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"Pyramids" remembered in Paris

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Jan Paulsson recalls the case

Leading arbitrator Jan Paulsson has told an audience in Paris about his work on the seminal Pyramids case as a young lawyer at Coudert Frères. Alex Uff, counsel at Shearman & Sterling, reports.

In the early 1980s, a young Jan Paulsson took on his first client, Southern Pacific Properties (Middle East), which was suing the government of Egypt for the cancellation of its project to build a destination tourism complex on the Pyramid Plateau, near Cairo.

Little did he know that the case would develop into a 14-year legal battle leading to a seminal jurisdictional decision that laid the foundation of modern foreign investment law.

Paulsson, now co-head of the international arbitration group at Freshfields Bruckhaus Deringer, described his work on the consecutive ICC and ICSID arbitrations in the second Berthold Goldman lecture, which forms part of the annual summer programme of the Paris-based International Academy for Arbitration Law.

The lecture series focuses on cases that have made arbitral history. The two arbitrations – which came to be known as the Pyramids case – certainly live up to that description.

Paulsson's lecture focused on the crucial jurisdictional aspects of the arbitrations. His narrative was interspersed with asides on arbitral ethics and opposing counsel, as well as colourful descriptions of politicians and would-be movie stars acting as

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expert witnesses, horse riding around the pyramids and enforcement proceedings in the Netherlands and before the Master of the Rolls in England.

Conceived soon after the 1974 enactment of Egypt's Law No. 43 on foreign investments, the tourism project at the centre of the arbitrations was masterminded by an unlikely duo of investors, Peter Munk and David Gilmour, who had previously made an unsuccessful venture into Hi-Fi manufacturing.

Through Southern Pacific Properties, they entered a joint venture with the Egyptian General Organisation for Tourism and Hotels, known as EGOTH.

Egypt, represented by the Minister of Tourism, participated in the negotiations and was a party to the initial tripartite "heads of agreement" concluded in September 1974. The government was unwilling to be a party to the final detailed joint venture agreement signed by SPP and EGOTH three months later, but, pressed by SPP, the Minister of Tourism added his signature and a notation that he had "approved, agreed and ratified" the document.

In May 1978, after the investors had carried out extensive studies and planning work and almost a year's worth of construction, the Egyptian government issued several decrees which had the effect of cancelling the project. Subsequent negotiations between SPP and the government to agree compensation broke down.

Chief among the challenges facing SPP was a major jurisdictional hurdle: while the government had signed the "heads of agreement" as a party, these contained no arbitration clause. The final joint venture agreement between SPP and EGOTH did contain such a clause – providing for ICC arbitration in Paris – but whether the Minister of Tourism's signature was sufficient to create jurisdiction over the government was highly uncertain.

Despite being a junior lawyer, Paulsson recalled his then boss at Coudert, W Laurence Craig, giving him the freedom to manage the case and decide the strategy, and telling him to "see how you get on".

An ICC arbitral tribunal was constituted to hear SPP's claim, comprising UK arbitrator Mark Littman QC (appointed by SPP), Egyptian Aly Elghatit (appointed by EGOTH and Egypt) and Italian Giorgio Bernini as chairman. In an aside, Paulsson noted that, at the time, the pool of international arbitrators was small and those there were were comparatively little known. It was therefore common to appoint tribunal members without having any detailed knowledge of their views.

He contrasted this with the situation today, where the mutual familiarity of counsel and arbitrators has the potential to impact on the deontology of arbitration (the subject of his now famous lecture, "Moral Hazard in International Arbitration", delivered at the University of Miami Law School in April 2010).

Returning to Pyramids, Paulsson recalled how, in an award issued in February 1983, the ICC arbitral tribunal determined, based on extensive evidence including testimony from the project's negotiators, that the Minister of Tourism's signature to the joint venture agreement meant that the government agreed not only to

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EGOTH's conclusion of the contract, but also to become a party to the contractual arrangements itself.

The arbitral tribunal then found Egypt liable to compensate SPP for the wasted costs of its investment and its foregone profits. EGOTH itself was not found liable, as it had been powerless to cancel or promote the project.

Egypt appealed the tribunal's jurisdictional findings of fact, including the meaning of the Minister of Tourism's signature of the joint venture agreement, before the Paris Court of Appeal. In a decision issued on 12 July 1984, the Paris court annulled the award - the same day that a Dutch court granted enforcement. The English Court of Appeal had already refused enforcement.

Paulsson recalled his disappointment with the Paris court's decision. How could a court which had not had the benefit of the live testimony which the ICC arbitral tribunal had heard be in a better position than the tribunal to make findings of jurisdictional facts? SPP appealed to the French Court of Cassation, which in January 1987 upheld the Court of Appeal's decision.

