

EUROPE



France

India v. CC/Devas: Potential Pitfalls of the Assignment of Arbitral Awards

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In a ruling rendered on 10 September 2024 – the latest development in the landmark investment arbitration *CC/Devas v. India* – the Paris Court of Appeal rejected the admissibility of third-party intervention in enforcement proceedings, based on the assignment of an arbitral award. This contribution discusses the implications of this recent decision and its impact on the evolving landscape of arbitral award assignment.

1. Background to the dispute

The dispute underlying the Paris Court of Appeal's decision in *CC/Devas v. India*¹ arose from a concession contract between Devas Multimedia Private Limited ('Devas'), a company based in Mauritius, and Antrix Corporation Ltd ('Antrix'), an Indian state-owned company, which allowed Devas to use India's electromagnetic spectrum for telecommunication services. Following the termination of the contract by Antrix, Devas' shareholders initiated UNCITRAL arbitration proceedings before the Permanent Court of Arbitration based on the 1998 India-Mauritius BIT, resulting in an award granting \$111 million in damages to the Devas' shareholders.²

After both the (i) award on jurisdiction and liability and (ii) the award on quantum were upheld by Dutch courts, Devas' shareholders sought to enforce the awards in France. An initial exequatur³ granted by a French judge was appealed by India. In parallel, following a liquidation proceeding in India and the obtaining of a Mauritian court injunction by India to prevent Devas' shareholders from filing a new investment treaty claim

valued at US\$640 million, Devas' shareholders assigned their rights to collect the award's proceeds to three U.S. companies⁴ (the 'Assignees'), who sought to intervene in the French proceedings. On 13 February 2024, the pre-trial judge ('conseiller de la mise en état') permitted the Assignees' intervention, finding notably that the provisions of the assignment agreements operated a conventional subrogation in favour of the Assignees, 'thus granting them standing and interest to intervene'.⁵

India opposed this intervention, arguing that third parties to an arbitration could not join enforcement proceedings. It further pleaded, in the alternative, against the validity of the assignment agreements, alleging that the Assignees had neither the interest nor the standing to act, that the assignment agreements were a 'sham' and thus invalid under English law (the law governing the assignment agreements), and they constituted maintenance and champerty,⁶ forbidden under English law. India also made allegations of fraud and claimed that the Assignees did not qualify as investors under the 1998 India-Mauritius BIT.

1 [Société CC / Devas et. al c. République d'Inde, Paris Court of Appeal, n° 24/00152 \(10 Sept. 2024\).](#)

2 [CC/Devas v. India \(I\), Award on Jurisdiction and Merits, 25 Jul. 2016 \(jsumundi.com\); CC/Devas v. India \(I\), Award on Quantum, 13 Oct. 2020 \(jsumundi.com\).](#) The dispute also gave rise to an ICC proceeding and an UNCITRAL arbitration between Deutsche Telekom and India.

3 The exequatur is a declaration by a national court recognizing that an arbitral award is enforceable within its jurisdiction. Following the grant of exequatur, enforcement proceedings permit the award's creditor to take practical steps to enforce the award against the debtor's assets (including measures such as freezing bank accounts, seizing property, etc.).

4 CCDM Holdings LLC, Telcom Devas LLC, and Devas Employees Fund LLC.

5 [République d'Inde c. Société CC / Devas et. al, Paris Court of Appeal, n° 22/11819 \(13 Feb. 2024\), 'Pre-trial judge's order' \(free translation from the author\).](#)

6 The common law doctrines of maintenance and champerty were defined in the *Camdex* decision of the London Court of Appeal (*Camdex International Ltd. v Bank of Zambia* (No. 1) [1998] 1 Q.B. 22) as occurring when a party brings forward a case it has no legitimate interest in, without valid reason or excuse ('maintenance') or when a person brings material supports to another's litigation against a share of the proceeds from the action or the lawsuit ('champerty').

