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The Paris Court of Appeal Weighs In On International Public Policy

January 2018

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On 16 January 2018,[1] the Paris Court of Appeal reaffirmed its greater control over international arbitral awards by setting aside an ICC arbitral award in *MK Group v. Onix* on international public policy grounds because of a fraudulently obtained administrative approval for the sale of a gold mining company's shares.

Background

A Laotian gold mining company, Dao Lao, was created in 2003 by Russian company MK Group (holding a 70% stake) and Laotian company Lao Geo Consultant (holding a 30% stake). In 2010, MK Group agreed to sell a 60% stake in Dao Lao to Ukrainian company Onix. In 2011, MK Group, Lao Geo Consultant, Onix, the Laotian Ministry of Planning and Investment and the Laotian Ministry of Natural Resources and Environment entered into a memorandum of understanding pursuant to which the share transfer was approved subject to Onix first investing USD 12.5 million in the project.

After a dispute relating to voting rights in Dao Lao arose, MK Group initiated ICC arbitration on the basis of the arbitration clause included in the shareholders' agreement with Onix, requesting the arbitral tribunal to declare that the 60% stake in Dao Lao had not been transferred to Onix because it had not invested the promised USD 12.5 million.

In 2015, the arbitral tribunal rendered an award finding that the share transfer from MK Group to Onix was validly made and that Onix owned the shares.

The ruling of the Paris Court of Appeal

MK Group challenged the award before the Paris Court of Appeal on several grounds. In particular, it argued that the award violated international public policy (1) because falsified documents had been produced before the arbitral tribunal, as one of the two versions of the memorandum of understanding did not include the condition relating to the USD 12.5 million investment, and (2) because the award violated overriding mandatory public policy provisions ("*lois de police*") of Laotian law.

The Paris Court of Appeal held that under the French Code of Civil Procedure it has the power to examine "in law and in fact" all of the elements which may lead to the setting aside of an arbitral award. It also explained that the notion of international public policy ("*ordre public international*") has to be understood as a specific conception of the French legal order, *i.e.* as the values and principles that France cannot ignore in an international context, and that it is only to this extent that some foreign overriding mandatory provisions may be regarded as part of international public policy.

1 Paris, 16 janvier 2018, n° 15/21703.

The Court went on to refer to a 1962 resolution of the United Nations General Assembly regarding the sovereignty of nations over their natural resources. The Paris Court of Appeal inferred from this resolution that there was an "international consensus" regarding the right of States to subject the exploitation of natural resources located within their territory to a preliminary authorisation and to exert control over foreign investments made in that area, which consensus was part of international public policy.

Turning to the facts of the case, in particular to the allegations of forgery, the Court found that there was no falsification in the sense that the part relating to the USD 12.5 million financing had not been added to a version of the memorandum of understanding or deleted from the other. In fact, it found that from the very beginning Dao Lao's management – which was the same as Onix's – had established two original versions containing different terms: the English original, reflecting the shareholders' agreement, did not make the transfer conditional upon the investment, while the Laotian original, on the other hand, did mention that condition. The Court found that this was meant to present the opposite position to the Laotian authorities and demonstrated that the investment was viewed by the Laotian authorities as a "substantial condition".

Thus, because the challenged award provided international protection to an investment made through the fraudulent acquisition of an administrative approval, it violated international public policy in a manifest, effective, and concrete manner ("*manifeste, effective et concrète*"). Accordingly, the Paris Court of Appeal set aside the award.

A reinforcement of international public policy

For many years, only "flagrant" violations of international public policy could result in the setting aside of an award in France. Indeed, French courts used to exert limited control over arbitral awards alleged to violate international public policy, based on a controversial use of the general principle that their role is to review the award itself and not the merits of the matter.[2]

In 2014, as the arbitral community was expressing doubts about the soundness of this policy, the Paris Court of Appeal signalled a return to a tighter control of arbitral awards, holding that judges hearing applications for annulment should look to all of the factual elements of a case to determine if an award violated international public policy in an "effective and concrete" manner, omitting the prior "flagrancy" requirement.[3]

In more recent decisions, the Paris Court of Appeal has also set out the requirement of a "manifest" violation of international public policy, which may on its face remind us of the former "flagrancy" element of the legal test. However, the overall impression remains that of a stricter control by the Court over international awards. A striking example of this is the Court's 2017 decision in *Kirghizstan v. Belokon*,[4] where the Court, basing its inquiry on "red flags" (*i.e.* on various indicators which by their nature strongly suggest the existence of a crime), set aside an investment treaty award on the ground that its enforcement would allow the award-creditor to make profits from illegal money laundering activities. The Court found this violated international public policy in a "manifest, effective, and concrete" manner. In that case, the Court went quite far in assessing the facts at issue independently from the arbitral tribunal's findings.

The Court acted similarly in its ruling in the *MK Group* case on 16 January 2018. While the Court referred to the "manifest, effective and concrete" standard, it examined closely the factual circumstances of the case in order to determine whether a violation of international public policy took place, which suggests, again, that the Court's oversight has become stricter.

Another interesting feature of this ruling is that the Paris Court of Appeal incorporated the "international consensus" reflected in a resolution of the United Nations General Assembly into international public policy, just like it had done in *Kirghizstan* in relation to the United Nations Convention against Corruption. It thus seems that public international law is bound to become a greater source of norms that are protected as a matter of international public policy.

Thus, the ruling issued in *MK Group* seems consistent with the *Kirghizstan* decision. The question now is whether France's highest court, the *Cour de cassation*, will follow suit and endorse this approach.

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2 Paris, 23 mars 2006, *Cytec*, *Rev. arb.* 2007.100, note. S. Bollée ; Paris, 15 février 2007, *Heresma*.

3 Paris, 4 mars 204, *Gulf Leaders*, *Rev. arb.* 2014.955, note L.-Ch. Delanoy.

4 Paris, 21 février 2017, *Kirghizstan*, *Rev. arb.* 2017.915, note M. Audit et S. Bollée.

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