INTERNATIONAL JOURNAL OF ARAB ARBITRATION

INTERNATIONAL JOURNAL OF ARAB ARBITRATION

VOL 13, NO.2 - 2021

VOLUME 13, NO.2 - 2021

Management and correspondance
Articles and correspondence should be sent to:

In Lebanon:
Ahdab Law Firm
Fayadieh road – after the junction of the Presidential Palace
Gardenia Centre, 3rd floor – 443
Hazmieh, Lebanon
Tel: +961 5 951827
Fax: +961 5 951973

In France:
Bird & Bird AARPI
2, rue de la Chaussée d'Antin
75009, Paris-France

Emails: info@intljaa.com

Websites and social medias: www.intljaa.com; www.facebook.com/journalOfArabArbitration; www.linkedin.com/company/international-journal-of-arab-arbitration; www.twitter.com/intljaa

The journal is also published online by Kluwer Law International available on: www.kluwerarbitration.com

Subscription to the website: Electronic subscription, unit price (70 USD)

ANNUAL SUBSCRIPTION:
Including two issues a year: 140 USD
Unit price (70 USD)
In Lebanon: 140 USD + dispatch cost
Outside Lebanon: 140 USD + 40 USD of shipment expenses

Distributed by

Al-Halabi Legal Publications

First branch: Zein building – Kantary Street – Facing the Embassy of India
Telephone: (+961) 3 364561
Mobile: (+961) 3 640544 - 640821
Second branch: Sodeco Square
Telephone: (+961)1 612632
Fax: (+961) 1 612633
P.O. Box: 11/0475 Beirut – Lebanon
E-mail: elhalabi@terra.net.lb – www.halabilawbooks.com
Al-Taawuniya Printing House
Telephone: (+961) 1 311310 – (+961) 1 301030

International Journal of Arab Arbitration

Volume 13 - No. (2) 2021

Table of Contents

Page

Egyptian Case Law

Jordanian Case Law

Lebanese Case Law

Tunisian Case Law

UAE Case Law

STATE COURT DECISIONS RENDERED BY NON-ARAB JURISDICTIONS

State of Libya vs. Cengiz İnşaat Sanayi ve Ticaret A.Ş.

Court of Appeal of Paris

Decision No. 18/27648 of 25 May 2021

Commentary

By Zeïneb Bouraoui*

In a judgment dated 25 May 2021, the International Commercial Chamber of the Court of Appeal of Paris dismissed the Republic of Libya's application to set aside the arbitration award rendered on 7 November 2018 in the treaty-based arbitration between Cengiz İnşaat Sanayi ve Ticaret A.Ş. ("**Cengiz**" or the "**Claimant**") and the Republic of Libya ("**Libya**" or the "**Applicant**"). In this case, the arbitral tribunal awarded an excess of USD 50 million in compensation to the Claimant, as well as additional relief, related to the release of certain performance bonds and financial guarantees. The Court of Appeal's decision of 25 May 2021 is particularly notable because this is the first time that the French annulment judge is confronted, in the context of reviewing a treaty-based arbitral award, with jurisdictional objections based on the alleged illegality of the underlying investment. As will be further discussed below, the Court's decision demonstrates that the French annulment judge will maintain a great level of deference to arbitral tribunals' assessment of their own jurisdiction whenever the host State's offer to arbitrate, as it appears in the Investment Treaty, is sufficiently broad to encompass allegations of illegality. This will likely be the case even where the underlying Investment Treaty contains a legality clause, and even where there are concerns that the underlying investment is tainted by fraud or corruption.

The underlying arbitration was conducted under the aegis of the International Court of Arbitration of the International Chamber of Commerce ("**ICC**"). The arbitral award was issued by a tribunal composed of three arbitrators: Mr. Juan Fernández-Armesto (President), Mr. Pierre Mayer (appointed by the investor) and Mr. Georges Khairallah (appointed by the State). The seat of the arbitration was Paris, France.

In the underlying arbitration, the Claimant - a Turkish construction company - lodged an ICC arbitration claim against Libya alleging that Libya should be held responsible under the Libya-Turkey bilateral investment treaty (the "**Investment Treaty**")[1] for a series of

---

* Zeïneb Bouraoui is a member of the Paris Bar and the New York Bar and an associate at the Paris office of Cleary Gottlieb Steen & Hamilton LLP. The views expressed in this article are those of the author alone and do not necessarily reflect the views of the author's firm or any of its clients.

1. Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya - the

actions taken by Libya's armed forces following the outbreak of the Libyan Revolution in 2011.

