EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2015/0117
CLAIM NO. BVIHC (COM) 2019/0067

BETWEEN:

PT VENTURES SGPS SA

Claimant

and

VIDATEL LTD

Defendant

Appearances:

Mr. Roger Masefield QC, with him Mr. David Welford and Ms. Akesha Adonis of Maples and Calder for the claimant

Mr. Jonathan Adkin QC, with him Ms. Tamara Cameron and Ms. Yegâne Güley of Walkers for the defendant

---

2020: February 24 and 25;
2020: March 16.

JUDGMENT

[1] **JACK, J [Ag.]**: This application concerns the enforcement of an arbitration award for US$646,445,968.

[2] Unitel SARL ("Unitel") is the main mobile telephone operator in Angola. On 20th February 2019, an arbitration tribunal sitting in Paris made a final award ordering that the defendant ("Vidatel") pay the claimant ("PTV") the sum of US$339,400,000 in respect of the diminution in value of PTV's shares in Unitel and US$314,865,512 in respect of unpaid dividends from Unitel. After discovery of a

mathematical error, by an addendum made 30th April 2019 the tribunal reduced the latter figure to US$307,045,968.

[3] The current proceedings, action BVIHC (COM) 2019/0067 ("the recognition action"), were commenced on 16th May 2019 by, what at any rate purports to be, a fixed date claim form. PTV sought leave to enforce the arbitral award (as varied) pursuant to sections 81 and 84 of the **Arbitration Act 2013**,[1] which gives force of law to the **New York Convention**.[2]

[4] What is now before me is an application by PTV filed on 2nd August 2019 seeking summary judgment in its favour in respect of enforcement of this final award (as varied by the addendum). PTV sought in the alternative a stay of the enforcement proceedings on terms that Vidatel provide security in a sum subsequently put at US$200 million. There were also two cross-applications by the parties which I resolved orally at the conclusion of the argument before me.

[5] The tribunal in its February award also made consequential orders for interest and costs. In para VI of the operative part of its award, the tribunal made provision for the offsetting of monies received under the award against dividends otherwise payable by Unitel. I shall revert to the terms of para VI in due course.

Procedural matters

[6] As long ago as 9th October 2015, in action BVIHC (COM) 2015/0117, Leon J granted PTV a worldwide freezing order against Vidatel. The freezing order has subsequently been extended and varied. PTV complain that Vidatel has not fully complied with the order. An application that Vidatel be found to be in contempt failed in 2016 before Leon J, although he was critical of Vidatel's compliance with its disclosure obligations.[3] Subsequently in 2019, Adderley J[4] found on balance of probabilities that Vidatel had broken the terms of the freezing order. (For reasons

[1] Act No 13 of 2013, Laws of the Virgin Islands.
[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10th June 1958.
[3] Delivered 24th June 2016, unreported.
[4] Delivered 2nd May 2019, unreported.

relating to an issue of self-incrimination, those proceedings before him were not for contempt.)

[7] On 10th June 2019, shortly after PTV issued its recognition action, Vidatel applied in France to annul the arbitration award. Under French law, applications to annul awards made by an arbitral tribunal sitting in Paris go directly to the Cour d'Appel de Paris. From this appeal court, there is a further right of appeal on a point of law to the Cour de Cassation, the highest civil court in France. It is common ground that the application to annul was brought within the time limits permitted by French law for the bringing of such an application.

[8] Vidatel take two points in the French proceedings. Firstly, they say that the arbitral tribunal was not properly constituted, so that its award is a nullity. Secondly, they say that two of the arbitrators, Marcelo Roberto Ferro ("Mr. Ferro") and Klaus Sachs ("Prof. Dr. Sachs"), were not independent. These I shall describe as the "Paris defences".

[9] The Cour d'Appel will hear oral argument in the case in December of this year. A judgment can be expected in the early part of next year. An appeal to the Cour de Cassation is, in the light of the sums at stake, almost inevitable and will take about a further year. A final decision is only likely to be obtained in France in 2022.

[10] The proceedings in this Court came before me for a first case management hearing on 20th June 2019. I directed that Vidatel's brief to the Paris court should stand (in English translation) as its defence to the recognition action in respect of the Paris defences and that PTV's reply in the Paris proceedings was to stand as its reply to the Paris defences. I directed that Vidatel should file a supplemental defence to the recognition action dealing solely with any additional issues specifically concerned with BVI law ("the BVI defences") with similar provision for PTV to file its reply thereto.

[11] Pursuant to those directions, Ms. Michelle Duncan swore a second affidavit which stands as Vidatel's defence in respect of the BVI defences. Mr. John Rogerson had sworn the first affidavit in support of the recognition action (which stands as the statement of claim in the recognition action). He swore a third affidavit which stands as PTV's reply to the BVI defences.

[12] Vidatel's BVI defences are three. First, the final award is said to have infringed the doctrine of separate corporate personality in that Vidatel is made liable for the wrongful acts of Unitel. Second, Vidatel did not have a proper opportunity to present its case to the tribunal on the valuation of PTV's Unitel shares. Third, the final award leads to double recovery, because PTV would have not just the dividends paid by way of damages from Vidatel, but also the increased capital value of Unitel.

The facts

[13] The shares in Unitel are and were held, one quarter each, by PTV, a Portuguese company; Vidatel, a BVI company; Geni SARL ("Geni"), an Angolan company, owned by a retired Angolan general; and Mercury Serviços de Telecomunicações SARL ("Mercury"), another Angolan company. Mercury is a wholly-owned subsidiary of Sonangol, Angola's state-owned oil and gas company. Sonangol has recently acquired majority ownership of PTV from a Brazilian company, Oi SA ("Oi"). Vidatel is owned by Ms. Isabel dos Santos. She is the daughter of a former president of Angola and is reputed to be the richest woman in Africa. More recently she appears to have fallen out with the Angolan state. On 23rd December 2019, an Angolan court granted an order of *saisie conservatoire* against her, including purportedly her beneficial ownership of Vidatel's shares in Unitel.

[14] The four shareholders held their shares pursuant to a shareholders' agreement with an effective date of 15th December 2000. (PTV was then called Portugal Telecom International SGPS SA.) The agreement is in English and largely follows an English common-law style of drafting. The substantive rights given by the agreement I shall discuss in relation to the arbitration award. Of importance for

the current application is the arbitration clause, clause 16. This follows clause 14, which is an "entire agreement" provision, and clause 15, which provides for the shareholders' agreement to be governed by Angolan law. Clause 16 reads:

> "16.1 Any claim, dispute or other matter in question between the Parties with respect to or arising under this Agreement or the breach thereof, shall be decided by arbitration, by a panel of five [5] arbitrators, one to be designated by each Party, and the fifth one to be designated by the other four arbitrators, provided, however, that if no agreement between the arbitrators designated by the Parties is reached, the independent arbitrator shall be designated by the President for the time being of the International Chamber of Commerce. Such arbitration shall be in accordance with Rules of the International Chamber of Commerce. Any such arbitration shall be conducted in English in Paris.
>
> 16.2 The independent arbitrator shall have a casting vote."

I do not need to set out clause 16.3.