2. Decision of the Paris Court of Appeal

The Paris Court of Appeal ('Court') overturned the pre-trial judge's order and dismissed the Assignees' intervention. Referring to the strict rules on intervention under the French Code of Civil Procedure (CPC),⁷ the Court first recalled that voluntary intervention 'is a request and is not a means of recourse' and that, as such, it does not follow the same procedural rules as third-party opposition (*tierce opposition* – a mechanism that allows individuals who were not party to a case, but have an interest in it, to challenge and seek a review of the decision that adversely affects them) and 'remains subject to the principle of the autonomy of arbitration'.⁸ The Court thus noted that voluntary intervention of third parties is not admitted in annulment proceedings nor in appeals against exequatur orders, 'except by the express will of the parties, which can only result from the parties' agreement'.⁹

The Court further stated that intervention 'is independent of any subrogation', noting that in this case the assignment agreements did not provide for subrogation, and negating any presumption of subrogation.¹⁰ It also observed that the Assignees had not only qualified themselves as 'assignees' and not as 'subrogated party', but had also requested confirmation of the exequatur 'in their personal capacity' and not as subrogated in the rights of the parties to the arbitration.¹¹

In overruling the pre-trial judge's order, the Court concluded that even if the Assignees had an interest in enforcing the award to recover the claim, they could not claim the right to seek annulment of the award or appeal the exequatur order, as 'those rights [are] being strictly attached to the status of party to the arbitration, which belongs only to the parties to the award or to third parties conventionally admitted as parties'.¹² The Court thus deemed the Assignees' voluntary intervention inadmissible, deciding that there was no need to rule on the legality of the assignment agreements under English law as such agreements did not grant the Assignees

the status of a 'party' to the arbitration, nor did they allow them to intervene in the appeal against the exequatur order.¹³

Finally, with regard to the claim of denial of justice, the Court held that denying third parties' intervention in the appeal proceedings did not violate their right of access to justice under Article 6 of the ECHR, since the arbitration procedure and the waiver of certain dispute resolution rights were in conformity with the Convention. Furthermore, the Court held that a judge's refusal to allow the intervention of a third party who does not fulfil the necessary conditions of admissibility does not constitute a denial of justice, 'as long as the appeal procedure continues regularly between the parties to the procedure, who are bound by the arbitration clause'.¹⁴

Accordingly, the Court rejected the intervention of the Assignees, who were unable to continue to seek the enforcement of the award.

3. Commentary

French courts are frequently requested to decide issues related to the **assignment of arbitration agreements**. For instance, the courts held in 2021 that the fact that an arbitration agreement is severable from the main contract does not in itself preclude its assignment.¹⁵ In the case of assignment of contracts, the assignee is bound by all its assignor's obligations, including those arising out from an arbitration clause.

However, French courts had not yet ruled on the validity of the **assignment of an award**. When a Luxembourg-based company attempted to enforce against Ukraine a SCC award assigned to it, the Paris Court of Appeal found the Ukrainian state to be immune from execution and rejected the request, without analysing the arguments based on the assignment itself.¹⁶ In 2021, the Paris Court of Appeal allowed the enforcement of an assigned award but the issue of the validity of the assignment of the award was not raised.¹⁷

7 Court of Appeal decision, *supra* note 1, paras. 28-37.

8 *Id.* paras. 37-39.

9 *Id.* para. 41.

10 *Id.* paras. 42-44. The pre-trial judge, in contrast, had found that (i) the contractual nature of arbitration does not 'in principle prevent the intervention of a person subrogated in the rights of one of the parties to the arbitration' and (ii), after analysing the provisions of the assignment agreements, that they operated a conventional subrogation (*subrogation conventionnelle*) in favour of the Assignees, 'thus granting them standing and interest to intervene'.

11 Court of Appeal decision, *supra* note 1, paras. 46-48.

12 *Id.* para. 51.

13 *Id.* paras. 53-54.

14 *Id.* para. 56.

15 Court of Cassation, 2nd civ., 20 Dec. 2001, no. 00-10806, *Quille le Trident c/ CEE Euro Isolation*, *Rev. Arb.* 2002, p. 379 et seq.; Court of Cassation, 1st civ., 26 June 2001, no. 99-17120, *American Bureau of Shipping (ABS) c/ Copropriété maritime Jules Verne*, *Rev. Arb.* 2001, p. 529 et seq.; M. de Boissésou, C. Fouchard, J. Madesclair, *Le Droit Français De L'Arbitrage*, *LGDI*, 2023, [177].

