The French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged: Is the Requirement of a "Flagrant" Breach Now Gone?

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For many years, the standard of review by French courts of awards rendered in international arbitration proceedings on grounds of violation of international public policy has been controversial. Scholars have debated the relative merits of a "*minimalist*" as opposed to a "*maximalist*" approach. In court decisions, the "*minimalist*" approach prevailed.

In the area of competition law, the "*minimalist*" standard of review found expression, perhaps most famously, in the 2004 Paris Court of Appeal decision in *SA Thales Air Defence v. GIE Euromissile and SA EADS France* (1er Ch., sect. C, 18 November 2004) with the requirement that relevant breach of international public policy be "*flagrant, actual and concrete" ("flagrante, effective et concrète")* on the face of the award. This standard was also applied by the French *Cour de cassation* in *Sté SNF v. Sté Cytec Industries BV* (1er Ch. civ., 4 June 2008), a challenge to an exequatur order alleging a breach of competition law. Proponents of the "*minimalist*" approach consider this standard to be justified by principles such as the finality of arbitration awards and the prohibition of the revision of awards on their merits by the courts. Critics have argued that the requirement of a "*flagrant*" breach of international public policy on the face of the award has led to a formalistic standard of review, which amounts to no real review at all.

Since the 2009 decision of the Paris Court of Appeal in the *Schneider* case, affirmed by the *Cour de cassation* in February 2014, it appeared that the same "*minimalist*" standard of review was also applicable with respect to the challenge of an award on the basis of allegations of corruption (cf. *Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH c. Sté CPL Industries Limited*, Paris CA, 10 September 2009; Cour de cassation, 1er Ch. civ., 12 February 2014). The ruling in Schneider departed from earlier decisions in challenges to awards based on corruption allegations. Previous case law permitted a review of the law and the facts insofar as they related to the application of the relevant rule of public policy (cf. *Sté European Gas Turbines SA v. Sté Westman International Ltd*, Paris CA, 1er Ch., 30 September 1993).

Decided shortly after the *Cour de cassation* ruling in *Schneider*, three recent Paris Court of Appeal decisions now suggest that the courts may, at least in the case of allegations of corruption, return to the previous position allowing for fuller review of facts and law in relation to the grounds for challenge. Most striking in these decisions is the absence of the word "flagrant" in the standard of review that has been applied.

In the first of these decisions, *Sté Gulf Leaders for Management and Services Holding Company* ("Gulf Leaders") *v. SA Crédit Foncier de France* ("CFF"), rendered on 4 March 2014, the Court formulated the standard of review as follows:

> "Where it is claimed that an award gives effect to a contract obtained by corruption, it is for the judge in set aside proceedings, seized of an application based upon article 1520-5° of the Code of Civil Procedure, to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality of the agreement and to appreciate whether the recognition or enforcement of the award violates international public policy in an actual or concrete manner." (Paris CA, Pôle 1, Ch.1)

The *Gulf Leaders* case involved a loan (USD 157.5 million) granted by CFF, payable in three tranches, and the subject of a USD 4.5 million underwriting fee. After payment of the first two tranches, CFF, for various reasons, refused to pay the third tranche and rescinded the loan contract, claiming repayment of the funds.

CFF commenced ICC arbitration proceedings against Gulf Leaders to recover the outstanding amount. Gulf Leaders contended that the loan contract was a product of corruption and therefore void for illegal cause, a defence that would have enabled it to avoid restitution. According to Gulf Leaders, CFF's payment of a USD 4.5 million fee to a Panamanian company, Riveroca, was a hidden commission (allegedly financed through the underwriting fee, said to have no basis), paid in view of the relationship between the company's manager and the CEO of Gulf Leaders at the time. The Tribunal found that corruption had not been proven and rendered an award in favour of CFF. Gulf Leaders challenged the award on grounds of violation of international public policy.