[15] Unitel commenced operations in April 2001 and grew to be the biggest mobile telephone company in Angola. Unitel declared a dividend every year (although the 2010 declaration was by way of a special dividend). These were paid to Mercury and Geni in Kwanza, the local Angolan currency, which is not freely convertible. However, PTV and Vidatel were entitled to payment in hard currency. There were delays in paying the hard currency dividends from the time of the 2010 special dividend. Between November 2012 and the date of the final award, PTV did not receive any dividend payment at all. (It refused to accept payment in Kwanza.) Although there were difficulties between the parties in 2006, matters started to become more tense in 2010. In 2014 relations between the parties broke down completely, when the other shareholders refused to vote on to Unitel's board the director nominated by PTV. PTV complains that the other shareholders, in breach of the shareholders' agreement, (mis)used their control of the board to prevent Unitel paying dividends to PTV.

[16] On 13th October 2015, PTV filed a request for arbitration with the International Chamber of Commerce ("the ICC"). In the request PTV submitted that, if the

arbitration tribunal was composed as required by clause 16, namely with PTV, Vidatel, Mercury and Geni each nominating one arbitrator, this would breach the requirement of "*égalité*", a mandatory rule of French arbitration law, because it would effectively mean one arbitrator against three, with the president unable to use a casting vote. It invited the ICC to appoint all the arbitrators. If the ICC was against it on the question of *égalité*, then PTV nominated Mr. Laurent Lévy as its arbitrator.

[17] In its response to the ICC, Vidatel objected to any departure from the clause 16 procedure for appointing arbitrators. Vidatel nominated Dr. Matthieu de Boisséson as its arbitrator. Mercury and Geni supported Vidatel's position on the constitution of the tribunal and nominated Dr. Maria Cristina Galhardo Vilão and Dr. Adelaide de Jesus Mata de Moura as their arbitrators respectively.

[18] PTV produced to the ICC an opinion from Prof. Charles Jarrosson, who is an eminent French lawyer-academic in the field of arbitration law. His opinion was that the constitution of the arbitration panel in accordance with clause 16 would be contrary to mandatory French law, because it would result in one PTV-nominated arbitrator against three respondent-nominated arbitrators. Whether he is right or not is the issue under the first Paris defence.

[19] The ICC accepted Prof. Jarrosson's view. Instead of accepting the four arbitrators nominated by the parties, it made its own selection of five arbitrators for the panel: Prof. Bernard Hanotiau, Prof. Dr. David Arias, Mr. Ferro, Prof. Luca Radicati di Brozolo, all as co-arbitrators, and Prof. Dr. Sachs, as president. This arbitration panel then proceeded to determine the arbitration. I shall deal with the facts said to show a lack of independence on the part of Mr. Ferro and Prof. Dr. Sachs when I consider how to deal with the second Paris defence. Likewise I shall set out the facts relevant to the BVI defences when I consider those defences.

Vidatel's preliminary point

[20] Vidatel take a preliminary objection to PTV's application. The primary relief PTV seek in the application is for "[s]ummary judgment in favour of PT Ventures". However, CPR 15.3 provides the "court may give summary judgment in any type of proceedings except… (c) proceedings by way of fixed date claim." Accordingly, Vidatel argue that PTV's application fails in limine.

[21] There are two arguments against this. The first is that, although the recognition action was commenced by way of a Form 2 appropriate for a fixed date claim, no return date was actually given on the claim form when it was issued, so it is not in truth a fixed date claim. It appears that shortly before issuing the recognition action, there were discussions between legal representatives about when counsel for both PTV and Vidatel might be available. PTV prevailed on the Court office to issue the claim without affixing a fixed date to it, pending counsel's availability being determined. CPR 2.4 defines "fixed date claim form" as "a claim form in Form 2 upon which there is stated a date, time and place for the first hearing of the claim." I do not accept that the omission of the date, time and place turns a fixed date claim form into an ordinary Part 8 claim. It seems to me that it is at most an irregularity which was corrected by the Court subsequently giving a return date for the claim: see CPR 26.9(2) and (3). Accordingly I reject this argument.

[22] The second argument is that, after I gave directions on 20th June 2019 for pleadings to be exchanged, what had been a fixed date claim converted into an ordinary claim. I was not taken to any *traveaux préparatoires* which might explain the origins of the fixed date claim in the Eastern Caribbean CPR. There are some similarities with Part 8 of the English CPR, which replaced proceedings commenced by originating summons and originating motion. However, a more likely origin is Order 3 rule 2 of the English **County Court Rules 1981**,[5] which substantially reproduced earlier versions of the CCR.

[5] SI 1981 No 1687.

[23] Under CCR Order 3 rule 2(1) all claims seeking a remedy for anything other than just a fixed sum of money were fixed date claims. Judgment by default was not available. Instead, the parties were expected to attend on the return date. At any rate originally in the nineteenth century, the parties were expected to attend with witnesses and the case would actually be tried then and there. (This explains the survival up to 1999 of some procedural oddities, like a plaintiff's right to request a non-suit. If the defendant attended with witnesses whom the plaintiff could not answer or presented an unexpected defence — there was no obligation to give notice of a defence prior to the return date — the plaintiff could withdraw his claim by asking to be non-suited. He was then able to recommence after paying the costs of the first action: CCR Order 18.) By the 1980's, however, this form of trial with witnesses on the return date virtually never occurred. Instead, if the defendant appeared on the return date, the court gave directions, typically for the exchange of pleadings.

[24] Our CPR 27.2 reflects this latter practice in the English County Court. If the defendant appears, the return date on the fixed date action is treated as a case management conference. Once the Court, exercising its case management powers, directs that pleadings be exchanged, in my judgment the case is deemed to proceed as an ordinary action. This accords with the purpose of the exclusion of fixed date claims from the summary judgment regime in Part 15. If the defendant acknowledges service prior to the return date and indicates an intention to dispute the claim, then issuing a separate application for summary judgment would interfere with the timetable of the fixed date claim. In particular, on the return date the Court can consider whether the fixed date claim can be dealt with summarily: CPR 27.2(3). Once the Court has given directions at the first case management conference, there is no reason in my judgment why a party should not, if the case or issues in the case are otherwise suitable for summary determination, make an application for that purpose.

[25] Even if I am wrong on this, however, Mr. Masefield QC for PTV had a fall-back argument. The hearing before me on 24th and 25th February was also a further

case management hearing. This gives me the power under CPR 25.1(e) to determine "which issues need full investigation at trial and accordingly dispos[e] summarily of the others." Since I heard full argument over two days, it makes obvious sense (and is fully in accordance with the overriding objective) to determine such matters summarily as can appropriately be dealt with in that way.

[26] In the event, although Mr. Adkin QC for Vidatel did not formally abandon his procedural objection, he did not pursue it with any vigour. I find that I do have the power to determine whether summary judgment should be given on any of the Paris or BVI defences. The test is whether the defendant has or has not a "real prospect of successfully defending the claim or issue": CPR 15.2(b).

