Annulment No More? A String of Recent French Decisions Uphold or Reinstate Arbitral Awards

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The historic attractiveness of France as an arbitral seat recently came under the spotlight following several annulments of awards in the French courts (some of which we discussed here). In a recent string of decisions, the French courts have upheld or reinstated six arbitral awards, providing additional guidance on arbitrator non-disclosure, allegations of illegality, sanctions and public policy, and interpretation of treaty nationality requirements.

Arbitrator Non-Disclosure of Links with Third Parties. On 14 September 2021, in *NHA v. China International*, the Paris Court of Appeal rejected an application to set aside an ICC award for improper constitution of the tribunal because the sole arbitrator had failed to disclose certain links with a third party that had an interest in the arbitration. The Court reaffirmed that non-disclosure alone is not enough to justify disqualification, unless the non-disclosed facts give rise to a reasonable doubt in the parties as to the impartiality and independence of the arbitrator.

On the facts, the Court found that the arbitrator had no obligation to disclose the link with the third party and that, in any case, this undisclosed link did not give rise to a reasonable doubt as to his independence or impartiality. The Court noted that recommendations from the arbitral institution can inform the scope of the duty to disclose, referring specifically to the ICC's Guidance Note on conflict disclosures by arbitrators.

Scope of Review of Allegations of Illegality. In *Nurol v. Libya* on 28 September 2021 and *Aboukhalil v. Senegal* on 12 October 2021, the Paris Court of Appeal rejected applications to set aside two UNCITRAL investment treaty awards against Libya and Senegal on the ground that alleged illegality surrounding the investment deprived the tribunal of jurisdiction. The decisions echo the Court's earlier findings in *Cengiz v. Libya*, on 25 May 2021.

In all three cases, the Court found that the legality of the investment—an express requirement in each applicable treaty—was a question for the merits, which is not subject to *de novo* review at the set-aside stage. The Court also invoked the principle of

severability of the arbitration clause, noting that "when the arbitration clause results from a bilateral investment treaty, the standing offer to arbitrate is independent of the validity of the operation giving rise to the investment or underlying it." In *Cengiz* and *Nurol*, the Court also rejected the argument that the investment did not qualify as an investment under local law, reasoning that an investment under the treaty was not "defined by the laws and regulations of the host State," as this would make treaty protection dependent on the unilateral actions of the contracting parties.

Impact of Sanctions. In *DNO Yemen v. Yemen* on 5 October 2021, the Paris Court of Appeal rejected an application to set aside an ICC award ordering foreign investors to pay damages to the Yemeni Ministry of Oil and Minerals and a Yemeni State-owned entity, on the ground that satisfaction of the award would violate public policy. Specifically, the award debtors argued that paying the damages due to the State could ultimately benefit sanctioned persons, falling foul of the international sanctions imposed as a result of the civil war in Yemen.

The Court held that international human rights law, international humanitarian law, and UN and EU sanctions in relation to Yemen form part of the French conception of international public policy and that the conformity of an arbitral award with international public policy is assessed at the time of the Court's determination, regardless of "hypothetical future circumstances." On the facts, the Court conducted a detailed assessment of the evidence to conclude that there was no violation of public policy because there was no "serious, precise and concordant evidence" that the funds would benefit sanctioned persons.

Dual Nationality. In two cases challenging treaty tribunals' decisions on jurisdiction, the Court of Cassation and the Paris Court of Appeal rejected attempts to add jurisdictional requirements that the relevant treaty did not expressly contain. In the latest decision in the *Serafín García Armas v. Venezuela* saga, on 1 December 2021, the Court of Cassation reversed the Paris Court of Appeal's annulment of a treaty award against Venezuela (on which we had reported here). The Court held that, in finding that the investors had to hold Spanish nationality—and thus qualify as foreign investors—at the time of the investment, the Court of Appeal had "added to the treaty a condition that is not provided there."

Similarly, in *Aboukhalil v. Senegal* (discussed above), the Paris Court of Appeal allowed Senegal to plead a new jurisdictional argument that dual nationals do not qualify as protected foreign investors under the relevant investment treaty, which it had not previously raised before the tribunal (applying the decision of the Court of Cassation in *Schooner*, on which we reported here). However, the Court then rejected the dual nationality objection, reasoning that the treaty in question did not specifically exclude

dual nationals and that "there is no basis to add to the text [of the treaty] a distinction that the contracting parties chose not to make."

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The main takeaways from these six recent decisions are as follows.

- **Reliance on institutional guidance for scope of duty to disclose.** In *NHA*, the Court reaffirmed the principle that a mere failure to disclose does not constitute lack of independence and impartiality, as it had held in its June 2020 *Dommo* decisions (on which we reported here). The Court's reference to the ICC's Guidance Note to inform the duty of disclosure signals that guidance from the relevant institution may inform the scope of the duty to disclose in any given case, but it remains to be seen how much weight the Court will place on such guidance going forward—especially as the scope of disclosure may differ as between institutional guidance and other soft law rules like the IBA Guidelines on Conflicts of Interest in International Arbitration. For an in-depth discussion of the evolving duty to disclose under French law, see our analysis here.

- **Allegations of illegality are not subject to *de novo* review of the tribunal's jurisdiction.** The Court of Appeal's finding that the allegations of illegality in *Cengiz*, *Nurol* and *Aboukhalil* were a matter for the merits, not jurisdiction, means that, as a practical matter, the French courts' review of such allegations is limited and the judge cannot second-guess the tribunal's holdings. It is yet unclear how precisely French courts will implement the broad pronouncements made in these cases, depending on the language of the underlying bilateral investment treaty, and the timing and nature of the alleged illegality.

- **Whether sanctions warrant set-aside depends on when and how they are invoked.** In *DNO Yemen*, the Court clarified the scope of French international public policy. It confirmed that UN and EU sanctions are included, as it had held in *Sofregaz*, on which we reported here, as are international human rights law and international humanitarian law. The concept of public policy is not static, however: violations of international public policy are assessed at the time of the Court's determination. Thus, "hypothetical future circumstances" are irrelevant, in the same way as EU sanctions against Guinea no longer formed part of international public policy after they were lifted (as the Court had held in *ADT*). Equally notable is the Court's detailed legal and factual review of whether the specific sanctions in question were implicated in the given case, applying the standard of "serious, precise and concordant evidence."

- **The Court of Cassation as guardian against judicial overreach.** The reinstatement of the *Serafín García Armas* award illustrates the Court of Cassation's role in reining

in improper annulments (see our discussion here). Both the Court of Cassation and, in *Aboukhalil*, the Paris Court of Appeal rejected attempts to read additional jurisdictional requirements into treaties that are absent from their text—a welcome counterpoint to French courts' ability to review jurisdictional decisions *de novo*.

In the broader European context of distrust towards investment arbitration and in particular the jurisdiction of treaty tribunals in matters potentially involving EU law (on which we reported here), these decisions illustrate the role of the French courts—and ultimately of the Court of Cassation—in protecting and preserving France's pro-arbitration heritage and legacy.

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