VALID ARBITRATION AGREEMENT RENDERED INEFFECTIVE BY CHANGED CIRCUMSTANCES – THE FRENCH APPROACH TO *HEIRS OF SULTAN OF SULU v MALAYSIA*[1]

Sovereign State of Malaysia v Nurhima Kiram Fornan

On 6 June 2023, the Paris Court of Appeal reversed the decision of the Paris Court of First Instance and refused to recognise a partial arbitration award on the basis that while the parties to the dispute had concluded an arbitration agreement, it was inextricably linked to the office of the British Consul-General of Borneo, which no longer exists. The arbitration agreement was thus rendered ineffective. The Paris Court of Appeal's judgment is of note because it found an intention to arbitrate but opted not to give effect to that intention. In this article, the authors examine how these issues would be considered in other courts.

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I. Summary

On 29 September 2021, the Paris Court of First Instance declared that a partial arbitral award dated 25 May 2020 was to be recognised in

[1] The authors thank their colleague, Audrey Husni, for her assistance with the French language sources used for this article.

France. The application for the *exequatur* order had been made by eight claimants in the arbitration who claim to be heirs and successors of the Sultan of Sulu (the "Heirs"). The respondent in the arbitration, Malaysia, had not substantively participated in the arbitration proceedings.

The partial award in question had been rendered in Madrid by a sole arbitrator in *ad hoc* proceedings. The sole arbitrator had decided, *inter alia*, that an 1878 agreement contained a valid arbitration agreement, and that he had jurisdiction to decide the claims submitted to arbitration proceedings by the claimants.

In its 6 June 2023 ruling, the Paris Court of Appeal (or the "Court") found, *inter alia*, that while an arbitration clause existed and the Heirs' application for *exequatur* had been procedurally admissible, the sole arbitrator who rendered the award of 25 May 2020 had no jurisdiction.[2] The parties' intention to arbitrate was tied to the former British Consul-General of Borneo serving as arbitrator. When that office disappeared, a renewed expression of the parties' intention to arbitrate would have become necessary, without which the arbitration clause became ineffective.

The Court granted Malaysia's application to reverse the first instance court's 29 September 2021 order and refused recognition of the 25 May 2020 partial award.

This case provides an insight into the French court's approach toward the *in favorem validitatis* principle as applied to arbitration agreements and is notable because it effectively invalidated the enforceability in France of the arbitration agreement which formed the basis of the arbitral award.

II. Relevant facts

The subject matter of this appeal was a Partial Award on Jurisdiction and Applicable Substantive Law dated 25 May 2020 (the "Partial Award") issued by Dr Gonzalo Stampa (the "Arbitrator") in *ad hoc* arbitration proceedings seated in Madrid brought by eight individuals claiming to be the Heirs against Malaysia.

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2 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal).

The underlying agreement was executed on 4 January 1878 by the Sultan of Sulu, who granted rights over a portion of territory in Borneo located in modern day Sabah, and M/s Alfred Dent and Baron Gustavus de Overbeck (the "1878 Agreement"). In return, the Sultan would be paid an annual sum initially fixed at 5,000 Malay Dollars. The 1878 Agreement was confirmed by a subsequent instrument signed by the Sultan and the British North Borneo Company, which succeeded the rights of the original signatories. Those rights were eventually passed on to Great Britain until 1963, when the State of Sabah was integrated into the Federation of Malaysia.

Malaysia continued making payments to the Heirs until 2013, when it stopped all payments.

In 2017, the Heirs invoked a clause in the 1878 Agreement providing for the submission of disputes to the British Consul-General in Borneo, a role which had long since been abolished. The Heirs therefore requested that the UK Foreign & Commonwealth Office appoint a person to preside over the dispute between them and Malaysia. The UK Foreign & Commonwealth Office declined to do so.

On 22 May 2019, the High Court of Madrid granted the Heirs' application to appoint a sole arbitrator, and appointed the Arbitrator.

On 30 July 2019, the Heirs filed for arbitration.

On 14 October 2019, Malaysia informed the Arbitrator that it contested the entire arbitral proceedings, the appointment of the Arbitrator and the choice of the arbitral seat. Malaysia also provided the Arbitrator with a legal opinion that it had commissioned from a leading Spanish law firm, Uría Menédez, contesting the existence of a binding arbitration clause.

In his Partial Award of 25 May 2020, the Arbitrator declared, *inter alia*, that the following provision formed a valid arbitration agreement between Malaysia and the Heirs:[3]

> Should there be any dispute, or reviving of all grievances of any kind, between us, and ours [*sic*] heirs and successors, with Mr. Gustavus Baron

[3] Partial Award on Jurisdiction and Applicable Substantive Law at [10].