After reviewing the Tribunal's reasoning, the Court of Appeal considered the facts in light of its own definition of corruption in the conclusion of a private contract. Since it was not alleged that Riveroca's manager worked for Gulf Leaders, nor that Gulf Leaders' CEO had received any commission or advantage, the Court concluded that corruption had not been established. Further, it found that Riveroca's manager had participated in contract negotiations with representatives of Gulf Leaders, suggesting no concealment of activities, and he had been engaged by CFF as a Middle East expert. It was therefore only after conducting its own review of the facts on the record, and applying the relevant principle of law, that the Court dismissed the application.

In the second decision, *Congo v. SA Commissions Import Export* ("Commisimpex"), the Paris Court of Appeal applied the same standard of review (Pôle 1, Ch. 1, 14 October 2014). Commisimpex involved a 1992 agreement providing for a payment schedule for the repayment of debts owing by Congo to the claimant, a supplier in the context of public works. The arbitration proceedings involved a claim by Commisimpex based on a 2003 agreement, providing for an additional debt, and founded upon a letter dating from 1992, said to have recorded decisions taken at meetings in that year. The 1992 letter had apparently disappeared and was "rediscovered" in 2003. Congo alleged that this letter had been falsified. It also contended that the 2003 agreement could only be explained by "*a general climate of corruption*", of which Commisimpex had taken advantage, and was therefore void for illegal *cause*. Further, Congo questioned whether the signatories of the 2003 agreement had the requisite

powers. In a majority decision, the Arbitral Tribunal rejected Congo's arguments and enforced the 2003 agreement.

In set aside proceedings on grounds of violation of international public policy, Congo advanced three arguments: (i) the 2003 agreement was void for illegal *cause*; (ii) the arbitral tribunal's finding that a debt was owed had no evidentiary basis; and (iii) the signatories of the 2003 agreement lacked the requisite powers.

Applying the same standard of review as the Court in *Gulf Leaders*, the Paris Court of Appeal examined the reasoning of the tribunal and provided its own analysis of the facts to conclude that Commisimpex had not shown that the award gave effect to a contract that was obtained through corruption. The Court added that it could not be accepted, without ruining the binding force of contracts, that a State could free itself of contractual obligations by alleging "*a general climate of corruption*" within its administration without specifying the individuals involved and without the alleged beneficiaries being prosecuted. The Court refused to consider the second and third arguments (above) advanced by Congo on the basis that they were an invitation to the court to revise the award on the merits, which is not permitted in set aside proceedings.

Most recently, the Paris Court of Appeal in *SAS Man Diesel & Turbo France* ("Man Diesel") *v Sté Al Maimana General Trading Company Ltd* (Pôle 1, 1er Ch., 4 November 2014) applied the same standard of review to dismiss an appeal of an exequatur order regarding an award rendered in Switzerland (an application to set aside was dismissed by the Swiss courts). Among the grounds advanced, the appellant alleged that the enforcement of the award in France would violate international public policy since the relevant contract was tainted with corruption. After an analysis of the facts, the Court concluded that corruption had not been proven.

This trilogy of decisions from the Paris Court of Appeal suggests a shift towards more substantive review of awards on grounds of violation of international public policy, at least in cases of corruption. An application to set aside has been filed with the *Cour de cassation* in the *Gulf Leaders* case and such applications could still be filed in relation to the decisions in *Commisimpex* and *Man Diesel*. It therefore remains to be seen whether this approach will be upheld by the *Cour de cassation*. Should this be the case, another matter still to be determined is whether the requirement that the violation of international public policy be "*flagrant*" will be eliminated with respect to the review of awards in cases other than those involving allegations of corruption, as many scholars have recommended.

If the *Gulf Leaders* test is upheld, one of the future challenges for the courts will be to determine the extent to which an examination of the facts can and should involve going behind the findings of fact of the arbitrators, particularly where witness evidence is involved and the tribunal has had the benefit of observing the relevant witnesses. Weighing competing interests of finality of arbitration awards and safeguarding the fundamental values that are meant to be protected by international public policy (the content of which may also be debated) is an exercise where the right balance is often difficult to discern.