10 Years on with French Arbitration Law Reform: Does the Judicial Control Frustrate or Facilitate the Enforcement of Arbitral Awards?

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Abstract

French arbitration law reform started since 2011 by Decree No 2011-48 to implement changes to the Civil Code of Procedure governing arbitration with the aims to enhance efficiency in the arbitral process and enforcement of arbitral awards to make French arbitration law more accessible to practitioners worldwide. Although the reform is a good step toward making French arbitration law more accessible, the recent decisions in *Sorelec v. State of Libya*[1] demonstrated an increased willingness and a tendency for judicial control on arbitration. The findings indicate that although the Decree has a potential thrust to reinforce the pro-arbitration philosophy of French law with a court system that supporting the enforcement of arbitral awards, however, the reform does not prepare or consider the development of case law for future judgments in French arbitration law. The questions remain: To what extent is the Decree affecting the pro-enforcement approach of French arbitration? Has the Decree succeeded in preserving the delicate and complex balance between judicial assistance and interference in the arbitration context? This article critically assesses the extent to which the judicial control under the Decree facilitates the enforcement of arbitral award.

I. Introduction

Arbitration remains the most preferred dispute resolution in international commercial disputes owing to its speed, confidentiality, neutrality and effectiveness. It is widely recognized that the parties may obtain a binding arbitral award in less time than before the domestic

[1] ICC Case No. 19329/MCP/DDA.

jurisdictions after exhaustion of all remedies. French arbitration law reform has been evolving year by year since 2011 by Decree No 2011-48 of 13 January 2011 (hereinafter the new Decree) to implement changes to the Civil Code of Procedure (hereinafter CCP) governing arbitration.[2] The new Decree, which came into force on 1 May 2011, aims to enhance efficiency in the arbitral process and enforcement of arbitral awards to make French arbitration law more accessible to practitioners worldwide. The new Decree arguably represents the most important reform of French arbitration law since the early 1980s. Nonetheless, although renowned as liberal and arbitration-friendly for decades, recent decisions in *Sorelec v. State of Libya*,[3] on the contrary, demonstrate an increased willingness and a tendency for judicial control on arbitration. In this case, the Paris Court of Appeal confirmed its heightened scrutiny of arbitration awards on international public policy.[4]

Questions remain: To what extent is the new Decree affecting the pro-enforcement approach of French arbitration? Has the new Decree succeeded in preserving the delicate and complex balance between judicial assistance and interference in the arbitration context?

In order to assess the 2011 French arbitration law reform, this article firstly critically examines how French arbitration has evolved in the texts of introduction, extension, supplementation and modification throughout the years following the 2011 reform to facilitate arbitration taking place on the French soil. Secondly, it analyses the judicial control occurring during the proceedings before and after the reform. Finally, the article assesses the overall effectiveness of French arbitration law as of today through case law.

The New Decree confirmed its willingness to reinforce the pro-arbitration philosophy of French law with a court system that supporting arbitration in order to effectively enforce

[2] Repblic of France: Ministry of Justice and Civil Liberties, NOR : JUSC1025421D, Decree No. 2011-48 of 13 January 2021, reforming the law governing arbitration. http://www.parisarbitration.com/wp-content/uploads/2014/02/French-Law-on-Arbitration.pdf (Last accessed 30/09/2021).
[3] ICC Case No. 19329/MCP/DDA.
[4] Paris Court of Appeal (Chamber 1-1), November 17, 2020, Nos. 18.07347 and 18.02568.

arbitral awards. This reform contains provisions applying exclusively to domestic arbitrations, international arbitrations including those related to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and ICC Rules of Arbitration,[5] and provisions applying to both domestic and international arbitrations. Among these changes, there have been two important regulatory and legislative innovations in the broad sense over the past 10 years, including amendments to the texts that directly and indirectly apply to arbitration law.

II. New Decree's Direct Impact on Arbitration

Following the new Decree, the direct impacts of French arbitration are twofold: legislative and regulatory impacts. The new Decree arbitration legislation contains provisions that apply exclusively to domestic arbitration, provisions that apply exclusively to international arbitrations and provisions that apply to both domestic and international arbitration aiming at supporting arbitration and effectively enforcing arbitral awards to make France a more arbitration-friendly jurisdiction.

A. New Decree's Legislative Impact on Arbitration

The legislative reform is considered as "The justice of the 21st century"[6] by rewriting article 2061 of the CCP, which provides:

> The arbitration clause must have been accepted by the party against which it is invoked unless that party has succeeded to the rights and obligations of the party which accepted it in the first place. If a party has not contracted in the framework of its professional activity, the arbitration clause cannot be invoked against it.

[5] ICC Arbitration is a flexible and efficient procedure for resolving domestic and international disputes. The awards are binding, final and enforceable anywhere in the world. The new version of the ICC Rules of Arbitration entered into force on 1 January 2021. They define and regulate the management of cases received by the International Court of Arbitration.

[6] Thomas Clay statement at the 10th anniversary of the French arbitration law reform conference on the 13th January 2021.

The prospect of arbitration reform since 2001[7] is to redefine the regime applicable to the validity and enforceability of arbitration clauses regarding domestic matters. To this end, it has introduced two main changes related to the notion of acceptance of arbitration clauses and the unenforceability of arbitration clauses against consumers. The former requirement of validity in contracts between professionals was applicable under the previous version of article 2061, which is now substituted with the notion of acceptance of the arbitration clause. Pursuant to article 1442 on domestic arbitration, an arbitration clause is valid in domestic matters in any contract[8] but is also valid in the case where the weaker party is a consumer. The clause although signed remains valid but shall be declared void as against the latter which is considered as a huge progress in French contract law as it also implies that the scope of the arbitration clause has been extended. The reform reasserts the key principle of parties' consent for arbitration that arbitration is a private process based on consent, except when a party succeeds to the rights and obligations of another party who initially accepted the arbitration clause.

When it comes to the arbitration proceedings, articles 1466 and 1468 of the CCP added major specifications. Article 1466 provides that "A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity." This article, deriving from a doctrine of 1996 written by the scholar Loïc Cadiet[9] first limits the bases for a party's annulment application on grounds of waiver and precludes one party to raise arguments that it

[7] This version replaces a previous version, introduced in 2001, which provided as follows: "*Except when there are particular legislative provisions, an arbitration agreement is valid in contracts entered into on account of a professional activity*." And the 2001 version was itself a modification from the original version of Article 2061, enacted in 1972, which provided as follows: "*An arbitration clause shall be void unless the law provides otherwise*."

[8] Arts 2059 to 2061 of the French Civil Code (CC) provide the scope of arbitration under French law. The French Code of Civil Procedure (CCP) draws a clear distinction between domestic (article 1442, et seq.) and international arbitration (article 1504 et seq.). Some of the provisions applicable to domestic arbitration also apply to international arbitration (article 1506).

[9] Jeuland, E. Clay, T. ''*Mediation and arbitration'': alternative dispute resolution: alternative to justice or judicial alternative? Comparative perspectives*'' (LexisNexis, 2005) at page 442.

failed to raise throughout the arbitration procedure. Evidently, article 1466 implies two effects: the procedural obligations before the tribunal and the obligations within the scope of an action for annulment. The procedural obligations imply to exclude everything likely to obstruct the proceedings including the validity of the convention, the arbitrator's duty, and the compliance with the conditions of impartiality, autonomy to assure arbitration fairness in France. Also, except for legitimate reasons, the irregularity enshrined in article 1466 demonstrates flexibility from the legislator in the reform, confirming that concerns can be raised regarding public policy on the ground that they can be invoked anytime or can be raised *ex officio* by the arbitral tribunal. In this context, when it comes to both protective public policy and procedural public policy available to the parties, but also when the party concerned does not invoke this ground *timely* it would not be able to invoke it before the Courts as it can then be presumed regarding jurisprudence.[10] "Timely" would mean with respect to the arbitration proceedings and the rules indicated in the arbitration agreement, enough to define the obligation of fairness towards the arbitrators.