Section 86 of the BVI Arbitration Act 2013

[27] It is common ground that the award in issue in these proceedings is an award which is subject to the terms of the **New York Convention**. "The general approach to enforcement of an award should be pro-enforcement… There must… be good reasons for refusing to enforce a New York Convention award."[6] Section 86 of the BVI **Arbitration Act 2013** provides a comprehensive code as to the circumstances in which enforcement of a convention award may be refused.[7] It will be noted that there is no power to refuse enforcement on the grounds that the tribunal has a made an error of law or fact.[8]

[28] Section 86 is in virtually identical terms to section 103 of the UK **Arbitration Act 1996**[9]. Section 86 provides:

> "(1) Enforcement of a Convention award may not be refused except in cases mentioned in this section.
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves

[6] Cukurova Holdings AS v Sonera Holding BV [2014] UKPC 15 at para [34], on appeal from this Court. It was a case on the Arbitration Ordinance 1976 but so far as relevant the 1976 Ordinance was in the same terms as the 2013 Act.
[7] IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp [2017] UKSC 16, [2017] 1 WLR 970 at para [41].
[8] Cukurova, *supra* footnote 6, at para [4].
[9] 1996 c. 23.

(a) that a party to the arbitration agreement was, under the law applicable to that party, under some incapacity;

(b) that the arbitration agreement was not valid,

(i) under the law to which the parties subjected it; or

(ii) if there was no indication of the law to which the arbitration agreement was subjected, under the law of the country where the award was made;

(c) that the person

(i) was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or

(ii) was otherwise unable to present his case;

(d) subject to subsection (4), that the award

(i) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or

(ii) contains decisions on matters beyond the scope of the submission to arbitration;

(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with,

(i) the agreement of the parties; or

(ii) if there was no agreement, the law of the country where the arbitration took place; or

(f) that the award

(i) has not yet become binding on the parties; or

(ii) has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if

(a) the award is in respect of a matter which is not capable of settlement by arbitration under the laws of the Virgin Islands; or

(b) it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that the award contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) If an application for the setting aside or suspension of a Convention award has been made to a competent authority as mentioned in subsection (2) (f), the Court before which enforcement of the award is sought may,

(a) if it thinks fit, adjourn the proceedings for the enforcement of the award; and

(b) on the application of the party seeking to enforce the award, order the person against whom the enforcement is invoked to give security.

(6) A decision or order made by the Court under subsection (5) is not subject to appeal."

[29] The two Paris defences raise issues under section 86(2)(e) (composition of the tribunal and independence of two of the arbitrators). The first BVI defence (the separate corporate personality issue) raises an issue under section 86(3) (public policy). The second BVI defence (valuation of Unitel's shares) raises an issue under section 86(2)(c)(ii) (party unable to present its case) as well as section 86(3) again. The third BVI defence (double recovery) raises an issue under section 86(3) once more.

The BVI defences

[30] I turn then to the BVI defences. I was originally of the view that it would be an abuse for an award debtor to seek to rely on matters before this Court, which it could not or did not rely upon before the courts of the seat of the arbitration. So, for example, suppose the corporate personality point was one which could not be taken before the Cour d'Appel de Paris, because French arbitration law was more limited than English or BVI law in the objections which could be raised. It would be wrong on this view to allow the award debtor to take points which the chosen law of the arbitration determined were not available on an application for annulment.

[31] Having heard counsel's submissions, I am persuaded that this view was wrong insofar as it prevented an award debtor seeking to rely on grounds of BVI public policy. The 2013 Act provides that BVI public policy trumps provisions of foreign arbitration law. An award debtor can thus rely on BVI public policy regardless of the law or public policy of the seat of the arbitration. That is not to say that the Court will not anxiously consider why a party has not taken a point in the obvious forum for doing so, namely the courts of the seat of the arbitration. However, it does not, in my judgment, debar this Court from doing so.

[32] The relevant authorities on public policy are usefully gathered together by Butcher J in **Process & Industrial Developments Ltd v Federal Republic of Nigeria**,[10] who said:

[10] [2019] EWHC 2241 (Comm).

"[98] The grounds on which enforcement of an award can be refused by reason of public policy are narrowly circumscribed. In **Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co**[11], Sir John Donaldson MR said this:

> 'Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J remarked in **Richardson v Mellish**,[12] "It is never argued at all, but when other points fail.' It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.'

[99] In **IPCO (Nigeria) v Nigerian National Petroleum Corp**[13] in the context of arguments to the effect that a foreign award should be refused enforcement under s. 103(3) Arbitration Act 1996 [our section 86(3)], Gross J reiterated the extreme caution with which arguments to the effect that enforcement should be refused on public policy grounds should be approached. In that case he also considered an argument that because of errors allegedly made by the tribunal in its assessment of damages the award was so excessive and that its enforcement would be contrary to public policy. He dismissed the argument at paragraph 50, saying:

> 'I can take this point summarily. The [award debtor's] argument was that the tribunal's errors (amounting to misconduct) led to an award so exaggerated in size that its enforcement, against a state company, would be contrary to public policy. With respect, this complaint appears to lack substance. Were it soundly based, a mere error of fact, if sufficiently large, could result in the setting aside of an award. That cannot be right and I say no more about this topic.'

[100] Further, in considering whether there should be a refusal of enforcement of an award on the grounds of public policy, it is necessary to have regard to, and take into account, the strong public policy in favour of enforcing arbitral awards: see **Westacre Investments Inc v Jugoimport-SPDR Ltd**[14]."

---

[11] [1987] 2 Lloyd's Rep 246 at p 254.
[12] (1824) 2 Bing 229 at p 252.
[13] [2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep 326 at para [13].
[14] [1999] QB 740 at pp 770-771, 773 *per* Colman J, upheld on appeal [2000] QB 288.

The first BVI defence

[33] I turn then to the corporate personality point. The way this is put in para [89] of Vidatel's skeleton is that the award:

> "finds Vidatel and the other respondents to the arbitration liable for the acts of Unitel, the tribunal having concluded that Unitel would not have carried out certain acts if its board of directors were differently constituted, which constitution was a result of the breach of the shareholders' agreement relating to the appointment of directors. The liability for the acts of Unitel must rest with Unitel. In making Vidatel liable for the acts of the board of Unitel, the tribunal ignored the separate corporate personalities of Unitel and Vidatel. To recognise an award premised on the absence of separate corporate personality would… be contrary to the public policy of the BVI."

The skeleton then refers to **Prest v Petrodel Resources Ltd**.[15]

[34] The question of causation of loss was hotly contested before the tribunal. The tribunal's discussion of the issue commenced at para [613] of the award. After setting out PTV's position, at para [637] it summarised Vidatel's position (omitting the footnotes to the body of the award, as I shall do throughout) as follows:

> "[Vidatel] agreed with [PTV] that the requirements for establishing causation are contained in Article 563 of the Angolan Civil Code but maintains that [PTV] has failed to establish causation between the alleged breach of Article 9.1 [of the shareholders' agreement, the right to appoint directors] and the losses it claims. More generally, [Vidatel] submits that [PTV] is attempting to impose on [the] Respondents a vicarious liability and to override key principles of corporate law, such as the legal independence of corporations, the limited liability of shareholders and their non-liability for actions taken by the management of the company."

[35] At paras [684] and [685] the tribunal found in favour of PTV on causation.

