The European Arbitration Review

2020

France

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Across 15 chapters, and 88 pages, the European Arbitration Review 2020 provides an invaluable retrospective from 31 authors. Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

This edition covers Austria, England and Wales, Finland, France, Germany, Italy, The Netherlands, Norway, Poland, Portugal, Russia, Spain, Sweden, and Ukraine. Among the nuggets it contains:

GAR Global Arbitration Review

France

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Summary

INTRODUCTION

France has long enjoyed a reputation as a leading light of modern international arbitration.

First, France was an early adopter of a modern arbitration law, enacting decrees in 1980–1981 providing for a liberal arbitration regime (well before the Netherlands, Switzerland and England followed suit in 1986, 1987 and 1996 respectively). Second, French courts and French scholars have long been noted for their contributions to the field (when it comes, for instance, to the severability of the arbitration agreement, the arbitral tribunal's competence to rule on its own jurisdiction or the recognition and enforcement of arbitral awards annulled at the seat).[1] Third, Paris is the home of one the leading commercial arbitration institutions, the International Court of Arbitration of the International Chamber of Commerce (ICC) and hosts hearing facilities of the most frequently used investment arbitration institution, the International Centre for Settlement of Investment Disputes (ICSID). Fourth, according to a survey of users in the field, Paris is the second most preferred arbitral seat in the world[2] and France has been the most popular country of seat for ICC arbitrations in the past five years.[3] Finally, France is also well represented among parties and arbitrators: for ICC arbitrations in 2018, for example, France was the second-most represented nationality among parties[4] and the fourth-most represented nationality among arbitrators.[5]

Thus, Paris has a serious claim to being the historical centre and home of international arbitration. When it comes to international arbitration, to quote Rick Blaine of Casablanca fame, '[w]e'll always have Paris'.[6]

Much of this enduring success has to do with French arbitration law and the approach of French courts, which are rightly perceived as supportive of international arbitration. In this article, following a brief overview of the French law on arbitration, we highlight three of French arbitration law's most salient features:

- the enforcement of arbitration agreements and recognition of the negative effect of competence-competence;
- the recognition and enforcement of awards annulled at the seat; and
- the scope of French courts' power to review awards, including recent developments regarding investor-state arbitration and the treatment of allegations of serious illegality.

AN OVERVIEW OF THE FRENCH LAW ON ARBITRATION

The French law on arbitration is contained in 86 articles of the French Code of Civil Procedure (CPC) – articles 1442 to 1527. These provisions hail from a 2011 decree, which reformed the law governing arbitration and replaced the provisions promulgated in 1980–1981.[7] The goal of the reform was not fundamentally to alter French arbitration law, which was already liberal and pro-arbitration. Instead, the main purpose of the reform was to make French law more transparent and accessible to a foreign audience in a globalised competitive market of arbitration seats.[8] Because the 1980–1981 provisions were, in typical Napoleonic fashion, extremely pithy, many of the principles and rules of French arbitration law have been developed through case law.[9] A statutory reform could realign the text of the CPC and the practice of the courts. Further, comprehensive statutory reform was an opportunity to

modernise and refine certain features of French arbitration law to make it even more liberal and pro-arbitration.

The 2011 reform respected the traditional French dualist approach, distinguishing between domestic and international arbitration.[10] The provisions governing domestic arbitration are contained in articles 1442 to 1503 of the CPC and the provisions governing international arbitration in articles 1504 to 1527. One of the reasons why the international arbitration provisions are so few compared to the domestic ones is that article 1506 cross-refers to various domestic arbitration provisions applicable by default in international arbitration (subject to the parties' agreement).

THE NEGATIVE EFFECT OF COMPETENCE-COMPETENCE

The principle of competence-competence, as it is generally understood, provides that an arbitral tribunal is competent to rule on its own competence or jurisdiction. Thus, the principle speaks to the competence of the arbitral tribunal, not of the courts.

French law goes further.[11] The classic understanding of the principle recognises the 'positive effect of competence-competence'. Under French law, the principle has an additional aspect: its 'negative effect'. The 'negative effect' effectively recognises that the competence of the arbitral tribunal to rule on its own jurisdiction also implies that it should have priority over courts to exercise that competence.[12] It is for the arbitral tribunal to rule on its own jurisdiction in the first instance.

