Another Swing of the Pendulum: French Courts Confirm Expansive Review of Public Policy and Arbitral Jurisdiction

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The attractiveness of France as an arbitral seat has come under scrutiny in recent years after the French courts annulled several awards based on an expansive and *de novo* review of the tribunal's jurisdiction and of allegations of illegality that the tribunal had considered and rejected.[1] Despite a string of decisions that upheld or reinstated awards in 2021, the pendulum appears to have swung back in the other direction. In four high-profile decisions, all resulting in the annulment of the challenged award, the French courts have confirmed their expansive review of arbitral tribunal jurisdiction and the conformity of the award with public policy.

Expansive Review of Alleged Illegality. In a highly anticipated decision in *Belokon v. Kyrgyzstan* on March 23, 2022, the Court of Cassation confirmed the Paris Court of Appeal's annulment of a Paris-seated UNCITRAL award on the basis of a violation of public policy, confirming the French courts' expansive approach to allegations of illegality affecting arbitral awards.[2]

In that case, the arbitral tribunal had found Kyrgyzstan liable for indirectly expropriating a Latvian businessman's investment in a Kyrgyz bank, and had rejected the State's money laundering allegations as insufficiently "probative and substantive." The Paris Court of Appeal, however, disagreed with the tribunal and annulled the award: it found that the investor had in fact acquired the Kyrgyz bank for the purpose of money laundering, and concluded that enforcing the award would allow the investor to benefit from laundered proceeds in violation of international public policy.[3] In doing so, the Court conducted its own analysis of the evidence before the tribunal and also considered new evidence that was not before the tribunal, some of which post-dated the award.

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[1] See our previous updates: Annulment No More? A String of Recent French Decisions Uphold or Reinstate Arbitral Awards (20 Dec. 2021), here; Three Investment Treaty Awards Run the Gauntlet in the French Courts (19 Apr. 2021), here; Paris Court Sets Aside Arbitration Awards Based on Corruption Red Flags (14 Dec. 2020), here.

[2] Court of Cassation, March 23, 2022, No. 17-17.981 (*Belokon*).

[3] Paris Court of Appeal (Chamber 1-1), February 21, 2017, No. 15-01650 (*Belokon*).

On March 23, 2022, the Court of Cassation upheld this decision, rejecting the appellant's arguments that the Court of Appeal had engaged in an impermissible *de novo* review of the award's merits and had provided insufficient reasons for its decision.

The Court then confirmed the set-aside of the award on the grounds that it violated international public policy in a "characterised" manner. In doing so, the Court confirmed that, at the set-aside stage, the reviewing court is "neither limited to the evidence produced in front of the arbitrators nor bound by their findings, assessments, and characterizations," and upheld the Court of Appeal's finding that the award violated public policy based on "serious, precise and concordant indicia" of money laundering, including the bank acquisition process, the bank's operations (nature, structure and volume of transactions), and the relationship between the investor and the President of Kyrgyzstan.

Just two weeks later, on April 5, 2022, the Paris Court of Appeal implemented this approach in *Santullo Sericom*, and set aside an ICC award in favour of a construction company for recovery of sums under public work contracts with the Republic of Gabon.[4] Although the arbitral tribunal had rejected the State's corruption allegations, the Court of Appeal, applying the same approach that the Court of Cassation had outlined in *Belokon*, concluded that there were "sufficiently serious, precise and concordant indicia" that the contracts were procured through corruption, and set aside the award on the grounds that it violated international public policy in a "characterised" manner.

In reaching this conclusion, the Paris Court of Appeal reviewed the corruption allegations *de novo*, including reaching its own evaluation of the probative value of the evidence before the tribunal—such as evidence that the minister received large sums of money as well as a money-stuffed Louis Vuitton bag—and new evidence that was not before the tribunal.

First *Achmea*-Related Annulments in National Courts. The EU's policy shift toward ending intra-EU bilateral treaty arbitration has engaged a new front: EU Member State courts have set aside an intra-EU treaty award for the first time since the German Federal Court of Justice set aside the *Achmea* award itself.

