Kluwer Arbitration Blog

2022 Year in Review: Arbitration-Related Developments in France

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This post provides a review of the most noteworthy arbitration-related developments in France in 2022. In a nutshell, last year, French courts consolidated previous approaches and solutions endorsed in 2020 and 2021, and confirmed major developments of French arbitration law.

The Fear of a Substantive Review of Awards by the Annulment Judge

Are French judges reviewing the merits of an arbitral award, at least under specific grounds, without saying so? The debate arose after the 2017 *Belokon* decision of the Paris court of appeal in which it found that the arbitrators had not given proper weight to allegations of money-laundering, and that upholding the award would result in a breach of international public policy.

The Court of appeal subsequently confirmed this approach with decisions suggesting that it could conduct an entirely fresh review of the case on the ground of public policy (under Article 1520(5) of the French Civil Code of Procedure ("CCP")) as reflected in *e.g.* the *Sorelec* and *Cengiz* cases, and as already established for the control of the tribunal's jurisdiction under Article 1520(1) CCP (*e.g.* the *Schooner* and *Aboukhalil* cases).

In this context, the judgment of the *Cour de cassation* in the *Belokon* case was awaited, to see how the decision could be confirmed without allowing a substantive review of the merits of the award.

The *Cour de Cassation* engaged in a balancing exercise. It confirmed first that the Court of appeal is not bound by the arbitrator's previous assessment and reasoning and is not limited in its review "to elements of evidence produced before the arbitrators".

It then noted that the Court of appeal had reviewed (i) the parties' relations between 2005 and 2010, (ii) the circumstances surrounding the acquisition of the investment, (iii) the relations between the banks owned by the claimant, as well as (iv) the volume and structure of operations realized by the bank constituting the investment, *and not* the lawfulness of the underlying activities under domestic law or the State's compliance with the investment treaty.

The *Cour de Cassation* distinguished the annulment judge's control over arbitral awards from a review on the merits of the award because of their different finality, arguing that the Court:

> “has not undertaken a new instruction or a review of the merits of the award, but has made a different assessment on the facts based solely on the compatibility of the recognition or enforcement of the award with international public policy” (free translation).

The *Cour de Cassation* seized the occasion to modify its standard of review, ruling that the annulment of an award under Article 1520(5) CCP requires the demonstration of a “characterized breach” (“*violation caractérisée*”) of the French international public order. This test confirms the extension of the judges’ scope of control, further increasing the fear that French annulment judges are reviewing cases on the merits in that occasion.

The *Cour de Cassation*’s reasoning is highly debatable as the Court of appeal’s review is, as explained by the *Cour de Cassation* later in the year in *Sorelec*, a control of “the reality of the allegation”, which can be conducted “in examining all supporting evidence produced, be it or not previously submitted to arbitrators” (previously discussed on the Blog). The fear grew even more when the Court strongly stated that “no limitation is brought to its power to research in law and in fact all elements on [the allegation]”, as previously purported by the Court in *Santullo* in relation to corruption allegations. Such an extended review suggests that French courts are now reviewing awards on the merits, at least when addressing issues of compliance with French international public order.

To calm some fears that an extended maximalist approach would pave the way to a systematic substantive review, the Court outlined a slightly more balanced approach in the *Pharaon* case, where it recalled that its control “does not aim at ensuring that the arbitral tribunal has properly applied legal provisions” and would rather extend to the application of a foreign public policy rule only if it is also recognized under French public policy.

At the end of the year, the *Cour de Cassation* recalled in the same line that its review of the tribunal’s decision on its own competence under Article 1520(1) CCP was “exclusive of any review on the merits of the award” (*Oschadbank v Russia*).

Arbitrators’ Independence and Impartiality: The Continuity of Previous Years

As every year, independence and impartiality and the arbitrators’ duty of disclosure generate their share of interesting cases, confirming several trends seen in the previous years.

The Court continues to assess very broadly whether a fact is “well-known” or not, with direct effect on the scope of the duty of disclosure (under French law, a well-known circumstance is not to be disclosed). While it was previously determined that all information published on *GAR* is deemed well-known by the Court (*Vidatel* addressed in last year’s review), it is now also the case for articles accessible on the Kluwer Arbitration database (see *Bestful*), and more generally for any information accessible through a Google search.