The proceedings shall be conducted correctly, and the party shall be fair throughout the proceedings so that the adversarial principle can be respected. This control is important in the sense that the case law refers to article 1466 to highlight the waiver principle, addressing the party claiming annulment must have challenged the arbitral tribunal's competence during the arbitration proceedings. Otherwise it is considered as having waived its right to challenge. In the event the party did not raise the cancellation clause, it would be considered that this party waived his right which will result in estoppel. This principle of fairness is defined through article 1466 and certain decisions implied that the article aims at preventing the plaintiff to invoke it in the case where the latter loses. In order for the arbitral award to be set aside, an idea which is not tangible as it seems unlikely for one party who has knowledge of defence

[10] *Togo v. SAS Accord Afrique*, no. 15/24961 [2017].

before the tribunal not to invoke it to set aside the arbitral award deliberately. The legitimate aim of Article 1466 is to comfort fairness during the proceedings before the arbitrators in order to compel the party to submit the irregularities *before*[11] the arbitral tribunal.

Schooner[12] is the case in point. The Paris Court of Appeal confirmed the application of article 1466 in *Schooner* by rejecting the application to set aside the arbitral award on the grounds that the tribunal had wrongly declined its jurisdiction. The applicants had raised jurisdictional arguments on annulment that were not part of their jurisdictional objections before the tribunal. Then, the applicants appealed the decision before the Court of Cassation, arguing that the Court of Appeal violated Articles 1466 and 1520(1) of the CCP by preventing them from raising jurisdictional arguments in annulment proceedings. On 2 December 2020 the Court of Cassation, agreeing with the applicants reversed the Court of Appeal's decision on the grounds that "Where jurisdiction has been disputed before the arbitral tribunal, parties to set-aside proceedings are not deprived of their right to rely on new pleas and arguments and to submit new evidence before the annulment judge."[13]

This unexpected decision was not welcomed by most scholars and practitioners as interpreted as "setting a dangerous precedent for using set-aside proceedings as a full-scale appeal during which a party can exceed the scope of its initial dispute and raise arguments that should have first been heard by the arbitral tribunal."[14] This is held explicitly by the decision that Article 1466 of the CCP does not prevent parties from raising new jurisdictional arguments at the annulment stage, directing its ruling away from the broad approach of waiver followed by the Court of Appeal.

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[11] Emphasis added.
[12] *Civ. 1re, 2 déc. 2020, n° 19-15.396, D. 2020. 2456.*
[13] Parties to set-aside proceedings can rely on new arguments, <https://www.lexology.com/commentary/arbitration-adr/france/freshfields-bruckhaus-deringer-llp/parties-to-set-aside-proceedings-can-rely-on-new-arguments-that-they-failed-to-raise-before-arbitral-tribunal> .Accessed 1 October 2021.
[14] Jourdan-Marques, J. "*Chronique d'arbitrage: compétence et corruption – le recours en annulation à rude épreuve*", (Dalloz actualité, 2020).

However, legal actions regarding provisional seizures and judicial safeguards must be brought in front of the competent state jurisdiction in accordance with Article 1468 of the CCP. The new article 1468, granting to the arbitrator powers to order interim measures, provides:

> "The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order. However, only courts may order conservatory attachments and judicial security.
>
> The arbitral tribunal has the power to amend or add to any provisional or conservatory measure that it has granted."

Put it simple, the arbitral tribunal can, on the conditions it determines and, if necessary, under penalty payment, order the parties to take any provisional or interim measures if considers appropriate pursuant Article 1468 of the CCP.

Furthermore, the New Decree has also introduced provisional measures to assist arbitration seated in their jurisdiction. However, these measures were doubts among commentators and well-known practitioners including Thomas Clay[15] regarding the possibility for the tribunal to provide these measures. The previous 1981 arbitration decree did not provide any provisions regarding the arbitrator's competence to order interim measures, a power that has been granted through various decisions before being codified.

Hence, the new Decree of 2011 codifies[16] the power of the arbitral tribunal to order interim measures, with daily penalties for any failure to comply with the measures. This codification strengthens the authority and powers, and by ricochet promotes arbitration. While an arbitral

[15] Thomas Clay is a French scholar and professor of International Arbitration Law and Director of the LLM in International Arbitration at the Versailles Law School in collaboration with the International Chamber of Commerce (ICC), lawyer and arbitrator at Clay Arbitration involved in several international cases in Commercial Arbitration, Investor-State, Sports Arbitration among others.

[16] See French Code of Civil Enforcement Procedures, Article L.131-1.

tribunal has no authority to ensure the enforcement of interim measures when a party refuses to comply voluntarily, a counterparty will be allowed to ask courts to order the performance of such interim measures.[17] Simply, according to Article 1449 of the CCP, a local judge can intervene to assistant arbitration proceedings seated in his or her jurisdiction as long as the arbitral tribunal is not constituted, a party can seize a local court to obtain interim measures. When necessary, the *juge d'appui* will assist the parties in the composition of the arbitral tribunal.[18]Nonetheless, the issue arises when it comes to the nature of the decision concerning interim or provisional measures. Such an issue was manifested in S.*A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg) Holdings 1* (hereinafter *Otor*)*[19]* in which the Paris Court of Appeal highlighted two points of importance in international arbitration.

Firstly, in France arbitral tribunals may grant provisional measures as an arbitral award, which implies that they may be set aside or enforced by the courts under the provisions governing the enforceability of international arbitral awards.

Secondly, the power of the arbitral tribunal to restrict or set conditions to the awards including penalties to the winning party in order to encourage compliance with the provisional measure. Therefore, the *Otor* decision affirmed the authority of the arbitrator to attach monetary penalties to its award but also demonstrated that, unless the parties agreed otherwise, the tribunal may qualify its measure as an award.

Distinctly, the New Decree suggested that these decisions could be considered as arbitral awards, but in October 2011 the French Court affirmed in *SA Groupe Antoine Tabet (GAT) v. République of Congo*[20] that the real sentence is the one ruling on the issue of authority, bringing an end to the proceedings or adjudicating partially or fully on the merits, as a judgment shall be final – an arbitral award is final and binding except when an appeal is possible. Thus, the

[17] See art. 1449 of the CCP
[18] Articles 1451 to 1453, CCP.
[19] *Paris Court of Appeal, S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg) Holdings,* [2004].
[20] See *Groupe Antoine Tabet c/ la République du Congo*, Cass. Civ. 1re, n 11-16444.

provisional measures do not meet the requirements and can only be used as a procedural order. Consequently, it is not possible to request an exequatur or appeal.[21]

This might be considered as an important gap in the text to exclude the possibility to enforce or challenge and deserves to be considered and reviewed in the future, especially with regard to foreign law such as *article 183 of the Swiss Federal Statute on Private International Law code*[22] which enables the arbitral tribunal to take provisional measures, and specifies that if the party concerned does not voluntarily comply with these measures, the arbitral tribunal may request the assistance of the state judge in order to facilitate the enforcement and address this resistance.