[36] I do not find it arguable that the tribunal's conclusion is contrary to BVI public policy. The tribunal found that Vidatel was in breach of the shareholders' agreement and that PTV has suffered loss and damage from Vidatel's breach.

[15] [2013] UKPC 34, [2013] 2 AC 415.

That is a completely orthodox approach to considering breach of contract on the part of Vidatel and the damage caused thereby. The fact that the damage was caused by Unitel's actions is neither here nor there in respect of Vidatel's liability to PTV, so long as there is adequate evidence of causation by Vidatel of the loss to PTV. In doing so, there is no overriding the different corporate personalities of Vidatel on the one hand and Unitel on the other. On the contrary, Vidatel is made answerable for its own breach of contract.

[37] Even if I am wrong in this and the issue of separation of corporate personalities is arguable, this would in my judgment be a straightforward case of the tribunal making an error of law or fact. No issue of public policy arises. Except in an egregious case (and possibly not even then: see Gross J in the **IPCO** case cited above), it is wrong to dress up an error of law or fact as a matter of public policy. The current case does not come close to being an egregious (still less a deliberate) mistake by the tribunal. This Court cannot investigate mere errors of law or fact committed by an arbitral tribunal. Something much more substantial is needed to bring a case within the public policy defence.

[38] In my judgment I can summarily dismiss the first BVI defence. It has no real prospect of succeeding.

The second BVI defence

[39] The second BVI defence is put this way in Vidatel's skeleton at paras [83] and [84]:

> "PTV sought as its principal remedy a full buyout of its shares in Unitel at a price of US$2,176,615,000, which it claimed was the fair value for those shares as at 15 December 2014, the claimed date of breach. In the alternative, it sought damages in the same amount for breach of the shareholders' agreement.
>
> These amounts were argued by PTV to be appropriate on the basis that by reason of the breaches of the shareholders' agreement PTV had been permanently deprived of all of its rights as a shareholder. PTV advanced no case that those rights had been lost in part, or only temporarily, so that some lesser amount of damages would be appropriate.

> The tribunal rejected PTV's case as to diminution of the value of its shares. However, it then adopted its own approach, supposedly pursuant to some 'broad discretion' conferred by Angolan law, decided that PTV's shares had declined in value by precisely two-thirds, and applied its calculation of the resultant damage [assessing the amount payable at US$339.4 million].
>
> This was an approach to the calculation of loss which was unheralded and on which Vidatel had no opportunity to advance evidence or make submissions. Put simply, in arriving at this critical element of the final award, the tribunal deprived Vidatel of the opportunity to present its case."

[40] I do not accept that Vidatel did not have an opportunity to address the issue of partial loss or damage. At para [1171] of its award, the tribunal summarises PTV's post-hearing brief and post-hearing reply brief as follows:

> "[PTV] submits that the tribunal has a broad discretion in determining the amount of compensation, noting that Article 566(3) of the Angolan Civil Code provides that '[i]f the exact amount of damages cannot be ascertained, the court shall judge equitably within the limits it deems proven.' On that basis [PTV] argues that the tribunal may adjust the values and methods proposed by the parties based on its own assessment of the evidence on quantum and the circumstances of the case, 'with a view to ensuring that PTV is fully compensated for its losses.'"

[41] Vidatel's response to this argument is recorded in paras [1192] and [1193] of the award:

> "[Vidatel] further rejects [PTV's] argument that, if the tribunal finds that the current value of [PTV's] shares is not zero, it should use its discretion to arrive at a figure it considers satisfactory. [Vidatel] agrees with [PTV] that neither the Santander valuations nor the value recorded in Oi's accounts are reliable proxies for the 'as is' value of Unitel or [PVT's] share in Unitel. According to [Vidatel] both figures are subject to the same 'value-inflating bias'.
>
> Contrary to [PTV's] position, however, [Vidatel] considers that it is not within the tribunal's discretion to calculate the 'as is' value of [PTV's] share or to grant compensation to [PTV] based on the difference between the

> 'as is' and 'but for' value; according to [Vidatel], the tribunal would thereby act *ultra petita* because it would decision on a claim that was not brought before it. In addition, [Vidatel] argues that Article 566(3) of the Angolan Civil Code does not excuse [PTV] from having to discharge its burden of 'proving the existence, nature and extent of its alleged loss.' [PTV's] claim for damages would thus have to be dismissed as unsubstantiated."

[42] In my judgment Vidatel had the opportunity to make submissions on the Article 566(3) point and indeed availed itself of the opportunity.

[43] Faced with that evidence from the tribunal's award, Mr. Adkin QC retreated to a fall-back argument that the tribunal had not given Vidatel an opportunity to comment on the *precise* figure which it had in mind. This objection is not made out either in my judgment. Section 86(2)(c)(ii) only gives a defence if a party was "unable to present his case." Here PTV had squarely invited the tribunal to use its Article 566(3) discretion. Vidatel had responded. It must have been aware that, if the tribunal was minded to exercise its Article 566(3) discretion, it would have to arrive at a figure. If Vidatel had wanted to put forward its own figure or any particular argument as to the figure which the tribunal should adopt, Vidatel could have done so. It cannot, in my judgment, avail itself of its own failure to make submissions on a point to complain that it was unable to present its case.

[44] Vidatel also sought to argue that there was a breach of BVI public policy. This, it seems to me, adds nothing to its section 86(2)(c)(ii) argument. Applying a BVI common-law eye to this issue, what the tribunal did was wholly unexceptional. The Unitel shares had diminished in value, but not (as PTV had argued) to nil. It heard submissions on what the diminution in value might be and then made its determination. There is no breach of BVI public policy. Indeed, it might have been contrary to BVI public policy if it had reached a determination the other way.

[45] Again, I can summarily dismiss the second BVI defence as having no real prospect of succeeding.

The third BVI defence

[46] The third BVI defence makes an allegation that PTV will obtain double recovery if the award is enforced and that permitting double-recovery is contrary to BVI public policy. It will be recalled that PTV complained that Vidatel, Mercury and Geni had used their control of Unitel to prevent the payment of dividends in hard currency to PTV. The tribunal assessed the total amount of dividends which should have been paid to PTV at US$307 million odd and ordered that the respondents pay that sum jointly and severally to PTV.

[47] The tribunal, however, recognized that this potentially worked an injustice. Payment by the respondents would not discharge Unitel's liability to pay the outstanding dividends to PTV. If Unitel did pay the dividends, then PTV would have a double recovery. In order to remedy this, the tribunal, at the end of para VI of the operative part of its award, provided:

> "To the extent that [PTV] receives payment these amounts [i.e. the damages in respect of unpaid dividends] from either [*sic*] of the respondents, it shall no longer claim payment of the same amount from Unitel."

Indeed, PTV offer an undertaking to this Court that, insofar as Vidatel has paid the award in respect of unpaid dividends, PTV will pay to Vidatel any monies received from Unitel in respect of those unpaid dividends.

