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Head Office
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Directeur général, directeur adjoint de la publication :
Emmanuel Jolivet

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The Right to Raise New Arguments on Jurisdiction in Annulment Proceedings

Simon Batifort
Partner at Curtis, Mallet-Prevost, Colt & Mosle LLP (New York)

Marie-Claire Argac
Counsel at Curtis, Mallet-Prevost, Colt & Mosle LLP (Paris)

On 2 December 2020, the French *Cour de Cassation* recognized that a party has the right to raise new arguments concerning jurisdiction during setting aside proceedings as long as the question of the arbitral tribunal's jurisdiction was debated in the underlying arbitration. In doing so, the *Cour de Cassation* clarified the scope of the parties' duty to raise irregularities before the arbitral tribunal to avoid being precluded from raising them subsequently at the annulment stage.

On 2 December 2020, the French *Cour de Cassation* overturned the Paris Court of Appeal's decision upholding the award rendered in *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Republic of Poland ('Schooner')*. The *Cour de Cassation* remanded the case to the Court of Appeal and held that, by refusing to allow the applicants to present new arguments concerning jurisdiction in support of their annulment application even though the question of the arbitral tribunal's jurisdiction had been debated in the underlying arbitration, the Court of Appeal had violated Articles 1466 and 1520(1) of the French Code of Civil Procedure (the 'CCP').[1]

Factual background

The underlying dispute arose out of the disallowance of certain tax deductions following an inspection of Kama, a Polish company, by the Polish tax authorities, which allegedly led to Kama's bankruptcy. The U.S. shareholders of Kama ('Claimants') initiated proceedings against Poland under the Poland - U.S. Bilateral Investment Treaty ('BIT') pursuant to the Additional Facility Rules of the International Centre for Settlement of Investment Disputes ('ICSID') alleging breaches of the BIT's provisions on fair and equitable treatment ('FET'), full protection and security, non-impairment, free transfer of funds, and expropriation.

During the arbitration proceedings, Poland objected to the tribunal's jurisdiction on a number of grounds, including that the dispute was a 'matter of taxation' falling within the scope of the taxation carve-out in Article VI(2) of the BIT. According to Poland, this carve-out had to be interpreted as applying both to substantive tax issues and to the procedural aspects of tax proceedings, such as the application and enforcement of tax laws. In response, Claimants argued, inter alia, that 'matters of taxation' did not extend to procedural aspects of tax proceedings. In the alternative, they argued that their claims relating to expropriation, free transfer of funds and the observance and enforcement of investment agreements were expressly excluded from the application of the taxation carve-out.[2]

In its award, the tribunal dismissed Claimants' claims in their entirety. On jurisdiction, the majority of the tribunal[3] found that the dispute did relate to 'matters of taxation' and was therefore covered by the BIT's taxation carve-out. The majority rejected Claimants' other arguments, including their allegations that the claims related to the observance and enforcement of an investment agreement.[4] However, the tribunal upheld its jurisdiction over the expropriation and free transfer

1 *Vincent J. Ryan, Schooner Capital LLC, Atlantic Investment Partners LLC v Republic of Poland*, Cour de Cassation, First Civil Chamber, Case No. 19-15.396, Judgment 2 Dec. 2020, Bull. civ.

2 *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 Nov. 2015, paras. 224-237.

3 Mr. Ali Khan (chair) and Prof. von Wobeser (appointed by Poland).

4 *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Republic of Poland*, supra note 2, at paras. 252-269.

of funds claims, finding that they were specifically excluded from the taxation carve-out. The tribunal nonetheless dismissed both claims on the merits.[5]

Claimants applied to the Paris Court of Appeal to have the award set aside. They argued, inter alia, that the tribunal had wrongly failed to exercise jurisdiction, which is a ground for annulment under Article 1520(1) of the CCP. Claimants sought to raise two new jurisdictional arguments (i.e. not previously invoked before the arbitral tribunal) against the application of the taxation carve-out:

1. The BIT's taxation carve-out did not apply to bad faith taxation measures.
2. In any event, the taxation carve-out could be circumvented because the BIT's most-favored-nation clause permitted Claimants to rely on another treaty that allegedly extended FET protection in matters of taxation.

Decision of the Paris Court of Appeal

In April 2019, the Paris Court of Appeal rejected Claimants' application for annulment in its entirety.[6] In doing so, it refused to consider Claimants' two new jurisdictional arguments on the ground that Claimants had failed to raise these arguments before the arbitral tribunal. The Court relied on Article 1466 of the CCP, which provides as follows:

> 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.[7]

The Paris Court of Appeal first clarified that the principle codified in Article 1466 applies not only to procedural irregularities, but also to any objection that could form the basis of an application for annulment, the only exception being the violation of substantive public policy under Article 1520(5) of the CCP, which can be raised for the first time before the annulment judge (or raised *ex officio* by the annulment judge).[8]

It further held that Article 1466 applies to arguments specifically articulated by the parties ('*griefs concrètement articulés*') rather than to general categories of annulment grounds ('*catégories de moyens*'). The Court of Appeal explained that the rationale behind Article 1466 is to prevent a party from withholding potential objections in order to raise them at a potential setting aside stage. This rationale, the Court explained, would be defeated if a party were allowed to present factual or legal arguments at the annulment stage that were different from the arguments submitted to the arbitrators.