Furthermore, Articles 1696 and 1697 of the Belgium Code[23] also allows the exequatur of these measures as well as the appeal but specifying that it is a question of a provisional measure and not an award. Article 1696 of the Belgium code provides:

> Without prejudice to Article 1679, paragraph 2, the Arbitral Tribunal may order interim and conservatory measures at the request of a party, with the exception of attachment orders."
>
> "Unless otherwise agreed by the parties, the Arbitral Tribunal shall freely assess the admissibility and weight of the evidence...

This article was inspired by Article 17H and 17I of the UNCITRAL law on the recognition of the recognition and enforcement of interim and provisional measures.[24] These provisions imply that unless the arbitral tribunal decides otherwise, the measures are automatically binding and the exequatur shall be granted by the court of first instance, whether those

[21] *L'imbroglio dans la qualification de la decision relative aux mesures provisoires*, Cass. 1re civ., 12 oct. 2011, no 09-72439.
[22] See https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en.
[23] See the Belgium judicial code provisions relating to arbitration https://www.uv.es/medarb/observatorio/leyes-arbitraje/europa-resto/belgica-judicial-code-arbitration-2013.pdf.
[24] For details, see UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

measures are issued in Belgium or outside. Moreover, the measure does not have to be made through an award as a letter is also valid.[25]

Therefore, there is a need to deal with the issue of qualification of these measures in French law as they are not explicitly defined or specified in the text, hence can be considered as a non-defined procedural order in arbitration law.

B. Regulatory Reform: a Codified Principle of Law for Arbitration Justice?

Regarding the regulatory amendments, the 2011 reform recognizes and officially enshrines the concept of a "supporting judge" well-known as the "*juge d'appui*" in Article 1452 of the CCP[26] as default provisions relating to the appointment and/or removal of arbitrators. This is the first time for the French Arbitration law to redefine the role of the French Courts in arbitration by granting *juge d'appui* the power to issue orders, on behalf of the state, to support a particular arbitration and ensure that it occurs in accordance with the law to avoid a denial of justice. It was created from the previous texts of 1981 with the aim of endowing Paris with a real institution of arbitration.[27] There was a need for a domestic judge supporting arbitration regarding any issue likely to arise during arbitration proceedings. This support from the judiciary contributes to the promotion of arbitration and the place of France as parties are likely to choose arbitration for the settlement of their disputes, countries with a stable legal environment as well as a legal system which is arbitration-friendly. This would allow the parties to organize the proceedings without fearing any potential interferences or interruptions. The *juge d'appui* is a judge acting in support of the arbitration process with the aim to facilitate arbitration proceedings at all stages and to hear disputes relating to: the

[25] A provisional or interim measure under Belgian law can be issued in the form of a letter or a note. *Doc.,Ch.,sess.2012-2013, n.53 2743/001*, p.26 ; CAPRASSE ET D. DE MEULEMEESTER, 'De Arbitrale uitspaark', La sentence arbitrale, Bruxelles Bruylant, 2006, at p.43.

[26] The *juge d'appui* is the president of the Court of first instance acting on behalf of the state to support arbitration within its scope of competence as the decree intends to preserve and ensure the delicate balance existing between judicial assistance and interference from the judge.

[27] Especially in *ad hoc* arbitration.

constitution of the tribunal, the resignation, inability to serve or abstention of arbitrators, and the extension of the deadline by which arbitrators shall hand down their award.[28] The role of the *juge d'appui* will be of importance for arbitrations that are not conducted under the auspices of an arbitral institution, which is usually empowered to deal with such issues as recognized as more reliable.

Other regulatory reforms which went more unnoticed but are more recent and no less important include the amendments of sections 1460 and 1469 on the *juge d'appui* in 2019 regarding its power and the procedures for bringing cases to court. Noticeably, the decree of 20 December 2019 removed the judge seized for interim measures and introduced a new judge who adjudicates according to a new procedure called the Expedited Proceedings (PAF),[29] hence rendering a judgment and no longer an order which has the benefit to be legally enforceable, a significant modification of the regime. To these amendments of Articles 1460 and 1469 was also added prior to September 2019 a modification of Articles 1449, 1459, 1469, 1487, 1505 and 1516 regarding the substitution of the *juge d'appui* by the *Tribunal de Grande Instance*[30] when it comes to international arbitration disputes. The *juge d'appui*, also called the "SAMU"[31] in arbitration proceedings was praised until the decree, as the judiciary open to arbitration served the development of the intervention and the case law related to the intervention of this judge. This decree provided stability to arbitration, nonetheless from the international perspective the parties recourse to institutional arbitration which does not include the *juge d'appui* who only interferes in *ad hoc* arbitration less frequent in international matters. In domestic matters, it is common belief due to practice that there is a

[28] See art. 1463(2) of the CCP.
[29] Became effective through the *Decree n 2019-1419, 20th December 2019* on the expedited procedures before judicial courts, published in the official journal on the 22nd December 2020
[30] The court of first instance.
[31] SAMU is the emergency care service in France, illustrating the role playing by the supporting judge in assisting during arbitral procedures.

lack of specialized judges who have consistent knowledge in the case law which sometimes results in inconsistent court orders.[32]

The powers of *juge d'appuri* under the new Decree have been extended. However, the new Decree appears to preserve the balance between the existed judicial assistance and interference in the arbitration context successfully. This balance is manifested in the fact, for instance, that:

- The *juge d'appuri* may issue an order related to arbitral procedure but cannot make a decision regarding the outcome of the case.
- The *juge d'appuri* under Article 1463(2) has the power to extend the six-month period allocated to the arbitral tribunal to render its award, which is applicable to international arbitration pursuant to Article 1506, unless the parties have provided otherwise.

In international arbitration, the role of *juge d'appui* will be performed by the President of *Tribunal de Grande Instance*[33] of Paris. With simple and logical rules for the constitution of the arbitral tribunal, the *juge d'appui* will allow arbitral tribunals to be constituted as promptly as possible, thereby facilitating arbitrations taking place in France.

III. French Arbitration and the Competence-Competence Principle

Although the New Decree on the reform of arbitration procedure has made significant changes to French domestic and international arbitration law, some gaps have been noticed. Regarding the competence-competence principle, French law differs from other legislations in one aspect that this principle only allows a *prima facie* control of the competence and only in the case where the arbitral tribunal is not yet constituted. This principle is also called the negative effect of the competence-competence principle. This negative effect, however, does

[32] Clay, T. 'Reform of the Civil code on arbitration in France' (2017) 35(1) AB at page 50.
[33] Civil Court of First Instance.

not exclude courts to adjudicate in case of challenges during the proceedings. The case *Elf Neftegaz*[34] best demonstrated the above assertion. In this case, the Paris Court of First Instance endorsed its pro-arbitration stance, holding that French courts cannot interfere with arbitral proceedings once the tribunal constituted. The case involves an antisuit injunction before the court in summary proceedings. It was held by the Supreme Court that the domestic court does not have the authority to interfere in an international arbitration proceeding. Such interference illustrates the negative effect of the competence-competence principle by excluding courts from the arbitration proceedings, as they shall not interfere in an international arbitration procedure. From the broader perspective, the judgment clearly demonstrates the French Courts' strong reluctance to intervene in arbitration proceedings once an arbitral tribunal has been constituted, confirming the long established pro-arbitration tradition in France.

