



**Review of
Investor-State Arbitral
Awards by States Courts:
Recent French Decisions**

Organisers



AAIL FOUNDATION

Dr Jane Willems

Associate Professor of Law and Associate Director of LL.M. in
International Arbitration & Dispute Settlement
School of Law, Tsinghua University

Attorney at Law and Arbitrator



Role of State Courts in Investment Arbitration

- ICSID Arbitration vs non-ICSID Arbitration
- Control of the award
- Recognition and enforcement of the award



ICSID vs non-ICSID Arbitration (I)

Annulment ICSID Convention Article 52(1)	Setting aside MAL Article 34
Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:	(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article. (2) An arbitral award may be set aside by the court specified in article 6 only if:



Review of
Investor-State Arbitral
Awards by States Courts:
Recent French Decisions



ICSID vs non-ICSID Arbitration (II)

Annulment

ICSID Convention Article 52(1)

- (a) the Tribunal was not properly constituted;
- (b) the Tribunal has manifestly exceeded its powers;
- (c) there was corruption on the part of a member of the Tribunal;
- (d) there has been a serious departure from a fundamental rule of procedure; or
- (e) the award has failed to state the reasons on which it is based.

Annulment

MAL Article 34

(a) the party making the application furnishes proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid [...]; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceeding or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration [...]; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, [...]; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.



ICSID vs non-ICSID Arbitration (III)

Recognition ICSID Convention Article 54(1)	Recognition MAL Article 35(1) – NYC Article III
<p>(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.</p>	<p>(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.</p> <p>NYC Article III Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.</p>



Review of
Investor-State Arbitral
Awards by States Courts:
Recent French Decisions



Non-ICSID Arbitration

Enforcement: Grounds for refusal to enforce NYC Convention Article V – MAL Article 36

- a) The parties to the agreement referred to in article II were, [...], under some incapacity, or the said agreement is not valid [...]; or
- b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or
- c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, [...]; or
- d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement, [...]; or
- e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- b) The recognition or enforcement of the award would be contrary to the public policy of that country.



ICSID Arbitration

Execution Article 54(3)

(3) Execution of the award shall be governed by **the laws concerning the execution of judgments** in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the **law in force in any Contracting State relating to immunity** of that State or of any foreign State from execution.



Review of
Investor-State Arbitral
Awards by States Courts:
Recent French Decisions



Paris Place of Arbitration in Non-ICSID Investor-State Arbitration

- Determination of the seat
- Choice of Paris as a seat
- French court proceedings with respect to setting aside and recognition proceedings
- Emerging case law on setting aside investor-state awards since 2014



	French Cases on Investor-State Arbitration	Outcome
1	<i>De Sutter v Madagascar (2016-2017)</i>	Set aside
2	<i>Kromstroy (Ukraine) v Moldavia (2018-2023)</i>	Set aside
3	<i>Rusoro Mining v Venezuela (2019-2022)</i>	Confirmed
4	<i>Schooner v Poland (2021-2022)*</i>	<i>SPC quashed CA's refusal to set aside</i>
5	<i>JSC Oschadb v Russia</i>	Confirmed
6	<i>Armas Gruber v Venezuela (2020-2021)</i>	Confirmed
7	<i>Strabag v Poland</i>	Set aside
8	<i>MM v Uruguay</i>	<i>Set aside</i>
9	<i>Belokon v Kyrgyz (2017-2022)</i>	<i>Set aside</i>
10	<i>Fornan et al v Malaysia (Sultan of Jolo v Malaysia)*</i>	<i>Not enforced</i>



Setting Aside Grounds: Article 1520 CPC

- (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or
 - *Rusoro Mining v Venezuela (2019-2022)*
 - *Schooner v Poland (2021-2022)**
 - *Armas Gruber v Venezuela (2020-2021)*
 - *JSC Oschadb v Russia (2021-2022)*
 - *M. I... P... v Venezuela (2017-2019)*
 - *Strabag v Poland (2022) – arbitration agreements in intra-EU BITs are contrary to EU law (Achmea decision)*
 - *Kromstroy (Ukraine) v Moldavia (2018-2023)**
- (2) the arbitral tribunal was not properly constituted; or
- (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or
- (4) due process was violated; or
 - *De Sutter v Madagascar (2016-2017)*
- (5) recognition or enforcement of the award is contrary to international public policy.
 - *Belokon v Kyrgiz (2017-2022)*



Recognition Foreign Awards by French Court

- (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or
 - *Fornan et al v Malaysia (Sultan of Jolo v Malaysia)* Paris CA no RG 22-04007, 6 June 2023
- (2) the arbitral tribunal was not properly constituted; or
- (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or
- (4) due process was violated; or
- (5) recognition or enforcement of the award is contrary to international public policy.