Finally, the Court of Appeal noted that its ruling was not incompatible with the annulment judge's duty to conduct a *de novo* review of both factual and legal arguments advanced in support of the grounds for setting aside since the annulment judge is not bound by the arbitral tribunal's underlying legal reasoning or factual assessment.

Decision of the *Cour de Cassation*

In its decision of 2 December 2020, the *Cour de Cassation* overturned the Court of Appeal's decision and remanded the case to the Paris Court of Appeal. The *Cour de Cassation* first recalled that, pursuant to Article 1520(1) of the CCP, an application to set aside is open in cases where the arbitral tribunal wrongly upholds or fails to uphold its jurisdiction. The *Cour de Cassation* then cited the principle set out in Article 1466 of the CCP. Based on those provisions, it held the following:

> [A]s long as the issue of jurisdiction has been pleaded before the arbitrators, the parties are not deprived of the right to raise new grounds and arguments pertaining to this issue and to adduce new evidence in relation thereto before the setting aside judge.[9]

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5 Prof. Orrego Vicuña dissented on jurisdiction and on the majority's finding on the absence of liability. *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Partial Dissenting Opinion of Professor Francisco Orrego Vicuña, 7 Nov. 2015.

6 *Vincent J. Ryan, Schooner Capital LLC, Atlantic Investment Partners LLC v Republic of Poland*, Paris Court of Appeal, No. 16/24358, Judgment, 2 April 2019. For a commentary on this decision, see W. Pydiamah & X. Vocaj, 'Paris Court of Appeal Upholds ICSID Additional Facility Award' (2019) 2 *ICC Dispute Resolution Bulletin*, 13.

7 Translation by E. Gaillard, N. Leleu-Knobil, D. Pellarini, available at https://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf . The French original of 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*'. Article 1466 is applicable to international arbitration by virtue of Article 1506(3) of the CCP.

8 See J. Jourdan-Marques, 'Chronique d'arbitrage: la cour d'appel de Paris s'adonne à l'orfèvrerie juridique' (2019) *Dalloz Actualité* (noting that this was the first time a French court clarified this point).

9 *Vincent J. Ryan, Schooner Capital LLC, Atlantic Investment Partners LLC v Republic of Poland*, supra note 1, at para. 6: '*[L]orsque la compétence a été débattue devant les arbitres, les parties ne sont pas privées du droit d'invoquer sur cette question, devant le juge de l'annulation, de nouveaux moyens et arguments et à faire état, à cet effet, de nouveaux éléments de preuve*'.

It concluded that, by refusing to hear Claimants' two new arguments in support of the arbitral tribunal's jurisdiction even though the parties had debated the question of the tribunal's jurisdiction in the arbitration, the Court of Appeal violated Articles 1466 and 1520(1) of the CCP.

Discussion

In *Schooner*, the *Cour de Cassation* addresses an important question: to what extent can a party seeking to have an arbitral award set aside advance arguments that it did not previously advance during the arbitration? It is not unusual for a party to identify new arguments at the setting aside stage. The question is whether such party should be deemed to have waived such arguments by not raising them before the arbitral tribunal.

Prior to this decision, the setting aside judge generally limited its review of the grounds for annulment to the specific arguments and evidence presented to the arbitral tribunal. The Paris Court of Appeal previously held that its review of the tribunal's decision on jurisdiction was limited to the factual and legal elements on the record and accordingly refused to consider evidence that the arbitral tribunal had deemed inadmissible.[10] More recently, Article 1466 of the CCP was invoked to prevent a party from seeking annulment of an award based on the alleged invalidity of the guarantee contract containing the arbitration clause when, in the underlying arbitration, the same party had objected to the jurisdiction of the tribunal based only on the alleged exclusive jurisdiction of the local courts provided for in the underlying contract between the parties.[11] In line with those decisions, the Court of Appeal held in *Schooner* that Article 1466 prevented a party from raising a new argument ('*grief*') at the annulment stage if it had not raised it in the underlying arbitration.[12]

In a decision rendered shortly before *Schooner,* the *Cour de Cassation* already indicated that the inquiry under Article 1466 should not be excessively formalistic.[13] In that case, the arbitration clause provided for an arbitration subject to the 'ICC or UNCITRAL rules' with a seat in New Delhi. The respondent unsuccessfully argued before the ICC International Court of Arbitration that the ICC Rules did not apply to the constitution of the tribunal (and that Indian courts were competent to appoint the co-arbitrators). It then argued before the arbitral tribunal that the arbitration clause was pathological and that the tribunal lacked jurisdiction but did not expressly reiterate its objection concerning the composition of the tribunal. The Paris Court of Appeal therefore held that the objection had been waived.[14] The *Cour de Cassation* overturned that decision on the ground that raising the pathological nature of the arbitration clause 'necessarily encompassed' ('*emporte nécessairement*') an objection as to the irregular composition of the ICC tribunal.[15]

