules from another treaty. The Court concluded that the tribunal had been improperly constituted, which is a ground for annulment pursuant to Article 1520, 2º of the French Code of Civil Procedure.

The Court also rejected DS Construction's argument that Libya's annulment application was inadmissible because it had refused to participate in the constitution of the tribunal and had acted in bad faith, noting that DS Construction had waived such an objection by failing to raise it at the outset of the arbitral proceeding.[2]

Oschadbank v. Russia. On March 30, 2021, the Paris Court of Appeal set aside a US$1.1 billion investment treaty award in favor of JSC Oschadbank, a Ukrainian State-owned

---

1 Paris Court of Appeal (Chamber 5-16), March 23, 2021, No. 18/05756.

2 Article 1466 of the of the French Code of Civil Procedure provides that "[a] party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity." However, as long as the issue of jurisdiction had been argued before the arbitral tribunal, Article 1466 does not preclude parties from raising new arguments and adducing new evidence with respect to jurisdiction at the annulment stage (Court of Cassation, December 2, 2020, No. 19.15396, *Schooner v. Poland*.)

bank, which alleged that Russia had expropriated its assets in Crimea.[3] Russia had objected to the jurisdiction of the arbitral tribunal and refused to participate in the proceedings.

Article 12 of the Russia-Ukraine bilateral investment treaty provided that it applied to investments made on the territory of one of the contracting Parties "as of 1 January 1992." At the annulment stage, Russia argued that it had found new evidence establishing that Oschadbank had acquired its branch in Crimea before that date. It therefore raised a new jurisdictional objection based on Article 12, which it had not argued before the arbitral tribunal. The Court dismissed Oschadbank's argument that this objection was inadmissible because it had not been raised before the tribunal. Based on this new evidence submitted by Russia, the Court concluded that the arbitral tribunal lacked jurisdiction *ratione temporis* and annulled the award pursuant to Article 1520, 1º of the French Code of Civil Procedure.

Rusoro Mining v. Venezuela. On March 31, 2021, the French Court of Cassation reversed and remanded the Paris Court of Appeal's partial annulment of a US$1.6 billion investment treaty award against Venezuela.[4] The Paris Court of Appeal had reasoned that the arbitration tribunal exceeded its jurisdiction by including, in its calculation of quantum, compensation for a time period that fell outside the three-year prescription period in the Canada-Venezuela bilateral investment treaty.

The Court of Cassation reversed the Paris Court of Appeal's decision, holding that the prescription period under the treaty is not a jurisdictional objection but an argument as to inadmissibility and therefore falls outside the scope of the standalone ground for annulment based on lack of jurisdiction under Article 1520, 1º. The Court of Cassation reinstated the award and remanded the case to a different composition of the Paris Court of Appeal.

Key takeaways. In recent years, French courts have been particularly active on the arbitration front, issuing decisions on questions of treaty interpretation, quantum, dual nationality, serious illegality, corruption "red flags," the impact of economic sanctions and now arbitration under the OIC Agreement, temporal jurisdiction and prescription periods.

The main takeaways from the three most recent decisions are as follows.

- **The Court of Appeal conducts an independent review of the tribunal's jurisdiction**. Article 1520 of the French Code of Civil Procedure provides an

[3] Paris Court of Appeal (Chamber 5-16), March 30, 2021, No. 19/04161.

[4] Court of Cassation (First Civil Chamber), March 31, 2021, No. 19-11.551.

exhaustive list of grounds for set-aside of awards (including treaty awards) seated in France, the first of which is that the tribunal incorrectly asserted, or declined, jurisdiction.[5] This is seen as a corollary of the negative effect of *compétence-compétence* under French law (as we described here).[6]

