

ARTICLE

INTERNATIONAL ARBITRATION: THE FRENCH SUPREME COURT REFUSES TO GIVE EFFECT TO AN AGREEMENT OBTAINED THROUGH CORRUPTION

Litigation - Arbitration - White Collar Crime | 24/10/17 | Marie Danis



Fighting corruption is a priority in France. This has been evidenced in particular by the provisions of the "Sapin II" Act[1] and, more recently, by the report of the Council of Europe's Group of States against Corruption (GRECO) on the assessment of measures implemented in France to fight corruption.

As far as arbitration is concerned, this fight entails in particular that an arbitral award must be denied recognition and enforcement if it gives effect to an agreement obtained through corruption. In a decision of September 13, 2017[2], the French Supreme Court (*Cour de cassation*) specified the procedure for the review by the French courts of arbitral awards when such allegations are raised.

In a nutshell, when ruling on an application for exequatur of an award that allegedly gives effect to an agreement obtained through corruption, the court should review all of the evidence that may allow it to determine whether such award causes an evident, effective and tangible breach of the French concept of international public policy.

In the case at hand, the dispute stemmed from an agreement made in 2007, negotiated by an employee in charge of his company's fertilizers department for the purchase and delivery from another company of very large quantities of fertilizers. The purchaser agreed in particular to pay for the costs of any demurrage, *i.e.*, penalties due if the charterer exceeded the agreed chartering period for uploading and downloading operations. Difficulties subsequently arose in connection with the performance of said agreement and the dispute was referred to an arbitral tribunal.

Further to the allegation that the employee who had negotiated the agreement was guilty of corruption, and while criminal proceedings were initiated against him before French courts, the arbitral tribunal stayed its ruling and required the payment of a security in favor of the purchaser. The tribunal also stated that, absent such payment, it would not review the purchaser's counterclaim for fraud. The company, however, was wound up during the proceedings, the security was not paid, and the claim for corruption was not reviewed.

Two awards were issued in London in favor of the seller on May 6, 2015 on the merits, and on January 4, 2016 on court fees, respectively, and were later granted exequatur in France. Yet, on May 12, 2016, the Paris Criminal Court (*Tribunal correctionnel*) found the seller guilty of corruption vis-à-vis the suspected employee.

Article 1520 5° of the French Code of Civil Procedure provides a list of cases where action for annulment is available, and also governs appeals lodged against exequatur orders[3]. Both of the appeals logically lodged against the two exequatur orders were based on the grounds that "recognition and performance of the award [would be] against international public policy"[4]. The Paris Court of Appeals, in decisions issued on September 27,[5] and November 15, 2016,[6] respectively, overturned both exequatur orders.

The French Supreme Court upheld the Court of Appeals' decisions. In fact, although the appellant claimed that the alleged corruption was unrelated to the purchaser's obligation to pay demurrage, the Court reiterated the rule that had already been set out on several occasions in recent decisions to deny exequatur: "*recognition of the award would enable the company [...] to derive a profit from the corrupt agreement*".

The French Supreme Court used the new criterion set by the Paris Court of Appeals to determine the breach of international public policy. In two recent decisions[7], the Court of Appeals indeed annulled arbitral awards further to allegations of corruption, based on the existence of serious, specific and consistent evidence showing a high risk of breach of international public policy.

In the case referred to the French Supreme Court, the acts of corruption no longer needed to be proved as they had already been ascertained by a French Criminal Court; yet the direct impact of such corruption on the agreement that was the subject of the arbitral award remained to be demonstrated. To this end, the Court held that the sale at issue had been made under unfair terms to the detriment of the company whose employee was corrupt and found that it was sufficient evidence. The Court held, accordingly, that granting the awards recognition would breach the French concept of international public policy, in that it would give effect to an agreement of corruption.

The Court thus seems to have implicitly upheld the recent case law trend[8] which, based on the sole characterization of serious, specific and consistent evidence, can hold that an award causes an evident, effective and tangible breach of the French concept of international public policy. National courts now carefully review awards to meet the worldwide purpose of fighting corruption in international trade.

[1] Act 2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of the economy

[2] French Supreme Court, 1st Civil Chamber, September 13, 2017, appeals no. 16-25.657 and 16-26.445

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[4] Article 1520-5° of the French Code of Civil Procedure



[5] Paris Court of Appeals, September 27, 2016, no. 15/12614

[6] Paris Court of Appeals, November 15, 2016, no. 16/11198

[7] Paris Court of Appeals, February 21, 2017, no. 15/01650; Paris Court of Appeals, May 16, 2017, no. 15/17442

[8] Marie Danis, *Has "serious, specific and consistent" evidence of a breach of international public policy become a criterion for the judge's review of arbitral awards?* June 21, 2017, August Debouzy Live