2022 also confirmed that the Court assesses the scope of the arbitrators’ duty of disclosure with reference to the arbitration rules applicable to the arbitral proceedings, a trend now referred to as the so-called “contractualisation” of the scope of disclosure. With this approach, which reflects the importance of the ICC arbitration to French courts, the choice of the parties directly influences the

scope of what is or is not to be disclosed. While in *Couach*, *Pizzarotti*, and *Billionaire*, the scope of the duty of disclosure was assessed on the basis of (different versions of) the ICC Note to Parties and Arbitral Tribunals, interestingly, this scope was assessed in *Rio Tinto* on the basis of the parties' "procedural agreement" that links between the arbitrators or their respective firms and the parties should not bar them from being confirmed by the ICC Court.

Procedurally, it is interesting to note that a claim for lack of independence and impartiality is more and more raised under both Articles 1520(2) CCP (irregular constitution of the tribunal) and Article 1520(5) CCP (public policy). As reflected in *Bestful*, this helps to circumvent the waiver rule enshrined in Article 1466 CCP.

Investment Arbitration: A Busy Year

It was a busy year for domestic courts addressing investor-state disputes, and French courts were also part of this game. As reflected by the great number of investment awards scrutinized by French courts, Paris remains a leading seat for non-ICSID investment arbitrations. Two investment awards were annulled by the Court of appeal (*Strabag v. Poland* and *Slot Group v. Poland*) while annulment was confirmed by the *Cour de Cassation* in two cases (*Belokon* and *Sorelec*), thus leading to an exceptionally high annulment rate of investment awards–a trend that can be witnessed since 2016.

In a context where several EU member states have declared that they would denounce the ECT rather than endorse a modernized version of the treaty (previously discussed on the Blog), France did so in late October 2022–a decision perhaps also motivated by the first ECT claim which was initiated this year against France by German investors in relation to renewable energy generation companies allegedly affected by a domestic budgetary law. The official withdrawal notice was later sent in December 2022 and will be effective in 20 years.

French Courts' Application of European Law and Impact on Arbitration in France

In line with the ECJ's recent rulings in *Achmea*, *Komstroy* and *PL Holdings*, two investment awards were set aside based on the intra-EU argument, taken as a matter of public policy (see *Slot Group* and *Strabag*), despite the investors' argument that both the EU and the European Court of Human Rights' criticism against Poland's latest judiciary reforms should have justified dismissing Poland's request for annulment.

The Court of appeal took an opposite view and simply applied *Achmea*, stating that it was not its role to review the Polish judiciary reforms, nor to appreciate the conditions under which the investors would be likely to obtain compensation before domestic jurisdictions. This conclusion is highly debatable considering France's international commitments under the ECHR. The Court of appeal's refusal to review the investors' arguments on this ground suggests that the ECHR would not be applicable in the context of arbitration enforcement proceedings. Such approach is harmful to due process and the rule of law in Europe. Without asking the Court to go that far, investors could have hoped for, at least, a review similar to that of the Swedish Supreme Court in the *PL Holdings* case.

Both judgments confirm that investment arbitration is progressively excluded from the picture and will not be available as a resolution mechanism for intra EU investment disputes. This conclusion may also breach the investors' right to a peaceful enjoyment of possessions, as protected under the ECHR and applied to arbitral awards in the *BTS Holding* decision (further discussed on the Blog).

Refusal to Pay Advance on Costs and Inconsistent Challenge to the Courts' Jurisdiction

As discussed this year on the Blog, the *Cour de Cassation* ruled in *Tagli'apau* for the first time that a general duty of procedural loyalty is attached to the arbitration agreement (that would not be limited to that provided in Article 1464(3) CCP) prevents an inconsistent respondent from refusing to pay its share of the advance on costs and to subsequently challenge the jurisdiction of national courts. This will be useful to dismiss bad faith claims, thus improving the efficiency of the arbitration. It will also cause a party to compensate for the impecuniosity of its counterparty, to avoid the risk of having to sue it before domestic courts, depriving the arbitration agreement of any effect. Courts will have to address this issue in the future, at the cost of having solvent parties unduly taking advantage of it.

Applicable Law to the Arbitration Agreement: The End of the Saga

As discussed this year on the Blog here and here, the *Cour de Cassation* confirmed in the *Kout Food* case that, under French law, arbitration agreements are construed pursuant to the law of the seat unless there is an express choice of the parties–as opposed to what was held in England.

Conclusion

Many decisions were referred this year to the *Cour de Cassation* which, overall, confirmed the case law developed these recent years by the Paris court of appeal. However, a question mark remains in relation to the scope and intensity of the annulment judge review on grounds of public policy, leaving Paris, on this issue, very isolated among the leading arbitration seats.

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This entry was posted on Tuesday, February 7th, 2023 at 8:05 am and is filed under 2022 in Review, Advance on Costs, Annulment, Applicable Law, Duty to Disclose, France, International Public Policy, Intra-EU Investment Arbitration

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