[48] Vidatel's position is that this does not go far enough. Mr. Adkin QC submits that it is not sufficient to avoid double recovery. This is because the tribunal overlooked a subtle point: if Vidatel pay the dividend claim, that will, in accordance with the tribunal award, discharge Unitel's liability for the dividends otherwise payable to PTV. Accordingly, Unitel's capital value will be commensurately increased by reason of its release from the obligation to pay dividends to PTV. Since PTV retains its quarter share of Unitel, the result is that PTV get both the dividends (via Vidatel) and the increase in the value of the shares.

[49] This is a point of such subtlety that Vidatel did not argue the point before the tribunal. It seems to me that there are at least three reasons why the point is a bad one. First, it may well be that Vidatel has some kind of restitutionary claim against Unitel, if Vidatel pay the amount of the dividends to PTV. Second, the three respondents get the same capital uplift as PTV in the value of their shares, because the capital appreciation benefits all four. There is no enrichment of PTV alone: everyone benefits. Any enrichment is therefore not unjust. It does not lie in Vidatel's mouth to complain of a capital uplift of which it itself has benefited. Third, the tribunal gave its award in respect of the share value under Article 566(3). The capital uplift from the non-payment of dividends by Unitel is a pretty hypothetical construct. Considerations such as this point are potentially liable to come into the general discretionary mix which the tribunal exercised in fixing the two-thirds diminution in value of PTV's shareholding. If Vidatel did not argue this point, the tribunal can hardly be blamed for not taking this, far-from-evident, point itself, when exercising its discretion to fix the amount of compensation.

[50] Further, there is not in truth *double* recovery; there would only be one and a quarter recovery (the dividends from Vidatel plus PTV's quarter share in the capital uplift from Unitel's non-payment of the dividends). Even if there were double recovery, it would be necessary to consider whether that so offends BVI public policy as to make the award unenforceable (at least to the extent of the double recovery). Here one needs to distinguish between a penalty (properly so called) and an award of damages which gives too much recovery. English law allows double recovery in some restricted circumstances: see, for example, section 1 of the **Landlord and Tenant Act 1730**,[16] which permits double recovery of rents from tenants wilfully holding over. I am not sure it would necessarily be contrary to BVI public policy to enforce an award of double recovery under the 1730 Act.[17]

[16] 4 Geo II c 28.

[17] Pencil Hill Ltd v US Citta Di Palermo SpA [2016] 1 WLUK 262 (Manchester Mercantile Court, 19th January 2016) *per* His Honour Judge Bird, cited in Process & Industrial Developments *supra*, footnote 10, at para [101].

[51] I will, however, assume without deciding that enforcing penalties is against BVI public policy. What has occurred here is not in my judgment the imposition of a penalty on Vidatel by the tribunal. All the tribunal has done (assuming it has gone wrong at all) is award too much in the way of damages. It may be (as I have discussed above) that in a really egregious case such an award would be contrary to BVI public policy. This is not such a case. Any uplift is modest. At most it results from the tribunal overlooking a subtle point not raised by Vidatel. In my judgment (even if I accepted that there was some error) this is a classic example of a mistake of law and fact which affords no ground on which to refuse enforcement.

[52] I respectfully agree with the conclusion of Butcher J in the **Process & Industrial** case[18] that:

> "there is no public policy which requires the refusal of enforcement to an arbitral award which states and is intended to award compensatory damages, and where, even if the damages awarded are higher than this Court would consider correct…, that arises only as a result of an error of fact or law on the part of the arbitrators. The enforcement of such an award would not be 'clearly injurious to the public good' or 'wholly offensive to the ordinary reasonable and fully informed member of the public'. Furthermore, the public policy in favour of enforcing arbitral awards is a strong one, and, if a balancing exercise is required at all, outweighs any public policy in refusing enforcement of an award of excessive compensation. The labelling of such excessive compensation as 'punitive' or 'penal', as the [award debtor] seeks to do in this case does not alter this conclusion.

[53] In my judgment, the third BVI defence has no real prospect of succeeding and I summarily dismiss it.

The first Paris defence: the composition of the tribunal

[54] The first Paris defence is that the tribunal was not constituted in accordance with clause 16 of the shareholders' agreement. PTV accepts that the tribunal was not

[18] At para [102].

constituted by the four arbitrators nominated by the parties. (That tribunal never got to the point of naming a president.) However, it says that under mandatory rules of French law the ICC were obliged to appoint a panel of five arbitrators in the manner in which they did: the "*Dutco*" point.

[55] Vidatel denies that French law obliged the ICC to appoint the panel members. On the contrary, it says, the ICC should have accepted the four arbitrators nominated by the parties. However, it takes a preliminary point, namely that this is a matter governed by Angolan law and that PTV has adduced no evidence of Angolan law. PTV's claim that the panel was appointed in accordance with French law is irrelevant in the absence of proof that Angolan law would apply French law as the law of the seat of the arbitration.

[56] I pointed out to Mr. Adkin QC that the general practice of common law courts is to assume that foreign law is the same as domestic law unless the parties plead and prove that there is a relevant difference. Rule 25 in **Dicey, Morris and Collins on the Conflict of Laws**[19] states:

> "(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.
> (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

[57] On that basis, the Court would assume that Angolan law (like English and BVI law) provided that matters as to the composition of the tribunal were issues for determination in accordance with the law of the seat of the arbitration. Mr. Adkin said that he would produce an authority to show that this was no longer the law, however, he did not in fact do so.

[19] 15th Ed. 2018 at para 9R-001.

[58] It is true that the rule that foreign law presumed to be the same as English or BVI law is not an absolute rule: see **Dicey, Morris and Collins**.[20] However, the learned editors' conclusion at para 9-29 is:

> "that there are cases in which the default application of a rule of English law is simply too problematic to be appropriate, but that apart from the fact that a court should not 'invent' a rule of English law to be applied in default of proof of foreign law, no sharp line exists to define the limits of the principle that in default of sufficient proof, foreign law will be taken to be the same as English law."

[59] It would be extraordinarily inconvenient if no such presumption existed. The cost of proving that the relevant Angolan law was the same as English or BVI law would be disproportionate to the benefit. Moreover, one of the truisms of comparative law is that in the commercial field, even though different systems of law may have very different premises and modes of reasoning, very often the actual legal results are very similar. (It is otherwise as regards family and inheritance laws.) The presumption works little injustice in commercial cases.

[60] In my judgment, this is not a case anywhere near Dicey's line, however lacking in sharpness that line might be. It is unproblematic to apply the presumption in the current case. I can safely proceed on the basis that Angolan law applies the law of the seat of the arbitration to issues such as the composition of the arbitral tribunal. Thus I reject Mr. Adkin QC's preliminary point.

[61] This leads to the main dispute between the parties: is there on the facts of this case a mandatory requirement of French law for the arbitral tribunal to be composed otherwise than in accordance with clause 16 of the shareholders' agreement? The parties have each put in evidence from eminent experts in French arbitration law: Prof. Jean-Baptiste Racine for PTV and Prof. Thomas Clay for Vidatel. Both experts are agreed that French law does have a principle of "*égalité*" which potentially overrides the parties' own agreement as to the

[20] At paras 9-25ff.

constitution of the arbitral tribunal. They disagree as to the principle's application to the facts of the current case.