Unfortunately, some inconsistencies appeared as in the same dispute, the French court handed down a decision enshrining the authority of the court of first instance in order to review the request of one party which have summoned one of the arbitrators to invalidate his appointment, a solution followed by another decision in 2017[35] in which it was held that the dispute related to the defective execution of an arbitral institution falls within the jurisdiction of the court of first instance. Therefore, it is noted that the court is competent regarding some aspects of the arbitral proceeding. It can then be asked whether the case law, by allowing these actions from the court has made possible what he declared impossible in the *Elf neftegaz* decision. The question remains: Would it be possible to prevent this through the texts? The New Decree does not provide any answer to address the existing legal gaps as there are no established general principles in arbitration law, and in the absence of a particular rule this is a

[34] *Case n°393 of the 28 March 2013 (11-11.320)* – Supreme Court – First Civil Chamber.
[35] *Supreme Court, Civil chamber 1, 13rd December 2017, n°16-22131.*

matter left to the discretion of the jurisprudence. Nonetheless, the courts are also not necessarily prone to provide principles in order to implement the texts in case of gaps.

A. The role of the juge d'appui in judicial control of arbitral awards

In international arbitration, choice of arbitral seat is one of the crucial decisions in any contractual negotiation and can have a direct impact on parties to settle their disputes before the award is made. This implies reframing the question related to the control of authority carried out by the jurisdictions in a context of *ex-post* control, meaning that although the case law and general law principles demonstrate confidence and reliability towards arbitration which is in this sense considered as receiving a special treatment both with regard to the arbitration clause and the effectiveness of the arbitral award. It is submitted that trust does not exclude control. It is therefore important that this key point of competence be controlled by the relevant authority.

The New Decree stated that the Paris Court of Appeal can deny recognition or enforcement of the foreign arbitral award only on the five grounds mentioned in Article 1520 of the CCP. An award may only be set aside by one of the following points where:

a. the arbitral tribunal wrongly upheld or declined jurisdiction;
b. the arbitral tribunal was not properly constituted;
c. the arbitral tribunal ruled without complying with the mandate conferred upon it;
d. due process was violated;
e. recognition or enforcement of the award is contrary to international public policy.

This applies to foreign arbitral awards and the enforcement of an arbitral award rendered in France but with an ongoing application for setting aside the arbitral award by reference of Article 1525[36] with the same restrictive form. This judicial control implies various aspects as

[36] This article relates to arbitral awards issued abroad and states that that: "An order granting or denying recognition or enforcement of an arbitral award made abroad may be appealed. The appeal shall be brought within one month following service (signification) of the order. However, the parties may agree on other means

the effectiveness of the arbitration agreement in its entirety will be controlled: the validity, the mandatory actions with regard to the parties in the clause (signatory and no signatory) and the scope of the control. The judge controls the decision of the arbitral tribunal on the competence whether he assumes jurisdiction not by examining the legal or factual elements, allowing evaluating the scope of the arbitration clause and concluding the consequences on the respect of the mission assigned to the arbitrators. Therefore, examining the legal and factual elements is an invitation for the parties to submit new evidence and argument in the context of an appeal.

When it comes to the arbitration proceedings, there is a fundamental issue of distancing arbitration and domestic justice. The ground is that during arbitration proceeding, the judge intervenes at specific stages regulated and limited by the New Decree[37] which is a good control. The questions remain: to what extent the control is balanced? Has it been succeeded in preventing the arbitral justice from interference likely to be detrimental as it might be damaging to the functioning of arbitration?

The reform highlights the role of the courts in judicial control through the legal recognition of the *juge d'appui*. The substance of the *juge d'appui* was enshrined in Article 1449 of the CCP which enables the judge to request measures of inquiry or interim measures under emergency conditions and before the constitution of the arbitral tribunal. Article 1449 provides:

"The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures.

Subject to the provisions governing conservatory attachments and judicial security, application shall be made to the President of the Tribunal de Grande instance or of the

of notification when an appeal is brought against an award bearing an enforcement order. *The Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520.*"

[37] See chapter II of the French law on arbitration from art. 1450 to 1461.

Tribunal de commerce who shall rule on the measures relating to the taking of evidence in accordance with the provisions of Article 1452 and, where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement."

The judge in this context intervenes in limited cases, adding to the fact that the judge does not have access anymore once the arbitral tribunal is constituted in the case of interim measures. There is an issue concerning the limitation of this control of jurisdiction, especially in the investment or general commercial sector where the party sometimes limits the matters in dispute and include in the dispute resolution clause. For instance, it shall be prohibited to submit to the arbitral tribunal the disputed facts prior to a certain date. *Rusoro mining v Venezuela*[38] is the case in point that the Appeal Court held that the arbitral award shall be partially set aside in compensation for the expropriation of a Canadian mining company's assets and investment. The international investment treaty regime[39] failed to impose a set of obligations on the investors, impose a time limitation but also bind investors to rules on compensation especially in the case of expropriation. The arbitrators should probably have been more careful in the drafting so that the arbitral awards would not have been partially set aside.

It is then important to promote arbitration but also to ensure that this *ex-post* control regarding the arbitrator's jurisdiction maintains a balance between a reasonable thorough examination and an undesirable substantial review. This would promote the renewal of the attractiveness of a major arbitration hub to consolidate the popularity of French arbitration for its sophisticated, reliable and arbitration-friendly position.

IV. Redefining the Notion of Public Policy: A Pro-Enforcement Approach through Judicial Control

[38] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5*

[39] See ICSID Convention Arbitration Rules, accessible at https://icsid.worldbank.org/resources/rules-and-regulations/convention/arbitration-rules. Accessed: 01/11/2021.

Field Code Changed

The complexity of the scope of public policy has divided scholars attempting to provide a common definition to the term and leading to a myriad of interpretations undermining the domestic courts' approach when it comes to enforcing foreign arbitral awards. Arbitral awards that contravene public policy varies from jurisdiction to jurisdiction, therefore an arbitral award can be contrary to the public policy of the state of the arbitral seat and non-contrary to the public policy of the state where enforcement is sought. Hence, this section discusses public policy and the pro-enforcement approach of public policy through various legislations including English law with a focus on OHADA and French law.

It is submitted that domestic courts are able to assess an arbitral award's compliance with internal and international public policy for enforcement of arbitral awards. It was held by the English court in *D.S.T. v. Rakoil*[40] that the arbitral award violated or endangered the interest of the state's citizens is considered as a bar to enforcing the arbitral award, adding the term "clearly injurious to the public good".[41] Whilst the French Courts have taken a restrictive approach to review the conformity of an international award with international public policy, upholding in *SNF SAS v Cytec Industries BV*[42] that the violation of public policy shall be "flagrant, actual and concrete". Such a violation can result in annulment or refusal of enforcement of an international award on French territory. The arbitration provisions of Saudi Arabia provide that in order for an arbitral award to be set aside, it must violate "the provisions of Sharia and public policy";[43] while under Poland arbitration law,[44] to set aside an arbitral award shall be contrary to the fundamental principles of the legal order of the Republic of Poland', including a situation amounting in essence to "the erroneous

[40] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co*., [1986 D No. 2196] [1987 R No. 273]
[41] Ibid.
[42] *SNF SAS v. Cytec Industries B.V., Court of Appeal of Paris, 23 March 2006, XXXII Y.B. COM. ARB. 282* (2008).
[43] French Code of Civil Procedure, Art. 1206(2)(2)
[44] See Art. 1206 of the CPP

interpretation by an arbitral tribunal of a contract", albert the consequence of that misinterpretation was a violation of a party's property rights.[45] The courts, aware of the need to provide a narrow interpretation of public policy grounds demonstrate that they prefer to extensively review the arbitral award on a case-by-case basis.[46]

Another legislation which is inspired by French law mostly due to the colonial heritage is OHADA law, legislation deriving from a supranational organization based in West Africa and grouping together 17 Member States. The OHADA law has its own unique when come to the notion of public policy relating to the enforcement of arbitral award. It is thus worth discussing the notion of public policy in OHADA legal regime in the following section.

