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COURT OF APPEALS OF PARIS
International Commercial Chamber

Section 5 - Chamber 16

RULING OF 11 JANUARY 2022

(No. /2022, 9 pages)

Case number: **20/17923 - Portalis No. 35L7-V-B7E-CCY34**

Decision on appeal before the Court: The exequatur order dated 24 May 2019 handed down by the Presiding Judge of the County Court of Paris

APPELLANT:

The Republic of Benin

Represented by the Judicial Agent of the Treasury, General Directorate of the Treasury and Public Accounting

Route Aéroport international Cardinal Bernardin Gantin, 01BP410 Cotonou, Republic of Benin

Represented by Michel Guizard, Esq., Barrister-at-Law admitted to the Paris Law Society of the law firm of Selarl Guizards & Associés (Law Society Membership No. L0020)

Represented by trial barristers,
Law Society

Esq., Barrister-at-Law admitted to the Paris
(Law Society Membership No.) and
Esq., Barrister-at-Law admitted to the Val-de-Marne Law Society (Law Society
Membership No.)

APPELLEE:

Société Générale de Surveillance SA (SGS)

Registered office: 1 place des Alpes, 1201 Geneva, Switzerland

Represented by its legal representatives.

Represented by

Esquire, Barrister-at-Law admitted to the Paris Law Society of
(Paris Law Society Membership #)

Represented by trial barrister,
Law Society

Esq., Barrister-at-Law admitted to the Paris
(Law Society Membership No.)

MEMBERS OF THE BENCH:

The case was tried on 26 October 2021 at a hearing open to the public before the following panel of justices:

Lord Justice of Appeal François Ancel, Presiding Justice
Lord Justice of Appeal Laure Aldebert, Associate Justice
Lord Justice of Appeal Fabienne Schaller, Associate Justice

who deliberated thereupon.

Clerk: at the appellate trial hearing: Najma El Farissi.



RULING:

The ruling was handed down after adversarial proceedings and made available at the Court Registry Office, the parties having previously been notified as required by virtue of the second paragraph of Article 450 of France's Rules of Civil Procedure. The official copy of the ruling was signed by Lord Justice of Appeal François Ancel, the Presiding Justice and Najma El Farissi, the clerk to whom the official copy of the ruling was given by the justice who signed it.

I. STATEMENT OF FACTS AND PROCEEDINGS

1. The Republic of Benin is an independent nation since 1st August 1960.
2. Société Générale de Surveillance SA (hereinafter "SGS") is a Swiss company which provides inspection, verification, testing and certification services for imported and exported products.
3. Following an international invitation to tender, the Republic of Benin and SGS signed on 5 December 2014 a procurement agreement for a three-year period (hereinafter the "Agreement") governed by the laws of Benin for the purpose of introducing a customs valuation certification programme.
4. This Agreement includes an arbitration clause providing for arbitration under the aegis of the ICC.
5. The Republic of Benin paid the invoices as required under the Agreement until 2015 and then it stopped honouring them, invoking the nullity of the Agreement, and the resumption of a previous agreement entered into in 2011 with the company Benin Control SA.
6. On 31 January 2017, SGS filed a request for arbitration with the ICC on the basis of the arbitration clause contained in the Agreement seeking payment of invoices under the Agreement and compensation for the violation of contractual undertakings (ICC Case No.).
7. On 13 February 2017, the Court of First Instance of Cotonou handed down a judgment that invalidated the disputed Agreement.
8. Following the separation of jurisdictional issues from the merits, the Arbitral Tribunal sitting in Ouagadougou, Burkina Faso, handed down a partial award on 6 April 2018 by virtue of which it found that it had jurisdiction to decide on the dispute (hereinafter the "Partial Award").
9. The Republic of Benin filed an application for the annulment with the Court of Appeal of Ouagadougou, which had jurisdiction over the seat of the arbitration. The Court of Appeal handed down a ruling on 21 September 2018 dismissing the application by the Republic of Benin.
10. The Republic of Benin filed an appeal to quash this decision with OHADA's Common Court of Justice and Arbitration (CCJA).
11. In a ruling dated 27 February 2020, the CCJA quashed the 21 September 2018 ruling from the Court of Appeal of Ouagadougou and, referring to the substantive issues in the case, annulled the Partial Award.
12. In the meantime, on 31 March 2019, the Arbitral Tribunal handed down a final arbitration award (hereinafter the "Final Award") in which it rejected the claim for the nullity of the Agreement and the claim for reimbursement made by the Republic of Benin



