

Authentic Copy  
delivered to the Parties  
on:



**REPUBLIC OF FRANCE**  
ON BEHALF OF THE FRENCH PEOPLE

**PARIS COURT OF APPEAL**

**International Chamber of Commerce POLE**  
**5 - CHAMBER 16**

**JUDGMENT OF 22 FEBRUARY 2022**

(No. 23/2022, 13 pages)

Registration no. on the General Roll: **RG 20/08929 - Portalis ID 35L7-V-B7E-CCAAZ**

Decision referred to the Court: Award of 8 June 2020 issued in Paris under the auspices of the International Commercial Chamber – International Court of Arbitration, registered under number **[CCI XXXXX/DDA (C-XXXX/DDA)]**

**APPELLANT HERETO:**

**S.A.S. CHANTIER NAVAL COUACH – CNC**

Having its registered office located: rue de l'Yser 33470 GUJAN-MESTRAS

Represented by Me **[CR]**, trial counsel and counsel with right of audience, member of the PARIS bar, bar number (toque): **[XXXXXX]**

**RESPONDENT HERETO:**

**Mr. [DS]**

**[address 1]**

**SEDES YACHTING LIMITED**

A company governed under Delaware Law (USA)

Having its registered office located: 910 Foulk Road, Suite 201, New Castle County, WILMINGTON – Delaware 19803 (UNITED STATES OF AMERICA)

Acting through its legal representatives,

**SEDES HOLDING A.S**

A company governed under Turkish Law

Having its registered office located: Yapi Kredi Plaza, n°176 C Block Kat. 2, 34330 LEVENT, ISTANBUL (TURKEY)

Acting through its legal representatives,

**SEDES MARINE MALTA LTD**

A company governed under Maltese Law

Having its registered office located: 198 old Bakery Street, VALETTA, VLT 1455 (MALTA)

Acting through its legal representatives,

Paris Court of Appeal

**Judgement of 22 Feb. 2022**

**Pole 5 - Chamber 16** RG No. 20/08929 - Portalis ID : 35L7-V-B7E-CCAAZ – Page 1

Represented by Me [LM] of [SDG], counsel with  
right of audience and member of the PARIS bar, bar number (toque): XXXXX  
Having as trial counsel Me [TM] and Me [RD], members of the PARIS  
bar, bar number (toque): XXXX

### COURT COMPOSITION:

The case was discussed in open court on 13 December 2021, before the Court  
composed of:

Fabienne SCHALLER, Judge, acting as President  
Laure ALDEBERT, Judge  
François MELIN, Judge

who ruled on the case.

Clerk, at the hearing: Najma EL FARISSI



### JUDGEMENT:

- adversarial
- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the French Code of Civil Procedure.
- signed by Fabienne SCHALLER, Judge, and by Najma EL FARISSI, Clerk, to whom the minute of the decision was delivered by the signatory judge.

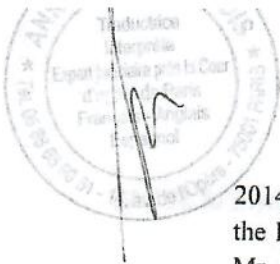
### I- FACTS AND PROCEEDINGS

1- The Court is hearing an application for annulment of an international arbitral award issued on 8 June 2020 under the auspices of the International Court of Arbitration of the International Chamber of Commerce (ICC) in a case between Chantier Naval Couach - CNC- SAS (hereinafter referred to as Couach), a French company engaged in the business of building yachts and high-speed service boats, and the Turkish investment company Sedes Holding, the Maltese company Sedes Marine Malta Ltd, the American company Sedes Yachting Ltd and Mr. [DS], a businessman of Turkish nationality who directly or indirectly holds the capital of the aforementioned companies (hereinafter the Respondents to the arbitration proceedings and the appeal).

2- The dispute arises from the order placed with Couach for the building and sale of a yacht on 25 August 2009 and 28 October 2009, the performance of which led to many disagreements between Couach and the Sedes companies involved in the purchase of the yacht, which did not materialise.

3- Following several legal proceedings brought before French courts by Couach to seek payment of damages, and a first arbitration which resulted in an award issued on 6 January





2014, Couach filed on 15 May, 31 May and 15 June 2018 an application for arbitration with the ICC Secretariat against Sedes Holding, Sedes Marine Malta Ltd, Sedes Yachting Ltd and Mr. [DS] for enforcement of the compulsory sale of the Yacht and in the alternative for termination of the contractual relationship seeking damages in any event under the arbitration clause provided for in the Construction Agreement.