A. Judicial control and public policy under OHADA law

Established in 1993, the Organisation for Harmonisation of Business Law in Africa (hereinafter OHADA) is a supra-national organization headquartered in Yaoundé of 17 Member States from Central and Western Africa, most of which being French-speaking sharing a common colonial language and civil law tradition as most of the member states are former French colonies. OHADA provisions are mostly inspired by the French legal system, hence French arbitration provisions. This pan-African and inter-State organization aims at harmonizing the State parties' business law with the use of alternative dispute mechanisms including arbitration in order to boost the regional economy.

The legal framework governing the enforcement of arbitral awards within the OHADA regime are the Uniform Act on Arbitration (hereinafter UAA) and the Common Court of Justice and Arbitration (hereinafter CCJA) rules. Pursuant to article 35.1 of the UAA, the text shall serve as the arbitration law within the Member States. Thus, the 17 OHADA Member States shall comply with the UAA provisions. Article 1 of the UAA provides: "This Uniform

[45] J Koepp and A Ason, 'An anti-enforcement bias? The application of the substantive public policy exception in Polish annulment proceedings', *Journal of International Arbitration* [2018] Vol. 35, Issue 2, p. 157 at 169.
[46] Ibid.

Act shall apply to any arbitration when the seat of the arbitral tribunal is located in one of the Member States."

Moreover, any arbitral awards rendered in the territory of one OHADA Member State is subject to exequatur before the competent judge of the State who may deny the request in the case where the arbitral award goes against international public policy pursuant to Article 31(4) of the UAA which provides that: "The recognition and the exequatur shall be denied when the award is manifestly contrary to international public policy."

Alternatively, the parties may resort to the CCJA who is empowered to adjudicate within six months and check the compliance of the awards with international public policies.[47] The concerns arise regarding the time issue of arbitral enforcement and public policy: it appears that the enforceability process would require more time for the judges to verify the conformity with international public policies since the revised UAA makes no provision of the time limit to apply for the enforcement order on the award following exequatur. This is mostly due to the inconsistency and lack of clarity from the legislator in defining what constitutes international public policy, which has eventually divided scholars in this approach.[48]

Nonetheless, it should be noted that international public policy may constitute a transposition of domestic public policies in an international context within the OHADA regime. Article 34 of the UAA provides that "arbitral awards rendered on the basis of rules other than those of the present Uniform Act shall be recognized in the States parties in accordance with any international conventions that may be applicable and, failing any such conventions, in accordance with the provisions of this Uniform Act." It is submitted that the recognition of arbitral awards depends on the particulars of the case, on the basis of either applicable

[47] Art. 31 of the CCJA Arbitration Rules

[48] See Douajni, G. 'La notion d'ordre public dans l'arbitrage OHADA, Revue camerounaise de l'arbitrage' 29(3) (2005) ; Ebongo, S. 'L'ordre public international des Etats parties à l'OHADA', Revue camerounaise de l'arbitrage 34(3) (2006).

multilateral agreements (such as the International Centre for Settlement of Investment Disputes and the New York Convention), bilateral agreements or the UAA itself.

B. OHADA law and the interpretation of public policy

Distinction shall be made on whether the substance of the matter has already been subject to the UAA upon which the public policy is assessed in light of OHADA law. On the contrary, issues outside the scope of OHAHA are assessed under international public policy of the relevant states. This is to ensure that community public policy is compatible with either international public policy or OHADA Member States' public policy.

Community public policy or OHADA public policy might include the matters that have been regulated through the OHADA Treaty[49] and well-known international conventions[50] facilitating the recognition and enforcement of arbitral awards as well as the harmonisation of the State signatories' laws. One of the solutions from the OHADA legislator to regulate and harmonize arbitral awards within the area was to join one of the most preferred international conventions regulating foreign arbitral awards namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention). It is noted that 5 out of 17 OHADA States are still not signatories of the New York Convention.

Article V(2)(b) of the New York Convention states that an award shall not be recognized and enforced if the competent authority in the country where recognition and enforcement is sought finds that "the recognition or enforcement of the award would be contrary to the public policy of that country."[51] Compliance with this article, the public policy exception can be

[49] The OHADA Treaty acknowledges the importance of arbitration as a modern business dispute resolution mechanism.

[50] For instance, International Centre for Settlement of Investment Disputes (ICSID) and the New York Convention.

[51] For discussion, see Hanotiau, B.; Caprasse, O. "Public Policy in International Commercial Arbitration / Enforcement of Arbitration Agreements and International Arbitral Awards" – The New York Convention Practice, Gaillard, E. and Di Pietro, D. eds., (Cameron May, 2008) - "The rule of public policy has the purpose of permitting the judge not to give effect to an award that would contradict the fundamental principles of the judge's social system." At pages 19-20.

raised *ex officio* by the recognition court. However, the term "public policy" is not defined under the New York Convention, which allows the Convention Member States freely define the concept of public policy.

Public policy exception is substantiated by the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law) in Article 36(2)(b), providing that an arbitral award may be refused on the grounds that the recognition or enforcement of the award would be contrary to the public policy of this State. Public policy exception enables the domestic courts to prevent the violation of the States' foundations by denying *ex officio* the recognition and enforcement of an arbitral award. The myriad of interpretations of public policy developed by domestic courts led to issues at the enforcement stage. In this regard, scholars argue that the public policy exception might be an important threat for commercial arbitration,[52] while others state that public policy exception has failed to be used as a defence to recognize and enforce arbitral awards, considered more as a theoretical defence.[53] The majority of domestic courts have used a narrow approach to public policy complying with the pro-enforcement approach of the convention.

According to Richard Cole, public policy, undefined and broad concept in international law emerges as "a basic balancing test of public versus private interests,"[54] demanding that when the arbitral award manifestly obstructs these interests, the enforcement shall be refused in order to secure the integrity of the Forum's state public policy.

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[52] Richard Cole, supra, at 373, 383. According to Cole, "The public policy defense should prevail to deny enforcement of an arbitral award only when that award violates the forum's most basic notions of morality and justice, and also disregards any significantly detrimental impact on the public's interests."; Moses, supra, at 218." [Public policy] presents the possibility of another broad loophole for refusing enforcement." "

[53] Shaleva, V. 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' AI, 19(1) (2003) at p. 80. Accessible at https://doi.org/10.1093/arbitration/19.1.67. Accessed 01/11/2021.

[54] Cole, R. 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards', 1(2) OSJDR. 365 (1986), at page 380. In fact, the arbitral award concerns the impact of a dispute which is entirely between the parties to the arbitration. But in some cases, such as antitrust, the arbitral award may concern beyond the interests of parties where public policy involves since the arbitral award is not designed for protecting the interest of the public at large.