This commentary will first provide an overview of the underlying arbitral proceeding initiated by Cengiz at the ICC as well as the arbitral tribunal's findings as set forth in its award of 7 November 2018 (Section I). Then, the commentary will provide a brief overview of Libya's application to set aside the award at the Paris Court of Appeal as well as a summary of the Court of Appeal's findings in this regard (Section II). Finally, the commentary will delve into the substance of the Paris Court of Appeal's decision by examining Libya's arguments in support for its application to set aside the award as well as the Court's reasoning in relation thereto:

- Libya's allegation that the tribunal lacked jurisdiction because Cengiz's investment is allegedly tainted by corruption (Section III);
- Libya's allegation that Cengiz's claims were inadmissible due to Cengiz's alleged failure to comply with the Investment Treaty's cooling-off period (Section IV);
- Libya's allegation that the tribunal lacked jurisdiction because Cengiz's investment failed to comply with the definition of investment under Libyan law and with the objective definition of investment under customary international law (Section V);
- Libya's allegation that the tribunal violated the mandate conferred upon it because it failed to render a reasoned award (Section VI); and
- Libya's allegation that the tribunal's award violates international public policy (Section VII).

I. THE CENGIZ V. LIBYA DISPUTE AT A GLANCE:

In 2008 and 2009, following the relaxation of international sanctions against Libya in the early 2000s, the Claimant, a Turkish construction company, through its Libyan subsidiary, entered into two contracts with the Libyan Housing and Infrastructure Board ("**HIB**") for the design and construction of infrastructure in the Southern region of Libya, in the Wadi Al Hayat (WAH) and Sebha regions.

Following the signature of the WAH and Sebha contracts, Cengiz began mobilizing its resources and deployed construction machines, facilities and camp installations on the two main construction sites. Construction work was underway when, in February 2011, anti-government protests spread throughout the country and the Libyan Revolution

State of Libya's legal predecessor - concerning the Reciprocal Promotion and Protection of Investments dated 25 November 2009, which entered into force on 22 April 2011.

erupted, ultimately putting an end to Libya's forty-year dictatorship under the rule of Muammar Gadhafi. The Libyan Revolution quickly developed into a full-fledged civil war and widespread violence.

Shortly following the start of the Libyan Revolution, Cengiz notified HIB of the difficulties it was facing in pursuing the projects, expressing concern about the general lack of safety on the construction sites. Cengiz notably requested that local authorities ensure the protection of Cengiz's construction sites and return missing machinery and equipment. HIB asked Cengiz to identify the damage it suffered and to continue working on the projects. During the following weeks and months, Cengiz's construction sites were subjected to several attacks by groups of armed individuals who restrained site personnel and forcibly took equipment, motors and vehicles belonging to Cengiz's Libyan subsidiary. As a result, confronted with a rapidly deteriorating security situation, Cengiz evacuated its staff from Libya. Subsequently, Cengiz's property and equipment, which it left on the main construction sites following the evacuation of its personnel from Libya, was either stolen or destroyed. As of March 2011, only 9% of the WAH construction project and 12% of the Sebha project were completed.

In 2013, the Claimant attempted to return to Libya and resume construction. To that end, Cengiz signed additional contracts with the HIB. However, Cengiz was never able to resume the projects and was not paid outstanding sums owed by the Libyan government.

In December 2015, the Claimant initiated ICC arbitration under the Investment Treaty, seeking, *inter alia,* an amount in excess of USD 300 million as compensation for the losses and damages incurred as a result of Libya's actions. In particular, Cengiz alleged that Libya breached its obligations under the Investment Treaty to provide, with respect to Claimant's investment, full protection and security, fair and equitable treatment, as well as adequate compensation for Claimant's losses under the Investment Treaty's compensation for losses clause (also known as the Investment Treaty's "**War Losses**" clause).

In its November 2018 award, the arbitral tribunal held that Libya had breached the Investment Treaty's full protection and security clause, finding overwhelming evidence that Libyan armed forces or other government-affiliated militias had pillaged and taken over Cengiz's construction sites. The arbitral tribunal also found that the Libyan authorities had come short of their obligation to exercise reasonable care to protect the construction sites against looting and destruction from non-state actors.

The arbitral tribunal did not hold Libya liable for breach of the Investment Treaty's fair and equitable treatment provision and found no violation of the Investment Treaty's War Losses clause.

II. LIBYA'S APPLICATION BEFORE THE PARIS COURT OF APPEAL TO SET ASIDE THE AWARD: OVERVIEW:

In December 2018, Libya sought the setting aside of the award before the Court of Appeal of Paris. Under French law, the annulment judge may only set aside an arbitral award if the setting aside application satisfies one of the following grounds: (i) the arbitral tribunal wrongly upheld or declined its jurisdiction over the dispute; (ii) the arbitral tribunal was not regularly constituted; (iii) the arbitral tribunal ruled without complying with the mandate conferred upon it; (iv) the due process requirement was violated; or (v) the recognition and enforcement of the award would violate international public policy.[2] These grounds for annulment are considered exhaustive.[3] In ruling upon applications for set aside of an award, French courts will not perform a *de novo* review of the merits of the underlying case, unless, as will be further discussed below, the setting aside application is based on an alleged violation of international public policy.

