FOLEY HOAG AARPI

KIEV ARBITRATION DAYS 2003

An Award Set-Aside: Connecting the Dots

Public Policy Implications for Arbitration: France

Thomas Bevilacqua, Partner, Foley Hoag, Paris Office

© 2013 Foley Hoag AARPI. All Rights Reserved.

Kiev, 14 November 2013

I. Preliminary Remarks

- **Broadly speaking, arbitrators sitting in France have the power to construe and apply requirements of the governing national law that rise to the level of public policy provisions.**

- In particular, arbitrators can decide the civil consequences, including contractual liability, when the arbitrating parties' relationship exists in a sector that is regulated by public policy provisions of law.

FOLEY HOAG AARPI

Examples (1):

- In a dispute involving a contract calling for payment of a royalty for use of a patented technology or pharmaceutical product, the tribunal can determine whether the patent was validly issued based on the existence of prior knowledge, in order to determine whether contractual liability exists between the disputing parties – *i.e.*, whether the contractual royalties are due. (Obviously the arbitrators have no power to confer patents but, in other words, they can assess civil consequences arising from obligations relating thereto.)
- Article L.442-6, 5° of the French Commercial Code, which makes it wrongful for a party to break off in an abrupt manner an established commercial relationship with another (*i.e.*, by not providing sufficient notice that takes into account a number of factors, the most important of which is the length of the relationship). This law considered to be a matter of public policy, and is a leading business tort in France. It is well established now that a jurisdictional objection based on the presence of the public policy consideration will fail.

FOLEY HOAG AARPI

Examples (2):

- Paris Court of Appeal, *Almira Films v. Pierrel*, 16 February 1989. The case arose in part from a false claim by one of the parties that it held an authorization from the French National Center of Cinematography, such authorization forming part of a regulatory scheme understood to rise to the level of public policy. A petition to set aside premised on the arbitrators' application of public policy rules failed. According to the Paris Court of Appeals, "*arbitrability must not be understood, so far as public policy is concerned, as meaning that arbitrators do not have the power to apply mandatory provisions, but merely that they must not decide cases which, by reason of the issues involved, fall within the exclusive jurisdiction of the national courts or where their decision would give its blessing to the infringement of a rule of public policy.*" (Rev. arb. 1989.711)

FOLEY HOAG AARPI

Examples (3):

- Paris Court of Appeal, *Labinal v. Sociétés Mors and Westland Aerospace*, 19 May 1993: "*Even though the economic public policy nature of EU competition law precludes arbitrators from granting injunctions or imposing fines, the arbitrators may nevertheless draw civil consequences from behavior which would be deemed illegal under the public policy rules directly applicable to the parties' relations*." (Rev arb. 1993.645) The case involved an allegation of an entente banned by European competition law in the course of a bidding process. One of the parties had challenged the tribunal's jurisdiction because the dispute was governed by public policy competition law rules.

Subjective/Objective arbitrability (1):

- Not every dispute may validly be submitted to arbitration. Some disputes are **objectively** not "arbitrable" as they arise out of certain matters for which the law prohibits arbitration; and others disputes are **subjectively** not "arbitrable" as they involve certain persons as parties.

- Article 2060 of the French Civil Code imposes limitations in both of these regards, though it is notoriously far from being a model of drafting clarity:

  "*It is **not permissible to submit to arbitration** matters of civil status and capacity of individuals, or relating to divorce or judicial separation of spouses, or disputes concerning public communities and public establishments, and, **more generally, all matters which concern public policy**.*

  Nevertheless, certain categories of public establishments of an industrial and commercial character may be authorized by Decree to submit to arbitration."

Subjective/Objective arbitrability (2):

- Objective: civil status of individuals, capacity
- Subjective: matters involving public entities, but this bar has been found inapplicable by the caselaw for at least 50 years to international commercial relations to which the State is a party (Galakis)

- Since "public policy" is not defined in Article 2060, it is left for the courts to decide on a case-by-case basis.

FOLEY HOAG AARPI

II. The public policy check by French courts (1)

- The requirement in French law that recognition and enforcement in France of the international arbitral award not be contrary to international public policy (Articles 1514 and 1520(5) French CPC).

