

Enforcement of multi-million dollar ICC award proceeds in BVI (BVI Commercial Court)

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In *PT Ventures SGPS SA v Vidatel Ltd (BVIHC (COM) 2015/0017 and 2019/0067*, 13 August 2020), the BVI Commercial Court ruled that an ICC arbitral award of over US\$646 million was enforceable in the BVI given the defendant's failure to establish, on a balance of probabilities, its defences related to the composition of the arbitral tribunal and an alleged lack of impartiality of two of the five arbitrators.

Speedread

The BVI Commercial Court has ruled that an ICC arbitral award of over US\$646 million was enforceable in the BVI, notwithstanding two defences raised by the party against whom enforcement was being sought.

The defendant argued that the composition of the arbitral tribunal was not in accordance with the agreement of the parties and that two of the five arbitrators lacked independence and impartiality.

The court rejected both defences. In respect of the composition of the arbitral tribunal, the court ruled that the ICC was correct in appointing all five arbitrators given that the arbitration clause in question was in breach of the French law principle of *égalité* (equality) between the parties in the appointment of arbitrators.

Regarding the alleged lack of independence of the arbitrators, in applying the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 and the ICC's Notes to Parties, the court ruled that neither arbitrator failed to disclose a relevant conflict of interest. Therefore, the court found that both defences failed and ordered enforcement of the award pursuant to section 86(1) of the BVI Arbitration Act, 2013.

The court's judgment affirms the general pro-enforcement approach to New York Convention awards, pursuant to which, the burden lies firmly on the party resisting enforcement to make out its case as to the exceptions outlined in section 86. Cogent evidence is required in order to establish a lack of impartiality or independence of the arbitral tribunal, with the result that very tangential purported connections to the parties will not suffice. (*PT Ventures SGPS SA v Vidatel Ltd (BVIHC (COM) 2015/0017 and 2019/0067*, 13 August 2020.)

Background

The BVI is party to the New York Convention and has therefore adopted a general pro-enforcement approach to Convention awards.

Section 86 of the BVI Arbitration Act, 2013 (AA 2013) provides that the enforcement of a Convention award may not be refused except in the specific circumstances outlined in Section 86(2). Section 86 is largely identical in terms to section 103 of the English Arbitration Act 1996. The exhaustive list of circumstances in which enforcement of a Convention award may be refused include a finding that the composition of the arbitral authority was not in accordance with the agreement of the parties, or if there was no agreement, the law of the country where the arbitration took place (section 86(2)(e)). It is pursuant to this sub-section that Vidatel's defences to the enforcement of the Award were raised.

In French arbitration law there is a mandatory principle of French public policy that an arbitration clause must provide for *égalité* (equality) between the parties in the appointment of arbitrators. The principle was first expressed in the well-known decision of the French Cour de Cassation in *Siemens AG/BKMI Industrienlagen GmbH v Dutco Construction Company XVIII YBCA 140 (1993)* and has come to be known as the "Dutco principle". For further discussion of the Dutco principle, see [Practice note, Multi-party and multi-contract issues in arbitration: Equal treatment](#).

Facts

In October 2015, PTV brought ICC arbitration proceedings against the three other shareholders in Unitel, (Angola's biggest mobile phone company) (Vidatel, Geni and Mercury) for alleged breaches of a shareholders' agreement between the parties. Vidatel is owned by Isabel dos Santos, daughter of a former president of Angola and is reputed to be the richest woman in Africa. The arbitration was seated in Paris, France.

Clause 16 of the shareholders' agreement provided that disputes were to be resolved by a panel of five arbitrators, one to be designated by each party and the fifth to be designated by the other four arbitrators. However, PTV requested that the ICC appoint all five arbitrators on the basis that clause 16 would have resulted in a breach of the mandatory French rule of *égalité* (equality) between parties given that it would have resulted in one PTV-nominated arbitrator against three respondent-nominated arbitrators. The ICC acceded to PTV's request (notwithstanding the respondents' objections) and appointed all five arbitrators of the tribunal.

On 20 February 2019, the tribunal awarded PTV US\$646,445,968 in respect of a diminution in value of PTV's shares in Unitel and unpaid dividends owed to PTV.

In May 2019, PTV applied to the BVI Commercial Court, pursuant to sections 81 and 84 of the AA 2013 for leave to enforce the award against Vidatel in the BVI. The BVI Court Commercial Court refused to grant summary judgment on the application to enforce, thereby requiring a full trial (see [Legal update, Summary enforcement of French ICC arbitral award refused \(BVI Commercial Court\)](#).)