In the present case, Libya sought to set aside the award on the basis of three of the aforementioned grounds. First, Libya invoked Article 1520(1) of the French Code of Civil Procedure to argue that the arbitral tribunal wrongly upheld its jurisdiction over the dispute. Second, Libya relied on Article 1520(3) to assert that the arbitral tribunal had failed to comply with the mandate conferred upon it pursuant to the parties' arbitration agreement because it issued an award which does not state the reasons on which it is based. Finally, Libya alleged that the recognition and enforcement of the award issued by the arbitral tribunal in this case would contravene international public policy pursuant to Article 1520(5) because Cengiz's underlying contracts were tainted by corruption.

The Paris Court of Appeal, presided over by Judge François Ancel, dismissed all of Libya's claims and upheld the award in its entirety. In particular, and as will be discussed in further detail below, the Paris Court of Appeal held that: (i) Libya's corruption allegations were insufficient to justify setting aside the award on jurisdictional grounds, and the annulment judge is not empowered to examine challenges to the admissibility of claims; (ii) thus, Libya's argument that Cengiz's claims were inadmissible due to Cengiz's alleged failure to comply with the Investment Treaty's cooling-off period does not constitute a ground for setting aside the award; (iii) the tribunal did not lack jurisdiction *ratione materiae* because the investment made by Cengiz complied with the definition of investment set forth in the Investment Treaty; (iv) the tribunal did not violate the mandate

2. *See,* French Code of Civil Procedure, Art. 1520.

3. *See, e.g., Société MK Group v. S.A.R.L. Onix,* Paris Court of Appeal, RG No. 15/21703 (16 Jan. 2018) ("*Considérant que si la mission de la cour d'appel, saisie en vertu de l'article 1520 du code de procédure civile, est limitée à l'examen des vices énumérés par ce texte, aucune limitation n'est apportée au pouvoir de cette juridiction de rechercher en droit et en fait tous les éléments concernant les vices en question* "). [Emphasis added.]

conferred upon it by the parties and issued a sufficiently reasoned award; and (v) the tribunal's award does not violate international public policy.

III. Unsubstantiated Corruption Allegations Do Not Constitute A Valid Ground For Setting Aside The Award for Lack of Jurisdiction:

Libya first argued that the arbitral tribunal had wrongly upheld its jurisdiction over Cengiz's claims because Cengiz's underlying investment in Turkey had been procured through fraud and corruption. Libya's jurisdictional argument is novel and forced the Paris Court of Appeal to grapple for the first time with the interplay between the legality of investments - which can be tainted by corruption or fraud and thus violate international public policy - and the necessity to preserve the sacrosanct principle of *kompetenz-kompetenz*.

Libya had not pleaded corruption as a bar to jurisdiction during the underlying proceeding and explained that proof of such corruption surfaced only following the issuance by the arbitral tribunal of its award. In particular, Libya explained that in April 2019 - *i.e.,* five months following the publication of the award - the Libyan Audit Bureau, a public Libyan entity which aims at preserving the public treasury, published a report which, according to Libya, sheds light on novel corrupt acts which had not been discussed during the course of the underlying arbitral proceeding. In particular, Libya explained that the Audit Bureau's report demonstrates that: (i) there was a "*general climate of corruption*"[4] at the time that the Cengiz contracts were concluded, with the construction sector being particularly tolerant of corrupt transactions; (ii) there were several "*chronological inconsistencies*," which, according to Libya, demonstrate that Cengiz engaged in corrupt transactions in order to obtain the construction contracts; (iii) the way in which the contracts were attributed to Cengiz remains unclear and calls into question the choice of Cengiz for such a large-scale contract, considering that Cengiz did not have a long-term presence in Libya; (iv) public procurement rules under local Libyan law were circumvented because the contracts were attributed to Cengiz without a tender process; (v) Cengiz's local Libyan subsidiary inexplicably benefited from a 17.4% increase in the contract price; and (vi) an illegal shareholder agreement was concluded between Cengiz and the International Company for Development and Investment ("**ICDI**") - a Libyan government entity with which Cengiz had partnered in order to incorporate its local Libyan subsidiary - thus nullifying the local joint venture along with the overall attribution of the contracts to Cengiz Libya.

4. *State of Libya vs. Cengiz İn aat Sanayi ve Ticaret A. .,* Court of Appeal of Paris, Decision No. 18/27648 of 25 May 2021, 136.

In the process of assessing the validity (or lack thereof) of Libya's jurisdictional objection, the Court of Appeal did not engage with the merits of Libya's allegations of corruption. Instead, the Court's assessment of Libya's jurisdictional objections was strictly limited to the interpretation of the Investment Treaty's arbitration clause. By contrast, and as will be further discussed below, when analysing Libya's corruption argument in the context of its claim that there was a violation of international public policy, the Court performed a full review of the evidence of corruption that Libya had introduced.