Due Process

- *PGM et DS 2, et MM. de Sutter v Madagascar, RG 14/19164*
- French Supreme Court 15 March 2016 Confirmed CA Paris
The ICC Award granted a 5% interest to the investor as loss of profit. The court held that the legal basis to grant monies to the investor was different from the one formulated in the claim made in the arbitration. Accordingly, the Tribunal did not comply with due process.

See *CCN v OMI*, CA Paris 25 March 2010:

In their reasoning, the arbitrators substituted the compensation claimed by OMI based on loss of earnings, which they considered inadequate, with a compensation based on the loss of opportunity to see the project materialize, which OMI had not claimed;

this substitution does not constitute a simple method of assessing the basis of OMI's compensation; in failing to invite the parties to explain themselves on this point, the arbitrators disregarded the principle of due process.



Common Features on Jurisdiction and Public Policy Grounds

- Jurisdiction to review BITs awards
- Standard of control: application of principles from commercial arbitration disputes
- *De novo* review
- Admission of new evidence
- Admission of new arguments



French Case Law Time Bar / Jurisdiction

3. *Rusoro Mining v Venezuela* (ICSID(AF)/12/5 , USD 966,500,000) (Canada-Venezuela BIT)

- 2019: CA Paris set aside the award – time bar under the BIT
- FSC 2021: quashed CA Paris: time bar does not constitute a jurisdiction issue subject to review
- 2022: CA Paris rejected application to set aside
- Failure to comply with amicable procedure (conciliation) does not constitute a jurisdictional defence but an admissibility defense which is not which is not a ground for setting aside.
- The 3-year time (submission to arbitration within 3 years from the date the investor knew or should have known of the violation and the loss) does not constitute a condition to consent to arbitrate which limit the scope of the arbitral tribunal's jurisdictional but an issue of admissibility [*recevabilite des demandes*] which is not a ground for setting



French Case Law on Jurisdiction

Admission of post-award jurisdictional arguments not raised in arbitration if there was a jurisdiction plea:

Schooner v Poland :

- Award decided no jurisdiction on tax issues

In annulment proceedings, the investor relied on the MFN clause for the first time

CA Paris: decided the argument was not admissible

FSC 2022: accepted new jurisdictional arguments

FSC: 'It follows from articles 1520.1° and 1466 CPC, that when jurisdiction has been debated before the arbitrators, the parties are not deprived of the right to put forward new pleas and arguments on this issue before the annulment judge, and to present new evidence to this effect.'



French Case Law on Jurisdiction (II)

- Interpretation of BIT definitions:
 - Investment
 - Nationality of investor



Intra-EU BITs and EU Law

Achmea v Slovakia (Netherlands-Slovakia BIT) – UNCITRAL arbitration – seat in Frankfurt – Judgment 6 March 2018, *Achmea* (C 284/16) EU:C:2018:158

Slovakia moved to get the award set aside on the bases that Article 8 BIT (investor-state arbitration clause) was contrary to EU law in the German court.

This question was referred to the CJEU: is Article 8 BIT (ISDS clause) compatible with Articles 267 and 344 TFEU.

The CJEU concluded that the ISDS has an adverse effect on the autonomy of EU law; the arbitration clause is contrary to EU law. Therefore, the AT has no jurisdiction as it could not refer EU law issues to the CJEU

**Agreement for the termination of all Intra-EU Bilateral Investment Treaties, signed on 5 May 2020.
(total 196 Intra-EU BITs)**

- Impact on AT's decisions on jurisdiction
- Impact on EU or non-EU State court's review of the award
- Impact on EU or non-EU State court's recognition of the award



Review of
Investor-State Arbitral
Awards by States Courts:
Recent French Decisions



French Case Law and EU Law

3 Strabag v Poland

(Austria-Poland BIT, partial award on jurisdiction, ICSID(AF))

➤ Paris CA 2022:

‘The primacy of European Union law is binding on all European Union Member States, and recourse to the Vienna Convention on the Law of Treaties or, if necessary, to the substantive rule of international arbitration law in order to claim the existence of valid consent, is ineffective in this regard.’