4-The respondents claimed that the sale could no longer be completed on various grounds, including the fact that the claims were time-barred or inadmissible and that the yacht had been resold by Couach to a third party in 2011.

5-In its award issued on 8 June 2020 in Paris, registered as [CCIXXXX- DDA (CXXXX/DDA)], the arbitral tribunal, in substance, dismissed all of Couach's claims, held that some documents were inadmissible and ordered Couach to reimburse Sedes Holding for the advance payment in the amount of EUR 400,000 and to bear the costs incurred during the arbitration.

6- In a notice dated 6 July 2020, Couach filed an application for annulment of the award issued, arguing that the arbitral tribunal had wrongly declined jurisdiction, that two members of the court had failed to disclose circumstances likely to cast doubt on their independence and impartiality, that the arbitral tribunal had not complied with its mandate, and finally that the award breached international public policy and infringed the adversarial principle (*audi alteram partem*).

7- The arbitral tribunal, seized with a request for correcting the amount of the escrowed funds, issued an amending award on 7 September 2020, not subject to appeal.

8-The Pre-Trial Judge declared the proceedings over on 16 November 2021.

## II/ CLAIMS OF THE PARTIES

9 - In its latest submissions communicated electronically on 12 July 2021, Couach requested the Court, in accordance with article 1353 of the French Civil Code, articles 1456, 1466 and 1520 of the French Code of Civil Procedure and Decree No. 2005-790 of 12 July 2005 on the rules of professional conduct for lawyers, to:

- HOLD AND JUDGE that COUACH is admissible and well-founded in its actions, claims and arguments.

Therefore,

- DISMISS the claims of SEDES HOLDING A.S, SEDES MARINE MALTA LTD, Mr. [DS] and SEDES YACHTING LTD.

- SET ASIDE the arbitral award issued on 8 June 2020 in Paris by the arbitral tribunal composed of Mr. [HZ] - President Arbitrator, Mr. [MH] - Arbitrator, and Mr. [JB] - Arbitrator, under the auspices of the International Chamber of Commerce - International Court of Arbitration, registered under number [CCIXXXX/DDA (C-XXXX/DDA)].

- ORDER SEDES HOLDING A.S, SEDES MARINE MALTA LTD, Mr. [DS] and SEDES YACHTING LTD, jointly and severally, to pay COUACH the sum of €80,000 under article 700 of the French Code of Civil Procedure





- ORDER it to pay all the costs of the case, with a portion thereof to the benefit of SELAS CARAYOL AVOCATS, members of the Paris Bar.

**10-In their latest submissions, communicated electronically on 20 October 2021, Mr. Demir SABANCI, SEDES HOLDING A.S., SEDES MARINE MALTA LTD, SEDES YACHTING LTD (hereinafter the respondents) requested the court, in accordance with Articles 700, 1466, 1520 and 1527 of the French Code of Civil Procedure, given the arbitral award of 8 June 2020 and the amending award of 7 September 2020 and the order of the pre-trial judge of 18 March 2021, to:**

- FIND INADMISSIBLE the annulment ground raised by COUACH regarding the irregular constitution of the Arbitral tribunal, as this ground is based on an alleged violation of Prof. [MZ]'s duty to disclose;
- FIND INADMISSIBLE the three annulment grounds raised by COUACH regarding the irregular constitution of the Arbitral tribunal, an alleged failure of the Arbitral tribunal to comply with its mandate and an alleged breach of international procedural public policy, in that these grounds are based on the fact that the Arbitral tribunal, during the arbitration proceedings, unlawfully raised of its own motion a point of law on statute of limitations;

In any event,

- HOLD AND JUDGE that COUACH's applications for annulment of the Arbitral Award and the Amending Award are ill-founded;  
Therefore,

- DISMISS COUACH's application for annulment of the Arbitral Award and the Amending Award;
- ORDER COUACH to pay to each of the Respondents the sum of 50,000 Euros under Article 700 of the French Code of Civil Procedure;
- ORDER COUACH to pay all the costs.