At this stage of its review, the Court started by noting that where the arbitration agreement derives from an investment treaty, the parties' joint intention must be examined "*in light of all the provisions of the treaty, so that the arbitral tribunal has jurisdiction only if it falls within the scope of the treaty and if all its conditions of application are met.*"[5] Then, the Court stressed that the annulment judge may not, under the guise of assessing the tribunal's jurisdiction, substitute itself for the arbitral tribunal in order to assess the legality of the investment or that of the underlying contract which characterizes such investment. The Court explained that a State's offer to arbitrate contained in an investment treaty is "*autonomous and independent from the validity of the transaction that gave rise to the investment or that supports it.*"[6] For the Court, the scope of Libya's offer to arbitrate, as found in the Investment Treaty's dispute resolution clause, was very broad since it encompasses all "[d]*isputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment*,"[7] and had been accepted by Cengiz when Cengiz filed its request for arbitration. This was sufficient for the Court to conclude that Libya had agreed that an arbitral tribunal would have jurisdiction over its allegations of illegality. The Court thus dismissed Libya's attempt at setting aside the arbitral tribunal's award on this ground.

IV. Alleged Failure To Comply With An Investment Treaty's Cooling-Off Period Pertains To Admissibility Of Claims And Not To The Tribunal's Jurisdiction:

Next, Libya argued that the arbitral tribunal should not have upheld its jurisdiction over the dispute because the Claimant had allegedly failed to comply with the Investment Treaty's 90-day cooling-off period. In particular, Libya maintained that Cengiz did not observe the Investment Treaty's obligation to "*endeavor to settle* […] *disputes by consultations and negotiations in good faith*,"[8] notably because Cengiz had failed to

5. *State of Libya vs. Cengiz İn aat Sanayi ve Ticaret A. .,* Court of Appeal of Paris, Decision No. 18/27648 of 25 May 2021, 43.
6. *Ibid.*, 46.
7. *Ibid.,* 47.
8. Libya-Turkey BIT (2009), Art. 8(1). [Emphasis added.].

respond to Libya's correspondence whereby Libya manifested its willingness to engage in amicable negotiations with Cengiz.

The Paris Court of Appeal ruled that the parties' non-compliance with an investment treaty's cooling-off period does not pertain to the arbitral tribunal's jurisdiction, but instead relates to the admissibility of Cengiz's claims. The Court explained that the French annulment judge may not set aside an arbitral award on the basis of challenges to the admissibility of claims and proceeded to dismiss Libya's argument based on this ground.

V. THE APPLICANT FAILED TO SUBSTANTIATE ITS ALLEGATION THAT THE AWARD SHOULD BE SET ASIDE BECAUSE THE ARBITRAL TRIBUNAL HAD WRONGFULLY UPHELD ITS JURISDICTION *RATIONE MATERIAE* OVER THE INVESTOR'S CLAIMS:

Libya then called into question the existence of a qualifying investment under the Investment Treaty and raised a series of arguments pursuant to Article 1520(1) of the French Code of Civil Procedure. Libya argued that the award should be set aside because the arbitral tribunal upheld its jurisdiction over Cengiz's claims even though the tribunal lacks jurisdiction *ratione materiae*. In particular, Libya argued that Cengiz's investment is not protected by the Investment Treaty for the three reasons discussed below.

First, Libya maintained that the definition of investments contained in Article 1(2) of the Investment Treaty - which only covers investments made "*in conformity with the hosting Contracting Party's laws and regulations*" - demonstrates that the Investment Treaty solely protects those assets that qualify as investments under local Libyan law. According to Libya, since Cengiz had failed to secure the proper registration and authorization of the contracts underlying its investment, as required under Libyan law, Cengiz is not entitled to benefit from the protection afforded by the Investment Treaty. Consequently, Libya alleged that the tribunal had ruled *ultra petita* when it upheld its jurisdiction over Cengiz's claims and argued that the Court of Appeal should set aside the tribunal's award based on Article 1520(1) of the French Code of Civil Procedure.

The Paris Court of Appeal was not convinced by Libya' argument. First, regarding the admissibility of Libya's objection, the Court explained that, considering that Libya had objected to the tribunal's jurisdiction during the course of the underlying arbitration, Libya was entitled to raise, at the setting aside stage, new arguments pertaining to the arbitral tribunal's jurisdiction. The Court's position in this regard is in line with French jurisprudence. In December 2020, the French Court of Cassation quashed the Paris Court of Appeal decision in *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland,* in which the Court of Appeal dismissed Poland's application to set aside the award, holding that the Polish applicant was precluded from

raising new jurisdictional arguments at the setting aside stage. In quashing the appeal court's decision, the French Court of Cassation explained that "*when the jurisdiction of the arbitral tribunal had been debated before the arbitrators, the parties are not deprived of the right to invoke, before the annulment judge, new pleas and arguments regarding jurisdiction and to introduce new evidence to this effect.*"[9]