> de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Brunei…

The Arbitrator also held that the place of arbitration was Madrid, and that he had jurisdiction over the claims brought by the Heirs.

On 29 June 2021, the Superior Court of Justice of Madrid annulled the High Court of Madrid's decision to appoint the Arbitrator, and therefore all the successive procedural acts in the proceedings, finding that Malaysia had not been properly served with notice of the Heirs' claim. The Arbitrator was ordered to close the proceedings.

On 29 September 2021, upon the application of the Heirs, the Paris Court of First Instance recognised the Partial Award in France by way of an *exequatur* order (the "*Exequatur* Order").

On 29 October 2021, the Arbitrator granted the Heirs' application to move the seat of arbitration to Paris, and issued a procedural order ordering the continuation of the arbitration in Paris.

On 10 December 2021, Malaysia lodged an appeal against the *Exequatur* Order.

On 28 February 2022, the Arbitrator published his final award in which he ordered Malaysia to pay the Heirs US$14.9bn (the "Final Award").

III. The Paris Court of Appeal's decisions on preliminary issues

A. Admissibility of application made by Malaysia

The Heirs argued that Malaysia's application was inadmissible and should be dismissed because a court considering the appeal of an *exequatur* order of a foreign arbitration award is limited to the assessment of the award itself. It is not to assess the request or order of *exequatur*, considering the limited grounds set out in Art 1520 of the French Code of Civil Procedure (which essentially mirror set-aside grounds against an award).

The Court of Appeal found that it had jurisdiction to assess the *Exequatur* Order of the Paris Court of First Instance, based on Art 1525 of the French

Code of Civil Procedure allowing an appeal in cases of recognition and *exequatur*.[4]

B. Admissibility of the application for exequatur *brought by the Heirs*[5]

Malaysia argued that the Heirs' application for the *Exequatur* Order was inadmissible. The Heirs had made illegitimate use of the French *exequatur* procedure to avoid the effects of the Madrid Superior Court's 29 June 2021 decision to annul the order appointing the Arbitrator, and had sought the Arbitrator's decision to move the seat of arbitration from Madrid to Paris. Malaysia further suggested that the Heirs had failed in their duty of candour to the Parisian court by failing to disclose that the Madrid court had annulled the order appointing the Arbitrator.

The Court of Appeal found that the Heirs' application for *exequatur* was admissible because, as the party for whose benefit the award was rendered, the Heirs had standing under the French Code of Civil Procedure. The fact that the Heirs had obtained an arbitral award condemning Malaysia to make payments justified their interest to request the *exequatur* of the Partial Award in France.

C. Admissibility of jurisdictional challenge[6]

The Heirs submitted that Malaysia was precluded from challenging the Arbitrator's jurisdiction pursuant to Art 1466 of the Code of Civil Procedure, which codified principles of estoppel. Malaysia had refused to participate in the arbitration proceedings where this challenge could have been raised. As such, Malaysia had not put its plea before the Arbitrator or the Spanish court in due time.

Malaysia submitted that a party who has not actively participated in arbitration proceedings cannot be said to have failed to raise a grievance in due time on grounds of estoppel, or Art 1466. Malaysia had not in

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4 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [31]–[39].

5 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [40]–[47].

6 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [51]–[62].

fact participated in the proceedings, and its few interactions with the Arbitrator were to denounce the arbitration proceedings entirely. Even if estoppel applied, in fact Malaysia had not waived any right to invoke this grievance since objections to the Arbitrator's appointment and jurisdiction were raised in good time.

The Paris Court of Appeal found that Malaysia's ground of appeal based on the Arbitrator's lack of jurisdiction was admissible as there were no procedural grounds precluding the Court from basing its decision on these grounds for appeal. Although Malaysia had not appeared in the arbitration proceedings, Malaysia had disputed the arbitral tribunal's jurisdiction in a timely manner, since it had challenged "the entire process of the arbitration" from the very beginning of the proceedings in a letter to the Arbitrator which made it clear that Malaysia challenged the arbitration as such and the jurisdiction of the Arbitrator. This position was also contained in a legal opinion from the law firm Uría Menédez contesting the existence of a binding arbitration clause. Further, the Arbitrator had examined Malaysia's objections to jurisdiction in his Partial Award.

