

Paris Court of Appeal outlines the scope of review of applications to annul arbitral awards under Article 1520, 3° of the French Code of Civil Procedure (Nantong v Cristal)

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Arbitration analysis: In this case, the Paris Court of Appeal reviewed an application to annul an arbitral award under Article 1520, 3° of the French Code of Civil Procedure ('CCP'). Article 1520, 3° of the CCP allows a party to apply to annul an award before French courts on the ground that 'the arbitral tribunal ruled without complying with the mandate conferred on it'. Here, the court refused to annul the award, holding that the fact that the arbitral tribunal applied the governing law without expressly referring to it in a consistent manner in the award is not enough to establish that the arbitral tribunal did not apply or disregarded the law. This case is interesting as it provides indications regarding the high standard of proof required to succeed in an application to annul an award under Article 1520, 3° of the CCP. It results from the present case that the applicant must establish more than mere inferences to successfully challenge an award on this ground. Written by William Kirtley, partner, and Seda Dundar, trainee at Aceris Law.

Nantong Deep Sea Fisheries Co Ltd v Cristal Fish SA, [RG n° 21/04655](#)

What are the practical implications of this case?

This case provides guidance regarding applications to annul arbitral awards on the ground that the arbitral tribunal ruled without complying with the mandate conferred on it. The main issues when challenging awards on this ground are whether the arbitral tribunal ruled *ultra petita* or *infra petita* and whether the arbitral tribunal acted as *amiable compositeur*, in the absence of such a mandate. In this regard, the present case outlines that a mere inference is not enough to explicitly establish that an arbitral tribunal did not comply with its mandate or that an arbitral tribunal ruled as *amiable compositeur* by ignoring the applicable law.

Additionally, this case provides details regarding the scope of review of applications to annul arbitral awards. Grounds to challenge arbitral awards are strictly limited under French law and, consequently, successful challenges to arbitral awards before French courts are rare. The Paris Court of Appeal's decision is an example of French courts' infrequency to set aside awards under the grounds stated in Article 1520 of the CCP. Article 1520 of the French Code of Civil Procedure enumerates five limited grounds under which a party may challenge an arbitral award:

'The application for annulment is only open if:

1° The arbitral tribunal wrongly declared itself competent or incompetent; or

2° The arbitral tribunal was improperly constituted; or

3° The arbitral tribunal ruled without complying with the mandate conferred on it; or

4° The principle of contradiction has not been respected; or

5° The recognition or enforcement of the award is contrary to international public policy.'

In the same vein, the French courts' power to review applications to annul awards does not entail a de novo review of the merits of the case. In this case, the Paris Court of Appeal correctly stated that 'it is not for this court to assess the application of that law [Mauritanian law], unless it engages in a process of review of the merits of the award, which does not fall within its function' The present case is a reminder that French courts are prevented from reviewing the merits of a dispute and thereby from re-assessing the legal and factual reasoning of the arbitral tribunal (CA Paris, 6 September 2022, RG n° 21/04655 (para 37)).

What was the background?

In 2018, Nantong Deep Sea Fisheries Co Ltd ('Nantong') and Cristal Fish SA ('Cristal') entered into a partnership agreement under Mauritanian Law whereby Nantong was to sell Cristal six fishing vessels (the 'Agreement').

After difficulties arose regarding the transfer of documents related to the right to fish in Mauritania, Cristal claimed that Nantong did not deliver the vessels within the deadline and, on May 30, 2019, Nantong notified Cristal of the termination of the Agreement.

On January 24, 2020, Cristal initiated arbitration before the International Chamber of Commerce ('ICC') in Paris. A sole arbitrator rendered an award on February 8, 2021, holding that the termination of the Agreement was 'due to the wrongful failure of Nantong to perform its obligations' and ordered Nantong to pay the sum of \$US 3.8m.

On March 9, 2021, Nantong applied to annul the award before the Paris Court of Appeal.

What issues were before the Paris Court of Appeal?

Nantong moved to set aside the award relying on Article 1520, 3° of the CCP, arguing that the arbitral tribunal ruled without complying with the mandate conferred on it by failing to apply Mauritanian law as agreed by the parties. Nantong argued that the arbitral tribunal had acted as *amiable compositeur* by referring to good faith without applying Mauritanian law.

Thus, the issue before the Paris Court of Appeal was whether the arbitral tribunal ruled in compliance with the mandate conferred on it, ie, by applying Mauritanian law as agreed by the parties, in light of Article 1520, 3° of the CCP. There was also an underlying issue as to whether the arbitral tribunal acted as *amiable compositeur* despite the absence of such a mandate.

What did the court decide?

On September 6, 2022, the Paris Court of Appeal refused to annul the award, holding that the arbitral tribunal ruled in compliance with the mandate conferred on it by applying Mauritanian law: (1) The court further ruled that the arbitral tribunal did not rule as *amiable compositeur* by referring to good faith (2).

Did the arbitral tribunal rule in compliance with Mauritanian law as agreed by the parties?

The Court of Appeal analyzed each of Nantong's claims regarding the alleged failure to apply Mauritanian law by the arbitral tribunal.

First, the court analyzed Nantong's claim that the arbitral tribunal did not apply Mauritanian law related to fishing in Mauritania. The court held that the law governing fishing in Mauritania was not referenced in an autonomous manner in the Agreement and that the arbitral tribunal did not disregard or fail to apply Mauritanian law related to fishing. On the contrary, the court found that the arbitral tribunal referred to Mauritanian law to assess the non-performance of contractual obligations.

Further, the court analyzed Nantong's claim that the arbitral tribunal did not apply Mauritanian law related to contractual liability. The court considered that the arbitral tribunal reached its decision in light of the exception of non-performance principle provided by Mauritanian law without it being apparent from the reasoning of the award that the arbitral tribunal departed from the provisions

applicable to the Agreement, whether it be Mauritanian contracts law or provisions related to the right to fish.

In light of the above, the court considered that ‘the fact [...] that the arbitrator applied the said Mauritanian provisions without expressly referring to them on each occasion in the reasoning of the award does not allow the inference that the arbitrator disregarded the said law’. Thus, the court held that Nantong did not establish the non-application of Mauritanian law by the arbitral tribunal and that the arbitral tribunal ruled on the basis of Mauritanian law (CA Paris, 6 September 2022, RG n° 21/04655 (para 30)).

Did the arbitral tribunal rule act as amiable compositeur without having been authorized to do so?

The Court of Appeal further analyzed Nantong’s claim that the arbitral tribunal acted as amiable compositeur by relying on good faith without having been authorized by the parties to do so.

The court considered that in the absence of the parties’ waiver of the application of the governing law agreed by the parties and the arbitral tribunal’s power to rule as amiable compositeur, Nantong only implicitly argued that the arbitral tribunal ruled in equity by relying on good faith. However, the court found that the arbitral tribunal stated in the award that Cristal based its claims on the breach of the duty of good faith by Nantong, which is a principle recognized under the Agreement and under Mauritanian law.

In light of the above, the court ruled that the award did not imply that the arbitral tribunal ruled in equity. Rather, the court considered that the arbitral tribunal properly based the award on Mauritanian law as agreed by the parties.

Case details:

- Court: Paris Court of Appeal
- Judge: Mr François Ancel
- Date of judgment: 6 September 2022

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