Then, the Court turned to the merits of Libya's *ratione materiae* objection and noted that the definition of investment contained in Article 1(2) of the Investment Treaty "*does not make the application of the BIT conditional on the definition of investment by reference to Libyan law.*"[10] Instead, for the Court, the Investment Treaty merely contains a legality clause, which could only call into question the existence of the overall investment - and thus could lead to the setting aside of the award - if the purported violation of local law was sufficiently serious. For the Court, the fact that Cengiz did not comply with certain registration and authorization requirements under local Libyan law does not affect the very existence of Cengiz's investment and thus does not constitute a valid basis for setting aside the award on jurisdictional grounds.

Second, Libya maintained that Cengiz's purported investment did not satisfy the objective definition of investment under customary international law, which, according to Libya, requires a contribution, a certain duration, and a risk. In particular, Libya argued that the contribution requirement was not met in this case because Cengiz's contracts were mere construction contracts for which Cengiz had not made any contribution. Libya also contended that the only element of risk incurred by Cengiz corresponded to contractual obligations which did not satisfy the risk requirement under the customary international law definition of "*investment.*"

The Paris Court of Appeal summarily dismissed Libya's argument in this regard, noting that these criteria - most commonly known as the *Salini* criteria or *Salini* test[11] - had been developed and applied by arbitral tribunals constituted under the aegis of the ICSID Convention. The Court observed that the Investment Treaty's definition of covered investments was very broad and contains no mention whatsoever of the *Salini* criteria. Consequently, the court found no merit in Libya's argument.

---

9. *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland,* French Court of Cassation, Case No. 19-15396 (2 Dec. 2020).

10. *State of Libya vs. Cengiz İn aat Sanayi ve Ticaret A. .,* Court of Appeal of Paris, Decision No. 18/27648 of 25 May 2021, 75.

11. *See, Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001), 52 ("[I]*nvestment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction* […]. *In reading the* [ICSID] *Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition*").

Finally, Libya argued that bank guarantees do not qualify as protected investments under the Investment Treaty. Libya consequently objected to the arbitral tribunal's decision to award compensation in relation to certain bank guarantees, which, according to Libya, was not permitted under the applicable Investment Treaty.

The Paris Court of Appeal similarly found no merit in this argument. The Court noted that, even assuming, *arguendo,* that the bank guarantees in question did not qualify as protected investments pursuant to the Investment Treaty, this would not prevent the arbitral tribunal from taking these guarantees into consideration when determining its damages award.

VI. Alleged Violation By The Arbitral Tribunal of the Mandate Conferred Upon It May Not Serve As A Ground To Review The Merits of the Dispute:

The following ground for annulment raised by Libya was based on Article 1520(3) of the French Code of Civil Procedure, which provides that "[t]*he action for annulment is only available if the arbitral tribunal ruled without complying with the mandate granted to it by the parties.*" According to Libya, the arbitral tribunal failed to fulfil the mandate granted to it by the parties when it contravened its obligation to state the reasons upon which its award was based, as required by Articles 1482, 1483 and 1506 of the French Civil Code of Procedure.[12] In particular, Libya maintained that the arbitral tribunal failed to render a reasoned award with regard to four of its main findings.

First, Libya argued that the arbitral tribunal breached its obligation to render a reasoned award because it failed to establish the existence of a causal link between Libya's treaty violations - *i.e.,* Libya's violation of the Investment Treaty's full protection and security clause - and the damages awarded. According to Libya, the arbitral tribunal's application of the principle of 'full reparation' of damage, derived from the PCIJ's landmark decision *Chorzów Factory,* does not necessarily imply that the award contains sufficient reasoning with regard to compensation.

Second, Libya argued that the arbitral tribunal failed to state reasons for its decision to reject Libya's argument that the Investment Treaty's War Losses clause was *lex specialis* and should thus supersede the other treaty provisions[13] invoked by Cengiz.[14]

12. French Civil Code of Procedure, Art. 1482 ("*The arbitral award succinctly sets out the respective claims of the parties and the grounds upon which they are based. The award is reasoned*"). *See also, ibid.,* Arts. 1483 and 1506.

13. *I.e.*, the Investment Treaty's full protection and security clause and fair and equitable treatment clause.

14. Readers might recall that the *Strabag v. Libya* arbitral tribunal took a similar approach when analysing whether the compensation for losses clause contained in the Libya-Austria bilateral investment treaty

Relatedly, Libya also maintained that the arbitral tribunal did not state the reasons underlying its decision to uphold the cumulative application of the Investment Treaty's full protection and security clause and its War Losses clause.