With its decision in *Schooner*, the *Cour de Cassation* now opens the way for parties to present new arguments pertaining to jurisdiction before the annulment judge as long as the broad issue of the tribunal's jurisdiction was debated before the arbitral tribunal. Thus, Claimants in *Schooner* were permitted to raise additional arguments in the setting aside proceedings to refute Poland's jurisdictional objection based on the taxation carve-out of the BIT as the question of the tribunal's jurisdiction had been raised and debated in the arbitral proceedings.

Beyond the particular facts of the *Schooner* case, the *Cour de Cassation*'s decision raises several questions as to its potential expansion to other scenarios. A first potential implication, by extension, is where a party advances a jurisdictional objection that is rejected by the tribunal. According to the holding in *Schooner*, such party may raise new arguments in support of the same jurisdictional ground at the setting aside stage.

10 *Papillon Group v République Arabe de Syrie*, Paris Court of Appeal, No. 08/01578, Judgment, 26 March 2009.

11 *République du Niger v Société A.D. Trade Ltd. Belgium*, Paris Court of Appeal, No. 15/16412, Judgment, 30 May 2017. On the prior application of Article 1466 CCP by the French courts, see also: *Gemstream v Y Corporation Inc*, Paris Court of Appeal, No. 17/10639, Judgment 10 Sept. 2019 (rejecting the applicant's argument that the arbitral tribunal had ruled *ultra petita* by ruling on the part of the dispute relating to certain costs incurred before French courts because the applicant had not argued that this fell outside the scope of the arbitrator's mission in the underlying arbitration); *Société J&P Avax SA v Société Tecnimont SPA*, Cour de Cassation, First Civil Chamber, No. 11-26.529, Judgment, 25 June 2014, Bull. civ. (holding that each fact and circumstance likely to constitute a breach of the arbitrator's duty of independence and impartiality must have been timely raised in the underlying arbitration in order to prevent waiver thereof); *M. Ch. Di Sabatino et autres v Société Animated Ventures et autres*, Paris Court of Appeal, No. 13/05894, Judgment 7 Oct. 2014 (holding that the applicant had failed to challenge the jurisdiction of the arbitral tribunal before the arbitral tribunal and was therefore precluded from challenging it at the setting aside stage).

12 See J. Jourdan-Marques, 'Chronique d'arbitrage : la cour d'appel de Paris s'adonne à l'orfèvrerie juridique' (2019) Dalloz Actualité (arguing that this solution 'is hardly surprising, although it had never been worded so clearly').

13 *Antrix B Limited v Devas Multimedia Private Limited,* Cour de Cassation, First Civil Chamber, No. 18-22.019, Judgment, 4 March 2020.

14 *Antrix B Limited v Devas Multimedia Private Limited*, Paris Court of Appeal, No. 16/03596, Judgment, 27 March 2018, Bull. civ.

15 *Antrix B Limited v Devas Multimedia Private Limited*, supra note 13.

For example, if a respondent State unsuccessfully argues before the arbitral tribunal that the claimant did not hold a qualifying 'investment' under Article 25 of the ICSID Convention because it had failed to make a 'contribution', the State may be able to argue for the first time at the setting aside stage that the claimant also failed to establish the existence of an investment 'risk'.[16]

Further, taken literally, the *Cour de Cassation*'s decision would permit challenges to jurisdiction based on entirely different jurisdictional grounds as long as the tribunal's jurisdiction was challenged in the underlying arbitration. For example, a respondent State that argues a lack of jurisdiction due the absence of a qualifying 'investment' before the tribunal could presumably subsequently raise an objection based on lack of consent to arbitration or lack of jurisdiction *ratione personae* for the first time before the annulment judge.

In sum, the *Cour de Cassation*'s decision signals a shift from the prior application of the duty of a party to raise all known irregularities, as set out in Article 1466 of the CCP, and opens the way for new and broader jurisdictional arguments at the setting aside stage.[17] While the decision may have far-reaching consequences, its full impact on a party's ability to raise new arguments at the annulment stage will need to be assessed in light of further cases involving different procedural scenarios.

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16 According to the well-known *Salini* test, a claimant must prove, inter alia, that it made a 'contribution' and assumed an investment 'risk' to establish the existence of an investment within the meaning of Article 25 of the ICSID Convention. *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, Decision on Jurisdiction, 31 July 2001, para. 52.

17 See also J. Jourdan-Marques, 'Chronique d'arbitrage: compétence et corruption – le recours en annulation à rude épreuve' (2020) *Dalloz Actualité*.