IV. The Paris Court of Appeal's decision on jurisdiction of the Arbitrator[7]

Malaysia invoked all grounds for the denial of the recognition and enforcement of arbitral awards set out in Arts 1520 and 1525 of the French Code of Civil Procedure.[8] The Court turned first to the issue of whether the Arbitrator had wrongly assumed jurisdiction.

A. Malaysia's arguments

Malaysia firstly argued that the colonial nature of the 1878 Agreement made disputes arising under it inarbitrable and excluded from commercial arbitration, because any disputes would ultimately require an arbitrator to assess Malaysia's rights in respect of some of its territories, which would involve considering Malaysia's sovereignty over these territories.

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7 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [48].

8 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [48]–[50].

Secondly, the 1878 Agreement did not contain an arbitration clause. The clause upon which the Arbitrator based his jurisdiction did not provide recourse to an independent and impartial third party, and had designated a person who was a representative of a party who was interested in the 1878 Agreement, namely, the British Crown.

Thirdly, and alternatively, even if the 1878 Agreement did contain an arbitration clause, it is now null and void because of its *intuitu personae* character, and the dissolution of the post of the British Consul-General in Borneo, which was specifically designated in the clause for settling disputes.

B. The Heirs' arguments

In response, the Heirs argued that when interpreted in light of the parties' intentions and in accordance with the principles of good faith and effectiveness, the relevant clause is an arbitration clause. The parties had agreed that they would not submit their claims to a court, but to a third party, the Consul-General of Borneo, who had been vested with jurisdictional power to settle disputes by a decision binding on the parties. The contract had neither been concluded with the British Crown, nor was it for its benefit. The Consul-General was therefore a neutral third party.

Second, the arbitration clause was valid under French international arbitration law and the fact that the office of Consul-General of Borneo no longer exists does not change the intention of the parties to submit disputes to arbitration.

Third, the contract had been concluded between natural persons representing private interests. The dispute under the contract was of a private and commercial nature, with no claim of sovereignty over the territories covered by the 1878 Agreement.

C. The Paris Court of Appeal's judgment

The Court considered the parties' arguments and concluded that the parties had intended to appoint a third party to hear any dispute arising from the agreement between them or their successors. In arriving at this conclusion, the Court reviewed several competing translations of the relevant clause, which had originally been written in Jawi, a derivative

of Arabic script.[9] Noting that the various translations were disputed, it analysed the parties' intention in light of the principle of good faith with a view to giving effect to the arbitration clause.

Even if the language in the dispute resolution clause was disputed and at times unclear, documents and correspondence surrounding the Agreement showed that the parties' intention was to have disputes adjudicated by a third party.

In particular:[10]

(a) The various translations had referred to "differences", "grievances" and "disagreements".

(b) The Consul-General of Borneo was a third party to the arbitration agreement which was entered into between the Sultan and two natural persons, not the British Crown. The third party was not legally bound by an obligation to accept this appointment.

(c) The Consul-General of Borneo was independent even though the 1878 Agreement was the first step in the process which resulted in the British colonisation of Sabah. This is because Great Britain was not a party to the agreement on the date the 1878 Agreement was concluded.

(d) As to the mission entrusted to the third party, the majority of the translations submitted favoured the use of "decision" and "judgment". One translation used "examination and opinion", and another used "knowledge and consideration".

(e) The Court took into account a message from the acting Consul-General to the Earl of Derby, reporting that the acting Consul-General had advised the Sultan of Sulu to insist that any dispute which may subsequently arise between the Sultan and the British Company should be submitted to him.

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9 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [63]–[69].

10 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [71].

The context and the majority of translations preferring notions of "judgment" and "decision" led the Court to consider that the parties had an intention to vest the Consul-General of Borneo with the power to settle any dispute arising between them or their successors, excluding recourse to national courts. Thus, the Court held that the disputed clause was a valid arbitration clause at the time it was signed.[11]

The Court considered, however, that the contracting parties had designated the Consul-General of Borneo specifically because of the position he held at the time the 1878 Agreement was entered into, taking into account his role in the negotiations, the relationship of trust he had established with the Sultan, and the fact that he had encouraged the Sultan of Sulu to involve him in the settlement of a potential dispute arising out of the Agreement.[12] For these reasons, the Court found that the designation of the Consul-General of Borneo could not be dissociated from the parties' intention to arbitrate.[13] Therefore, once the office of Consul-General of Borneo ceased to exist, the disputed clause became ineffective. This finding was reinforced by the fact that a British Consul-General would not have been an independent third party once Great Britain succeeded to the rights of one of the parties to the 1878 Agreement in 1946.[14] This fact would have necessitated a renewed expression of the parties' intent to arbitrate in order for the clause to remain valid (which after 1946 had been unsuccessfully negotiated).[15] Absent an agreement about such an essential element of the arbitration clause, there was no longer an intention to arbitrate and the arbitration clause in question became inoperable.[16]

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11 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [75] and [76].

