

Public Policy: Recent developments in France

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Kiev, 5 October 2015

Public Policy: definition

- **Public policy:**

- *“refers to matters which the laws of a state or state courts have determined to be of such fundamental importance that contracting parties are not free to avoid or circumvent them”*

J. Nuss QC, “Public Policy Invoked as a Ground for Contesting the Enforcement of an Arbitral Award, or for Seeking its Annulment” (2013) 7 Dispute Resolution International 119.

- *is “a sort of sentinel, an eager guardian with menacing eye, as a lokapala, a Shi-Tennô, who would protect the temple of the forum law, against foreign evil spirits”.*

G. Légier “Les rapports familiaux et l’ordre public au sens du droit international privé” (1999) Revue de recherche juridique 293, at p. 293.

Public Policy: NYC Article V(2)(b)

Recognition and enforcement of an arbitral award may also be refused if the competent authority of the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Public Policy: UNCITRAL Model Law

- **Article 34. Application for setting aside as exclusive recourse against arbitral award**
 - (2) An arbitral award may be set aside by the court ... only if:
 - (b) the court finds that: [...]
 - (ii) the award is in conflict with the public policy of this State.

- **Article 36. Grounds for refusing recognition or enforcement**
 - (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
 - (b) if the court finds that: [...]
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

Public Policy: France (CPC)

- **Domestic arbitration**

Article 1492

*“An award may only be set aside where:
(5) the award is contrary to public policy.”*

Article 1488

“No enforcement order shall be granted where an award is manifestly contrary to public policy”

- **International arbitration**

Article 1520

*“An award may only be set aside where:
(5) recognition or enforcement of the award is contrary to international public policy.”*

Article 1514

“An arbitral award shall be recognised or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy. [emphasis added]”

Public Policy: French case law – three periods

Regarding the intensity of the control, three periods can be delimited :

- **Period I** (pre 2000's): a relatively thorough control from the courts
- **Period II** (appr. 2000-2012): a restricted control following an increasingly pro-arbitration doctrine
- **Period III** (post 2012): a disagreement between the Court of Appeal and the Cour de Cassation

Public Policy: French case law – First period

“ The court had to review in fact and in law, all the elements allowing to confirm whether or not the rule pertaining to public policy had been applied”.

- *Plateau des pyramides, Cass. 1e civ., 6 Jan. 1987*

Public Policy: French case law – Second period

In order to be sanctioned, the arbitrator's breach of public policy must be established to be "flagrant, actual and concrete".

- *Verhoeft v. Moreau*, Cass. 1e civ., 21 March 2000

An award could be annulled only if it misapplied rules pertaining to public policy in a "flagrant, effective and concrete" manner.

- *Thalès v. Euromissile*, CA Paris, 18 Nov. 2004; *Linde*, CA Paris 22 Oct. 2009

Public Policy: French case law – Second period (cont.)

“ Whereas in respect of the international public order, the judge reviews the recognition and enforcement of the award only as to the compatibility of the award with public order, whereas this control is limited to verify that the alleged violation is not blatant, actual and concrete; [...]

the judge, who acted within the limits of his powers, that it to say, without revising the merits of the award, proceeded with the control of the award in light of EC competition law, has rightly pointed out that the recognition and enforcement of the award were not contrary to the international public order” [...]

- *SNF v Cytec, Cour de Cassation, 4 juin 2008*

Public Policy: French case law – Third period

Position of the Court of Appeal:

“When it is alleged that a contract was obtained through corruption, the annulment judge has to review in fact and in law all the elements to decide whether the arbitration clause is illicit and whether the recognition and execution of the award violate international public policy in a concrete and effective manner”.

- *Gulf Leaders, CA Paris 4 Mar. 2014; Republic of Congo, CA Paris, 14 oct. 2014*

“... in the absence of any allegation of fraud, it is of little importance that the exequatur of the Award - which is brought to the Court’s attention in the framework of the annulment proceedings - was granted before the exequatur of the decisions of the courts of [Burkina Faso]. From the resulting incompatibility of the award with the decision of the [Burkina Faso Court of Appeal] it follows that the award’s recognition and enforcement would violate the international public order in clear and concrete manner”.

- *SA Planor Afrique v Etisalat, CA Paris, 17 January 2012*

Public Policy: French case law – Third period (cont.)

Position of the Cour de Cassation:

“The judge acting in the set aside proceeding is able to rule on the admissibility of the award into the French legal system. He is not acting as the judge for the case which the parties agreed to submit to arbitration”.

- *Schneider*, Cass. Civ. 1, 12 February 2014

Thank you

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