

THE PUBLIC POLICY EXCEPTION IN INTERNATIONAL ARBITRATION: A SNAPSHOT FROM
FRANCE

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Abstract

The public policy exception for setting aside an arbitral award has long been the source of debate in jurisdictions far and wide. France is no stranger to this debate. Long having occupied the centre-stage in international arbitration, France has among the most modern laws on arbitration, and a rich body of jurisprudence, having dealt with a wide range of issues in the field. Nevertheless, it is witnessing further changes, not the least on the issue of resistance to the recognition and enforcement of awards on grounds of violation of public policy. This article looks at the manner in which this aspect has evolved in French jurisprudence, how the courts are grappling with changes in the nature of international commerce, and the ensuing impact on their approach, and finally it further speculates how this might evolve further.

I. Introduction

It continues to be the golden age of arbitration. Constant evolution in the field, coupled with the strides made by States that have hitherto resisted accepting arbitration amply demonstrate this. The thorn in the side of course that preoccupies parties and practitioners alike, remains in the form of problems of recognition and enforcement of arbitral awards.

As of today, 157 countries have ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [**“the New York Convention”**]¹ – and yet, getting a foreign arbitral award enforced still often presents a challenge. Resisting enforcement on public policy grounds occupies a place of honour, as it is seen as the most controversial ground on which parties resist enforcement of awards. This is because of the diversity in the approaches taken by different national courts in relation to the notion of public policy in international arbitration, and the risk that State courts will reassess the merits of the matter decided by the arbitrators under the guise of controlling public policy.

In this article, we will look at the manner in which French courts have treated the public policy argument in the context of international arbitral awards. It begins with a brief introduction to French law on international arbitration, and in particular, on recognition and enforcement of arbitral awards (section **II.A**), before examining, in brief, the scope of the review that French courts undertake when asked to set aside an arbitral award (section **II.B**). Then, we delve deeper to analyse the body of case law to reveal how French courts have grappled with the application of the public policy exception, historically and until fairly recently (section **III.A**), before examining the evolution

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¹ *Contracting States*, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/countries>.

in this position due to a spate of recent decisions of the French courts (section **III.B**). We conclude with musings on what these developments signify for recognition and enforcement of awards in France (section **IV**).

II. Review of international arbitral awards by French courts

Before taking a look at how French courts have grappled with the public policy aspect arising from enforcement of awards, it is important to set out the basic elements of French law on international arbitration, as well as the specific provisions dealing with recognition and enforcement of international arbitral awards.

France was among the first countries to have adopted a very favourable law on arbitration, back in 1981. In playing their part, French courts had always proven to be pro-arbitration: while courts would step in at the request of the parties, they refused to interfere in the arbitral process itself, and only undertook a very limited scrutiny of the award when a party sought to set aside or enforce the award. In France, arbitration is seen as a separate legal order in its own right, distinct from the legal order of individual States, even that of the seat of arbitration or that of the State in which a party wishes to enforce the award.² In short, France has time and again shown itself to be an arbitration-friendly jurisdiction, with substantive and procedural laws that encourage arbitration, ably aided by courts that can deal with issues arising out of an arbitration but resist interfering in the matter.

A. French legal regime governing review of international arbitral awards

French international arbitration legislation (that is not based on the UNCITRAL Model Law)³ was introduced in the French Code of Civil Procedure [**FCPC**] by Decree No. 81-500 enacted on May 12, 1981. This regime was reformed by Decree No. 2011-48 of January 13, 2011 (which entered into force on May 1, 2011) in order to further modernise the legal framework and incorporate the jurisprudence developed by French courts. As it stands, Title II, Book IV of the FCPC contains all provisions relating to international arbitration, with Chapter III under Title II focusing on recognition and enforcement of foreign awards or awards rendered in international arbitration proceedings.