[62] Both are agreed that the origin of the "*égalité"* principle (at least for current purposes) is the decision of the Cour de Cassation in **Dutco**[21]. This was a case in which there were three parties: BKMI, Siemens and Dutco. The relevant agreement had a standard form reference to arbitration, where the claimant nominated one arbitrator, the respondents nominated one arbitrator, and the two arbitrators nominated a president. A dispute arose in which Dutco raised claims against both BKMI and Siemens. The claims were at least in part in the alternative, so that BKMI and Siemens did not share the same interest in the defence of Dutco's claims.

[63] The Cour d'Appel held that BKMI and Siemens were obliged to agree on a single arbitrator between themselves. The Cour de Cassation disagreed. It held:

> "le principe de l'égalité des parties dans la désignation des arbitres est d'ordre public; qu'on ne peut y renoncer qu'après la naissance du litige…"
>
> ["the principle of equality of the parties in the appointment of arbitrators is a matter of public policy, that can only be waived after the dispute has arisen…"]

Both BKMI and Siemens had a right to appoint their own arbitrator and it was against public policy, the court held, to force them to "share" one arbitrator.

[64] Paris is of course one of the major centres of arbitration in the world. The issue of *égalité* has generated a large number of cases, articles and books. I was only taken to a very small number of these. If the matter comes to trial, there will be, I suspect, a lot more citation of French authority.

[65] Mr. Adkin QC submitted that there were three ways of interpreting *égalité*. First, it could mean each party *to the arbitration agreement* having the right to appoint one

[21] BKMI Industrienlagen GmbH et Siemens AG v Dutco Construction *Bull. Civ.* 1 No 2, decision of the Chambre Civile 1 of the Cour de Cassation of 7th January 1992.

arbitrator each. Second, it could mean each party *to a dispute* under the arbitration agreement having such a right. Third, it could mean each *side to a dispute* having such a right. In the first two cases, this would mean the original four arbitrators were the appropriate panel in accordance with *égalité*. Only in the last case would there be an argument for the approach taken by the ICC in appointing its own panel.

[66] Dutco, he submitted, was a case in the second category. It was not authority over cases in the third category.

[67] Mr. Masefield QC accepted that these were the three analytical categories. He submitted that the current dispute fell into the third category. (He described this third category as "*égalité des plaideurs*", but I am not sure if this is generally recognised as having the meaning given it by Mr. Masefield; it might equally refer to the second category. I shall thus avoid using the expression.)

[68] Mr. Adkin QC submitted firstly, that that was wrong in principle and secondly, that, even if it was right in principle, in the current case all four parties had different interests, so each party would have been entitled to its "own" arbitrator. He made good on the second part of his submission by pointing out that both Mercury and Geni had separate representation. They had interests separate from Vidatel's. At para [1502] of the final award, the tribunal noted that PTV sought that all three respondents be made jointly and severally liable for any award.

[69] At para [1509] of the award the tribunal recorded that Mercury:

> "submits that the parties' obligations under the shareholder's agreement are not plural and solidary and therefore do not give rise to joint and several liability but 'each party responds only for its acts.'"

At para [1514] the tribunal recorded the same submission by Geni.

[70] Further, deciding who was against whom at the initial stage of a multi-handed arbitration, when the reference was first made, would not necessarily be easy, he

submitted. It was only once pleadings were exchanged that the contours of the dispute would become apparent. Moreover, in the nature of any legal dispute, as issues develop, it may happen that parties who had thought themselves aligned become opposed — most strikingly, he submitted, in a criminal trial, when the defendants, who had put up a combined front against the prosecution case, suddenly start running cut-throat defences against each other.

[71] Mr. Masefield QC's reply to this was that one had to look at the reality. The third category was readily workable.

[72] I do not need to resolve these issues on the current application. I merely have to decide whether Vidatel's case has a real prospect of success. I also remind myself that I am primarily guided by the expert evidence of French law which has been presented to me. This does not, of course, mean that I should not exercise my critical faculties in assessing their opinions, but I am not primarily making my own assessment of the raw source material. Rather I am deciding which expert's view I prefer. It will only be if I can confidently reject one expert's view that I can find the test for summary judgment (or summary disposal) satisfied.

[73] In the current case, as I have said, both Prof. Racine and Prof. Clay are eminent lawyers in the field of French arbitration law. Both are university professors with a wealth of practical experience. Both have a track record of publishing academic articles and books on arbitration law. Indeed Prof. Racine in his expert reports cites four articles written by Prof. Clay. I do not need to set out the two men's full résumés for the purpose of the current application; it suffices to say that they are both very well-qualified experts.

[74] Prof. Racine's view at para [14] of his first report is:

> "The principle of equality of the parties in the constitution of the arbitral tribunal, created by the *Dutco* decision, is *a fortiori* applicable to the present case, which is emblematic of a breach of equality between the parties. Thus, in the [current] case… the implementation of the arbitration clause would have led to the designation by the claimant of one arbitrator

> and the designation by the three co-respondents of three arbitrators. Accordingly, the implementation of the clause would have been incompatible with the principle of equality of the parties in the constitution of the arbitral tribunal. For this reason, the ICC Court adopted an approach that was most in line with the principle of equality… Indeed, if the ICC Court had implemented the arbitration clause as drafted it would have infringed the principle of equality of the parties in the constitution of the arbitral tribunal. In order to uphold the principle of public policy the clause could not be applied as it stood. To reiterate: a principle of public policy takes precedence over the will of the parties." (Prof. Racine's emphasis and mode of emphasis.)

[75] Prof. Clay's views are less easy to summarise. In his report he says:

> "[30] …The process for appointing arbitrators may be different depending on the agreements of the parties, but each party must have had the right to express itself in an equal way on the process agreed upon. Moreover, if the parties do agree on the way in which the arbitrator's contract must be formed in accordance with this principle of equality, then neither the arbitration institution nor the judge acting in support of the arbitration can override it.
>
> …
>
> [36] **In appointing the five arbitrators itself, the International Court of Arbitration of the ICC violated the fundamental principle of the appointment of arbitrators by the parties, which its own Rules require it to apply.**
>
> …
>
> [39] To admit, as my colleagues Jean-Baptiste Racine and Charles Jarrosson have done, that a potential consortium of co-defendants would have had the effect of violating the principle of equality of the parties, with the appointment of a larger number of arbitrators on the side of the defendant, amounts to a pure and simple denial of the *Dutco* case law. Equality would not be undermined by each defendant being able to appoint one arbitrator, just as the plaintiff could. On the contrary, the principle of equality would have been complied with because each party would have appointed one arbitrator, meaning that each party would have participated in the constitution of the arbitral tribunal on an equal footing." (Prof. Clay's emphasis and mode of emphasis.)

Prof. Clay notes at para [42] that arbitrators, once appointed, are expected to be independent and that it is wrong to presume them biased in favour of the party appointing them.

[76] In my judgment, either of these views could be correct. Both are arguable. It follows that Vidatel has a real prospect of succeeding in its annulment application to the Cour d'Appel. Accordingly, I refuse summary judgment on the first Paris defence.