and ordered the Republic of Benin to pay the sum of EUR to SGS for its invoices in addition to default interest at the rate of 4.5%. It dismissed the claim of SGS for payment of damages and interest.

13. The Republic of Benin filed an application for the annulment of the Final Award in the Court of Appeal of Ouagadougou, which annulled the Final Award in a ruling on 20 December 2019.

14. The County Court of Paris issued an exequatur order on 24 May 2019 in respect of the 31 March 2019 Final Award.

15. In a ruling dated 12 March 2020, the Court of Appeal of Cotonou upheld the 13 February 2017 judgment of the Court of First Instance of Cotonou and dismissed the motion to dismiss for lack of jurisdiction raised by SGS on grounds in particular that the application for the invalidation of a government contract cannot be brought before an Arbitral Tribunal as it falls within the exclusive jurisdiction of the administrative courts.

16. On 10 December 2020, the Republic of Benin filed an appeal against the 24 May 2019 exequatur order.

17. On 4 May 2021, a pretrial appellate court justice found the appeal of the Republic of Benin admissible.

18. The Parties accepted the procedural protocol of the international commercial chamber.

19. The pretrial phase ended on 19 October 2021.

II. CLAIMS OF THE PARTIES:

20. In its latest brief served electronically on 18 October 2021, the Republic of Benin, by virtue of Articles 1520 and 1525 of France's Rules of Civil Procedure and the bilateral treaties applicable, sought the following remedy from the Court:

FIND that it had jurisdiction to rule on the effects (i) of the 13 February 2017 decision of the Court of First Instance of Cotonou upheld by the 12 March 2020 ruling of the Court of Appeal of Cotonou and (ii) the 20 March 2019 ruling of the Court of Appeal of Ouagadougou;

RULE that (i) the 13 February 2017 decision of the Court of First Instance of Cotonou upheld by the 12 March 2020 ruling of the Court of Appeal of Cotonou and (ii) the 20 March 2019 (sic) ruling of the Court of Appeal of Ouagadougou were final decisions and no longer subject to appeal (res judicata) in France;

RULE that the recognition of the Final Arbitration Award is a violation of international public policy;

RULE that the 31 March 2019 Final Arbitration Award was rendered by an Arbitral Tribunal that lacked jurisdiction;

As a consequence:

DISMISS all the claims of SGS;

INVALIDATE the 24 May 2019 exequatur order;



In any case:

ORDER SGS to pay to the Republic of Benin the sum of EUR 10,000.00 by virtue of Article 700 of France's Rules of Civil Procedure;

ORDER SGS to pay all court costs.

21. In its latest brief served electronically on 18 October 2021, SGS, by virtue of Articles 1520 and 1525 of France's Rules of Civil Procedure, sought the following remedy from the Court:

With respect to the claims relating to the recognition and exequatur of the judgments and rulings from Benin or Burkina Faso

Principally:

FIND these claims inadmissible;

In the alternative, with respect to the recognition by right:

REFUSE the recognition by right of the 13 February 2017 decision of the Court of First Instance of Cotonou, of the 27 February 2020 ruling of the Court of Appeal of Cotonou and 20 December 2019 ruling of the Court of Appeal of Ouagadougou;

As a further alternative, with respect to the recognition and exequatur of these decisions:

In limine litis, FIND that it does not have jurisdiction to grant exequatur to the 13 February 2017 judgment of the Court of First Instance of Cotonou, to the 27 February 2020 ruling of the Court of Appeal of Cotonou and to the 20 December 2019 ruling of the Court of Appeal of Ouagadougou;