The OHADA legislator has not specified the scope of the international public policy under OHADA Rules and case law has still not ruled yet on the matter either. As of today, there have been few cases relating to public policy issues under the OHADA regime. Thus, public policy shall be determined geographically as the scope shall depend on the geographic territory under the Treaty as well as the particular interests whose violation cannot be supported by OHADA public policy, left to the discretion of the domestic courts. The CCJA has taken the lead in the determination of the international public policy of OHADA, through some decisions that will be presented hereafter, both applying the UAA[55] and the CCJA Arbitration rules.[56]

In *Oryx Bénin v Société Africaine de Distribution et de Négoce*,[57] the CCJA held that it is wrong to declare an arbitral award contrary to domestic and international public policy on the ground that this arbitral award violates article 76(3) of the Bylaws of the Bar Association of Benin. The argument was that the retainment of a lawyer has been duly authorized by the President of the Bar Association whereas this lawyer obtained court decisions before being authorized by the President of the Association since it is established that by letter addressed to the arbitral tribunal, the President of the Bar Association had given his consent to the retainment of the lawyer concerned as counsel for the defendant. The Court highlighted that a breach of public policy cannot be characterized through a mere allegation of violation of natural rules and consequently implies annulment of an arbitral award.

Moreover, in *Republique du Benin v Societe générale de surveillance*[58] the CCJA held that *res judicata*,[59] constituting a fundamental principle of justice and ensuring judicial security, is

[55] See S14.06 A.
[56] See S14.06 B.
[57] See *Société ORYX BENIN S.A. c/ SOCIETE Africaine de Distribution et de Négoce dite ADN GAS Sarl*, Case N° 154/2016
[58] *Republic of Benin v. SGS Société Générale de Surveillance SA*, Judgment n° 068/2020.
[59] For discussion, see the section of 'Enforcement of Res Judicata principle under the UAA and the CCJA Arbitration rules'.

part of international public policy that is corroborated by article 26(e) of the UAA that "*The action for annulment shall only be admissible if the arbitral award is contrary to international public policy*".

C. Enforcement of Res Judicata principle under the UAA and the CCJA Arbitration rules

Res judicata is a fundamental doctrine illustrating the finality of a matter which has already been determined by a court of competent jurisdiction. This principle - ensuring judicial security and principle of justice - prevents a party from re-litigating any claim, defence, or issue which has already been litigated. In this context, the CCJA in *Republique du Benin v Societe générale de surveillance*[60] held that *res judicata* is part of international public policy - the violation of *res jusdicata* is generally, but not universally, accepted to be contrary to public policy. Put it simple, the *res judicata* principle is verified by the CCJA that prevents the arbitral tribunal from making a ruling in the same case, between the same parties and within the same object, where a court of law before which no jurisdictional objection was raised had already ruled. Thus it was held by the Court that a breach of international public policy must be annulled that "the partial arbitral award declaring the arbitral tribunal competent to rule again on a request inviting to note that the contract concluded on 5 December 2014 is and remains valid, effectively binds the parties and that the republic of Benin has not complied with its terms, while the said contract was already annulled by the State court."[61]

Moreover, due to the dual function of arbitration centre and jurisdiction conferred by the OHADA legislator to the CCJA enshrined under the CCJA Arbitration Rules[62] including the

[60] *Republic of Benin v. SGS Société Générale de Surveillance SA*, Judgment n° 068/2020
[61] Ibid.
[62] See art. 1.2 of the CCJA Arbitration rules

authority to make the arbitral awards rendered under its auspices[63] enforceable,[64] CCJA cases benefit from the *res judicata* and are enforceable within the whole OHADA area grouping the 17 Member States. It is thus submitted that any decision from the CCJA cannot be challenged before any other court in any of the seventeen Member States.[65] In the event the decision has been challenged, the judgment rendered by a Court of Appeal nevertheless remains a final decision to implement the *res judicata* rule as long as it (arbitral award) is not annulled. In case a challenge is dismissed, the arbitral award becomes irrevocable. The violation of the principle of *res judicata* is also considered as a violation of international public policy which is enshrined in Articles 29(2) and 30 (5) of the CCJA Arbitration Rules.

Hence, it was held in *Planor Afrique v Atlantique Telecom*[66] that the arbitral tribunal making a ruling regarding the same case and the same parties violates international public policy, thus the arbitral award must be annulled.[67]

The authority of the arbitral tribunal to hear disputes arises from the exercise by a State of its prerogatives. This is because a public authority must be limited when it comes to the question of redress owed to a legal person resulting from damage due to the exercise of those prerogatives, as far as that State may resort to arbitration in respect of its rights, and without having to judge the validity of the acts taken by the State in exercising its prerogatives authority. In this context, in *État du Benin v. société commune de participation*,[68] the Court instead of limiting the arbitral award to pecuniary penalties rightfully held that the decree had no effect on the agreement of the parties, thus the said agreement shall not be suspended on the ground that the decree has violated international public policy and must be annulled.

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[63] See Article 30.1 of the CCJA arbitration rules.
[64] See Article 30.2 of the CCJA arbitration rules.
[65] See also order N°003/2009/CCJA 22/01/2009; ECOBANK BURKINA SA C/ JOSSIRA INDUSTRIE SA, JURIDATA N° J003-01/2009
[66] *Planor Afrique v Atlantique Telecom*, N. 03/2011.
[67] ibid.
[68] *Etat du Bénin v. Société Commune de Participation, N° 104/2015*

D. Public policy under OHADA and French Law

In *Société Nestle Cameroon v. Groupe Abbassi*,[69] an arbitral award has been wrongfully criticized on the ground that it had violated international public policy by making a unilateral interpretation of the order of referral ruling out the law of the parties, thereby failing to comply with their will pursuant to article 21 of the OHADA Treaty.[70]The arbitral tribunal after assessing the case decided that:

> Since the minutes of the case management conference is a consensual document requiring the signature of the Parties alongside those of the members of the arbitral tribunal under Art. 15.2 of the CCJA Arbitration Rules, it is ineffective for the petitioner to maintain that the wording found cannot be considered to expressly modify Art. 20.1 of the contract, due to the fact that the arbitral tribunal did not question the Parties on their intentions.[71]

The tribunal also considered that

> the autonomy of the parties, pivotal principle in international arbitration in particular with regard to the determination by the parties of the law applicable to the merits of the dispute; commands to give full effect to the choice of the Parties freely expressed in the minutes of the case management conference specifying unequivocally the rules the parties wish to see applied to the resolution of their dispute to deduce that will be applied the Uniform Acts applicable within the OHADA State Parties and French law

[69] Case N° 081/2019.
[70] Art.21. Pursuant to an arbitration clause or submission agreement, any party to a contract may submit a contractual dispute to arbitration as provided for in this part, where one of the parties is domiciled or has his usual place of residence in the territory of a State Party, or where the contract is performed or will be performed wholly or partly in the territory of one or more States Parties. The Common Court of Justice and Arbitration shall not itself settle such a dispute. It shall appoint or confirm arbitrators who shall keep the court informed of the progress of the proceedings and submit the draft award to the court for its approval in conformity with article 24 below.
[71] *Société Nestle Cameroon v. Groupe Abbassi, Case N° 081/2019.*

residually, according to the first item of their agreement in the minutes of the case management conference.[72]

Hence, the Court held that there was no breach in international public policy and the petition for annulment lacked merits.