- Article 1514: "*An arbitral award shall be recognized 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**.*"

FOLEY HOAG AARPI

II. The public policy check by French courts (2)

- Article 1520: "***An award may only be set aside where:***

  (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or

  (2) the arbitral tribunal was not properly constituted; or

  (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or

  (4) ***due process was violated; or***

  (5) ***recognition or enforcement of the award is contrary to international public policy****.*"

- These are the exclusive grounds for setting aside.

  Article 1525: "*An order granting or denying recognition or enforcement of an arbitral award made abroad may be appealed. […] The Court of Appeal may deny recognition or enforcement of an arbitral award only on the grounds listed in Article 1520.*"

FOLEY HOAG AARPI

II. The public policy check by French courts (3)

- NY Convention Article V:

"*1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […]*

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

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

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

FOLEY HOAG AARPI

French courts' application of the public policy check

- The rather superficial nature of the inquiry conducted by French courts, whether it be

- at the trial court level (recognition and enforcement order, the "*ordonnance d'exequatur*")

- or the appellate level
  - appeal of an order denying recognition and enforcement of an international arbitral award made in France [Article 1523 French CPC]
  - petition to set aside an international arbitration award rendered in France [Article 1520 French CPC]
  - appeal of an order granting enforcement of an international arbitral award made in France if the parties expressly waive their right to bring an action to set aside [Articles 1522 and 1524 French CPC]
  - appeal of an order granting or denying recognition and enforcement if the award was made abroad [Article 1525 French CPC]

FOLEY HOAG AARPI

Procedure (1)

- At the trial court level, “exequatur” constitutes little more than a mere formality carried out by the *Tribunal de Grande Instance*, which performs a *prima facie* review of the award. In France, the inquiry conducted is particularly favorable to the binding effect and efficiency of the award.
  - *Ex parte* process. Art. 1516
  - No need for originals of the arbitration agreement or even the award (compare this to other, more formalistic jurisdictions); translations no longer need to be certified.
  - No need to certify the post-issuance existence of the award.
  - The granting language is literally rubber stamped on the award itself. Art. 1517
  - No reasoned decision, unless exequatur is refused. Art. 1517
  - Far cry from the award recognition process applicable in certain other jurisdictions, where a full civil case is opened at the first instance court level, with discovery and motion practice.

Procedure (2)

- Article 1516 French CPC:

  "*An arbitral award may only be enforced by virtue of an enforcement order (exequatur) issued by the Tribunal de Grande Instance of the place where the award was made or by the Tribunal de Grande Instance of Paris if the award was made abroad.*

  Exequatur proceedings shall not be adversarial.

  Application for exequatur shall be filed by the most diligent party with the Court Registrar, together with the original award and arbitration agreement, or duly authenticated copies of such documents."

- Article 1517 French CPC:

  "*The enforcement order shall be affixed to the original or, if the original is not produced, to a duly authenticated copy of the arbitral award, as per the final paragraph of Article 1516.*

  Where an arbitral award is in a language other than French, the enforcement order shall also be affixed to the translation produced as per Article 1515.

  An order denying enforcement of an arbitral award shall state the reasons upon which it is based."

Extent of the review (1)

- French courts consider that an award can be denied recognition and enforcement or set aside if it violates international public policy in a "flagrant, effective and concrete manner" ("*de manière flagrante, effective et concrète*"). (*See* Paris Court of Appeal, *Thalès v. Euromissile*, 18 November 2004; French Court of Cassation, First Civil Chamber, *SNF SAS v. Cytec Industries BV*, 4 June 2008, Rev. arb. 2008.473.)
- A "minimalist" approach that advocates that the judge should be reticent to interfere with the effectiveness of awards and should limit his or her role to ensuring, without truly reviewing the substance of the award, that its enforcement would not severely impinge the fundamental values of the French conception of international public policy.
- The French position is based on the notion that the national courts are not in a position, on a request for recognition and enforcement or a petition to set aside, to judge a case that was not and cannot be argued on the merits before it; it is the province of the arbitrator to rule on all litigious matters, including those relating to the validity of the contract.