Third, Libya argued that the arbitral tribunal failed to render a reasoned award with regard to its interpretation of Article 10 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**"), which provides that "[t]*he conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.*" In particular, according to Libya, the tribunal did not verify the requirement, pursuant to Article 10 of the ILC Articles, of the existence of a "*real and substantial*" continuity between the former insurrectional movement and the new Government that such movement had succeeded in forming.[15]

Third, Libya maintained that the arbitral tribunal did not give reasons for its decision to hold Libya responsible for breach of the Investment Treaty's full protection and security clause with respect to each individual attack suffered by Cengiz on its construction sites.

Finally, Libya argued the arbitral tribunal failed to assess Cengiz's alleged failure to comply with the Investment Treaty's 90-day cooling-off period.

In response, and in an attempt to defend against the annulment of the award by the Paris Court of Appeal, Cengiz argued that Libya's arguments pursuant to Article 1520(3) of the French Code of Civil Procedure are inadmissible. According to Cengiz, the tribunal's alleged failure to issue a reasoned award does not constitute a ground for annulment under French law and cannot be examined through the lens of a tribunal's alleged failure to comply with the mission granted to it by the parties. On the substance of Libya's

---

was *lex specialis*. *See, Strabag SE v. Libya,* ICSID Case No. ARB(AF)/15/1, Award (29 June 2020), 224-228 ("*The Tribunal finds that Article 5* [of the Austria-Libya BIT, which corresponds to the BIT's Compensation for Losses clause] *does not have the preclusive effect urged by Respondent* […]. [T]*he Tribunal does not accept the contention that lex specialis derogat legi generali operates as a supplementary rule of interpretation capable of altering the ordinary meaning of the words of Article 5(2). Article 32 of the VCLT gives a limited and precisely defined role to supplementary means of interpretation. They can confirm a meaning that is clear from the text* […] *or they can be considered if plain meaning leaves a text "ambiguous or obscure" or* "[l]*eads to a result which is manifestly absurd or unreasonable." Respondent has not shown how these conditions exist here, and they do not.* […] *Accordingly, the Tribunal finds that Article 5 of the Treaty does not preclude the possibility of claims based on other provisions of the treaty with respect to the matters that also fall under Article 5 of the Treaty*"). [Emphasis added.]

15. *See,* J. Crawford, THE ILC ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), Article 10, Comment 7 ("*Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming*").

arguments, Cengiz maintained that Libya's arguments on this ground are inadmissible because they seek to review the *quality* of the arbitral tribunal's reasoning, rather than its *existence*, and that, in any event, the arbitral tribunal's award is fully reasoned.

The Paris Court of Appeal first explained that, contrary to Cengiz's allegation, the arbitral tribunal's obligation to render a reasoned award pertains to the tribunal's mandate as conferred upon it by the parties. The Court thus ruled that Libya's arguments regarding the arbitral tribunal's alleged failure to give reasons in its award constitutes an admissible ground for setting aside the award pursuant to Article 1520(3) of the French Code of Civil Procedure.

The Court then turned to assessing the merits of Libya's arguments in this regard and found that all four grounds raised by Libya, whereby Libya seeks to call into question the tribunal's compliance with its duties, in fact constitute attempts to contest the sufficiency and relevance of the arbitral tribunal's reasoning, rather than its mere existence. The Court reiterated that the annulment judge is not empowered to review the substance of an arbitral award's reasoning, and that Libya may not, under the guise of an argument that the tribunal failed to state the reasons on which its award was based, attempt to re-plead the merits of its case.

More specifically, with respect to Libya's arguments regarding Article 10 of the ILC Articles, the Paris Court of Appeal noted that, as Libya had acknowledged, the tribunal reasoned that "*the Libyan Shield was a group of militias, created to support the insurrection. Since the Libyan Revolution eventually triumphed, its actions are attributable to Libya under the principle set forth in Article 10 of the Draft ILC Articles*"[16] and that "[w]*hen the Libyan Revolution eventually assumed the Government of Libya, the Libyan Shield became officially affiliated with the state security apparatus* […] [and] *thus was transformed into an organ of the Libyan State.*"[17] This, according to the Paris Court of Appeal, demonstrates that Libya is seeking to reconsider the substance of the arbitral tribunal's award, which the annulment judge is not empowered to do.

The Paris Court of Appeal then noted, with respect to the arbitral tribunal's alleged failure to give reasons in its decision to hold Libya liable for breach of the Investment Treaty's full protection and security clause, that, contrary to Libya's allegations, the arbitral tribunal had explicitly provided reasons for its decision, including by stating the ways in which Libya could have reasonably ensured the protection of Cengiz's investment. For example, the Court observed that the arbitral tribunal considered that Libya could have

16. *Cengiz İn aat Sanayi ve Ticaret A. v. The State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award (7 Nov. 2018), 433.
17. *Ibid.*, 434.

complied with its full protection and security obligation by "*provid*[ing] *basic static protection to the two Main Camps, as a deterrent against theft and plunder by violent mobs*."[18]