French courts may review an arbitral award rendered in an international arbitration proceeding either when a dissatisfied party applies for setting aside the award,⁴ or files an appeal against the order of exequatur, i.e., the order granting enforcement of the award within one month of the service of the order or award.⁵ Since the 2011 reform, Article 1519 of the FCPC prescribes that parties may bring an action to set aside the award before the appellate court of the place where the award was made on the limited grounds listed under Article 1520 of the FCPC.

² Dominique Hascher, *France, The Review of Arbitral Awards by Domestic Courts*, in *THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS*, IAI SERIES NO. 6 97-110 (Emmanuel Gaillard ed., 2008).

³ United Nation Commission on International Trade Law [UNCITRAL], UNCITRAL Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) UN Doc A/RES/ 61/33 [*hereinafter* "Model Law"].

⁴ CODE DE PROCÉDURE CIVILE (C.P.C.), art. 1518 (Fr.) [*hereinafter* "FCPC"].

⁵ *Id.* art. 1523.

Article 1522 of the FCPC further allows parties to waive their right to bring an action to set aside an award. The parties nonetheless retain their right to appeal an enforcement order on any of the grounds mentioned in Article 1520 FCPC.

The only grounds on which a party may apply for an international arbitral award to be set aside or appeal against the order of exequatur are therefore contained in Article 1520 FCPC, and are as follows:

- the arbitral tribunal wrongly upheld or declined jurisdiction; or
- the arbitral tribunal was not properly constituted; or
- the arbitral tribunal ruled without complying with the mandate conferred upon it; or
- due process was violated; or
- recognition or enforcement of the award is contrary to international public policy.

Certainly, there are similarities between this provision and similar provisions contained in the New York Convention⁶ or the UNCITRAL Model Law⁷ but in this regard, Article 1520 and its interpretation by French courts are regarded to be more favourable to arbitration than other conventions to which France may be party to (such as the New York Convention).⁸

In this article, the authors will focus on French case law where parties have invoked the last provision, that of international public policy, to resist recognition or enforcement of an award.

B. Scope of review undertaken by French Courts

First, review of an award shall be applied for only on the grounds contained in Article 1520. The annulment judge will not review the reasoning of the arbitrators as this is not an appeal, and therefore, deficiencies in the arbitral tribunal's reasoning may not be argued.⁹

Second, French courts have held that the decision of the courts at the seat of the arbitration does not impact the validity of an arbitral award. French law treats an international arbitral award as an independent judicial decision that is not, in and of itself, related to any national legal order.¹⁰ As such, a solid body of French jurisprudence establishes that French courts can recognise and enforce awards that have been set aside elsewhere.¹¹

⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (June 10, 1958), art. V, 330 U.N.T.S 38 [*hereinafter* "New York Convention"].

⁷ Model Law, art. 36.

⁸ Denis Bensaude, *French Code of Civil Procedure (Book IV), Introductory Remarks*, in CONCISE INTERNATIONAL ARBITRATION 1133-1134 (L. Mistelis ed., 2d. ed. 2015).

⁹ Hascher, *supra* note 2, at 98, "*The review of the award is of a disciplinary nature. The case submitted to the arbitrators cannot be reheard; the court reviewing the award is not there to re-examine the dispute itself. Its role is limited to reviewing the award... There is therefore no substantive review, i.e., the courts are not supposed to determine whether the arbitrators' decision was right or wrong.*"

¹⁰ Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ. June 29, 2007, Bull civ. I, No. 250, Société PT Putrabali Adyamulia v. SA Rena Holdings, REV. ARB. 507 (2007) (Fr.) [*hereinafter* "Putrabali"].

¹¹ Cour d'appel [CA] [regional court of appeal] Paris, Feb. 12, 1993, Unichips Finiziaria v. Gesnouin, (1) REV. ARB. 255 (1993). In this case, the Paris Court of Appeal held that the Swiss Supreme Court's decision denying Unichips' application for setting aside the award on the basis of the Swiss Private International Law Act could not form the basis

III. The French approach to the Public Policy Exception

This section aims to provide a compendium of the landmark judgements in which French courts have delved into the public policy dilemma, and in so doing, will attempt to identify different trends in the courts' approaches.