Extent of the review (2)

- According to Professor Fadlallah, what the reviewing court looks at are not abstract rules of public policy but the concrete application of those rules as performed by the tribunal.
  - And he elaborates further: What will not be recognized are awards that refuse to apply a mandatory rule of public policy to factual circumstances that have been found by the arbitrators to fall within that rule's scope. For instance, arbitrators who fail to annul a contract when, under their own findings, it is illegal under EU competition law. Another example: giving effect to a contract when it has been demonstrated that it was obtained by fraud. Or another: relying on proof that was obtained by fraud in order to found an award. (Note, French Court of Cassation, First Civil Chamber, SNF SAS v. Cytec Industries BV, 4 June 2008, Rev. arb. 2008.473)

Extent of the review (3)

- An award can run afoul of international public policy on both procedural and substantive grounds. See Paris Court of Appeal, Port Autonome de Douala v. White Nile Corporation, 1 March 2007 (Rev. arb. 2007.143):
  - enforcement of an award is incompatible with procedural international public policy when "fundamental rules of a fair trial have been violated" and with substantive international public policy when "fundamental legal principles have been breached to such a point that the result arrived at by the arbitrators is irreconcilable with the system of values essential to our legal order".

FOLEY HOAG AARPI

Procedural aspect (1)

- An arbitral award can be set aside or its enforcement may be refused in France if the arbitrators have failed to comply with due process (Article 1520(4) French CPC). The line between the due process ground and the international public policy grounds is not always entirely clear, and the former is sometimes considered as being subsumed in the concept of procedural public policy.

FOLEY HOAG AARPI

Procedural aspect (2)

- Examples
- Due process – right to be heard on all matters decided by the arbitrators
  - Late submitted documents, witness statements do not render the award subject to being set aside, as long as the other side has a chance to respond. French Court of Cassation, First Civil Chamber, Pakistan Atomic Energy Commission v. Société générale pour les techniques nouvelles, 7 January 1992 : "A légalement justifié sa décision de rejeter un recours en annulation l'arrêt qui retient qu'une partie avait été en mesure d'organiser, en temps utile, sa défense et que ni le principe de la contradiction ne celui de l'égalité des parties n'avaient été violés". (Rev. arb. 1992.625)
  - Increasingly, a check on whether arbitrators have submitted all decisive issues of law and fact for dispute. (Caribbean Nickel: lost profits claimed vs. loss of a chance to carry out a project theory applied in the award; award annulled. French Court of Cassation, First Civil Chamber, 29 June 2011, No. 10-23321)

Procedural aspect (3)

- Equality in the arbitrator designation process
  - French Court of Cassation, First Civil Chamber, B.K.M.I. and Siemens v. Dutco, 7 January 1992: "The principle of equality of the parties in the designation of the arbitrators is a matter which concerns public policy, which can only be waived after the dispute has arisen." (Rev. arb. 1992.470)
- Incompatibility between an award and an earlier court decision enjoying res judicata status
  - Paris Court of Appeal, Planor Afrique SA v. Emirates Télécommunications corporation "Etsalat", 17 January 2012. The court considered that an international arbitration award that was incompatible with an earlier rendered foreign court judgment (Ougadougou, Burkina Faso) that immediately enjoyed res judicata effet in France under an international judicial cooperation convention had to be set aside as violative of international public policy. (Rev. arb. 2012.569)

Substantive aspect (1)

- The review of compliance with international public policy exercised by the President of the *Tribunal de Grande Instance* is no more than a *prima facie* control. Even at the appellate level, the non-respect of international public policy generally must be obvious just from reading the award in order for annulment to be ordered.

FOLEY HOAG AARPI

Substantive aspect (2)

- Examples

- Non-recognition of awards that fail to respect public policy rules regarding corruption or fraud

  – Paris Court of Appeal, European Gas Turbines SA v. Westman International Ltd, 30 September 1993 (Rev. arb. 1994.359). The Paris Court of Appeal considered that a part of the award was contrary to international public policy as having been based on a fraud committed by one of the parties in the arbitration proceedings. That party had deliberately submitted documents designed to mislead the tribunal that it had incurred certain expenses – and hence suffered certain damages – which it had not.