### **III/ GROUNDS FOR THE DECISION**

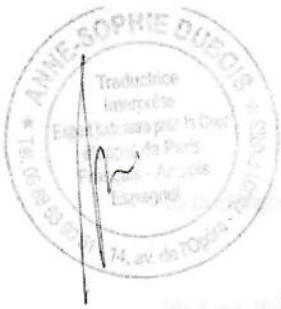
**On the first grounds for annulment for lack of jurisdiction of the arbitral tribunal (Article 1520(1) of the French Code of Civil Procedure) and breach of international public policy (Article 1520(5) of the French Code of Civil Procedure) based on the statute of limitations.**

11-Couach argues that its main claim against Sedes Holding was a claim for enforcement of the Construction Agreement (§ 405 et seq. of the Claimant's Reply) and that the arbitral tribunal held this claim to be time-barred in respect of that company (§ 171 et seq. of the Award).

12-It argues that its claims were not time-barred and that by ruling errantly, the arbitral tribunal wrongly declined jurisdiction and breached international public policy in that it deprived it of its right of access to a court.

13- The respondents reply that issues relating to the statute of limitations of claims brought before the arbitral tribunal fall outside the scope of review of the annulment judge, so that the grounds are ill-founded.





**THEREUPON,**

14-Couach relies on the same grievance to support these two grounds, that is the arbitral tribunal's ruling that the action against Sedes Holding, respondent to the arbitration, was time-barred.

*On the Ground of Lack of Jurisdiction of the Arbitral Tribunal,*

15-The Court finds that Couach does not elaborate on this ground, it merely criticizes the reasoning used by the Arbitral tribunal to hold that its action was time-barred, without questioning the power of the arbitral tribunal to rule on the dispute or addressing its jurisdiction.

16-Therefore, the issue is not one of jurisdiction but of the arbitral tribunal's assessment of a ground of non-admissibility raised by the respondents, which falls outside the scope of review of the annulment judge, so that this ground is ill-founded.

*On the Ground of Breach of International Public Policy,*

17-The right of access to justice means the right to make one's case and to be heard by a court. It is not to be confused with the legal action.

18-In this case, Couach does not argue that it was not heard by the arbitral tribunal, but it claims that it erred in its judgment.

19-This ground amounts to criticising the arbitral tribunal's reasoning without showing how the award would breach international public policy.

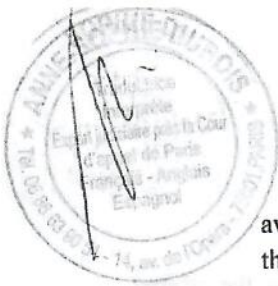
20-It appears from these findings that the grounds of appeal based on the alleged irregular nature of the arbitral tribunal's decision on the statute of limitations shall be dismissed.

**On the Inadmissibility of the Three Grounds for Annulment Put Forward by the Respondents based on the Issue Raised of its Own Motion regarding the Statute of Limitations of the Action**

21-Couach argues that in raising the ground of statute of limitations of its own motion, the arbitral tribunal made a serious defect in deliberately favouring one party, amounting to a lack of impartiality, a failure to comply with its mandate and an excess of power, so that the award shall be set aside in accordance with articles 1520(2), (3) and (5) of the French Code of Civil Procedure.

22-Couach points out that according to article 2247 of the French Civil Code, which sets out that "*Judges cannot of their own motion, set up a ground of statute of limitation*", the arbitral tribunal could not raise this ground of its own motion.

23-With regard to the inadmissibility of the claim, Couach replies in substance that the issue here was not an irregularity within the meaning of article 1466 of the French Code of Civil Procedure but rather the actual arbitral tribunal's power, which it could only have become



aware of once reviewing the award, so that it could not have raised it before the completion of the arbitration proceedings.

24- In reply thereto, the respondents argue that these grounds for annulment shall be held inadmissible under article 1466 of the French Code of Civil Procedure, as Couach failed to react in due time.

25-The respondents claim that Couach, which was in a position to do so, failed to challenge the ground raised by the arbitral tribunal of its own motion, so that it is deemed to have waived it.

26-On the merits, the respondents argue that the judge's prohibition to raise of its own motion the statute of limitations is a procedural rule that only applies to state judges and that the use of this power is not tantamount to biased behaviour.

#### **THEREUPON,**

27-According to article 1466 of the French Code of Civil Procedure, which applies to international arbitration under article 1506 of the same code: *“the party who, knowingly and without any legitimate reason, fails to claim an irregularity before the arbitral tribunal in due time shall be deemed to have waived the right to rely on it.”*

28-This provision does not only cover procedural irregularities but all the grievances that are grounds for annulment of awards, with the exception of grounds based on Article 1520(5) of the French Code of Civil Procedure alleging that the recognition or enforcement of the award would breach international public policy.