Thus, if an arbitral tribunal has already been seized of the dispute, then it has exclusive jurisdiction to rule on its own jurisdiction.[13] Moreover, even if an arbitral tribunal has not yet been constituted and seized of the dispute, courts must decline jurisdiction and defer to the future arbitral tribunal unless the arbitration agreement is 'manifestly void or manifestly not applicable'.[14] That is an extremely high threshold, requiring that it be self-evident on the face of the arbitration agreement that it is void or not applicable. For instance,[15] French courts have held that when the arbitration agreement refers to disputes concerning the interpretation and execution of the contract, and the dispute concerns its alleged nullity, the arbitration agreement is not manifestly inapplicable.[16] Further, an arbitration agreement that provides that 'the arbitrators will not be bound by any rule or deadline provided in the Code of Civil Procedure' is not manifestly void.[17] Any doubt implies that the decision on jurisdiction must belong to the arbitral tribunal in the first instance.

It is only at the end of the arbitral process, when the arbitral tribunal will have rendered its award and when a party seeks to annul the award or to have it recognised and enforced, that the courts will eventually be allowed to review the arbitral tribunal's jurisdiction.[18] This is a crucial point: the 'negative effect of competence-competence' is not a principle of exclusivity, but of priority only. When the courts review the arbitral tribunal's jurisdiction, they apply a de novo standard, assessing all relevant elements of law or fact.[19]

While the 'negative effect' principle has long been seen as a hallmark of French arbitration law,[20] it appears that the principle is progressively gaining recognition around the world, with one commentator mentioning Switzerland, Hong Kong, the Philippines, Venezuela, Singapore, India, Colombia and Brazil.[21]

THE ENFORCEMENT OF ANNULLED AWARDS

Another notable feature of French arbitration law is what has been called its 'universalist' (sometimes also referred to as a 'delocalised') conception of arbitration.[22] According to

this approach, the legal seat of the arbitration is largely (and perhaps even entirely) irrelevant, as international arbitration constitutes its own distinct legal order. Such a conception is typically opposed to a 'territoralist' approach, which sees the seat and its law as the necessary sources of the arbitral tribunal's authority and of the arbitral award's existence and validity.[23]

The universalist approach has multiple consequences, including for instance when it comes to the French court's power to support, as juge d'appui, arbitrations with no ties to France if one of the parties is exposed to a risk of denial of justice, for instance by appointing an arbitrator to break a deadlock in the constitution of the tribunal.[24] But the most notorious consequence of the universalist conception is that it permits the recognition and enforcement in France of awards annulled at the seat of the arbitration.

Under French arbitration law, as held in an unbroken line of decisions since 1984, including the famous Norsolor,[25] Hilmarton,[26] Chromalloy[27] and Putrabali[28] cases, annulment at the seat is irrelevant to recognition and enforcement in France.[29] That is because, as the French Court of Cassation notoriously put it in the landmark Putrabali decision in 2007:

> [a]n international arbitration award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.30

While the 1958 New York Convention provides that an award having been 'set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made' is one of the seven limited grounds on which a court may refuse to recognise and enforce an international arbitration award,[31] French law does not include such a ground. As a result, the French domestic regime is more favourable and applies to the recognition and enforcement of international awards instead of the New York Convention, as article VII(1) of the Convention expressly permits.[32]

While other courts, including US and Dutch courts, have enforced arbitral awards annulled at the seat where they found that the court decision annulling the award was fundamentally flawed,[33] under French law a decision to set aside the award at the seat may not only sometimes be disregarded, but it is also strictly irrelevant to recognition and enforcement of the award. In other words, under French law, the nature of and reasons for the decision annulling the award at the seat play no role in the decision whether to enforce the award or not.

COURT REVIEW OF AWARDS

Under French law, in the international realm, '[n]either an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award', subject to a narrow exception ('where enforcement could severely prejudice the rights of one of the parties').[34] Further, there are only five limited grounds for setting aside or refusing to recognise and enforce an award, as listed in article 1520 of the CPC:

- the arbitral tribunal wrongly upheld or declined jurisdiction;
- the arbitral tribunal was not properly constituted;
- the arbitral tribunal ruled without complying with the mandate conferred upon it;

- due process was violated; or
- recognition and enforcement of the award is contrary to international public policy.[35]