[77] For completeness, I should mention that there was some discussion about whether the ICC-appointed tribunal or the original party-appointed tribunal had a *Kompetenz-Kompetenz* to determine which tribunal had the power to determine the disputes between the parties. It was common ground that the ICC-appointed tribunal did not (because that would be a complete boot-strapping exercise), but the power of the first party-appointed tribunal was left open. The question is wholly academic, because the first tribunal never sat and never purported to resolve the question of its own power to determine whether its own composition was contrary to French public policy.

Staying the proceedings

[78] Before examining the second Paris defence, I shall consider what the procedural way forward is, in the light of my determination that the first Paris defence is properly arguable. In PTV's application for summary judgment, it sought in the alternative an order that the recognition action be stayed pursuant to section 86(5)(a) of the 2013 Act pending the determination of the annulment application by the French courts. This was to be subject to the condition that Vidatel provide security for PTV's claim in the sum of US$659,221,157.40. PTV subsequently reduced the sum sought by way of security to US$200 million.

[79] Before me, however, Mr. Masefield QC abandoned his client's application for this alternative relief. He no longer sought himself a stay. Instead, in a move I confess I have not encountered before, he suggested instead that the Court of its own motion should stay the proceedings and order that Vidatel provide security in the sum of US$200 million, or such lesser sum as the Court thought appropriate.

[80] It would in my judgment be most unusual for the Court to make an order staying an action of its own motion, when the party seeking the stay had expressly abandoned its application for a stay. In the current case, Vidatel's position is that they want this Court to proceed to trial as soon as reasonably possible in order to determine whether the final award is enforceable or not. In view of PTV's abandonment of its application for a stay, PTV can hardly object to the fixing of an early date for the trial.

[81] It would suffice for me to say that, in the light of the parties' concurrent wish to go to trial, I would be minded to refuse to stay the proceedings until the final outcome of the Paris proceedings is known. However, that would not do justice to Mr. Masefield QC's careful submissions.

Ordering that security be given

[82] There are three permutations of how an action to enforce an award might come to be adjourned. Firstly, the putative award debtor might apply on the basis that it is challenging the award in the courts of the seat of the arbitration. This is likely to be the commonest case. Secondly, the putative award creditor might apply on the basis that it wants the challenge at the seat of the arbitration to be decided before it enforces. Thirdly, the court itself might adjourn pending the decision of the courts of the arbitral seat.

[83] In the first case, the provision of security is "the price of the adjournment": **Yukos v Dardana**[22] approved by the UK Supreme Court in **IPCO (Nigeria) Ltd v Nigerian Nations Petroleum Corp**.[23] The court granting the adjournment has the power to order that, if the security is not provided, the claimant can enforce the full amount of the award.

[22] [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep 326 at paras [27]-[29].
[23] [2017] UKSC 16, [2017] 1 WLR 970 at paras [28]-[29], Lord Mance JSC approving the judgment in Dardana of Mance LJ.

[84] In the second case, the court has no power to order that security be given. As the English Court of Appeal said in **Dardana**[24] "so long as the [putative award debtor's] application under [the equivalent of section 86(2)] remained undetermined, there could have been no question of the court allowing enforcement. That would have been a denial of justice."

[85] In the third case, the Court *does* have the power to order that security be granted, but only in limited circumstances. In **Soleh Boneh v Republic of Uganda**[25] the plaintiff had obtained an arbitral award against the defendant in the sum of US$9.5 million. The application for enforcement came before Mr. Michael Barnes QC, sitting as a deputy High Court judge. The defendant did not appear. The deputy judge decided of his own motion to adjourn the matter but ordered that the defendant pay the full amount of the award (including interest) into court, with the defendant debarred from resisting enforcement in default. On appeal, the Court of Appeal held that the judge had the power to make such an order, including the debarring element, but on the facts reduced the amount of security to be provided.

[86] Mr. Masefield QC relied on this authority for the proposition that, if I adjourned the case of my own motion, I would have the power to order security, with enforcement of the full amount in default of the provision of security. However, this overlooks the explanation for the order made in **Soleh Boneh** given in **Dardana**. Mance LJ (as he then was) explained[26]:

> "In the absence of any application under section 103(2) [the equivalent of our section 86(2)], the respondent had no ground for resisting enforcement under section 103(2), unless the court 'considered it proper' to adjourn under section 103(5) [the equivalent of section 86(5)]. So the court could impose terms, on which alone it would 'consider it proper' to adjourn and would forego from enforcing the award."

[24] At para [18].
[25] [1993] 2 Lloyd's Rep 208.
[26] At para [26].

[87] In the current case, Vidatel has put forward a defence under section 86(2). There is thus in my judgment no jurisdiction for me to debar it from pursuing that defence unless it satisfies a condition of putting up security. The considerations preventing a debarring order in my second case, also prevent it in this third case.

[88] I note that in **Stati v Republic of Kazakhstan**,[27] Popplewell J (as he then was) considered that **Soleh Boneh** and **Dardana** did give him the power to impose conditions on an adjournment made on the court's own motion. However, this seems to be a case of Homer nodding. The case was argued in some haste as a vacation matter. At para [5] of his second *ex tempore* judgment given on the day of the hearing, he said that **Soleh Boneh** was a case "where an application [was] being made for an adjournment by the party which [was] seeking to resist enforcement of the award." That was not in fact the case. In my judgment this undermines the judge's conclusion on his jurisdiction to order security. He overlooks **Dardana**'s explanation of the basis on which security could properly be ordered in **Soleh Boneh**. In any event, the judge in his discretion refused to order that security be given, so the judge's view on jurisdiction was *obiter*. It was not necessary for his decision and therefore does not form part of the *ratio decidendi*.

[89] In my judgment I should follow **Dardana** in the sense I have set out above. I hold that I have no jurisdiction to adjourn the enforcement action on terms that Vidatel provide security.

Adjourning of the Court's own motion

[90] Should I nonetheless (despite my inability to order that security be given) adjourn until the outcome of the French proceedings is known? Given that neither party seeks an adjournment, it would be a strong thing for me to order an adjournment. Nonetheless, I should consider whether to do so.

[91] There are two main grounds on which the courts adjourn enforcement proceedings: breach of comity and the risk of inconsistent judgments. The

[27] [2015] EWHC 2542 (Comm).

difficulty in applying these as grounds for an adjournment is that they are inherent in the **New York Convention** scheme of enforcement. A court asked to enforce an award before an annulment application has been decided by the court of the seat of the arbitration will always be at risk of opining on a matter which will come before the court of the seat (thereby breaching comity). Likewise, the enforcement court is always at risk of inconsistency — reaching a conclusion different to that of the court of the seat.

[92] I note that this is a case of an international arbitration. The parties are variously incorporated in Angola, Portugal and the BVI. They have no connection with Paris, save as the seat of the arbitration. As such, they must be taken to have been aware of the bases on which enforcement in, for example, this Territory might be opposed. The potential breach of comity and the risk of inconsistent judgments have less weight than might be the case where the arbitration was purely domestic: see Gross J in **IPCO** at para [16] (where the parties were Nigerian and the seat of arbitration was Nigeria).