Alternatively, FIND the application for the exequatur of the 13 February 2017 judgment of the Court of First Instance of Cotonou, the 27 February 2020 ruling of the Court of Appeal of Cotonou and the 20 December 2019 ruling of the Court of Appeal of Ouagadougou inadmissible;

In any case, DISMISS the application for the exequatur of the 13 February 2017 judgment of the Court of First Instance of Cotonou, the 27 February 2020 ruling of the Court of Appeal of Cotonou and the 20 December 2019 ruling of the Court of Appeal of Ouagadougou;

In any case, with respect to the application for the invalidation of the 24 May 2019 exequatur order handed down by the Presiding Judge of the County Court of Paris;

FIND that the 20 December 2019 ruling of the Court of Appeal of Ouagadougou that annulled the Final Award has no effect in the French legal system;

RULE that all the grounds of appeal raised by the Republic of Benin against the application for the exequatur without merit;

UPHOLD the 24 May 2019 exequatur order handed down by the Presiding Judge of the County Court of Paris;

DISMISS the application by the Republic of Benin to reform the 24 May 2019 exequatur order handed down by the Presiding Judge of the County Court of Paris as well as all claims, pleas and submissions;



ORDER the Republic of Benin to pay to SGS Société Générale de Surveillance SA the sum of EUR 100,000.00 by virtue of Article 700 of France's Rules of Civil Procedure as well as all costs;

III. GROUNDS FOR THE DECISION:

The claims concerning the recognition of foreign judgments

22. SCS maintains that the applications of the Republic of Benin for the recognition or exequatur judgments and rulings from Benin or Burkina Faso, assuming that they can be described as claims, are inadmissible in the court seized with the appeal against the exequatur order as it does not have the jurisdiction to grant exequatur to a foreign judgment, which is a separate process.

23. It considers that if, however, this claim was granted, the requirements necessary for the recognition are not fulfilled insofar as the claims run counter to the bilateral judicial cooperation treaties. It maintains in particular that the requirements under the Agreement establishing cooperation in the area of justice between France and Benin, 27 February 1975 (the "France-Benin Cooperation Agreement") are not met to the extent that decision from the courts of Benin are administrative in nature and they are excluded from the agreement.

24. It adds that the recognition of these decisions cannot come into play to the extent that they do not meet the requirements under these treaties insofar as they were rendered by courts that do not have jurisdiction because of the arbitration clause contained in Section 18 of the Agreement and because they violate the public policy principle in terms of SGS's defence rights and its right to a fair trial, which its defence was refused and to assert the existence of an arbitration clause in the lower court.

25. With respect, lastly, to the "*de facto effect*" of the foreign judgment, which do not require any recognition of the judgment, it explains that it can only take into account factual evidence and it is otherwise in relation to the normative effects of the enforceability and the *res judicata* that give rise to an application for recognition, the admissibility of which is subject to the requirements set out above are not fulfilled.

26. In response, the Republic of Benin contends that it is not asking the court to grant the exequatur to foreign judicial decisions but their recognition and it points out that the bilateral treaties applicable do not make the effects of the judicial decisions conditional to the exequatur granted by the presiding judge of the court of first instance of the place where enforcement is sought. It maintains that under Article 44 of the France-Benin Agreement the judicial decisions handed down in Benin have by right *res judicata* in France; the decision handed down by the Court of First Instance of Cotonou, which took jurisdiction and invalidated the Agreement, meets all the requirements to be recognised by right and to have *res judicata* in France; the same applies to the France-Benin Agreement and to the decisions handed down by the courts in Burkina Faso that annulled the awards which must be recognised by right with no need to apply for exequatur. It disputes that the principle of the autonomy of international arbitration is a matter of French public policy. In any case, it maintains that any French court can determine incidentally the international legality of a foreign judgment and its recognition to the extent that they meet the requirements, which is the case here. It points out the *de facto* and *de jure* effects that arise as a result of the aforementioned decisions, namely that the Agreement is null and void and that the Final Arbitration Award was annulled. It maintains that, based on the very confession of SGS which filed appeals against these decisions, it recognises that they have *res judicata*, thereby making the exequatur of the Final Arbitration Award impossible.