Finally, regarding Libya's argument that the arbitral tribunal failed to state the reasons for its award because it did not examine Cengiz's alleged failure to comply with the Investment Treaty's 90-day cooling-off period, the Paris Court of Appeal found that the fact that the arbitral tribunal assessed the merits of Cengiz's claims suffices to establish that the tribunal considered such claims to be admissible and thus, that it considered that the Investment Treaty's cooling-off period requirements had been satisfied. In particular, the Court took note of the fact that the arbitral tribunal had expressly noted in its award that "*given that no agreement was reached between the Parties during the 90-day period, Cengiz was entitled to exercise its right to commence arbitration proceedings under Article 8 of the BIT*."[19]

Consequently, the Paris Court of Appeal concluded that Libya had not demonstrated that the arbitral tribunal failed to render a reasoned award and dismissed all of Libya's arguments for annulment of the award based on Article 1520(3) of the French Code of Civil Procedure.

The Paris Court of Appeal decision confirms that any review of the reasons underlying an arbitral tribunal's award will necessarily be restrictive in scope and that French courts, seeking to preserve a high level of deference to arbitral tribunals' decisions, will not venture into performing a *de novo* review, unless the arbitral tribunal's reasoning is wholly lacking.[20]

VII. The Setting Aside of An Arbitral Tribunal's Award on Public Policy Grounds Must Be Based On Sufficiently Serious Violations:

Finally, and as a last subsidiary argument supporting its application to set aside the award, Libya argued that the recently uncovered evidence of corruption in the report issued by the Libyan Audit Bureau should result in the setting aside of the arbitral award

18. *Ibid.*, 448.

19. *Ibid.*, 342.

20. *See, e.g.,* C. Seraglini, J. Ortscheidt, Droit de l'arbitrage interne et international, (2nd Ed.), pp. 989, 978; French Court of Cassation, Decision No. 14-23822 (30 Jan. 2019) ("*Mais attendu que le juge de l'annulation est juge de la sentence pour admettre ou refuser son insertion dans l'ordre juridique français et non juge de l'affaire pour laquelle les parties ont conclu une convention d'arbitrage ; que, sous le couvert du grief non fondé de violation de l'article 1520, 3°, du code de procédure civile, le moyen, qui reproche à la cour d'appel de ne pas avoir sanctionné une erreur de droit qui aurait été commise par les arbitres, ne tend qu'à obtenir une révision au fond de la sentence arbitrale ; qu'il ne peut être accueilli*").

pursuant to Article 1520(5) of the French Code of Civil Procedure on the ground that the award was contrary to international public policy.

The Paris Court of Appeal started by explaining that the annulment judge has the authority to annul an award that infringes international public policy even when the allegations in relation to this ground had not been raised during the arbitral proceedings. The jurisprudence of French courts also demonstrates that the French annulment judge considers that it has the power to review an award "*in law and in fact*" to determine whether the award violates international public policy. In doing so, the annulment judge may exercise certain investigative powers to examine all facts that are relevant to determining whether the underlying contract was procured through corruption.[21] This exception to the rule precluding a *de novo* review of arbitral awards at the setting aside stage may appear as a profound contravention of the principle of finality of arbitral awards. Yet, it is also a powerful tool to investigate potentially serious illegalities at any stage of the arbitral proceedings and to prevent parties from benefitting from the protections contained in investment treaties when the underlying contract was, for example, tainted by fraud or corruption.

The Court also explained that, in line with well-established jurisprudence of French courts, the relevant standard that is to be applied by the annulment judge when determining whether an infringement of international public policy has occurred is whether the execution of the arbitral tribunal's award would manifestly, effectively and concretely infringe the principles and values of international public policy.[22] The Court then proceeded with an assessment of a series of red flags or *indicia* of corruption that were raised by Libya. Once again, the Court's approach conforms with well-established French jurisprudence. In order to address the difficulty of obtaining direct evidence of acts of corruption, French courts have developed a circumstantial evidence test based on "*serious, precise and consistent indicia*" of fraud or corruption.[23]

First, the Court found that the general climate of corruption that allegedly prevailed in Libya at the time that Cengiz's contracts were concluded does not constitute sufficient

21. *See, e.g., Alstom Transport SA v. Alexander Brothers Ltd.,* Paris Court of Appeal, RG No. 16/11182 (10 Apr. 2018), p. 5.

22. Pursuant to a French *jurisprudence constante,* international arbitral awards may be set aside based on a violation of international public policy only if the alleged public policy violation satisfies the heightened standard of being "*flagrant, effective and concrete*." *See, e.g., Société MK Group v. S.A.R.L. Onix,* Paris Court of Appeal, RG No. 15/21703 (16 Jan. 2018), p. 8.