  – Paris Court of Appeal, *Me Van Meensel ès qualité de curateur de Viva Chemical (Europe) NV v. Pétroval et autres*, 9 April 2009, RG no. 07-17.769. The Paris Court of Appeal vacates the Paris *Tribunal de Grande Instance*'s order granting enforcement of a consent award (« *sentence d'accord-parties* »). What was at issue was a fraudulent arrangement between two related entities having no real dispute between them to start an arbitration, and obtain in one day's time a settlement presented in the form of an award, in order to shelter assets from falling into the bankruptcy estate. The bankruptcy administrators of the company that had "lost" the arbitration appealed the order granting enforcement of the award, as they considered that it violated the rule of equal treatment of creditors, which constitutes a public policy rule. The Paris Court of Appeal ruled in their favor considering that the award was contrary to international public policy as it was obtained by fraud during the suspect period (time between cessation of payments and opening of bankruptcy proceedings).

FOLEY HOAG AARPI

III. Possible recognition/enforcement in France of awards annulled at the seat of arbitration

- Legal foundation

- New York Convention Article VII(1)'s more favorable right provision.

  Article VII(1):

  "*The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States* ***nor deprive any interested party or any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon****.*"

- Absence of a New York Convention Article V(1)(e) equivalent in French law (recognition and enforcement may be refused when the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made")

- French courts consider that awards are judicial decisions which are not anchored to a specific legal system. They are "international judicial decisions" ("*décisions de justice internationale"*) that can be recognized and enforced in France despite having previously been annulled at the seat of arbitration.

French jurisprudence regarding the recognition and enforcement in France of arbitral awards annulled at the place of arbitration (1)

- Examples:

  – French Court of Cassation, First Civil Chamber, *Hilmarton v. Omnium de traitement et de valorisation*, 23 March 1994 (Rev. arb. 1994.327)

  "[C]'est à juste titre que l'arrêt attaqué décide qu'en application de l'article 7 de la Convention de New York du 10 janvier 1958, la société OTV était fondée à se prévaloir des règles françaises relatives à la reconnaissance et à l'exécution des sentences rendues à l'étranger en matière d'arbitrage international et notamment de l'article 1502 du nouveau Code de procédure civile ***qui ne retient pas, au nombre des cas de refus de reconnaissance et d'exécution, celui prévu par l'article V de la Convention de 1958*** " ; *"la sentence rendue en Suisse était une sentence internationale qui n'était pas intégrée dans l'ordre juridique de cet Etat, de sorte que son existence demeurait établie malgré son annulation*".

FOLEY HOAG AARPI

French jurisprudence regarding the recognition and enforcement in France of arbitral awards annulled at the place of arbitration (2)

– French Court of Cassation, First Civil Chamber, *PT Putrabali Adyamulia v. Rena Holding*, 29 June 2007 (Rev. arb. 2007.507)

"*Mais attendu que la sentence internationale, qui n'est rattachée à aucun ordre juridique étatique, est une décision de justice internationale dont la régularité est examinée au regard des règles applicables dans le pays où sa reconnaissance et son exécution sont demandées ; qu'en application de l'article VII de la Convention de New York du 10 janvier 1958, la société Rena Holding était recevable à présenter en France la sentence rendue à Londres le 10 avril 2001 conformément à la convention d'arbitrage et au règlement de l'IGPA, et fondée à se prévaloir des dispositions du droit français de l'arbitrage international, qui ne prévoit pas l'annulation de la sentence dans son pays d'origine comme cause de refus de reconnaissance et d'exécution de la sentence rendue à l'étranger ; Que dès lors, c'est sans encourir les griefs du pourvoi que la Cour d'appel a décidé que la sentence du 10 avril 2001 devait recevoir l'exequatur en France*".

– Paris Court of Appeal, Egyptian Gen. Petroleum Corp. v. National Gas Co., 24 November 2011 (Rev. arb. 2012.134)