16 Paris Court of Appeal, 5 Jan. 2012, no. 11-10949, *Société Sinequanon Invest c. L'Ukraine*.

17 Paris Court of Appeal, 7 Dec. 2021, no. 18-10217, *FG Hemisphere Associates c. République Démocratique du Congo*. See also Court of Cassation, 1st civ., 28 Feb. 2024, no. 22-16152, *FG Hemisphere Associates LLC c. République Démocratique du Congo*.

To the author's knowledge *Devas* is the first case in which a French judge has had to decide on the validity of an award assignment agreement. The position of the French Court of Appeal is straightforward: the notion of an 'arbitral award creditor' for the purpose of intervention in enforcement or annulment proceedings is strictly interpreted to include only direct parties to the arbitration or those conventionally admitted as such.

The decision of the Paris Court of Appeal is in line with the provisions of the French Civil Code on assignment and subrogation: only a subrogee steps into the shoes of the original party and party status, whereas an assignee, as a third party, has limited rights. Specifically, an assignee is entitled to the proceeds of the arbitration claim but lacks the broader rights of a party to the arbitration. Essentially, the decision distinguishes between the monetary rights transferred to the assignee by the assignment, which coexist with the personal rights retained by the assignor. In contrast, a subrogee would benefit from both sets of rights.

Assignment of awards: a solution to increasingly complex enforcement procedures

As enforcement of arbitral awards becomes more difficult and investors seek access to liquidity, award creditors are developing new solutions. One such solution is the assignment of arbitral awards – whereby the rights under an award are transferred from the original creditor (the assignor) to a third party (the assignee), allowing the assignee to enforce the award and collect its proceeds and the assignor to monetise and access upfront liquidity, while alleviating the burdens associated with post-award proceedings.

The growing involvement of third-party funders in international arbitration and the evolution of complex funding agreements have contributed to the development of this practice. As enforcement is increasingly viewed as a distinct concern, third-party funders are sometimes intervening at the enforcement stage only. An illustration of this trend is the *Stans Energy and Kutsay Mining v. Kyrgyzstan* case,¹⁸ in which, pursuant to an assignment of an arbitral award, the funders enforced the award.

Admissibility issues in civil law and common law

The assignment of an arbitral award must be distinguished from the assignment of an arbitration agreement:

- > **Assignment of an arbitration agreement:** Refers to the transfer of rights and obligations under the arbitration agreement (with the assignee stepping into the shoes of the assignor and becoming a party to the arbitration agreement, thus assuming all rights and obligations under it),
- > **Assignment of an arbitral award:** Implies the transfer of rights to the award to another party, often for a discounted fee, therefore not raising the same risks and legal complexities.

In terms of **admissibility**, the New York Convention does not explicitly address the assignment of arbitral awards. The lack of any specific requirements for the validity of such assignments may be justified by the fact that, similar to the assignment of an agreement to arbitrate, the assignee is considered 'sufficiently warned' and aware of the arbitral award, and also as having had 'the opportunity to scrutinise [the assignment] in advance'.¹⁹ Nevertheless, if the assignment took place after the award was rendered, to seek enforcement, the assignee has to submit documents evidencing the assignment²⁰ in order to fulfil the requirements of Article IV(1) of the New York Convention.

The defences that can be raised against an assignment of arbitral award and the intervention of an assignee vary depending on the legal systems.²¹ In **civil law**, parties mainly rely on arguments related to the legal standing of the assignee.²² This was also one of India's arguments in *CC/Devas* as it claimed that the Assignees lacked legal standing to enforce an award because they were not parties to the arbitration and because they could not rely on the award due to certain conditions of the agreement to arbitrate not being met. It is worth mentioning that the French doctrine of '*retrait litigieux*', as articulated in Article 1699 of the French Civil Code, allows the debtor of an assigned claim to repurchase the claim from the assignee for the same price paid by

18 Reasons for Decision, Ontario Superior Court of Justice, 18 July 2022, *Gebre LLC v The Kyrgyz Republic et al.* 2022, [6].