A. Evolution in the Approach of the French Courts

Article 1520(5) contains the phrase 'international public policy', has been interpreted to denote "*the French conception of international public policy, that is the rules and values which cannot be violated within the French legal order, even in the framework of situations of an international nature.*"¹² The FCPC in this regard draws a sharp distinction between international arbitration and domestic arbitration, where 'public policy' is interpreted through the prism of French domestic public policy.¹³

While the notion of public policy has been largely unruffled in its understanding over the past decades, the level of control exercised by French courts has varied to the extent that three more or less distinct phases may be identified.¹⁴

At first, a 'maximal' approach to the review process was advocated – as was seen in the *Pyramids* case.¹⁵ This approach entailed an examination both in law and fact of the arbitrator's decision in order to ensure that *first*, public policy has been taken into account by the arbitrators and *second*, that it has been correctly applied in the case. The Court of Cassation stated that the court before which review was sought was not restricted in its power to examine all relevant facts and laws to determine whether the underlying award conformed to international public policy and due process was upheld.¹⁶

Then came the second phase – one whereby judicial review was limited to an examination of the award in light of the effects it produced. The control for conformity to public policy was seen as being limited to verifying the conformity of the decision or the effect of the award to public policy. This strict stance on the limits of review set upon the French courts made sense against the larger context of the pro-arbitration atmosphere in France.

of a setting aside action in France as the French courts could exercise its own review. This has subsequently been confirmed in the Hilmarton case (Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., June 10, 1997, Bull. civ. I, No. 104, *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV) (Fr.)*), the Chromalloy case (cour d'appel [CA] [regional court of appeal] Paris, Jan. 14, 1997, 95/23025, *République arabe d'Égypte v. Société Chromalloy Aero Services*) and in the Putrabali case (Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ. June 29, 2007, Bull. civ. I, No. 250).

¹² Cour d'appel [CA] [regional court of appeal] Paris, June 14, 2001, *SA Compagnie commerciale André v. SA Tradigrain France*, REV. ARB. 773 (2001).

¹³ Article 1484 FCPC in relation to awards rendered in domestic arbitration proceedings requires adherence to public policy while Article 1520 FCPC in relation to awards rendered in international arbitration proceedings refers to international public policy (i.e. the French notion of international public policy).

¹⁴ Charles Jarosson, *L'intensité du contrôle de l'ordre public*, in ERIC LOQUIN & SÉBASTIEN MANCIAUX, L'ORDRE PUBLIC ET L'ARBITRAGE 165-168 (2014).

¹⁵ Cour de cassation [Cass.] [supreme court for judicial matters] Jan. 6, 1987, *Southern Pacific Properties Ltd. v. Republic of Egypt* 'The Pyramids Case', REV. ARB. 469 (1987) (note by Philippe Leboulanger).

¹⁶ *Id.* at 474.

A clear enunciation in this second phase came in 2000, with a Court of Cassation decision where it held that in order to be set aside, an award must be found to contravene public policy in a “*flagrant, effective and concrete*” manner.¹⁷

Subsequent cases and doctrine have assisted in decoding these terms. For a violation to be considered flagrant, it must be “*discernible immediately by the annulment court while ‘effective’ is a violation that determines an actual conflict with public policy and ‘concrete’ suggests that a violation must result in a resolution that is materially contrary to public policy.*”¹⁸

This was incontrovertibly – or so it was thought at the time – confirmed in a landmark decision of the Paris Court of Appeal, *Thales v. Euromissile*.¹⁹

This dispute had arisen out of a 1991 agreement by virtue of which Euromissile had agreed to produce a category of Thales missiles and was granted exclusive rights of production and sale for the same. In 1998, Thales won a bid for the manufacture and sale of the same missiles to a third State-entity party. Thales approached Euromissile to discuss production of these missiles, but the two could not agree on a purchase price, following which Thales initiated arbitration proceedings alleging that Euromissile was in breach of the underlying agreement and then proceeded to unilaterally terminate the agreement itself.