This is consistent with the general tendency of French law to support the finality of arbitral awards. However, a recent spate of annulment decisions has arguably cast a shadow across this landscape. According to a commentator, in the period January 2016 to May 2018, almost 25 per cent of set-aside applications in front of the Paris Court of Appeal[36] led to annulment.[37] That number seems high. By way of comparison, in the similar period 2016–2017, only slightly more than 7 per cent of set-aside applications in international cases succeeded in front of the Swiss Federal Supreme Court (leaving aside challenges in sports arbitrations, all of which failed).[38] As the same commentator notes, '[w]e are done with the myth of invulnerable awards, including in the international realm'.[39]

This statistic must be interpreted with caution. First, there is arguably a self-selection effect. Because, as just noted, the grounds for annulment are limited and a set-aside application is normally non-suspensive, it may be that only strong set-aside applications are being brought.[40] If it is right that fewer and stronger set-aside applications are being brought, one would expect more of them to succeed. But one would also then expect the proportion of awards challenged in France to have dropped.

Second, as explained above, it is a feature of French arbitration law that judicial control of the arbitral tribunal's jurisdiction is concentrated at the end of the process, as a result of the 'negative effect of competence-competence'. In other legal systems, arbitration proceedings can be stopped by the judge at the outset for lack of jurisdiction. In France, they are almost always allowed to proceed. If the arbitral tribunal then incorrectly finds that it has jurisdiction, it will get to render a full award and it is only at this point that the court will get to correct the jurisdictional mistake and annul the award. In other words, structurally, one would expect more annulments as a result of the application of the negative effect of competence-competence.

Third, it is difficult to make much of abstract statistics, because of course certain awards ought to be annulled.

While a comprehensive review of each set-aside decision is beyond the scope of this article, two significant recent trends suggest an increased level of judicial scrutiny.

The Review Of Investor-state Awards

Most investor-state awards are rendered under the auspices of the ICSID Convention. In such cases, the arbitration does not have a national seat. Under the ICSID Convention, review of the award, including through annulment proceedings, is entirely self-contained.[41] Thus, for ICSID Convention awards, national courts play no review role.[42]

But many investor-state awards are not ICSID Convention awards: consider, for instance, awards rendered under the ICSID Additional Facility rules and the 'parallel universe'[43] of investor-state proceedings under the UNCITRAL Arbitration Rules. These do have national seats, and review is decentralised and done by national courts, under the 1958 New York Convention framework and domestic arbitration laws.

France appears to have been a popular seat for non-ICSID Convention investor-state proceedings. Since 2008, there have been a dozen or so applications in the French courts

for set-aside of treaty awards.[44] A comprehensive review of such applications as of 2017 indicated that they had led to partial or total annulment in four out of nine cases.[45] And recent set-asides in high-profile cases have focused attention on the French courts' approach to such reviews.

The 29 January 2019 decision of the Paris Court of Appeal, partially annulling the ICSID Additional Facility award in the Rusoro v Venezuela case, is illustrative.[46] In the Rusoro arbitration, the relevant treaty provided that an investor may submit a dispute to arbitration only if, inter alia, 'no more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage'.[47] Because the claim was commenced on 17 July 2012, the cut-off date was 17 July 2009.[48] As a result, the tribunal found that certain actions taken by Venezuela in April and June 2009 – the '2009 Measures' – '[could not] result in enforceable claims'.[49] Having concluded that other actions by Venezuela had unlawfully expropriated the claimant's investment in 2011, the tribunal went on to consider quantum and ordered Venezuela to pay Rusoro US$966.5 million plus interest as compensation for the expropriation of its investment.

The French court found that the tribunal's assessment of quantum – a 'weighted combination' of three valuations[50] – contradicted the tribunal's finding on its jurisdiction over the 2009 Measures and that the tribunal had effectively compensated claimant for certain of the 2009 Measures even though they were outside its jurisdiction.[51] The court's key statement reads:

> By neutralizing the effects of the gold export restrictions decided in April 2009, the tribunal ended up in reality, as the applicant accurately observes, including in the compensation for the damage following the 2011 expropriation the indemnification for that [damage] resulting from the 2009 measures, even though it [the damage resulting from the 2009 measures] did not fall within its jurisdiction ratione temporis.52

Thus, the court set aside the portion of the award ordering Venezuela to pay Rusoro US$966.5 million plus interest, finding that the tribunal had exceeded its jurisdiction. While the tribunal had explicitly held that it did not have jurisdiction over the 2009 Measures, the court appears to have reasoned that the tribunal had implicitly assumed jurisdiction over these measures by failing to exclude their effect from its assessment of the damages caused by the 2011 expropriation. In other words, the court recast its review of the tribunal's quantum assessment as a jurisdictional issue, leading to a de novo review and to annulment.