19 S. Jagusch, A.C. Sinclair, 'Chapter 15: The Impact of Third Parties on International Arbitration – Issues of Assignment' in L.A. Mistelis, J.D.M. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International, 2006), p. 295.

20 M. Scherer, 'New York Convention, Article IV [Formal Requirements for Recognition and Enforcement of Arbitral Awards]' in R. Wolff (ed), *New York Convention: Article-by-Article Commentary* (2nd ed, C.H. Beck, 2019) [14].

21 C. Dupeyron, M. L. Mancinelli, 'The Emerging Practice of Assigning Arbitration Awards: Rationale, Structure and Potential Hurdles' (2022) 40.1 *ASA Bulletin*, pp. 20-21.

22 Id. pp. 20-25. See also G. Lazarev, *Assignment of arbitral awards* (Practical Law Kluwer Blog, 12 Dec. 2016).

the latter. This right, which can be exercised if specific conditions are met, is designed to shield the debtor from speculative practices.

In **common law**, the available defences against assignment of awards are the doctrines of maintenance and of champerty, which are contrary to public policy and can result in the inability to enforce the award. These doctrines are aimed at discouraging a party from supporting a suit solely for a financial interest in its outcome ('champerty') or to discourage an unconnected third party from assisting litigation proceedings, for example with financial resources ('maintenance').

On the issue of **legal standing**, **civil law courts** tend to take a broad interpretation and to allow enforcement of awards by third parties, not only original award creditors, based on a valid assignment agreement. However, if an arbitration agreement explicitly prohibits assignment, such an argument is inadmissible.²³

- > *Euler Hermes v PJSC Odessa Fat and Oil Plant*: An Ukrainian court initially denied enforcement to Euler Hermes, who was the assignee of Pontus Trade S.A. on the basis of lack of standing.²⁴ The court's reasoning was that only the original creditor (or its representative) could request enforcement, rejecting a broad interpretation of the term 'creditor'.²⁵ Although this reasoning was initially upheld by the Court of Appeal of Odessa,²⁶ it was later overturned by the Supreme Court but still confirmed by the Court of Appeal, so the assignee was unable to enforce.²⁷
- > *Regent Company v. Ukraine*: The ECHR ruled that refusal to enforce an award due to lack of standing was a violation of state obligations and an interference with the right to property.²⁸ Along the same lines, Turkish courts have recently rendered several decisions in which assignees and the standing of assignees have been recognised, allowing assigned arbitral awards to be enforced.²⁹

23 For a similar argument, see *Balkan Energy Limited v. Republic of Ghana, D.D.C.*, [2018] Case No. 17-cv-00584 (APM), pp. 18-19.

24 Ruling of Prymorskyi District Court of Odessa City, 20 March 2013, *Euler Hermes v. PJSC Odessa Fat and Oil Plant*. In this case, PJSC Odessa was required by a FOSFA award to pay a debt to Pontus Trade S.A., a company from Switzerland, which assigned its rights to Euler Hermes.

25 Ibid.

26 Ruling of the Court of Appeal of Odessa Region, 5 June 2013, *Euler Hermes v. PJSC Odessa Fat and Oil Plant*.

27 K. Pilkov, 'Assignment of Benefits of Arbitral Awards: Problematic Enforcement in Ukraine' (Kluwer Arbitration Blog, 2014).

28 S. Konrad, M. Birch, 'Non-Enforcement of Arbitral Awards: Only a Pyrrhic Victory?' (2010) 4.4 *Revista Română de Arbitraj*, p. 50.

29 M. Arseven, 'In Quest of Collection: Assignment of Arbitral Awards under Turkish Law' (<https://www.morogluarseven.com/>), 12 Apr. 2022).