The award ordered Thales to pay damages to the tune of Eur. 110 million for Euromissile’s loss of the exclusive production and sales rights. As per the tribunal, Thales was liable for unilaterally terminating the agreement.

In review proceedings before the Paris Court of Appeal, Thales alleged that the award violated international public policy as it gave effect to a contract that breached European competition law. Thales argued that it was of no consequence that neither party has raised the issue during the course of the arbitration as, according to Thales, the arbitral tribunal had an obligation to raise it of its own accord. Euromissile responded by stating that Thales was estopped from raising new arguments in relation to European competition law as it had not done so during the arbitration.

The Court of Appeal held that the failure to raise an argument based on European competition law during the arbitration did not – in and of itself – estop Thales from arguing this before the State courts. However, the Court ultimately dismissed the application. The Court held that – and seen herein is the tipping point to the next phase - for an award to be set aside on the basis of an international public policy violation, the violation has to be flagrant, effective and concrete.

¹⁷ Cour de Cassation [Cass.] [supreme court for judicial matters] Mar. 20, 2000, Verhoeft v. Moreau, Yves Derains (note), REV. ARB. 805 (2001).

¹⁸ Piero Bernardini, *The Scope of Review in Annulment Proceedings*, in INTERNATIONAL ARBITRATION AND PUBLIC POLICY 167 (Devin Bray & Heather L. Bray eds., 2015).

¹⁹ Cour d’appel [CA] [regional court of appeal] Paris, Nov. 18, 2004, *Thalès v. Euromissil*, REV. ARB. 751 (2005); S. Bollee, REVUE CRITIQUE DU DROIT INTERNATIONAL PRIVE 104 (2006); Denis Bensaude, *Thalès Air Defence BV v. GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law*, 22(3) J. INT’L ARB. 239 (2005).

The Court further stated that the allegation of a violation of public policy does not permit derogating from French rules of procedure whereby an arbitrator's decisions may not be reviewed on its merits, nor does it permit a judge to revisit the finality of the award. Since the invalidity of the agreement for its violation of European competition law had not been raised and argued before the tribunal, the alleged violation was evidently not "flagrant" and the setting aside application could not be allowed.

This position was later confirmed by the Paris Court of Appeal in the *SNF v. CYTEC* case.²⁰ In this case, Cytec, a Dutch Chemicals supplier began arbitration against SNF, a French producer of polymers for water treatment plants, for the breach of a long-term supply agreement. SNF sought the annulment of the supply agreement on grounds of an alleged incompatibility with European competition law. The arbitral tribunal considered SNF's submissions but declined to annul the agreement.

SNF challenged the enforcement of the award arguing, like in *Thales*, that the enforcement of the award would contravene international public policy as its enforcement would entail a violation of European competition law. The Court of Appeal dismissed the challenge and in so doing, expressly sought to limit the scope of application of the *Pyramids* case.²¹ The Court explained that it certainly, as per the terms of Article 1520 of the FCPC,²² had the power to consider legal and factual elements in undertaking the review of an arbitral award for conformity with international public policy. However, the review itself was limited to that of the award and not of the arbitral process. The Court stated that its scope of review was only extrinsic as it entailed only an examination of "*the recognition or the enforcement of the award and its compatibility with international public policy*", thereby confirming the principles set forth in its previous decision (in *Thales*).

In a subsequent appeal brought before the Court of Cassation, the Court reiterated in simple terms that the alleged violation of international public policy is required to be 'flagrant, effective and concrete' in nature.²³ The Court found, after having exercised its power of review within this limited scope and without an examination of the substance of award, that the recognition and enforcement of the award was appropriate.

And thus, the mantra of this second phase was concretised – courts were not to use their control to decide once again what the tribunal had already decided and that, in essence, the control was to be seen as 'extrinsic'.