Wherefore:

27. In the case in point, the Republic of Benin maintains in substance that because of the aforementioned foreign decisions that must be recognised in France, on the one hand, the Final Award was handed down by an Arbitral Tribunal that lacked jurisdiction and, on the other hand, the recognition or the enforcement in France of the Final Award is contrary to international public policy.

28. However, an international arbitration award, which is not associated with the legal system of any particular state, is an international judicial decision the legality of which is examined based on the rules applicable in the country in which its recognition or its enforcement are sought.

29. As a consequence, the recognition in France of an arbitration award rendered abroad is examined based on the rules applicable in France and the annulment of said award by the courts of the seat of arbitration is of no consequence with respect to its recognition.

30. Moreover, separately and independently of the rules applicable for their recognition in France, of which a court can be seized incidentally to review, and even assuming that they are in the case in point fulfilled, the decisions of the Court of Appeal of Ouagadougou had respectively annulled the Partial Award and the Final Award by virtue of two decisions dated 27 February 2020 and 20 December 2019 or the decisions from the courts in Cotonou that ruled on the merits of the dispute, are not such as, in and of themselves, to impede a court review of just the rules applicable in France, of the application for exequatur of these awards in France, and precisely the one sought relating to the Final Award.

31. The grounds of appeal based on the lack of jurisdiction of the Arbitral Tribunal and on the violation of international public policy based solely only Articles 1520 and 1525 of France's Rules of Civil Procedure should therefore be examined.

32. It should be noted that under Article 1525 of France's Rules of Civil Procedure, "*an order granting (or denying) recognition or enforcement of a foreign award (that is, an award made outside France) may be appealed. However, the court of appeal may refuse recognition or enforcement only in the cases listed in Article 1520*".

The ground of appeal based on the lack of jurisdiction of the Arbitral Tribunal

33. The Republic of Benin maintains that two courts already ruled that the Arbitral Tribunal lacked jurisdiction to decide on said litigation. It points out that the Court of First Instance (hereinafter the "CFI") of Cotonou ruling in an administrative case found that it had jurisdiction in a judgement dated 13 February 2017, upheld by OHADA's Common Court of Justice and Arbitration (hereinafter "CCJA") whose decisions are internationally recognised, found in a ruling dated 12 February 2020 that the Arbitral Tribunal lacked jurisdiction to decide the dispute between the Republic of Benin and SGS. It thus maintains an Arbitral Tribunal may not take jurisdiction in order to reopen and decide issues already ruled on by a state court that took jurisdiction to decide the dispute and handed down a final decision no longer subject to appeal (*res judicata*), of which it points out that it constitutes a fundamental principle of justice.

34. In response, SGS maintains that the Arbitral Tribunal rightly found that it had jurisdiction and the annulment of the Final Award by the Court of Appeal of Ouagadougou and by the CCJA has no effect on the recognition and the enforcement of said award sought in France. It further notes that by virtue of the common will of the parties, the arbitration clauses contained in the agreement entered into by SGS and the Republic of Benin on 5 December 2014, which the parties did not renounce, justifies the application of the competence-competence doctrine and of the principle of the autonomy of the arbitration clause.



35. In any case, SGS adds that the courts in Benin wrongly found that they had jurisdiction in disregard of said principles and doctrine and despite the motions to dismiss for lack of jurisdiction filed by SGS in the local courts. It also contends that the CFI of Cotonou ruled on the issue of jurisdiction in disregard of the defence rights and the right to a fair trial of SGS by denying it the opportunity to file written submissions and to make oral arguments during the trial hearing.

Wherefore:

36. Under Article 1520(1) of France's Rules of Civil Procedure, action for annulment is available "*if the tribunal wrongly found that it had or lacked jurisdiction...*".