V. Public Policy: Arbitrability under EU Competition Law and Corruption

Since 2011, there is no major evolution of jurisprudence when it comes to public policy, as the Supreme Court has, as of today, still not progressed on this matter. Moreover, it appears that the French legal system went from trust to mistrust regarding the domestic courts, but also assist to defiance from the Paris Court of Appeal towards the arbitrators. Questions remain: Is it the result of the doctrine asking for more control? Or is it a natural evolution deriving from changes in personalities of the judges, formation, or different vision of arbitration?

What has not changed after the reform is the rationale behind the arbitral award. The arbitral award is rendered with regard to public policy essentially looking at the practical result of the dispute, the solution and not the arbitrator's reasoning is addressed. On contrary, since 2011, the Paris Court of Appeal has amended the scope of its control. In the *Thales* case,[73] the French court held that in order to annul or refuse the exequatur, the violation of public policy shall be "*flagrant, effective and concrete*"[74], a decision demonstrating a case law more restricted over the years, which was strengthened in *Grands Moulins de Strasbourg*[75] in 1991 that the judge mentioned the terms effective and concrete violation of public policy.

The landmark ruling in the *Thales* case was the first in which the French judges considered the challenge of an international arbitration award on the grounds that a breach of EC

[72] Ibid.
[73] *SA Thales Air Defence v. GIE Euromissile and SA EADS France* (1er Ch., sect. C, 18th November 2004)
[74] Ibid.
[75] *Case N°89-22.042 [1991].*

competition law rendered it unenforceable on public policy grounds. The French Court of Appeal held that"…while EC competition law did form part of French international public policy, a violation must be flagrant, effective and concrete in order to justify setting aside an arbitral award."[76]

Thus, the Court of Cassation held that there was no such violation. Nonetheless, critics have argued that the requirement of a "flagrant" breach of international public policy on the face of the award has led to a formalistic standard of review, which amounts to no real review at all.[77]

The decision in *Thales* was reaffirmed in *SNF v. Cytec,*[78] a case involving the challenge of the enforcement of an arbitral award on the grounds that the award was contrary to international public policy due to a breach of EC competition law. The dispute went first to the Paris Court of Appeal comprising the same three judges as in *Thales*. In this case and for the first time, the French Court of Cassation confirmed the strong pro-arbitration policy of French courts as there were very few decisions on the arbitrability of competition law matters and the enforcement of arbitral awards on this matter. Thus, case law was mostly based on decisions of the Paris Court of Appeal. The French Court of Appeal in the *SNF V Cytec* case ruled that on an application to annul an award on public policy grounds, stating that the Court's review"…could only be extrinsic since only the recognition or the enforcement [of the award] is examined with respect to compatibility with international public policy…"[79]

The Court of Appeal thus confirmed pro-arbitration policy in this case involving alleged breach of EC Competition Law that already established in its previous decisions.

Subsequently, the Court of Cassation held that

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[76] Ibid.

[77] Peterson, P. 'The French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged: Is the Requirement of a "Flagrant" Breach Now Gone?', See Kluwer Arbitration Blog, (2014) http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruptionis-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/

[78] *CASE NO 04/19673* [2008].

[79] CA Paris, Ch. 1 Sec. C.March 23, 2006, p. 6.

> Concerning the violation of international public policy, only the recognition or the enforcement of the arbitral award has to be examined by the judge [hearing the application to set the award aside] with respect to its compatibility with public policy, with control being limited to the flagrant, effective and concrete character of the alleged violation.

The Supreme Court concluded by approving the recognition and enforcement of the arbitral awards as it has exercised its control "within the limits of its power of control, that is without an examination of the substance of the arbitral award".[80] This decision confirmed the strict approach of the Court in the review of arbitral awards for setting aside arbitral awards or challenging proceedings, although this decision seems more favourable to the enforcement of arbitral awards than *the Eco Swiss* decision[81] of the European Court of Justice (ECJ) in which the ECJ allowed for limited review. It was held that the domestic court shall annul an arbitral award contrary to EC competition law where domestic rules require it to grant an annulment on the basis of breach of public policy. It is interestingly noticed that "interrelation of arbitration and competition law" best demonstrated "antitrust claims arbitrable",[82] which was affirmed in *Mitsubishi Motor v Soler*[83] case.

The landmark case in *Mitsubishi* was raised the concern to determine whether an American court should enforce an agreement to arbitrate antitrust claims when that agreement arises from an international transaction. Undoubtedly the US antitrust laws aim at promoting national interest by outlawing anti-competitive practices. The principle underlying the antitrust policy is that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest

[80] *Case No. 06-15320, First Civil Chamber* [2008].
[81] *Eco Swiss China Time Ltd. V. Benetton International NV*, case C-126/97, [1999], ECR I-3055.
[82] Ehab Quote and Margaret Liu(2021), Third party arbitration in the UK: critically assessing the applicable rules of the joinder of two different proceedings under the Brussels Recast Regulation (EU1215/2012), (2021) 42 E.C.L.R. Issue 6, p. 303.
[83] *Mistsubishi Motor v Soler Chrysler-Plymouth* 473 U. S. 614 (1985).

material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institution".[84]

The US Supreme Court held in *Mitsubishi*[85] that private antitrust claims are arbitrable in a transaction arising in international commerce, adding that if an international contract contains a broad arbitration agreement, policy favouring arbitration overrides the domestic public policy against arbitration of antitrust claims.

The Court of Cassation through these decisions confirmed the French courts' "longstanding policy not to review the merits of an arbitrator's decision".[86] This rationale has also been confirmed in the two decisions in the *Schneider*[87] case in 2009 and 2014 which derived from earlier decisions based on corruption allegations. Previous decisions allowed a review of the law and the facts as long they related to the application of the relevant rule of public policy.[88]

Thus, the standard of review by French courts of arbitral awards rendered in international arbitration proceedings on grounds of violation of international public policy has long been considered as a minimalist approach, justified by principles such as the finality of arbitration awards and the prohibition of the revision of awards on their merits by the courts.

In 2014, the Supreme Court rejected the review on points of law and fact of the arbitrator's decision, however, in the same year the Court of Appeal reconsidered this solution in *Gulf Leaders v CFF*,[89] and reaffirmed its solution in *MK Group v Onyx*,[90] *Alstom Transports v.*

[84] *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4* (1958).
[85] See *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc. 473 U.S. 614* (1985).
[86] Citation of Judge Hascher, who was part of the formation of the Paris Court of Appeal which ruled over the *Thalès v. Euromissile and SNF v. Cytec* cases
[87] *Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH c. Sté CPL Industries Limited, [2009]; 1st Civil Chamber.* [2014]
[88] *Sté European Gas Turbines SA v. Sté Westman International Ltd, Paris CA*, 1st Civil Chamber, [1993].
[89] *Sté Gulf Leaders for Management and Services Holding Company ("Gulf Leaders") v. SA Crédit Foncier de France N. 12/17681* [2014].
[90] *Case n° 15/21703, 1st Civil Chamber, CA Paris* [2018]

Alexander Brothers[91] et *Sorelec v Lybia*[92] that corruption is a violation of 'international public policy'.[93] In the *Gulf Leaders* case, the Court held that:

"Where it is claimed that an award gives effect to a contract obtained by corruption, it is for the judge to set aside proceedings, seized of an application based upon article 1520-5 of the Code of Civil Procedure, to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality of the agreement and to appreciate whether the recognition or enforcement of the award violates international public policy in an actual or concrete manner".[94]

Thus, it was after conducting its own review of the facts and applying the relevant principle of law that the Court of Cassation dismissed the application. The French courts have long held that corruption is an "obvious, effective and concrete" violation of international public policy.[95] Hence, an arbitral award enforcing a corrupt scheme will not be recognized in France or could be set aside by the courts.