²⁰ Cour d'appel [CA] [regional court of appeal] Paris, Mar. 23, 2006, *SNF v. Cytec*, Dalloz, S. Bollee (note), REV. ARB. 100 (2007).

²¹ Jarosson, *supra* note 14, at 166.

²² CODE DE PROCÉDURE CIVILE (C.P.C.) art. 1502 (Fr.) (prior to the reform in 2011).

²³ Cour de Cassation [Cass.][supreme court for judicial matters] June 4, 2008, *SNF v. Cytec*, I. Fadlallah (note), REV. ARB. 473 (2008); F.X. Train (note), GAZETTE DU PALAIS, 32 (Feb. 2009); Alexis Mourre, JOURNAL DU DROIT INTERNATIONAL, 1107 (2008).

B. Recent Cases: Bucking the trend or setting a new one?

Here we embark on the third discernible phase: that of a creeping return to stricter control and a wider scope of review by the court.

In 2009, in *Linde AG v. Halyvourgiki AE*, the Paris Court of Appeal made a sharp steer towards a stricter degree of control in the setting aside proceedings in arbitration. This dispute arose from a 2002 contract for supply of liquid gas by Linde, a German producer of liquid gas, to Halyvourgiki AE, a Greek operator of steel mills. A dispute arose subsequently as the amount of liquid gas produced by Linde exceeded Halyvourgiki's needs and therefore, it sold the excess gas to third parties. The arbitral tribunal found that Linde had breached the 2002 contract by such sale to third parties.

Linde subsequently applied to the Paris Court of Appeal to set aside the award by arguing that the decision of the arbitral tribunal and the specific directions it imposed on Linde, resulted in an interpretation of the contract such that it resulted in a production limitation placed on the supplier, thereby violating Article 81 of the EC Treaty in a 'flagrant, effective and concrete' manner.²⁴ Halyvourgiki argued that Linde had not raised this argument before the tribunal and that regardless, the reviewing court was could not re-examine the tribunal's award on its merits.

The Court of Appeal when examining the admissibility of the application, first reiterated the party line: to set aside an award, the breach of public policy rules should be flagrant, effective and concrete but then went on to hold that when a party raises a public policy challenge, the court could examine in law and in fact, the elements contained in the award.²⁵ Commentators have noted that the court went as far as to state that it could conduct an examination in law – seen as harking back to the “*Pyramids formula*” i.e., that of a larger scope of review by French Courts.²⁶

Then came a series of developments in 2014 which set in motion a see-saw between the maximal and minimal approaches, finally settling on one side. One interesting aspect tying these together - as seen below – is the allegations of corruption by a party.

The first in this series was a February 2014 decision of the Court of Cassation in *Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH v. Sté CPL Industries Limited* [“**Schneider**”]²⁷, on an appeal arising out of a 2009 decision of the Paris Court of Appeal.²⁸

In the *Schneider* case, the parties had entered into an exclusive promotion contract and a joint venture agreement whereby CPL Industries and other Nigerian companies were to provide Schneider with assistance in the negotiation and performance of public tender contracts in Nigeria. A dispute arose

²⁴ Cour d'appel [CA] [regional court of appeal] Paris, Oct. 22, 2009, 08/21022, *Linde AG v. Halyvourgiki AE*, F.X. Train (note), REV. ARB. (October 2009) [*hereinafter* “Linde”].

²⁵ *Id.* ¶ 30.

²⁶ Jarosson, *supra* note 14, at 167.

²⁷ Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 12, 2014, *Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH v. Sté CPL Industries Limited* (Fr.).