37. The court reviews the decision of the Arbitral Tribunal on its jurisdiction by seeking all legal or factual information making it possible to assess the scope of the arbitration clause.

38. By virtue of a material rule of international arbitration law, the arbitration clause is legally separate from the maintain agreement that contains it or refers to it and its existence and its effectiveness are assessed subject to the mandatory rules of French law and of international public policy based on the common will of the parties with no need to refer to the laws of any state.

39. So, the fact that a judge from a state court found that he or she had jurisdiction to decide on a dispute relating to an agreement containing an arbitration clause does not prevent a judge reviewing arbitration award from making the determination, which he or she must make by virtue of the aforementioned material rule, of the jurisdiction of the Arbitral Tribunal notwithstanding the rules regarding the recognition in France applicable with regard to a foreign judgment.

40. In the case in point, based on evidence produced, section 18 of the Agreement in dispute contains an arbitration clause the validity of which is noted contested, which stipulates that "*Any dispute that arises as a result of the execution of this agreement and its exhibits will first attempt to be resolved out-of-court at the initiative of either of the parties, which must notify the other party in writing and ask for negotiations to commence within a period of no more than fifteen days.*"

If no out-of-court settlement can be reached, the disputes, disagreements or claims arising from or relating to this agreement or to its interpretation will be submitted to arbitration according to the arbitration rules of the International Chamber of Commerce (ICC) of Paris.

The arbitral tribunal shall be comprised of three arbitrators, one of whom shall be appointed by each of the parties. These two (02) arbitrators will appoint the third one who shall serve as the president of the arbitral tribunal.

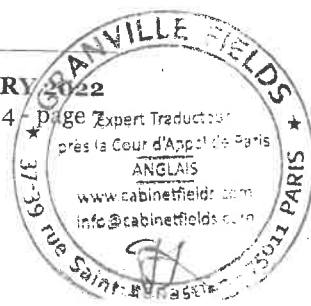
If the two arbitrators fail to agree on the appointment of the third arbitrator to serve as the president of the arbitral tribunal, then the position will be filled by the International Chamber of Commerce (ICC) of Paris.

To this end, either party may refer the matter to the International Chamber of Commerce (ICC) of Paris.

The seat of the arbitral tribunal shall be in an ECOWAS country other than Benin. The applicable law shall be Beninois law. The arbitral award rendered shall be binding on the parties".

46. It is well-established that the dispute between the parties arose as a result of the failure by the Republic of Benin to execute said Agreement, as alleged by SGS, so the Arbitral Tribunal rightly found that it had jurisdiction to decide on the dispute based on the common intent of the parties.

47. As a consequence, the ground of appeal shall be rejected.



The ground of appeal based on a violation of international public policy for failing to observe the fact that judgments from Benin and Burkina Faso were final and no longer subject to appeal (res judicata)

48. The Republic of Benin maintain that res judicata is a principle of international public policy, that the irreconcilability of an arbitration award with a foreign decision that has become final and no longer subject to appeal previously rendered constitutes a violation of international public policy. It considers that by taking jurisdiction in disregard of the 13 February 2017 judgment of the CFI of Cotonou upheld by the Court of Appeal of Cotonou which found that it had jurisdiction to decide the litigation and that invalidated the Agreement, the Arbitral Tribunal rendered an award that contravenes international public policy by violating the res judicata of the judicial decisions of the State of Benin and of the 20 December 2019 ruling of the Court of Appeal of Ouagadougou that annulled the Final Award (hereinafter the “Burkina Faso and Benin Decisions”) and therefore the order for the exequatur of the Final Award runs up against the abovementioned decisions and violates international public policy.

49. In any case, the Republic of Benin points out that there is a risk of a patent conflict between the exequatur order recognising the Final Award and the Burkina Faso and Benin Decisions, the claim of irreconcilability can be characterised as an incompatibility of the grounds of the legal decisions in question. Yet, in the case in point, the Arbitral Tribunal rejected the claim of the nullity of the Agreement—and this in contradiction with the judgment of the CFI of Cotonou that annulled the Agreement. Consequently, the upholding of the exequatur order would run counter to international public policy.