12 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [77].

13 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [78].

14 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [79].

15 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [80].

16 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [81].

Therefore, the Paris Court of Appeal concluded that the Arbitrator could not validly declare himself competent to decide on the Heirs' claims.[17] The Court concluded that this set-aside ground demanded the reversal of the Paris Court of First Instance's execution order of 29 September 2021 and the denial of the *exequatur* of the Partial Award – and obviated the need to examine the other grounds for appeal.[18]

V. Comment

The Paris Court of Appeal concluded that the Arbitrator had no jurisdiction because the arbitration agreement could not be carried out, in spite of the parties' common intention to refer their disputes to arbitration.

As with many French courts, the Paris Court of Appeal was very concise in its reasoning – spanning only two-and-a-half pages on the issues this comment focuses on. This makes it difficult to extrapolate too much from the decision. When commenting below on several of its holdings, we therefore also consider how courts in other jurisdictions have or might have approached the issues:

A. Evidence of an agreement to arbitrate

In finding that the disputed clause was an arbitration clause, the Court considered that the reference to a non-judicial, neutral third party for his or her judgment or decision was sufficient to evidence the parties' common intention to arbitrate. This effectively aligns with the Arbitrator's determination that the relevant clause "contains a submission to the decision of a private neutral party, which can be construed as a submission to arbitration".[19]

In this connection, a point made in a recent judgment of the Hague Court of Appeal adjudging the same dispute bears considering.[20] It found

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17 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [82].

18 *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [83] and *dispositif* 4 and 5, respectively.

19 Partial Award on Jurisdiction and Applicable Substantive Law at [114].

20 *Heirs to the Sultanate of Sulu v Malaysia*, Case No 200.317.091/01 (27 June 2023, Court of Appeal of the Hague).

that there was no evidence that the parties intended for any disputes to be settled by the Consul-General to the exclusion of ordinary courts.[21] In a modern day dispute resolution clause, it is assumed that the reference of disputes to a non-judicial neutral third party amounts to an election that the third party will have exclusive jurisdiction over disputes, to the exclusion of national courts.

The Paris Court of Appeal considered that the majority of the translations of the 1878 Agreement alluded to notions of "judgment" or a "decision" by the Consul-General, as opposed to his "consideration" or "knowledge". However, the translation of the clause that the Arbitrator himself relied on refers to the "consideration or judgment" of the Consul-General. This translation would appear to have given the parties an option – they could have asked the Consul-General to simply "consider" their dispute (and presumably suggest solutions), or they could have asked him to adjudicate over it and make a decision. On the basis of the ambiguous wording in the various versions of the 1878 Agreement the parties may have intended some non-judicial process other than arbitration, such as mediation, conciliation or other good offices.

Applying the principles arising from Singaporean cases, one might find that in spite of its reputation as a pro-arbitration jurisdiction, the Singapore Court would be unlikely to agree with the Paris Court of Appeal that an intention to arbitrate existed just because the clause in question indicated that disputes would be judged or decided by a non-judicial third party, assuming this party could be said to be neutral. To illustrate this, in *Teck Guan Sdn Bhd v Beow Guan Enterprises Pte Ltd*,[22] the dispute resolution clause was held not to be an arbitration clause even though it intended that disputes would not be referred to a court, but would be governed by the rules of an association. Other courts therefore seem more strict than the Paris Court of Appeal in requiring evidence of an agreement to resolve disputes through arbitration.[23]

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21 *Heirs to the Sultanate of Sulu v Malaysia*, Case No 200.317.091/01 (27 June 2023, Court of Appeal of the Hague) at [6.23].

22 [2003] 4 SLR(R) 276.

23 Lars Markert & Natalie Yap, "Are There (No) Limits in Applying the *In Favorem Validitatis* Principle to Arbitration Agreements?" [2022] 2 SIArb J 74.