²⁸ Cour d'appel [CA] [regional court of appeal] Paris, Sept. 10, 2009, 08/11757, *M Schneider Schaltgeratebau und Elektroinstallationen GmbH* [Austria] v. *CPL Indus. Ltd.* [Nigeria] (Fr.).

from this agreement due to which CPL Industries commenced arbitration proceedings and sought the payment of certain outstanding sums of money for services provided. Schneider argued that in order to obtain the public tender contracts, CPL Industries had bribed Nigerian officials and that therefore, the contracts were in violation of Nigerian public policy. The sole arbitrator found that the evidence was insufficient to establish corruption by the officials of CPL Industries and accordingly, ordered that Schneider pay these sums due to CPL Industries.

In the setting-aside proceedings, Schneider alleged that the enforcement of the award would entail a violation of French public policy, alleging fraud and corruption and stating that the arbitrator had failed to draw the appropriate legal consequences from the factual evidence presented to him, and that the award effectively rendered corruption permissible.

When seized with this application in 2009, the Paris Court of Appeal rejected these arguments. The court noted that its role was restricted to examining whether the enforcement of the award would violate French international public policy, and whether such violation was ‘flagrant, effective and concrete’; and seeing as it was not the case at hand, the court rejected all of Schneider’s arguments related to public policy.

Five years later, upon appeal, the Court of Cassation reaffirmed the decision of the Court of Appeal and seemed to wish to continue with the minimalist approach in review of arbitral awards – even in respect of challenges based on allegations of corruption.²⁹

Then came an interesting wave of decisions – the first arising roughly twenty days after the *Schneider* decision – where French courts seemed to signal a return to an approach of undertaking a deeper review of law and facts, but mainly in cases involving allegations of corruption.

The first case in this regard was *Sté Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France* [“**Gulf Leaders**”].³⁰ This case involved a loan (USD 157.5 million) granted by SA Crédit Foncier de France (CFF) to the Gulf Leaders for Management and Services Holding Company, payable in three tranches, and subject to a USD 4.5 million underwriting fee. After payment of the first two tranches, CFF refused to pay the third tranche and rescinded the loan contract. It then commenced ICC arbitration proceedings to reclaim the amounts already paid.³¹ The opposing party argued that the underlying agreement was a product of corruption and that therefore it was not obliged to return the money already received.

²⁹ Cour d’appel [CA] [regional court of appeal] Paris, Oct. 22, 2009, 08/21022, *Linde AG v. Halyvourgiki AE, F.X. Train* (note), REV. ARB. (October 2009).

³⁰ Cour d’appel [CA] [regional court of appeal] Paris, Mar. 4, 2014, *Sté Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France* (Fr.).

³¹ For a detailed analysis on this case, see Patricia Peterson, *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?*, KLUWER ARB. BLOG (Dec. 10, 2014), <http://kluwarbitrationblog.com/2014/12/10/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/>.

The tribunal however did not accept this argument of alleged corruption and decided in favour of CFF. Gulf Leaders challenged the recognition and enforcement of the award on grounds of violation of international public policy.

The Court of Appeal first examined the reasoning of the arbitral tribunal in the underlying award and looked at the various factors taken into consideration to decide that corruption had not been materially established. Following this, the Court of Appeal further developed its own reasoning after conducting a review of factual and legal elements.³²

It first declared that corruption in conclusion of a contract presupposes that there be – whether directly or indirectly – a promise of an added benefit or advantage to a person for performing or abstaining from the performance of his duty or contractual obligation. The Court then re-examined all allegations of corruption and found that they were each justifiable and did not raise any suspicions of corruption.³³

There are two takeaways from this decision: first, that Paris Court of Appeal looked at the reasoning of the tribunal but nevertheless conducted its own review of the facts and principles of law before arriving at its decision; and second, that this approach was further validated and confirmed by the superior court in an appeal arising from this decision.³⁴

This represented a clear departure from the approach adopted by Court of Appeal until 2009 (and reaffirmed just days earlier in 2014 by the Court of Cassation). Another noteworthy aspect is that the requirement that a violation be “flagrant” was not iterated by the Court of Appeal.³⁵