50. In response, SGS points out that the assessment of the violation of international public policy is limited to the flagrant, effective and concrete nature of the alleged violation of public policy. It points out that the conflict of the decisions is insufficient to characterise a violation of international public policy, save where such conflict occurs during the same proceedings, which is not the case here, of where, with respect to foreign judgments, they are recognised and granted exequatur in France. It notes that the Benin decisions and the 20 December 2019 ruling of the Court of Appeal of Ouagadougou annulling the Final Award that cannot be recognised in France were not granted exequatur and thus cannot be considered as irreconcilable with the Final Award, which has been granted exequatur.

Wherefore:

51. Under Article 1520(5) of France’s Rules of Civil Procedure, an appeal against an exequatur order of an international arbitration award handed down abroad relates to the conflict of the recognition or the enforcement of said arbitration award with international public policy; this review is of the compatibility of the solution of the award with the conception of international public policy; in the French legal system, that is to say the values and principles which it cannot accept are disregarded even in an international context.

52. In the case in point, the Republic of Benin claims that the recognition of the Final Award clashes with the res judicata of the 13 February 2017 judgment of the CFI of Cotonou as upheld by the 12 March 2020 ruling Court of Appeal of Cotonou.

53. However, on the one hand, the international arbitration award, which is not attached to the legal system of any particular state, is an international judicial decision the legality of which is examined based on the rules applicable in the countries where its recognition or its enforcement are sought so it cannot depend on the solution provided in a foreign decision, even if it is liable to be recognised in France.

54. On the other hand, if French international public policy is liable to clash with the irreconcilability between an arbitration award and a decision from a foreign court that leads



to legal repercussions that are not mutually exclusive, these decisions still have to be likewise enforceable in France.

55. It is well-established that neither the 13 February 2017 judgment of the CFI of Cotonou nor the 12 March 2020 ruling of the Court of Appeal of Cotonou, nor the 27 February 2020 ruling of the CCJA or the 20 December 2019 ruling of the Court of Appeal of Ouagadougou were not granted exequatur in France, which was not even sought by the Republic of Benin, only recognition, in fact contested, is insufficient.

56. As these decisions have not been granted exequatur in France, they cannot under any circumstances hinder on this ground the exequatur of the Final Award, bearing in mind that the mere disregard of res judicata of a foreign judicial decision is irrelevant so there is no need to examine the recognition of these decisions which is irrelevant in the case in point.

57. As a consequence, the ground of appeal shall be rejected.

Expenses and Court Costs:

58. The Republic of Benin, the losing party, should be ordered to pay costs.

59. In addition, it must be ordered to pay to SGS, which had to undertake unrecoverable expenses to assert its rights, compensation by virtue of Article 700 of France's Rules of Civil Procedure that it is only fair to set at EUR 50,000.00.

IV. DECISION

On these grounds, the Court:

1. Rejects the motions to dismiss for lack of jurisdiction;
2. Holds that there is no need to rule on the applications for recognition of (i) the 13 February 2017 decision of the Court of First Instance of Cotonou upheld by the 12 March 2020 ruling of the Court of Appeal of Cotonou and (ii) the 20 March 2019 (sic) ruling of the Court of Appeal of Ouagadougou;
3. Upholds the exequatur order handed down by the Presiding Judge of the County Court of Paris on 24 May 2019 in respect of the 31 March 2019 Final Award;
4. Orders the Republic of Benin to pay EUR 50,000.00 to SGS by virtue of the provisions of Article 700 of France's Rules of Civil Procedure;
5. Orders the Republic of Benin to pay costs.

The Clerk

Najma El Farissi

The Presiding Justice

François Ancel





I, Granville Wesley Fields,
sworn translator,
French/English, certify that
the preceding is an exact
translation of the original
and of the attached copy
in French

This document is assigned
the number 2022-1179

Signed and stamped *ne varietur* in
Paris, France
on 5 May 2022