- **New arguments and evidence may be admissible at the annulment stage only in limited circumstances**. Article 1466 of the French Code of Civil Procedure provides that a party waives an irregularity that it has knowingly and without good cause failed to raise before the tribunal.[7] Accordingly, in *DS Construction*, the Court of Appeal found that certain arguments were inadmissible because they had not been raised before the tribunal in the first instance.[8] In two recent cases, the Court of Cassation and the Paris Court of Appeal held that new arguments and evidence on the alleged lack of jurisdiction could be admissible on the condition that the issue of jurisdiction had been raised before the tribunal.[9]

- **The Court of Cassation polices against judicial overreach**. The Court of Cassation will review the Courts of Appeal's determination for errors of law (but not fact), reigning in annulments that exceed the proper scope of court review. In *Rusoro*, the Court of Cassation redrew an oft-neglected line between jurisdiction and admissibility, confirming that certain kinds of preliminary objections do not qualify for the independent court review of jurisdiction under Article 1520, 1º of the French Code of Civil Procedure.

These decisions occur in the broader European context of distrust towards investment arbitration. France has joined the majority of EU Member States in terminating its intra-EU investment treaties, calling for a standing international investment court and proposing a restriction of the jurisdictional and substantive coverage of the Energy

---

5 Article 1520 provides: "*Le recours en annulation n'est ouvert que si : 1° Le tribunal arbitral s'est déclaré à tort compétent ou incompétent.*"

6 *See also* Court of Cassation (First Civil Chamber), March 31, 2021, No. 19-11.551, *Rusoro*; Paris Court of Appeal (Chamber 5-16), June 3, 2020, No. 19/03588; Paris Court of Appeal (Chamber 1-1), November 18, 2010, No. 09/19535.

7 Article 1466 provides: "*La partie qui, en connaissance de cause et sans motif légitime, s'abstient d'invoquer en temps utile une irrégularité devant le tribunal arbitral est réputée avoir renoncé à s'en prévaloir.*"

8 Paris Court of Appeal (Chamber 5-16), March 23, 2021, No. 18/05756, ¶¶ 50-51 ("*Ainsi, la société DS Construction n'est plus recevable à invoquer devant le juge de l'annulation un abus de droit ou un défaut d'intérêt à agir, alors que les faits allégués en son soutien préexistaient à cette instance et qu'il lui appartenait donc de soulever ce moyen dès le début de l'instance arbitrale, ce qu'elle s'est abstenue de faire. Il convient en conséquence de considérer que la fin de non recevoir soulevée par la société DS Construction, fût-elle susceptible de fonder en droit international public une irrecevabilité, n'est plus recevable devant le juge de l'annulation.*")

9 Court of Cassation (First Civil Chamber), December 2, 2020, No. 19.15396, *Schooner v. Poland*; Paris Court of Appeal (Chamber 5-16), March 30, 2021, No. 19/04161, *Oschadbank*.

Charter Treaty.[10] In late March 2021, the French Minister for Foreign Trade was reported to have said that France no longer wants "private arbitration tribunals" in its future agreements.

Against that context, it may increasingly fall to the French courts—and the Court of Cassation as ultimate guardian against improper annulments—to protect and preserve France's legacy as an arbitration-friendly jurisdiction.

* * *

Please do not hesitate to contact us with any questions.

PARIS

Antoine F. Kirry
akirry@debevoise.com

Alexandre Bisch
abisch@debevoise.com

Fanny Gauthier
fgauthier@debevoise.com

Alice Stosskopf
astosskopf@debevoise.com

Romain Zamour
rzamour@debevoise.com

LONDON

Lord Goldsmith QC
phgoldsmith@debevoise.com

NEW YORK

Samantha J. Rowe
sjrowe@debevoise.com

Patrick Taylor
ptaylor@debevoise.com

Ina C. Popova
ipopova@debevoise.com

[10] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, *available at* <https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)646147>; EU text proposal for the modernisation of the Energy Charter Treaty (ECT), available at <https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf>; *see* our previous update on EU Member States issuing declarations to terminate intra-EU Bilateral Investment Treaties and our previous update on the CJEU Advocate General opining against intra-EU arbitration under ECT.