The next decision was rendered in the *Commisimpex* case³⁶ that involved a 1992 agreement providing a payment schedule for the repayment of debts owed by Congo to the claimant, a supplier of public works. A previous arbitral award rendered in 2000 had ordered Congo to pay certain amounts in light of the 1992 agreement. In 2003, the parties entered into another agreement in relation to Congo’s outstanding debts as above. In April 2009, since Congo had defaulted on its payment under the above agreement, Commisimpex commenced arbitration proceedings under the 2003 agreement, which resulted in an award in its favour.³⁷

In setting-aside proceedings, Congo argued that recognition of the sentence would result in the violation of international public policy and would result in money laundering. Congo argued, *inter*

³² Louis Christophe Delanoy, *Les allégations de corruption et le contrôle de la sentence au regard de l'ordre public: vers un revirement de la Cour de cassation? note sous Cass civ 1re, 24 juin 2015*, (1) REV. ARB. 221, 226 (2016).

³³ Cour d’appel [CA] [regional court of appeal] Paris, Mar. 4, 2014, *Sté Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France* (Fr.).

³⁴ Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ, June 24, 2015, *Sté Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France* (Fr.).

³⁵ Delanoy, *supra* note 32, at 224.

³⁶ Cour d’appel [CA] [regional court of appeal] Paris, Oct. 14, 2014, *Congo v. SA Commissions Import Export* (Fr.) [*hereinafter* “Commisimpex”].

³⁷ See also Peterson, *supra* note 31.

alia, that the 2003 agreement was void as its object was illegal and that it was concluded in a general climate of corruption.

Applying the same standard of review as the court in *Gulf Leaders*, the Paris Court of Appeal examined the reasoning of the tribunal and then, re-examined the facts of the case in light of allegations of corruption put forward by Congo. It found that each of the allegations presented as ‘suspicious’ had plausible explanations in contemporaneous evidence, and that therefore, Congo had not demonstrated that the arbitral award would give effect to a contract that was concluded by using corrupt methods or in a general climate of corruption.³⁸

Rounding off the year was the *SAS Man Diesel & Turbo France v. Sté Al Maimana General Trading Company Ltd.* [“**Man Diesel**”] case.³⁹ Like in the above discussed cases, a challenge against an award was made before the Paris Court of Appeal and among other grounds, the appellant alleged that the enforcement of the award in France would violate international public policy since the relevant contract was tainted with corruption.

The Paris Court of Appeal undertook the same exercise wherein it re-examined the arguments and the allegations of corruption. It first looked at the reasoning of the tribunal and subsequently, conducted an analysis of the facts at hand, and held that each of the allegations of appearance of corruption were in fact justifiable by contemporaneous facts and evidence and therefore, dismissed an appeal of an order of exequatur regarding an award rendered in Switzerland (where the Swiss courts had also dismissed an application to set aside the award).

In taking note of this trend, established within one year, authors recognise this as having become formulaic: if an award is alleged to give effect to a contract tainted by corruption, then it falls upon the court, if asked to set aside the award on public policy grounds, to analyse both in fact and in law all elements that may enable the court to rule on the nature of the underlying contract and whether or not, giving effect to it would result in the violation of public policy.⁴⁰

This current of wider review in cases involving allegations of corruption evidently begs the question – does it stop here or is there a possibility for a larger scope of review in disputes that affect other aspects of public policy?

The recent decision of the Court of Appeal in *Valeri Belokon v. The Kyrgyz Republic* [“**Valeri**”] is relevant here. In this case, the Paris Court of Appeal, in February 2017, annulled an UNCITRAL

³⁸ Valentine Chessa, *La République du Congo v. S.A. Commissions Import Export, exerçant sous l'enseigne Commisimpex*, Court of Appeal of Paris, 14 October 2014, (contribution by the ITA Board of Reporters, KLUWER LAW INTERNATIONAL).

³⁹ Cour d’appel [CA] [regional court of appeal] Paris, Nov. 4, 2014, *SAS Man Diesel & Turbo France* (“**Man Diesel**”) v. Sté Al Maimana General Trading Company Ltd. (Fr.).