Energy Chartered Treaty and EU Law

➤ Intra-EU investment disputes under the ECT

Green Power Partners K/S and SCE Solar Don Benito APS (Denmark) v The Kingdom of Spain, Award dated 16 June 2022, The tribunal constituted under the Arbitration Rules of the Arbitration Institute of the SCC unanimously denied its jurisdiction *ratione voluntatis* over an intra-EU investment dispute arising under the ECT. This is the first known award to deny jurisdiction on the basis that EU law applies to the question of the tribunal's jurisdiction and that such law precluded the offer of Spain, as an EU Member State, to submit to arbitration a dispute with investors from another EU Member State (here, Denmark).

➤ Extra-EU investment disputes under the ECT

Enforcement of AES Solar and others (PV Investors) v. The Kingdom of Spain, PCA Case No. 2012-14 award [Case 1:21-cv-03249-RJL](#) Refusal to enforce 29 March 2023 In a first, a US court has dismissed a petition by Basket Renewable Investments LLC to enforce an arbitration award under the ECT against Spain, finding that under EU law the state lacked the legal capacity to extend an offer to arbitrate an intra-EU investment dispute:

'Because Spain's standing offer to arbitrate was void as to the Companies under the European Union law to which both Spain and the Companies are subject and which applied to the dispute by the terms of the Energy Charter Treaty itself, no valid agreement to arbitrate exists, and this Court therefore lacks the subject matter jurisdiction [under the Foreign Sovereign Immunities Act] necessary to confirm the tribunal's award.'



Review of
Investor-State Arbitral
Awards by States Courts:
Recent French Decisions



French Case Law and EU Law

2. *Kromstroy (Ukraine) v Moldavia* (ECT - *ad-hoc* award 2013 – USD 48.7 M)

- Paris CA 2016: held that no *ratione materiae* jurisdiction: no ‘investment’ under the ECT
- FSC 2018: quashed the Paris decision
- Paris CA 2019: requested CJEU to interpret “investment” under Article 1(6) and Article 26(1) ECT

2021 CJEU decision: “Article 1(6) and Article 26(1) ECT must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an ‘investment’ within the meaning of those provisions.”

NB: The CJEU also took the opportunity to rule that ECT-based intra-EU arbitrations are contrary to EU law (here a non-EU investor and a non-EU Member State).

- Paris CA 2023: held no jurisdiction: no investment



French Case Law and Corruption

International Instruments

Inter-American Convention against Corruption (29 March 1996)

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 Nov 1997)

Council of Europe Criminal Law Convention on Corruption (27 Jan 1997)

United Nations Convention against Corruption (31 October 2003)

National statutes

US Foreign Corrupt Practices Act 1977

UK Bribery Act 2010

French Sapin II Statute 2016

Soft law

UN Global Compact, Principle 10

2011 OECD Guidelines for Multinational Enterprises, Guideline VII 'Combating Bribery'

ISO 26000 Issue 1 : Anti-corruption para. 6.6.3



Review of
Investor-State Arbitral
Awards by States Courts:
Recent French Decisions



Illegality and Corruption

- **Violation of International public policy: Threshold of Control by French courts has evolved and been lowered:**
 - ***Thales 2004*** Violation must be **flagrant, effective and concrete**.
 - ***2012 (one case)***: Violation must be **effective and concrete**.
 - ***2012-2017 cases***: Violation must be **manifest, effective and concrete**.
 - ***Belokon CA 2017***: Violation must be manifest, effective and concrete.
 - ***Belokon FSC 2022***: ‘violated international public policy in clean manner [de **manière caractérisée**]’. FSC substituted its own criteria.



Illegality and Corruption

➤ Examples of international public policy :

Public corruption: *Schneider v CPL Falkony and Akiya*, FSC 12 Feb 2014

Private corruption: *Indrago v Bauche*, FSC 13 Sep 2017

Money Laundering: *Belokon v Kirgiz*, FSC 13 Sept 2017, Art. 23(1) UN Convention 2003

Embezzlement: *DRC v Customs and Tax Consultancy* Paris CA 16 May 2017 – Art. 17

UN Convention 2003

Illegality: *MK Group v Onix, Financial Initiative*, Paris CA 16 Jan 2018



Illegality and Corruption

➤ Standard of review

de novo, court's examination is not limited to:

- evidence submitted to the arbitrators
- findings made by the arbitrators.
- appreciation made by the arbitrators; and
- characterisation made by the arbitrators.



Illegality and Corruption

➤ Standard of proof

Lowered to application of Red Flags standard: ‘serious, precise and consistent presumptions’ (Art. 1382 French CC):

Money Laundering: *Belokon v Kirgiz*, FSC 13 Sept 2017, Art. 23(1) UN Convention 2003

Illegality: *MK Group v Onix, Financial Initiative*, Paris CA 16 jan 2018