Illegality And International Public Policy

In the past few years, French courts have scrutinised allegations of serious illegality affecting the validity of an award on several occasions, through the application of the international public policy ground for set-aside.[53] This development goes hand-in-hand with a proliferation of allegations of serious illegality in arbitral proceedings.[54]

The landmark 21 February 2017 decision of the Paris Court of Appeal annulling the UNCITRAL Arbitration Rules award in Belokon v The Kyrgyz Republic is emblematic.[55] In 2007, Mr Belokon acquired a Kyrgyz bank, Insan, which he renamed Manas Bank. Following political protests in the spring of 2010, which led to the deposition of President Bakiev, the government placed Manas Bank under government control in temporary administration and then initiated administrative and criminal proceedings against the bank, its management

and its board, and placed the bank in receivership. The bank was eventually declared bankrupt in 2015. Mr Belokon claimed that the destruction of his investment breached the Latvia–Kyrgyz Republic bilateral investment treaty (BIT). The Kyrgyz Republic answered that the government's decisions were all motivated and justified by the serious criminal activities in which Manas Bank and Mr Belokon engaged, particularly money laundering. The tribunal found that the government's actions violated the BIT and awarded Mr Belokon some US$15 million in compensation (plus interest).

While the tribunal found that '[i]f probative and substantial evidence of Manas Bank having be[en] actively involved in money laundering had been produced and presented to the tribunal, the claim under the BIT may have been defeated',[56] after examining the evidence 'with punctiliousness',[57] it held that the government had failed to establish that Manas Bank actually carried out money laundering activities. The tribunal's assessment of the evidence and its reasoning were thorough.

The Paris Court of Appealourt disagreed with the tribunal's evidentiary assessment. In a detailed decision, it reviewed the allegations of money laundering and found that there were 'serious, precise, and converging indicia',[58] that Mr Belokon and Manas Bank had engaged in money laundering. In the course of reaching this conclusion, the court discussed and expressly disagreed with many of the tribunal's factual findings. The Court held that recognising and enforcing the award would violate international public policy in a 'manifest, effective, and concrete manner' and annulled the award. In defining its role as a reviewing court, the court stated, in broad terms, that it had to 'satisfy itself that the enforcement of the award was not of such nature as to cause a party to benefit from the fruit of criminal activities'.[59]

The Belokon annulment decision has been described as an 'epistemological turning point as to the scope of the judge's control' over international public policy for two reasons.[60] First, practically, the court's evidentiary assessment was strikingly thorough and detailed. Not only did the court find that its enquiry 'was not limited to the evidence produced in front of the arbitrators, nor limited by the findings, assessments and qualifications made by them',[61] and that it had to make a de novo assessment of the facts and law,[62] it then actually conducted what a commentator has termed a 'real civil investigation'.-[63] Second, as a theoretical matter, the court relied upon a broad definition of its review function: it saw its task, as guardian of international public policy, as being to prevent parties from benefiting from 'the fruit of criminal activities'. This contrasts with previous decisions focused specifically on corruption and formulating the requirement of international public policy as '[not] giv[ing] effect to a contract concluded by corruption'.[64] The Belokon holding is broader in two ways: first, it refers to 'criminal activities' in general and not just corruption; second, it does not specifically refer to a contract procured or concluded by corruption or other illegality, but instead to the broader notion of 'benefit[ing] from the fruit of' illegality.

The trend towards greater scrutiny of allegations of illegality, under the guise of the international public policy ground for set-aside, was confirmed on 16 January 2018, when the Paris Court of Appeal in MK Group v Onix further expanded the scope of the international public policy ground for set-aside to encompass a prohibition on 'the fraudulent acquisition of an administrative authorisation, to which the legislation of [the state] conditioned the exploitation of the natural resources on its territory'.[65] Thus, the international public policy ground for set-aside can be triggered by 'fraud' in obtaining an administrative permit and not just by 'criminal activities'.

CONCLUSION

These developments in French case law occur in the broader European context of a public retreat from investment treaty arbitration as we know it. Instead of promoting the independence of arbitration, the current attitude of many EU member states and the European Commission is that they no longer trust it. It remains to be seen whether French courts will continue their historic legacy of deference to arbitral tribunals, or whether these recent cases augur a turning tide.

Endnotes

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