⁴⁰ Clément Fouchard, *L’intensité du contrôle de la contrariété d’une sentence à l’ordre public international par le juge de l’annulation: une confirmation mais encore des questions*, note sous Paris, Nov. 25, 2014, (2) REV. ARB. 555 (2015); See also, Comments on the Gulf Leaders case by French legal scholars including Louis Christophe Delanoy, REV. ARB. 955 (2014); S. Bollée, DALLOZ 1967 (2014); Comments on the Commisimpex case by French legal scholars including Denis Bensaude, (73) GAZETTE DU PALAIS, (Mar. 2015); Eric Loquin, RTD COM. 67 (2015); Thomas Clay, DALLOZ 2541 (2014); Comments on the Man Diesel case by French legal scholars: Denis Bensaude, (73) GAZETTE DU PALAIS, (Mar 2015); Eric Loquin, RTD COM., 67 (2015).

award⁴¹ directing the State to pay the claimant USD 15 million.⁴² The dispute between the parties arose under the Latvia-Kyrgyzstan BIT in 2010 during a period of political tension in the Kyrgyz Republic, when the State placed five banks, including one owned by the claimant, under temporary state administration. This was subsequently extended several times.

In 2011, the claimant, Valeri Belokon commenced arbitration under the UNCITRAL Rules alleging that the State had indirectly appropriated the bank. In an award rendered in October 2014, the arbitral tribunal found in favour of the claimant and ordered the State to pay him USD 15 million. In doing so, the tribunal rejected the State's defence that it had done so due to the claimant's involvement in money laundering and other criminal activities that violated Kyrgyz criminal law and public policy.

In its application before the Paris Court of Appeal to set aside the award, the State raised these arguments once again and adduced further evidence that another bank, held by the claimant in Latvia, had also been found to be in breach of anti-money laundering rules, after the award was rendered by the UNCITRAL tribunal. In its decision, the court first acknowledged that it could not look at whether the claimant had indeed engaged in money laundering, but rather could only check whether enforcement of the UNCITRAL award would lead to a violation of international public policy. Nevertheless, in its decision, the court first found that the tribunal had not given sufficient weight to the evidence adduced by the State, then took into account the new evidence, and after conducting a thorough factual and legal review, found that there was ample clear evidence that pointed to improper conduct on behalf of the claimant. The court recalled that it was required to determine whether recognition or enforcement of the award would undermine efforts against money laundering by, in essence, permitting the claimant to profit from its own criminal conduct. Accordingly, the court then set aside the award.

This case could be indicative of the next bastion – i.e., after introducing a stricter degree of control of review by the State courts in cases tainted by allegations of corruption, French courts may now be less reticent, and therefore more willing to conduct a strict review of even those arbitral awards that, if enforced, may result in benefiting a party that has profited from involvement in activities such as money laundering.

IV. Conclusion – Back to the Future?

As seen in the cases above, French jurisprudence wonderfully demonstrates the constant evolution in our interpretation of the notion of public policy and its interplay with international dispute resolution. At this stage, we are able to draw two primary – and at times, contradictory – conclusions: *first*, that international arbitration as a system of adjudication of disputes, is best served with efficiency in courts and finality of arbitral awards, and State courts must play their role in ensuring these are upheld by only allowing a limited scope of control in reviewing arbitral awards. *However*, courts are also guardians of public policy and therefore, may not shy away from examining

⁴¹ Valeri Belokon v. The Kyrgyz Republic, Award (Oct. 24, 2014).

⁴² Cour d'appel [CA] [regional court of appeal] Paris, Feb. 21, 2017, The Kyrgyz Republic v. Valeri Belokon (Fr.).

awards in a more meaningful and non-illusory manner, when enforcing them would lead to violations of public policy. Now, it remains to be seen whether in addition to corruption and money laundering, other violations of public policy will engender stricter control by French courts, and if this gradually turns into the general approach adopted by French courts.