[93] An important matter will always be the delay associated with adjourning. In the current case, the French proceedings will not be finally determined until 2022, two years away, whereas this Court can accommodate a trial in July or August this year. In the light of the *saisie conservatoire* granted by the Angolan court, PTV may be prejudiced by any delay. There appears, at least potentially, to be a rush by creditors to enforce their debts.

[94] Before exercising my discretion in deciding whether to adjourn, it is worth considering the consequences of there being inconsistent judgments of this Court and the French courts. There are a number of ways in which this can be overcome. The first would be to extend the time for appealing against any judgment on enforcement until, say, 28 days after (a) the final determination of the Cour de Cassation or, (b) if no timeous appeal in cassation is brought, on the expiry of the ordinary time for appealing against the decision of the Cour d'Appel de Paris, whichever is sooner.

[95] Now it is true that, if PTV won before this Court in the enforcement action, it would be likely to try and seek the appointment of a liquidator of Vidatel. The risk of the liquidator then deciding not to pursue the annulment proceedings in France could, however, be overcome by giving the directors of Vidatel the power to continue to have conduct of those proceedings, notwithstanding the appointment of a liquidator. Such a power has previously been exercised in this jurisdiction: see, for example, **Re Koshigi Ltd; Re Svoboda Ltd**,[28] where Adderley J appointed receivers but gave the directors of the two companies conduct of an appeal against his orders. (Whether such a power should be granted, and whether it should be limited solely to the proceedings before the Cour d'Appel de Paris, or include any appeal to the Cour de Cassation, would be matters for this Court when hearing any application for the appointment of a liquidator of Vidatel.)

[96] Second, if this Court granted enforcement but the French courts annulled the arbitration award, then Vidatel may be able (rather than appealing) to apply to this Court to set aside this Court's judgment. Historically a judgment debtor in that position had a remedy of *audita querela*. In **Turner v Davies**,[29] the plaintiff was the administrator of an estate. He recovered a judgment against the defendant. Before he could execute the judgment his letters of administration were withdrawn. It was held that this post-judgment event could be relied on by the defendant to prevent execution, the relevant procedure being the defendant issuing a writ of *audita querela*. The original (English) Rules of the Supreme Court were in the Schedule to the **Judicature Act 1875**[30] (UK). These provided in Order XVI rule 22:

> "No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded: and the Court or Judge may give such relief and upon such terms as may be just."

[28] BVIHC (COM) 2019/230 and BVIHC (COM) 2019/231, delivered 14th May 2019 unreported.
[29] (1669) 1 Mod Rep 69, 2 Wms Saunders 137.
[30] 38 & 39 Vict c 77.

[97] A similar provision survived into the last iteration of the (English) RSC, but was not reproduced either in the English CPR or the Eastern Caribbean CPR. The 1875 Act is of some significance, because it is the last occasion the Westminster Parliament made rules of court directly by primary legislation (so that rules of substantive law could be altered). All subsequent iterations of the RSC from 1881 onwards were made by delegated legislation.

[98] Does the omission of the equivalent of Order XVI rule 22 mean that the procedure is no longer available? It seems to me strongly arguable that *audita querela* and subsequently RSC Order XVI rule 22 gave a defendant a substantive rather than a procedural right to have execution stayed. (Presumably in order to be effective, any execution already effected would have to be reversed. This seems to be envisaged in the general power to give "such relief… as may be just.") The 1875 Act merely changed the procedure to be used to enforce the right. The rule-making bodies in England and the Eastern Caribbean can only change procedural rules, not substantive rules: **Stichting Administratiekantoor Nems v Anna Radchenko et al**.[31] If that is right, the dropping of the equivalent of Order XLI rule 22 in the English and Eastern Caribbean CPRs does not prevent a defendant raising post-judgment matters in order to prevent execution.

[99] Serjeant Williams' fifth note to Saunders' report of **Turner v Davies** (which considers the common law pre-1876) says that the courts were willing to deal with straightforward post-judgment events in a summary fashion, without requiring the defendant to issue *audita querela* proceedings. It may be that that is the approach which this Court would take if it allowed enforcement, but the French courts subsequently annulled the arbitration award. I see no reason why the same consequence should not flow if matters were the other way around, with this Court refusing enforcement, but the French courts upholding the award, so that it was PTV seeking the setting aside of this Court's order after trial.

[31] BVIHCMAP 2019/003 (delivered 29th March 2019) at para [8].

[100] Accordingly, I do not consider that either party would be irredeemably prejudiced, if this Court made a determination as to the enforceability of the tribunal's award, which the decision of the French courts subsequently found to be wrong.

[101] Given the absence of irredeemable prejudice, in my judgment the Court should fix a date for the trial of the enforcement action and should not adjourn the case of its own motion.

The second Paris defence: the conflicts ground

[102] I turn then to the second Paris defence. The allegations in very simplified overview are these. Mr. Ferro is said to have been the legal adviser to a Mr. Nelson Tanure ("Mr. Tanure"). Mr. Tanure was an indirect shareholder in Oi and was for a time a director of Oi. Under the ICC Rules, Vidatel submits, Mr. Ferro was obliged to disclose the relationship. PTV's case is that the relationship is too tenuous either to be disclosable or to give rise to fears for Mr. Ferro's independence.

[103] The allegation against Prof. Dr. Sachs is that he was a partner in CMS, an international firm of lawyers. Another partner in CMS, a Mr. Groenewegen, was appointed by a Dutch court as bankruptcy trustee of Portugal Telecom International Finance BV, Dutch company. This was another subsidiary of Oi. Again, the ICC Rules, Vidatel submits, required disclosure. PTV's short answer is that Prof. Dr. Sachs and Mr. Groenewegen were partners in different legal entities: CMS Germany and CMS Netherlands respectively.

[104] In my judgment the appropriate course on case management grounds is to refuse to determine this part of the summary judgment application. This action is going to trial in any event on the first Paris defence. If I determined the application in respect of the second Paris defence and refused summary judgment, then the second Paris defence would be tried as well. If I were to grant the summary judgment application, there would inevitably be an appeal. Either that appeal would be heard before the trial (which would inconvenience the Court of Appeal)

or it would be heard afterwards. If it were heard afterwards and the Court of Appeal (or the Privy Council) allowed the appeal against the summary judgment, then there would be a need for another trial. Either way there would be a great expenditure of costs and Court time.

[105] Further, if the matter goes to trial, there is likely to be only a limited amount of live evidence to be heard on the second Paris defence. I have read the written evidence and heard the submissions of counsel. Hearing the second Paris defence at the trial will not lengthen the time estimate by very much. The increased costs will be small (and certainly much less than if appeals were to be brought). It is much more satisfactory in my judgment for the Court to determine the second Paris defence on the balance of probabilities at trial, rather than give scope to a rather arid dispute about the degree to which there may or may not be a "real" prospect of Vidatel succeeding on the second Paris defence.

Conclusion

[106] Accordingly, I:

(a) Grant summary judgment against Vidatel on the three BVI defences;

(b) Refuse summary judgment against Vidatel in respect of the first Paris defence; and

(c) Adjourn generally the application for summary judgment in respect of the second Paris defence.

[107] I will hear counsel on what consequential orders I should make and on fixing a date for trial.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar