

ARTICLE

HAS "SERIOUS, SPECIFIC AND CONSISTENT" EVIDENCE OF A BREACH OF INTERNATIONAL PUBLIC POLICY BECOME A CRITERION FOR THE JUDGE'S REVIEW OF ARBITRAL AWARDS?

Litigation - Arbitration - White Collar Crime | 21/06/17 | Marie Danis



In annulment proceedings of arbitral awards, the judge acts as regulator of private justice. While France is known to be favourable to arbitration and respectful of awards, the position taken recently by the Paris Court of Appeals illustrates the desire to strengthen the review of awards where there is sufficient evidence that the international public order has been breached.

Checking whether an arbitration award complies with international public order has long been criticized. For fear of reviewing an award on the merits when ruling in annulment proceedings, which is not allowed under French law, courts have long limited their review to a *prima facie* check for potential breaches of international public policy.

Balance has been found, as perfectly illustrated by two recent decisions rendered by the Paris Court of Appeals in February and May 2017; they show how the judge's review of the award is adjusted in consideration of how significant is the evidence of breach of international public policy.

1. Moderate review in the absence of any serious, specific and consistent evidence of breach of international public policy

The decision rendered on 16 May 2017 (no.15/17442) was issued in a case relating to an agreement for the reorganization of the Office for Customs and Excise in Democratic Republic of the Congo (DRC). Annulment proceedings were started by the DRC against an award finding that the DRC was exclusively responsible for the termination of the agreement. In its action, the DRC claimed that public procurement contract rules had been breached due to the absence of any call for bids prior to the execution of the agreement, and claimed that this constituted acts of corruption.

The Paris court first stated as a reminder that: "*In a matter such as the instant case, annulment would not apply unless there is serious, specific and consistent evidence demonstrating that the award would result in giving force to an agreement obtained through corruption*".

The Court of Appeals then dismissed the argument based on the consideration that "*non-compliance with transparency rules applicable to public procurement contracts does qualify as particularly significant evidence of such offenses, [but] cannot be punished per se independently from any actual violation of the aim of combatting corruption*".

Yet, only a few months earlier, the court carried out a close review of the facts of the case.

2. Effective review where there is serious, specific and consistent evidence showing a high risk of breach of international public policy

The decision dated 21 February 2017 (no.15/01650) related to the annulment of an award deciding an expropriation dispute where a Latvian investor, who had purchased a bank in the Republic of Kirghizstan, prevailed. The Republic of Kirghizstan considered that the award contradicted the global fight against money-laundering and started proceedings before the Paris Court to have it annulled, on the grounds that it breached the international public policy.

The State's claim was supported by numerous facts to corroborate its allegations, thereby prompting the annulment judge to carry out a detailed review of the factual circumstances of the case. The Paris Court found (i) that the investor had very close ties with the Kirghiz President's son; (ii) that the bank's clients were offshore companies whose transactions generated no economic benefit; and (iii) that Latvian courts sentenced the bank for money-laundering practices just one year after the arbitration award was issued. The Paris court correlatively annulled the award and ruled that:

"there is serious, specific and consistent evidence that the purchaser took [the bank] over for the purpose of developing money-laundering practices in a State where his special ties with the person holding economic power would preserve his business and money-laundering practices from any effective inspection".

In this decision, the judge directly relies on a concept borrowed from French evidentiary law (new article 1382 of the French Civil Code), namely the existence of "*serious, specific and consistent evidence*" to adjust the intensity of its review of the existence of a breach of international public policy. From now on, provided such evidence exists, the judge may carry out a stronger review of the award, including by considering new evidence. In so doing, the judge avoids criticism relating to the absence of an effective review of international awards, without being blamed for reviewing them on the merits.