More recently, in *Webcorp v. Gabon*[96] case, the Paris Court of Appeals set aside an arbitral award that had granted the Maltese construction company Webcor ITP (Webcor) and its Gabonese subsidiary Grand Marché de Libreville (GML) more than 100m$ in damages on the ground of the violation of international public policy as it held, based on the evidence discovered only after the award has been rendered, that the underlying contracts were obtained through corruption. The court found that while negotiating the contracts, Jean-François Ntoutoume Emane, former mayor of Libreville was offered a luxurious honeymoon by the construction companies, which together with the accompanying circumstances led it to

[91] *Case n°16/11182 N° Portalis 35L7-V-B7A-BY3JK*, CA Paris, [2019]
[92] *Sorelec v. State of Libya, ICC Case No. 19329/MCP/DDA* [2020]
[93] Paris Court of Appeal, 17 November 2020, No. 18-02568, Libyan State v. Sorelec.
[94] *CA Paris, Société Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France* [2014].
[95] See *Alstom Transports v. Alexander Brothers, Case n°16/11182 N° Portalis 35L7-V-B7A-BY3JK, CA Paris*, [2019].
[96] *Webcor ITP Limited and Grand Marche De Libreville v La Commune De Libreville and La République Gabonaise - ICC Arbitration Case* No 21458/MCP/DDA [2018].

consider that there were "serious, precise and consistent indications".[97] With this decision, the Court confirmed that an award giving effect to corrupt practices cannot be granted recognition and/or enforcement in France as it violates international public order. The court also reminded that a mere violation of a mandatory provision of foreign law cannot *per se* justify setting aside an arbitral award in France.[98]

Through these judgments and analysis from the Paris Court of Appeal with regard to public policy, it is noted that the Court of Appeal operates a thorough review of the compliance with the requirements of public policy and seeks *de jure* and *de facto* elements regarding corruption. Then, the court in addition to the evidence presented to the arbitral tribunal, accepting any new evidence from the parties. The Paris Court of Appeal does not consider the observations of the arbitrators throughout the control as in *Sorelec*[99] where the Court held that although the claim or argument was not submitted to the arbitrators, the court may proceed with the control of requirements and compliance with international public policy. The Court found in *Sorelec* that the awards were contrary to the French conception of international public policy owing to a settlement agreement procured through corruption. The ground in *Webcorp v. Gabon*[100] is that the Paris Court of Appeal set aside an ICC arbitral award enforcing a settlement agreement owing to the agreement procured by corruption of public officials. The decision adopted by the French courts is in line with anti-corruption rules in arbitration. Relying on the international consensus of the definition of corruption enshrined under Article 16 of the 2003 United Nations Convention against Corruption, which it had

[97] Ibid.
[98] Legal News. France – a honeymoon to remember – award set aside over corruption allegations (Gabon and City of Libreville v Webcor and GML, Home/Arbitration/Arbitration analyses archive/2021, https://www.lexisnexis.co.uk/legal/news/france-a-honeymoon-to-remember-award-set-aside-over-corruption-allegations-gabon-city-of-libreville.
[99] *Libya v. SORELEC, Case No. 18/02568, CA Paris* [2020].
[100] *Webcor ITP Limited and Grand Marche De Libreville v La Commune De Libreville and La République Gabonaise - ICC Arbitration Case* No 21458/MCP/DDA [2018].

earlier endorsed in the *Alstom v Alexander Brother*[101] and *Securriport*[102] and the 1997 OECD Convention on Combating Bribery, the Paris Court of Appeal held that:

"The prohibition of bribery of public officials is one of the principles which violation cannot be disregarded by the French legal system, even in an international context. It is therefore a matter of international public policy."[103]

Consistent with its previous rulings, the Paris Court of Appeal confirms in *Libya v. SORELEC*[104] the use of the "red flags"[105] test. According to this method, the courts admitted corruption by relying on circumstantial evidence to determine whether the underlying contract was procured by corruption. Such evidence shall be qualified as "serious, specific and consistent" contrary to the French conception of international public policy. Thus, the vice in question can be reported through the Red flags technique. In other words the Appeal Court will not verify whether the evidence of corruption is reported, as the evidence does not exist from the perspective of the parties. Therefore, they will only have to invoke accurate and serious evidence related to the corruption allegations, and once all the evidence are gathered *in fine* the Court may set aside the arbitral award, a view contrary to the current view of the Supreme Court but a view which consolidates the construction of the jurisprudence of the Court of Appeal which holds that since an inadmissibility argument cannot have the effect of enabling the recognition of an arbitral award that would violate international public policy, the issue of corruption can be raised at any time. Hence, in this case were considered as red flags: the state of civil war Libya was in at the time, the abnormal procedure followed for concluding the contract, the hastiness of the signing and the unusual terms of the contract.

[101] Paris Court of Appeal, 28 May 2019, No. 16/11182, Alstom Transport SA V. Alexander Brothers Ltd; Paris Court of Appeal, 27 October 2020, No. 19/04177, Benin v. Sécuriport, para. 26.
[102] Ibid.
[103] Paris CA, 17.11.2020, *Libya v. SORELEC*, No. 18/02568.
[104] Ibid.
[105] Red flags are a test to assess circumstantial evidence, inspired by US FCPA practice pursuant to which the party seeking to have the award set aside discharges the burden of proof by relying on "serious, precise and consistent" circumstantial evidence of the corrupt scheme.

This illustrates and confirms the provisions of article 1466 of the CCP which states that "A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity."

Finally, the Paris Court of Appeal also held that it would review an award's compatibility with international public policy even in cases where the corrupt scheme had not been alleged by the parties before the arbitral tribunal.

Regarding the reform of 2011 and its effort to judicially improve the control of arbitral awards and their compliance with public policy, questions remain: Is there a real control of the effective and concrete nature of the breach of requirements regarding public policy while the Court adjudicates or when are presented to the Court required elements with regard to domestic law? Since domestic law requirements is based on public policy elements including right to oblivion, inability for the judge to rule on evidence that no longer exist which are not considered by the Court of Appeal during review. Most important, has the French judge's position evolved regarding his view of arbitration? The case law is as of today more restrictive, although overall the case law evolution of the Paris Court of Appeal appears over the years logical and coherent.

VI. Conclusions

Parties choose arbitration for various reasons: arbitration offers a solution of confidentiality and discretion required for business confidentiality; quick especially in international arbitration as there are fewer legal remedies. Therefore, the award is swifter; the competence of the arbitrators although extending the criteria regarding the disclosure obligation and evaluation of the independence of the arbitrators. The reform is a good step toward making French arbitration law more accessible although we may still notice some inconsistencies as some aspects of the reform have not been implemented remaining incomplete and suggesting

that the reform does not prepare to consider the development of case law for future judgments in French arbitration law. Nonetheless, the reform has not only clarified and codified significant principles that already existed in French case law of arbitration, but also introducing key innovations that should strengthen France's position as an international arbitration hub. For the next 10 years, some improvements are required although the text itself has been quite a success, the quality of the text is quite representative of the Place of Paris regarding as the main purpose of the 2011 reform was, first of all, to make the law more accessible which by ricochet shall make Paris more attractive as a place of arbitration.

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