Shortly after PTV issued its application for enforcement in the BVI, Vidatel applied to the French Court of Appeal to annul the award on two bases (referred to in the BVI court's judgment as the Paris Defences):

- The arbitral tribunal was not properly constituted and the Award was therefore a nullity.
- Two of the five arbitrators were not independent or impartial.

The sole issue for determination at the BVI trial was whether the Paris Defences could be established on a balance of probabilities. With respect to the composition of the arbitral tribunal, while both parties agreed that the Dutco principle existed, they differed in respect of its application.

Vidatel argued that the French rule of *égalité* dictated that there be equality among the parties to the dispute in the appointment of arbitrators such that clause 16 was consistent with this principle: each party would nominate its own arbitrator. Vidatel therefore argued that the ICC was wrong to have departed from clause 16 in its appointment of all five arbitrators. PTV argued, on the other hand, that the principle pertained to there being equality between the applicant vis-à-vis the respondents, such that clause 16 would have unequally provided for one applicant-appointed arbitrator and three respondent-appointed arbitrators.

In respect of the allegation of a lack of independence and impartiality, Vidatel argued that two arbitrators, Professor Dr Sachs and Mr Ferro were not impartial or independent on account of their alleged failure to disclose purported connections with PTV.

Decision

Justice Adrian Jack (Ag) held that the award was enforceable in the BVI.

In respect of the composition of the arbitral tribunal, the court heard expert evidence on French law from both sides as to the meaning of the principle of *égalité* and ruled that on a balance of probabilities, PTV's interpretation of the principle was more mainstream. The court ruled that Vidatel, Mercury and Geni (as co-respondents) were properly considered as one "party" given the convergence of their interests, such that clause 16 would have amounted to a violation of the principle of *égalité* and the ICC was right to have appointed all five members of the tribunal.

The court also ruled against Vidatel in respect of the impartiality of the arbitrators. Having regard to both the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 and the ICC's Notes to Parties, the court ruled that neither Professor Dr Sachs nor Mr Ferro failed to disclose a relevant conflict of interest. With respect to Professor Dr Sachs, it was alleged that he was a law partner of an individual tangentially affiliated with PTV. However, the court ruled that there was no such partnership given that Professor Dr Sachs was partner in a CMS law firm entirely separate from the firm of the alleged affiliate, there being no fee sharing between the two firms. In respect of Mr Ferro, it was alleged, among other things, that his firm was regular counsel to one of the shareholders of Oi, which was in turn a majority shareholder of PTV. The court ruled that in all of the circumstances, those matters did not create a sufficient link between PTV and Mr Ferro so as to give rise to any justifiable fear that Mr Ferro's impartiality and independence were at risk.

The court therefore ruled that both Paris Defences failed.

Comment

Given that the French annulment proceedings are still pending, it remains to be seen whether the French Court of Appeal will take the same view on the Paris Defences, in particular, as it pertains to the interpretation of the French law principle of *égalité*. Notably, the arbitration was the first ICC arbitration conducted with a panel of five arbitrators. Similarly, the BVI judgment is the first judicial authority dealing with the principle of *égalité* in the context of a five-person tribunal.

A decision is expected from the French Court of Appeal early next year. However, given the existence of a right of appeal to the French Cour de Cassation, it is expected that a final decision is only likely to be obtained in France in 2022. On that basis, in March 2020 the BVI Commercial Court declined to adjourn the enforcement proceedings of its own motion pending the outcome of the French proceedings, given the delay this would have occasioned and on the basis of its finding the neither party would be irredeemably prejudiced if the French court later ruled inconsistently with the BVI court's decision. The BVI court was thereafter able to render a timely decision on enforcement while the French proceedings remain pending.

The court's judgment affirms the general pro-enforcement approach to Convention awards, pursuant to which, the burden lies firmly on the party resisting enforcement to make out its case as to the exceptions outlined in Section 86. Cogent evidence is required in order to establish a lack of impartiality or independence of the arbitral tribunal, with the result that very tangential purported connections to the parties will not suffice.

Case

PT Ventures SGPS SA v Vidatel Ltd (BVIHC (COM) 2015/0017 and 2019/0067, (13 August 2020) (Justice Adrian Jack (Ag.)).

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