Since the CJEU's 2018 decision in *Achmea*, a series of further CJEU rulings and the conclusion of a treaty terminating intra-EU BITs, among other developments, have created profound uncertainty for investors (as we reported here). Although tribunals have on the whole rejected objections to their jurisdiction on the basis of *Achmea*, it was

[4] Paris Court of Appeal (Chamber 5-16), April 5, 2022, No. 20-03242 (*Santullo Sericom*).

only a matter of time before Member State courts would be called upon to address the implications of *Achmea* on enforcement and set-aside of arbitral awards.

In a pair of decisions rendered on April 19, 2022, the Paris Court of Appeal annulled two intra-EU BIT awards against Poland for lack of jurisdiction: a partial award in favour of Austrian investors Strabag and Raiffeisen Centrobank, and a final award in favour of Czech gambling investor Slot Group.[5]

In both decisions, the Court held that the treaties in question did not validly provide for arbitral jurisdiction and that the CJEU's reasoning in *Achmea* was generally applicable to intra-EU BITs regardless of their specific wording. Recalling the primacy of EU law in all EU Member States, the Court further held that jurisdiction cannot otherwise be established by recourse to the Vienna Convention on the Law of Treaties or to a substantive rule of international investment law. The Court also rejected arguments that the investors would have no neutral forum to bring claims in Polish courts, noting that the principle of mutual trust between the courts of EU Member States must prevail in the absence of a contrary decision from EU authorities and rejecting the investors' arguments based on recent decisions by the CJEU and the European Court of Human Rights on judicial independence in Poland.

What Next? The *Achmea*-based annulments are unsurprising given the EU's policy shift, the fact that EU Member State courts are bound to comply with EU law, and French courts' *de novo* review of arbitral jurisdiction.

In the short term, the immediate question for most investors in the EU is likely to be the prospect of successfully enforcing an intra-EU award outside the EU.[6] The European Commission's recently announced legislative initiative aimed at "clarifying and supplementing EU rules" on cross-border investment within the EU, including improving enforcement in disputes between investors and Member State governments, is still a long way off. It is unclear if these reforms will provide robust protection for investors, and they do not solve the immediate problem of the intra-EU awards that continue to accumulate against Member States in the meantime. Over the longer term, the EU and individual Member States may need to craft a solution for resolving these claims as an asset class.

Although it has long been accepted that French courts assess jurisdiction *de novo* at the award review stage, the standard of review for a violation of international public policy has been in flux. The 2004 decision of the Paris Court of Appeal in *Thalès,* whose

[5] Paris Court of Appeal (Chamber 5-16), April 19, 2022, No. 20-13085 (*Strabag and Raiffeisen Centrobank*) and Paris Court of Appeal (Chamber 5-16), April 19, 2022, No. 20-14581 (*CEC Praha and Slot Group*).

[6] The Future of Investment Law in the EU: A Practical Perspective (8 Dec. 2021), here.

approach was subsequently confirmed by the Court of Cassation, had established a high bar for set-aside on the basis of public policy—the violation had to be "manifest" (or "flagrant"), "effective" and "concrete."[7] Over the years, this standard has gradually eroded, the review of the French courts has intensified, and the bar for set-aside has effectively been lowered.

The landmark *Belokon* decision continues this trend. The Court now requires a "characterised" violation of public policy—a term that appears to more accurately reflect the Court's actual practice of effectively *de novo* review. Although this decision is likely to define the French courts' approach to issues of grave illegality for the foreseeable future, it is unclear if French courts will limit this approach to violations that they consider particularly serious, such as corruption or money laundering, or if it will govern international public policy review more generally. Either way, the tendency toward expansive court review appears to have spilled over beyond the question of jurisdiction.

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[7] Paris Court of Appeal, November 18, 2004, No. 2002-19606 (*Thalès*); Court of Cassation, June 4, 2008, No. 06-15320 (*Cytec*).

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