23. In French: "*faisceau d'indices graves, précis et concordants*." *See, e.g., Alstom Transport SA v. Alexander Brothers Ltd.,* Paris Court of Appeal, RG No. 16/11182 (10 Apr. 2018); E. Gaillard, *The emergence of transnational responses to corruption in international arbitration,* in W. W. Park (Ed.), *Arbitration International 1* (2019) ("*Arbitral tribunals are not alone in applying the red flags methodology to allegations of corruption and illegality. In a series of recent cases, French courts have also applied the red flags methodology in proceedings to set aside arbitral awards*").

indicia to conclude that there were acts of corruption. In particular, the Court took notice of the fact that Libya failed to detail the specific nature of the alleged corrupt acts and did not reveal the identity of any persons involved in any purported corruption scheme. It was notably unclear for the Court whether Libya intended to decry corrupt acts involving an intermediary in the procurement of the underlying construction contracts, or whether Libya denounced a corruption scheme directly involving agents of the Libyan State, such as HIB's public officials.

Second, the Court also took notice of the fact that, while Libya claims that corrupt acts allowed Cengiz to establish its investment in 2008, Libya failed to justify having prosecuted any public agents that may have been involved in this alleged corruption scheme, even though at least two public entities were directly involved in Cengiz's investment operation.

Finally, the Court considered that the allegation of the existence of mere "*chronological inconsistencies*" does not suffice to substantiate the existence of *indicia* - let alone concrete evidence - of corrupt acts that would justify the setting aside of the award. The Court notably found that the fact that Cengiz's contracts had been approved by several Libyan public authorities suggests that corruption was unlikely.

The Court then concluded that Libya failed to provide serious and concordant circumstantial evidence that Cengiz's investment had been tainted by corruption and proceeded to dismiss Libya's ground for annulment based on an alleged violation of international public policy, pursuant to Article 1520(5) of the French Code of Civil Procedure.

The Court's assessment of the alleged public policy violation in this case departs from its position in the recent decision of *Sorelec v. Libya,* in which the Paris Court of Appeal set aside two arbitral awards rendered under the aegis of the ICC Rules in favour of the French construction company Sorelec against the State of Libya, on the ground that the arbitral awards resulted from a settlement agreement that was tainted by corruption. In the *Sorelec* case, the parties did not plead corruption during the underlying arbitration even though, and contrary to the *Cengiz v. Libya* case, evidence upon which the Libyan applicant relied in support of its corruption claim was available during the arbitration. Contrary to the case at hand, the Paris Court of Appeal in *Sorelec* found the evidence uncovered by the Libyan Audit Bureau to be convincing, which, according to the Court, positively established the existence of corruption of Libyan public officials and demonstrated that "*certain local and foreign entities have benefited from a situation characterized by political and regional division, a lack of stability, the deterioration of resources, institutional fragmentation, and the resulting segregation of the state* [...] *and consequently engaged in corrupt acts.*"[24]

24. *State of Libya v. Sorelec,* Judgment of the Paris Court of Appeal, Case No. RG 18/022568 (17 Nov. 2020), 45.

Unlike in *Cengiz v. Libya*, the Paris Court of Appeal in *Sorelec* concluded that evidence of a mere general climate of corruption suffices to set aside an award on public policy grounds.[25]

In many respects, the decision of the Court of Appeal in *Cengiz v. Libya* reaffirms the position of French courts in previously well-established jurisprudence, notably with respect to heightened scrutiny of alleged illegalities that may affect the underlying arbitral proceedings, the recourse to a circumstantial evidence test to determine whether the underlying contract was tainted by corruption, and the fact that evidence of corruption was admissible even though it had never been raised during the arbitral proceeding. Nevertheless, the Court's decision may signal a possible shift in the Paris Court of Appeal's position, which, in recent years, has been confronted with a proliferation of illegality allegations - most notably corruption - as grounds for the annulment of arbitral awards. This case shows that the Paris Court of Appeal is willing to adopt a more stringent approach to corruption allegations, in order to ensure that corruption claims raised at the setting aside stage - whether on jurisdictional or public policy grounds - do not become a Trojan horse normalizing a *de novo* review of arbitral awards.

Nevertheless, this judgment of the Paris Court of Appeal raises several questions regarding the future of the annulment judge's review of corruption allegations raised through the lens of jurisdictional objections. If this question arises in future annulment proceedings, it is not unlikely that a French judge would venture into a reassessment of the arbitral tribunal's appreciation of its own jurisdiction if the judge considers that evidence of corruption is sufficiently serious and convincing. Another possibility would also be for the French annulment judge to remain silent on this issue and to sanction investments tainted by corruption solely on the ground that the award violated international public policy.

25. Other jurisdictions have adopted a similar approach. For instance, in 2019, the Hague Court of Appeal declined to enforce an arbitral award holding that there were "*strong indications*" of corrupt acts during the procurement of the underlying contract. *See, Bariven S.A. v. Wells Ultimate Service LLC,* The Hague Court of Appeal (22 Oct. 2019).