B. Neutral decision-maker

The Paris Court of Appeal considered a message from the acting Consul-General to provide relevant context. That message stated that the Sultan of Sulu was advised by the then Consul-General of Borneo to insist on referring future disputes to his office, but it did not report what was actually agreed by the parties in negotiations. The circumstances raise doubts whether under modern standards the Consul-General of Borneo could have been a neutral, impartial party, considering he advised the Sultan of Sulu in the negotiations. This point was noted by the Hague Court of Appeal. While the British government was not a party to the contract, the Hague Court of Appeal also considered that certain acts contemplated by the 1878 Agreement required the British government's approval. With the Consul-General of Borneo being a representative of the British government and acting in British interests, this office could not be neutral. The Hague Court of Appeal therefore found that in the context, the dispute resolution clause was not an arbitration clause by modern standards. The Paris Court of Appeal agreed at least in so far as it considered that once Great Britain succeeded to the rights of one of the parties to the 1878 Agreement in 1946, a British Consul-General would not have been an independent third party anymore and would have necessitated a renewed expression of parties' intent to arbitrate for the clause to remain valid (which after 1946 had been unsuccessfully negotiated).[24] It did not, however, have to analyse this issue since it had already considered the arbitration clause impossible of being performed on other grounds.

C. Abolition of the office of Consul-General of Borneo rendered the arbitration clause impossible to carry out

The Paris Court of Appeal reasoned that given the context of the negotiations of the 1878 Agreement,[25] the parties' intention to arbitrate was premised upon the identity of the arbitrator being the Consul-General of Borneo. Thus while there had once existed an arbitration

[24] *Sovereign State of Malaysia v Nurhima Kiram Fornan*, Judgment No 54/2023 (6 June 2023, Paris Court of Appeal) at [79]–[80].

[25] This point was also noted in *Heirs to the Sultanate of Sulu v Malaysia*, Case No 200.317.091/01 (27 June 2023, Court of Appeal of the Hague) at [6.25].

agreement, it became ineffective when the office of Consul-General of Borneo was abolished.

One wonders whether the identity of the office of the arbitrator was indeed inextricably linked to the intention to arbitrate, or if the court of the arbitral seat might be able to appoint the arbitrator. In this connection, it is noted that the Heirs sought the assistance of the Madrid High Court to appoint an arbitrator after the UK Foreign & Commonwealth Office had declined to do so. While the Madrid court ordered the appointment of the Arbitrator on 22 May 2019, this order was annulled on 29 June 2021 by the Superior Court of Justice of Madrid (albeit for defects in service on Malaysia). The High Court of Madrid subsequently found that the Partial Award was null and void.

In Singapore, the courts endeavour to give effect to the parties' intention to arbitrate, and will try to fix defects in the arbitration clause. However, the typical case in which the court rescues some pathology in an arbitration clause tends to be one where there is a defect in designating the arbitral rules or institution,[26] rather than the current case, where a sole arbitrator is identified through a certain office which does not exist anymore at the time the dispute arises. It would therefore appear that since the parties' common intention was to arbitrate their disputes before the Consul-General of Borneo, appointing as arbitrator anyone other than a person in that office would mean that the tribunal was not constituted in accordance with the agreement of the parties, giving rise to a ground for resisting enforcement under s 31(2)(*e*) of the International Arbitration Act 1994,[27] Art 36(1)(*a*)(iv) of the UNCITRAL Model Law on International Commercial Arbitration[28] or Art V(1)(*d*) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[29] The Hague Court of Appeal determined this ground to be

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[26] See, for example, *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936; *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5; *cf TMT v RBS* [2017] SGHC 21.

[27] 2020 Rev Ed.

[28] UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

[29] 330 UNTS 3 (10 June 1958; entry into force 7 June 1959). Separately, the arbitration agreement would be incapable of being performed for the purposes of s 6 of the Singapore International Arbitration Act: *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* [2008] SGHC 229.

applicable as regards the Arbitrator's Final Award.[30] It thus seems the finding of the Paris Court of Appeal is aligned with that of the Hague Court of Appeal and the approach by Singapore courts.

In conclusion, the Paris Court of Appeal's decision is interesting since it took a comparatively lenient approach with respect to the evidence required for finding an agreement to arbitrate. Despite having accepted a valid arbitration clause, it then did not follow through on the *in favorem validitatis* principle, but insisted (on the basis of an assumption) that the involvement of the then-Consul-General of Borneo in the negotiations of the 1878 Agreement entailed the parties' intention to have his office tied to the role of arbitrator. As shown, the Hague Court of Appeal took a somewhat different approach and the ongoing enforcement efforts of the Heirs make it likely that we will see further permutations of courts dealing with the validity of arbitral agreements and perceived defects therein.

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[30] *Heirs to the Sultanate of Sulu v Malaysia*, Case No 200.317.091/01 (27 June 2023, Court of Appeal of the Hague) at [6.14].