Common law jurisdictions provide examples of enforcement of assigned awards in which the maintenance and champerty doctrines have been invoked. The landmark case is *FG Hemisphere v DRC*, in which two awards had been assigned by Ukraine's Energoinvest to FG Hemisphere, a U.S. fund, which attempted to enforce the awards against the Democratic Republic of Congo. Enforcement attempts were successful in the U.S.,³⁰ Jersey³¹ and Hong Kong,³² despite the Hong Kong judge's concern 'that the assignment of the awards might constitute maintenance or champerty'.³³ The judge however decided that no such issue arose.³⁴ By contrast, champerty and maintenance are not recognised in several European countries,³⁵ including France. As such, and although the Paris Court of Appeal found there was no need to rule on the legality of the assignment agreements, it is no surprise that the pre-trial judge in *CC/Devas v. India* considered India's arguments based on these doctrines to be procedural matters and held them inapplicable before a French Court,³⁶ evidencing their limitation in civil law jurisdictions. The outcome could have been different in a common law context.

Specificities in investment arbitration

The practice of assignment of arbitral awards has mostly developed in the field of investment arbitration,³⁷ where discussions arose around the assignee's standing, considering that the award is predicated on protections granted by a treaty to investors meeting specific criteria, as well as around the legitimacy of the assignment agreement. In most cases, these arguments have not been successful. For example:

30 *FG Hemisphere Associates, LLC v. Democratic Republic of Congo & SNEL* [2011] No.05-7040, USCA Col., 3.

31 [2010] JRC 195, *FG Hemisphere Associates LLC v Democratic Republic of Congo and La Generale des Carrieres et de Mines*.

32 See the decisions at [2009] 1 HKLRD 410 (Court of First Instance), HCMP 928/2008, [2010] 2 HKLRD 66 (Court of Appeal) and FACV 5-7/2010 (Court of Final Appeal).

33 [2009] 1 HKLRD 410 (Court of First Instance), HCMP 928/2008, [135].

34 Id. [136].

35 R. Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2021), p. 61.

36 See para. 40 of the pre-trial judge's order, *supra* note 5.

37 G. Lazarev, 'Assignment of arbitral awards' (Practical Law Kluwer Blog, 12 Dec. 2016), *supra* note 22.

- > *Blue Ridge Investments v Argentina*³⁸: The U.S. courts granted enforcement of an ICSID award (*CMS v Argentina*³⁹) after Blue Ridge purchased CMS' interest in the award and despite Argentina's argument that the assignee lacked legal standing to enforce the award. The court highlighted that the term 'party' is undefined in the ICSID Convention and that neither the ICSID Convention nor U.S. law prohibited award assignment, leading to the interpretation that the term could also include an assignee.
- > *Belize Social Development Limited v. The Government of Belize and Balkan Energy Ltd. v. Republic of Ghana*: In two other cases, U.S. courts ruled that the assignment agreement only needed to be valid under the law governing the agreement, rendering potential invalidity under the State's law irrelevant, so the assignees were able to enforce the awards.

The decisions immediately above thus take the analysis a step further than the Paris Court of Appeal in *CC/Devas v. India*, which did not consider it necessary to rule on the legality of the assignment agreements.⁴⁰

As evidenced in *CC/Devas v. India*, the practice of assignment of awards is evolving fast due to the fact that the enforcement phase has become increasingly complex. Despite being a rather new feature of international arbitration, this practice is generally accepted by both civil law and common law courts which consider the assignment of rights to be valid as long as the assignment agreement is valid under its governing law and gives the assignee a valid legal standing. The decision of the Paris Court of Appeal, however, underscores the complexities and nuances inherent in the assignment and enforcement of international arbitration awards, and highlights a cautious approach towards third-party intervention in arbitration-related matters. The ruling indicates a more restrictive interpretation of the rights of assignees, suggesting that the acceptance of such assignments and the standing of assignees in enforcement proceedings may not be as straightforward as previously thought.

38 *Blue Ridge Investments, LLC v. Republic of Argentina*, [2012] 902 F Supp 2d 367, 380-382.

39 *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

40 The pre-trial judge, on the other hand, had emphasised that the assignee did not have to meet the specific criteria imposed on investors for protection under the BIT.