29-In this case, the challenge, which is about the point of law which the arbitral tribunal raised of its own motion and submitted to the adversarial debate, is a procedural irregularity and not a matter of merits.

30-The alleged irregularity falls within the scope of the aforementioned provisions, so that the three grounds shall be held inadmissible.

31-It is undisputed that the issue of the statute of limitations was raised by the arbitral tribunal of its own motion and submitted to the adversarial debate on the first day of the hearing, that Couach replied thereto orally and in its post-hearing briefs, which it regularised.

32-It is common ground that Couach did not at any time challenge the independence or impartiality of the arbitral tribunal or allege that the arbitral tribunal was deviating from its mandate or engaging in an unlawful procedural act in submitting the issue of the statute of limitations to adversarial debate.

33-Accordingly, it cannot argue that this alleged procedural anomaly first occurred to it when it read the award, whereas at that time it only became aware of the fact that the tribunal had not followed its legal arguments on this issue.





34-Couach is therefore deemed to have waived the right to bring an action under Articles 1520(2), (3) and (5) of the French Code of Civil Procedure arising from the fact that the arbitral tribunal had raised of its own motion the statute of limitations in the course of the proceedings.

35-These three grounds of appeal are consequently inadmissible so that their related grievances shall not be examined.

**On the Ground for Annulment Alleging irregularity in the Composition of the Arbitral Tribunal (Article 1520(2) of the French Code of Civil Procedure)**

- As regards Mr. [JB], co-arbitrator

36-Couach claims that Mr. [JB] lacked impartiality.

37-It claims that the arbitrator appointed by the respondents failed in his duty to disclose under the ICC Guidance Note as he did not inform the parties about his new appointment as arbitrator during the arbitration proceedings, at the initiative of Bredin Prat law firm, counsel for the parties to the dispute, of which it became aware after the award on the ICC website (case no. XXXXX). In this respect, it points out that Bredin Prat failed in its duty of loyalty by not disclosing this information.

38-It believes that the successive appointment by Bredin Prat, counsel for the respondents, of the same arbitrator in a very short period of time without its knowledge during the arbitration proceedings involving it, infringes the neutrality of the arbitrator, which casts legitimate doubt on its independence and impartiality, and as a result the award shall be set aside as having been issued by an arbitral tribunal that was not properly constituted.

- As regards Mr. [MZ] President of the Arbitral Tribunal

39-Couach claims that Mr. [MZ] lacked impartiality at the beginning of the arbitration proceedings.

40-It complains that Mr. [MZ] took on this assignment without reporting in his statement of independence that he had sat on an arbitral tribunal in which Mr. [MY], a partner at Bredin Prat, a law firm pleading for the respondents to the arbitration, was sitting, and that he had issued an award with Mr. Mayer on 27 July 2018, i.e. 15 days earlier, in a case involving a stake of EUR 130,000,000.

41-As for the inadmissibility of this ground raised by Couach, it argues that this link, which it discovered shortly after the appeal was lodged, does not fall within the scope of the public knowledge exception and could not be easily accessed on 16 August 2018, the date of Mr. [MZ]'s statement of independence.

42-It claims that if it had been informed by Mr. [MZ] or the firm Bredin Prat itself of this information it would have sought its challenge.

43-In response thereto, regarding Mr. [JB], the respondents argue that, in view of the IBA guidelines and the ICC Rules (2017), Mr. [JB] did not fail in his duty to disclose, since





this concerns a single appointment and is not part of a "business flow" (*courant d'affaires*) between him and Bredin Prat within the meaning of positive law.

44-They argue that this is a standard situation and that the threshold at which legitimate doubts may arise in the minds of the parties as to the arbitrator's independence and impartiality is set at four appointments in three years, which was not the case in this instance.

45-They infer from this that the arbitrator's situation was free of any partiality and that he was not required to disclose this information, which does not raise any reasonable doubt about his independence and impartiality.

46- As regards Mr. [M2], the respondents reply that this ground for annulment is inadmissible on the grounds that the fact that Mr. [M2] had sat before with a partner of the Bredin Prat law firm had been known and public for more than two years at the time of the formation of the court in July 2018, as it could be found through a Google search, on the ICSID website and in the trade press, and that consequently Couach shall be deemed to have waived the right to rely on it on the basis of Article 1466 of the French Code of Civil Procedure.

47-They further state that, in any event, this fact was in no way likely to arouse a reasonable doubt as to the independence or impartiality of Mr. [M2]

#### **THEREUPON,**

48-The arbitrator's failure to fulfil his duty of impartiality and independence is punishable under Article 1520(2) of the French Code of Civil Procedure.

49-In accordance with Article 11 of the ICC Rules in its 2017 version, to which the parties have agreed to abide:

"1) Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.

2) Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

3) An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration."

50-Under article 1456(2) of the French Code of Civil Procedure, which applies to international arbitration under article 1506 of the same code:

"Before accepting to serve, the arbitrator shall disclose any circumstances likely to affect his independence or impartiality. He shall also disclose without delay any such circumstances that may arise after he accepted to serve."





51-It appears from these texts that the arbitrator shall disclose any circumstance which might be of such a nature as to call into question his independence or impartiality in the eyes of the parties or that could be likely to affect it, whether before or after accepting to serve, it being understood that this disclosure lies with the arbitrator and not with the parties' counsel.

52- The duty to disclose which lies with the arbitrator before his appointment shall be assessed in the light of the public knowledge of the situation criticized, its link with the dispute and its impact on the arbitrator's judgment.

53-In any event, the failure of the arbitrator to disclose information that he should have reported does not by itself constitute a lack of independence or impartiality. The information in question shall be such as to give rise to a reasonable doubt in the minds of the parties as to the impartiality and independence of the arbitrator, i.e. a doubt that could arise in the mind of a person in a similar situation who would have access to the same information that is reasonably available.

54-It is in the light of these considerations that it shall be assessed whether the arbitrators, Mr. [JB] and Mr. [MZ], should have disclosed, in the case of the former, his new appointment as co-arbitrator at the initiative of counsel for the respondents that took place during the arbitration and, in the case of the latter, that he had sat in an arbitration together with a partner of that firm, and whether their failure to do so was such as to cast reasonable doubt in the mind of Couach as to their impartiality and independence, which are also the concerns of the appellant.

***On the Ground for Annulment Alleging Irregularity in the Composition of the Arbitral Tribunal as regards Mr. [JB]***

***On the Arbitrator's Duty to Disclose, Mr. [JB]***

55-Since the content of the duty to disclose is not set out in Article 1456 of the French Code of Civil Procedure, in the present case of an arbitration conducted under the auspices of the ICC, the arbitrator may refer in particular to the recommendations made in this regard by that arbitration centre.

56-In this respect, under the 2019 version of the "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", called ICC Note, to which Mr. [JB] could have referred to in 2020 at the time of the disputed facts, among the circumstances that must be particularly considered by the arbitrator is that "*the arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel for one of the parties or its law firm*".

57-In this case, the appointment of Mr. [JB] as an arbitrator by Bredin Prat, counsel for the respondents in another arbitration proceeding, while he had previously been appointed by that counsel for one of the parties in the case, constituted a circumstance covered by this note, which should have caused him to disclose it in the framework of the current arbitration and thereby causing the arbitrator to immediately inform the parties.





*On the Reasonable Doubt in the Minds of the Parties*

58-In order for this failure to disclose to result in the annulment of the award, Couach shall establish that these circumstances are such as to create a reasonable doubt in its mind as to the independence or impartiality of the arbitrator in this dispute.

59-In this case, it is undisputed that Mr. [JB] was appointed only twice by this counsel, Couach acknowledging that both appointments, i.e. the one in the arbitration in dispute and the one during the arbitration proceedings, make up the entirety of the arbitrator's known appointments.

60-Moreover, Couach does not rely on any other evidence, especially with regard to the facts or circumstances surrounding the case for which the arbitrator had been newly appointed, a connection or involvement of the parties in the case he was to rule on, other than the fact that his appointment was contemporary with the arbitration in question.

61-Given these circumstances, the lack of information on this appointment cannot, on the mere basis of temporality, be such as to give rise to reasonable doubts as to Mr. [JB]'s independence or impartiality.

62- The ground for annulment based on the irregularity of the constitution of the arbitral tribunal on this grievance shall be dismissed.

*On the Ground of Annulment Alleging Irregularity in the Composition of the Arbitral Tribunal with regard to Mr. [MZ]*

**On the Admissibility of this Ground**

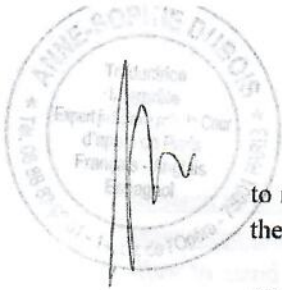
63-A party who knowingly fails to exercise, within the time-limit provided for in the applicable arbitration rules, its right to challenge, based on any circumstance of such a kind as to call into question the independence or impartiality of an arbitrator, is deemed to have waived the right to rely on it before the annulment judge.

64-In this respect, it should first be recalled that it is common ground that only such information that is easily accessible, which the parties could not have failed to review before the arbitration began, qualifies as a public known situation likely to temper the content of the arbitrator's duty to disclose.

65-In this case, it appears from the facts and the documents produced in the proceedings, and in particular from the information available on the ICSID website and in journals specialising in arbitration, even though the latter are not free of charge, that the fact that Mr. [MZ] sat with Mr. [MY] in an ICSID arbitration that began in 2016 was a piece of information that Couach or its counsel could not have missed since it was easily accessible at the time he was appointed by the parties in the disputed arbitration in August 2018, and in any event, it is not such as to cast reasonable doubt on his independence and impartiality.

66-The publicly known nature of this information thus made it possible for Couach, if it had deemed it necessary, to lodge a challenge, so that it shall be deemed to have waived its right





to rely on an irregularity as to the constitution of the arbitral tribunal, under Article 1466 of the French Code of Civil Procedure.

67-Accordingly, the ground based on the failure of arbitrator Mr. [M?] to disclose facts that could affect his independence or impartiality is inadmissible.

#### **On the Lack of Impartiality Resulting from the Award Itself**

68-Couach complains that the arbitral tribunal "*often reproved it and its counsel, without ever adopting the same attitude towards the other parties and their counsel*".

69-In this respect, it quotes extracts from the Award which, in its view, reveal undoubted annoyance or even hostility on the part of the arbitral tribunal towards it, and thus its partiality, which grounds the annulment of the Award in accordance with Article 1520(2) of the French Code of Civil Procedure.

70-In reply thereto, the respondents dispute this analysis and uphold that the demonstration of bias on the part of the court does not result from the terms of the award, which do not leave any room for doubt, but are a matter of freedom of expression and of the arbitral tribunal's assessment of the issues at stake.

#### **THEREUPON,**

71- It shall be recalled that the content of the grounds of the arbitral award do not fall under the review of the annulment judge.

72- The lack of impartiality shall result from accurate and ascertainable facts of such a nature as to cast a reasonable doubt on this impartiality.

73-If such a doubt can result from the award itself, this doubt still has to be substantiated by accurate information on the structure of the award or its terms, which would suggest that the court's attitude was biased or at least would be such as to give the impression that it was biased.

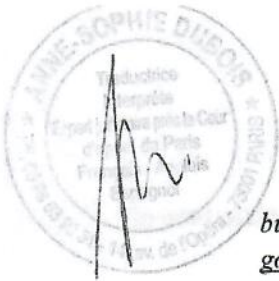
74-In this case, it is through specific facts drawn from the Award that Couach complains that the arbitral tribunal was biased in that it:

- systematically considered that its developments and case law references were not relevant (§ 189 of the Award)
- gave it a law lecture in § 200 of the award, in stating that "*the applicant seems to mix up the concepts of suspension and interruption of the statute of limitations*".
- declined to consider a decision of the Chambéry Court of Appeal that it had quoted on the grounds that "*the existence of this decision and its content are not substantiated*"
- in its conclusion, labelled it as disloyal by assessing its judicial strategy in the following terms reflecting its hostility in § 278:

"278 *The Arbitral tribunal considers that the French legal proceedings initiated by the Applicant, and the merits of the arguments brought therein, to which the Respondents had to reply, amount to a breach of the arbitration agreement set out in the Construction Agreement and of the duty of loyalty. In particular:*

- (i) *The convoluted arguments made by the applicant in these domestic court proceedings to*





build an independent cause of action under Purchase Order No. 1 cannot have been made in good faith, and must have stemmed from a strategy to circumvent the arbitration agreement in the Construction Agreement, which clearly applied to the claims, on the basis of well-established principles of French international arbitration law

(ii) The ever-changing positions of the Applicant in these French court proceedings and in the two successive ICC arbitrations in which one or more of the respondents had to take part, particularly due to the lack of knowledge of some critical facts (e.g. the 2011 resale) by the Applicant's counsel, compelled SEDES Holding and SEDES Malta (at least) to adapt to an ever-changing target."

75-However, it appears from the statement of these grievances that these extracts from the award express the arbitral tribunal's response to the legal arguments in the case serving as a basis for the award's grounds, which it is not up to the annulment judge to review. It is a statement of grounds that testifies to its sovereign assessment of the grounds and documents, without proof of any kind of excess or demonstration of bias.

76-The same applies to the assessment of Couach's procedural conduct, which was in keeping with the mandate of the arbitral tribunal, since the parties had referred to it the matter of loyalty of their respective conduct in relation to the previous proceedings.

77- Couach's criticism about having been labelled as disloyal by a "harsh and unfair" assessment that "does not reflect reality" does not fall within the scope of an application for annulment and cannot, in any event, lead the Court of Appeal, as the annulment judge, to reconsider this assessment under penalty of reviewing the award.

78. This ground shall therefore be dismissed.

**On the Ground of Annulment for Failure of the Arbitral Tribunal to Comply with its Mandate (Article 1520(3) of the French Code of Civil Procedure)**

79-Couach complains that the arbitral tribunal changed the terms of the dispute by declining to rule on the inadmissibility of a claim.

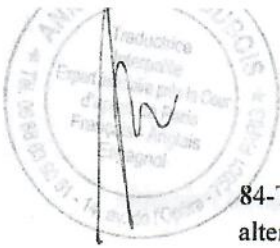
80-It states that it had brought an alternative claim before the court for damages against Sedes Malta following its failure to fulfil its obligations, which the court dismissed without addressing the res judicata argument put forward by Sedes in its defence, nor did it actually rule on the merits.

81-It argues that, when dismissing its claim, the Court failed to consider the res judicata objection and improperly disregarded a claim.

82-On the merits, it argues that the arbitral tribunal relied on the reasoning of the first ICC Award without examining the grounds (§111 to 129 of the Award).

83-It infers therefrom that by declining to rule on res judicata and to examine the parties' arguments on the merits, the arbitral tribunal breached its mandate, so that the award shall be set aside.





84-The respondents reply that the objection that they had raised in defence of Couach's alternative claim for damages against Sedes Malta is merely a defence and not an actual claim on which the arbitral tribunal held that it did not have to rule upon since, according to its analysis, it agreed with the findings of the first ICC Award.

**THEREUPON,**

85- In accordance with Article 1520 (3) of the French Code of Civil Procedure, an application for annulment may be filed if the arbitral tribunal ruled without complying with the mandate it had been given.

86-An arbitral tribunal shall rule only on the claims referred to it.

87-Failure to address submissions is not a ground for setting aside an arbitral award.

88-In this case, the arbitral tribunal considered Couach's alternative claim for damages against Sedes Malta without explicitly addressing the respondents' objection based on res judicata from the first ICC award, in order to dismiss this claim, which it found to be ill-founded in any event.

89. The arbitral tribunal ruled as follows in § 234-236 of the award, which the court quotes hereinbelow:

*"234. The Arbitral Tribunal agrees with this analysis of the terms of the Construction Agreement in that the Applicant was required to submit a valid call for payment to trigger Sedes Malta's payment obligations, and also agrees that Couach's letter of 22 December 2009 did not comply with the "Contract's Provisions for Requesting Payment", i.e. Article 3.3 of the Construction Agreement (Exhibit C-5) referred to above in paragraph 119 of the ICC First Award.*

*235. Couach's failure to issue a valid call for payment means that Sedes Malta cannot be found to have breached any payment obligation.*

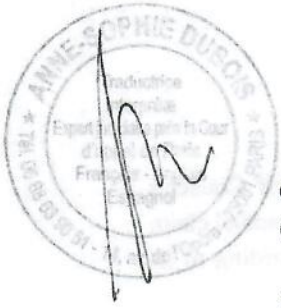
*236. Therefore, even if these findings of the ICC First Award are not res judicata, the Arbitral Tribunal, considering the same facts, evidence and legal issues as addressed in the ICC First Award, draws the same conclusion: Sedes Malta had not breached any payment obligation prior to the Applicant's letter of 22 December 2009. In the absence of new evidence or legal arguments, it is unsurprising that this arbitral tribunal comes to the same conclusion as the tribunal that issued the First ICC Award. If we leave aside the technical aspects of res judicata in arbitral awards, it would be contradictory for this Tribunal to reach a conflicting conclusion."*

91-Indeed, it was not a claim but a defence that it considered neither useful nor relevant to the outcome of the dispute.

92- Finally, it is on the basis of its reasoning that it agreed with the conclusion of the first ICC Award.

93-Given these considerations, this ground of appeal, which in fact seeks to have the award reviewed, is ill-founded and shall be dismissed.





**On the Last Ground for Annulment for Failure to Comply with the Adversarial Principle  
(Article 1520(4) of the French Code of Civil Procedure)**

94. Couach complains that the Court :

- held "*inadmissible its exhibits C-32 and C-66, as well as paragraph 36 of its Statement of Claim and paragraphs 114, 118 and 436 of its Reply*" (§ 149 of the arbitral award) and thus infringed evidence law,
- discarded a case law reference on the grounds of its alleged non-disclosure, in this case a judgment of Chambéry Court of Appeal issued on 24 October 2017 for which the arbitral tribunal had shown and which was easily accessible on legal publishers' websites.

95-It infers that by disregarding these documents and this case law while it could have reopened the debates to request their production, the arbitral tribunal obstructed the adversarial principle which would require setting aside the award.

96-In reply thereto, the respondents argue that the disputed documents were discarded following an adversarial debate and that Couach, which failed to produce the decision, cannot rely on its own failure to do so in order to criticise the award, pointing out, furthermore, that the appellant fails to establish a grievance in any event.

**THEREUPON,**

97- In accordance with Article 1520(4) of the French Code of Civil Procedure, an application for annulment may be lodged if the adversarial principle was not complied with.

98- The adversarial principle merely requires that the parties be given the opportunity to debate the arguments put forward and the documents produced.

99-In this case, it does not result from the award that the tribunal decided to withdraw the disputed documents concerning a draft settlement agreement (C32) and an attendance sheet at a mediation meeting (C66) by imposing its decision with no further explanation.

100-On the contrary, it is established and undisputed that this decision was made following an adversarial debate, on the basis of Article 7.4 of the CMAP mediation rules, which provides that mediation is strictly confidential.

101-Finally, Couach, which had to prove its allegations, cannot blame the arbitral tribunal for not having taken into account a decision that it did not produce and attribute its own failure to the tribunal.

102-This ground for annulment, which also seeks to challenge the reasoning of the award, which it is not for the court to review, shall also be dismissed.

103-The appeal against the award shall therefore be dismissed, there being no need to rule on the amending award which was not part of the appeal filed with the Court by Couach.



**On Costs and Expenses**

104-Couach, the losing party, is ordered to pay all the costs.

105-In addition, it is ordered to pay the respondents, which had to incur irrecoverable costs to enforce their rights, compensation under Article 700 of the French Code of Civil Procedure, the amount of which is fairly set at EUR 100,000.

**I/OPERATIVE PROVISIONS**

**On these grounds, the Court:**

- 1- Holds inadmissible the three grounds raised by Chantier Naval Couach under Articles 1520(2), (3) and (5) of the French Code of Civil Procedure in that they are based on the fact that the Arbitral Tribunal considered of its own motion the statute of limitations in the course of the proceedings,
- 2- Holds inadmissible the ground raised by Chantier Naval Couach on the basis of Article 1520(2) of the French Code of Civil Procedure, alleging a breach of its duty to disclose by Mr. [M2], arbitrator,
- 3- Dismiss the application for annulment of the arbitral award issued on 8 June 2020 in Paris under the auspices of the International Chamber of Commerce - International Court of Arbitration, registered under ICC number [CC1XXXXX/00A (C-XXXX/00A)].
- 4- Orders Chantier Naval Couach to pay SEDES HOLDING A.S, SEDES MARINE MALTA LTD, Mr. [DS] and SEDES YACHTING LTD the total amount of EUR 100,000 under Article 700 of the French Civil Procedure Code;
- 5- Orders Chantier Naval Couach to pay all the costs.

**The Clerk**

**Najma EL FARISSI**

**The President**

**Fabienne SCHALLER**

TRUE AND ACCURATE TRANSLATION  
into English of the original document in French  
registered under no. 2208-65 on 18 Aug. 2022  
Anne-Sophie DUBOIS, Certified Translator