Paulsson, however, was determined not to give up. He looked again at Egypt's Law No. 43 of 1974, which also contained a jurisdictional section providing several options for the resolution of disputes between the government and investors, including ICSID arbitration.

At that time, the idea of a unilateral offer to arbitrate was virtually unheard of, Paulsson recalled – so much so, that the reaction he received from colleagues when he explained the idea was "that's not arbitration" and "how can you have an arbitration that only one party can start?" But once again, after they debated the question, Laurie Craig told Paulsson to "give it a try".

The ICSID arbitral tribunal comprised Robert Pietrowski, Jr (appointed by SPP), Mohamed El Mahdi (appointed by Egypt) and the late Eduardo Jiménez de Aréchaga, a Uruguayan former president of the International Court of Justice, as chairman. It issued two decisions on jurisdiction. The first, rendered in 1985, decided that it should wait until the French Court of Cassation's decision before proceeding; the second, rendered in 1988, decided by a majority that the jurisdictional provisions of Egypt's Law No. 43 of 1974 amounted to a unilateral offer to unknown potential investors to arbitrate disputes relating to their investments, which was capable of being accepted by an investor.

The second decision followed two oral hearings and turned, in part, on whether the Arabic text of Article 8 of Law No. 43 should be understood in an obligatory or optional sense.

The decision was pivotally important. Paulsson put the question, would there be anything left of investor-state arbitration today if a tribunal of this calibre had found that there was no jurisdiction?

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The ICSID tribunal went on to render an award of damages in SPP's favour in 1992. Egypt made an application for annulment of the award pursuant to Article 52 of the ICSID Convention, but the parties settled the dispute before this was decided.

Paulsson drew a number of conclusions from Pyramids.

First, that arbitration works – SPP's rights were vindicated and it secured compensation for its losses. Second, that it requires staying power: the dispute took 14 years to resolve during which he never gave up.

Paulsson also speculated that being new to international law and having a "simple understanding" of the issues had allowed him to present them more effectively to his potential client, who thus chose to retain him over more established international law heavyweights.

Turning to the human side of the dispute, Paulsson recalled the good relations he had had with his opposing counsel in the ICC arbitration, Egyptian Ahmed El Kosheri. The two became friends and recently appeared as co-counsel defending Egypt in the ICSID arbitration brought against it by Helnan International Hotels.

Paulsson's gratitude to Laurie Craig, his boss at Coudert, for allowing him the freedom to conduct the case himself and test his ideas in practice, was also a theme running through the lecture.

Paulsson emphasised that the dispute had concerned only compensation for SPP's lost investment; it was not an attempt to compel Egypt to reinstate the cancelled project. He also recalled that the project had been designed to respect the integrity of the pyramids' site and not to interrupt the view of it. Since illegal construction was going on around the pyramids at the time in any event, the project would have cleaned up the site, rather than disrupt it.

In a coda to his account, Paulsson noted that one of the original investors behind the Pyramids project, Peter Munk, is currently undertaking a destination tourism project in Montenegro, where he is regarded by the government as the best investor in the country.

Finally, Paulsson reminded the audience of his 1995 article "Arbitration Without Privity", written in light of the ICSID arbitral tribunal's 1988 decision, which is generally seen as a seminal article on jurisdiction in investment arbitration. Paulsson noted how the "blip on the radar" he identified in his article has turned into a new continent of investor-state arbitration.

But while the main conclusion of his article has proved to be right, the warning at the end still stands: "Arbitration without privity is a delicate mechanism. A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash." Paulsson closed by inviting the audience to decide for themselves whether this had happened.

The Arbitration Academy provides an annual advanced course in international arbitration, which runs for the first three weeks of July and is presided over by the global

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head of international arbitration at Shearman & Sterling, Emmanuel Gaillard.

It features a general course, taught this year by William W Park of Boston University on the role and the rule of law in international arbitration, as well as six special courses, taught this year by Gabrielle Kaufmann-Kohler, Eric Loquin, W Michael Reisman, Mahmoud Mohamed Salah, Hi-Taek Shin and James Castello.

The academy also features an annual inaugural lecture, this year given by Sergei Lebedev on the negotiation of the 1958 New York Convention.

The academy was created in 2011. This year it has accepted 124 participants of 56 nationalities representing every continent, and has awarded 30 scholarships to participants.

Coudert Frères, Paulsson's former firm, dissolved in 2006 after failing to reach a merger agreement with Baker & McKenzie. Many Paris partners joined Orrick or Dechert.

Please see gallery of photos below. Credit: Julie Cohen

Jean Claude Najar, with Paulsson's boss at Coudert, Laurie Craig, behind

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Emmanuel Gaillard, president of the Academy, introduces the lecture

The event took place on 10 July

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