Belokon v. Kyrgyzstan: practical implications of award set-asides arising from corruption allegations.

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Belokon v. Kyrgyzstan: Practical Implications of Award Set-Asides Arising from Corruption Allegations

Introduction

As one of the most arbitration-friendly jurisdictions, French courts have long had a tradition of judicial non-interference in the arbitral process.[1] In the context of annulment proceedings, French courts are normally granted limited scope in reviewing arbitral awards.

However, on March 23, 2022, the French Cour de Cassation (France's supreme court of appeal on matters of law) upheld a 2017 Paris Court of Appeal decision vacating a US$15 billion UNCITRAL award against Kyrgyzstan in *Belokon v. Kyrgyzstan*.[2] The Paris Court of Appeal had set aside the award based on international public policy, as enforcement of the arbitral award would enable the investor to profit from money laundering revenues.[3] In reaching this decision, the Paris Court of Appeal had relied on documents and evidence that were not previously produced or relied upon by the arbitral tribunal.

The Cour de Cassation judgement brings welcome confirmation that French judges have full authority and an expanded scope of fact-finding powers when reviewing the implications of enforcing an arbitral award on the grounds of international public policy due to allegations of corruption and money laundering. This *Insight* aims to highlight the key findings in these decisions and briefly touch on comparative developments in the English courts.

Background

The dispute concerned the emergency measures Kyrgyzstan applied to the relevant investment, a local bank named Manas Bank. In 2010, as a result of political turmoil and change of presidential regime in Kyrgyzstan, the Kyrgyz National Bank, with a view to ensuring stability in the banking sector, suspended Manas Bank's management for a period of 4 years. The Latvian investor, Mr. Belokon, commenced UNCITRAL arbitration proceedings in 2011, alleging the emergency measures amounted to indirect expropriation and violation of the fair and equitable standards under the Kyrgyzstan-Latvia bilateral investment treaty (BIT). By the time the arbitral award was rendered in 2015, Manas Bank was insolvent.

Findings of the Arbitral Tribunal

The arbitral tribunal issued an award in Mr. Belokon's favour, dismissing Kyrgyzstan's arguments that Manas Bank was engaged in money laundering and other criminal activities and therefore its emergency measures were justified.[4] The arbitrators found that Kyrgyzstan did not submit sufficient evidence to demonstrate violations of the legal order of Kyrgyzstan.[5] The arbitral tribunal pointed out that if Kyrgyzstan had produced substantial and probative evidence of Manas Bank's active involvement in money laundering, the investment protection might have been denied.[6]

State-Led Challenge to the Arbitration Award

As the arbitration was seated in Paris, Kyrgyzstan challenged the arbitral award before the Paris Court of Appeal on the basis that, inter alia, recognition or enforcement of the award would contradict the prohibition on money laundering pursuant to the UN Anti-Corruption Convention of December 9, 2003 (France and Kyrgyzstan, amongst others, are signatories).[7] Kyrgyzstan argued that this, in turn, violated the French concept of international public policy under article 1520(5) of the French Code of Civil Procedure, as allowing the award would effectively enable Mr. Belokan to benefit from his unlawful activities.[8]

Findings from the Paris Court of Appeal

The Paris Court of Appeal noted that its duty was not to establish if Mr. Belokan was liable for money-laundering but to examine if international public policy would be violated if the award were enforced or recognized in France pursuant to article 1520(5).[9]

Upon review, the Paris Court of Appeal found the factors surrounding the acquisition of the investment suspicious; noted the relationship between Manas Bank and another bank owned by Mr. Belokon that was subject to a fine by the Latvian authorities for violations of anti-money laundering legislation in 2016; and found that Manas Bank's transactions had considerably exceeded the GDP of Kyrgyzstan in 2008—which, considering the poor economic conditions at the time, could not be explained by ordinary banking practices.[10]

On the weight of the evidence submitted (which either was not previously presented to the arbitral tribunal or only made available after the award was rendered), the Paris Court of Appeal concluded that recognition or enforcement of the award would ultimately benefit Mr. Belokan from illegal activities.[11]

Investor-Led Challenge: Cour de Cassation's Key Findings

Mr. Belokon appealed to the Cour de Cassation, arguing the Paris Court of Appeal had gone beyond its powers under article 1520(5) by examining the merits of the arbitral award *de novo*.[12]

The Cour de Cassation confirmed the Paris Court of Appeal's approach to setting aside the award.[13] It further affirmed that the prohibition and fight against money laundering constituted a core component of French international public policy, allowing the Court of Appeal to conduct an extensive review and go beyond the evidence originally submitted to the arbitral tribunal.[14]

The Cour de Cassation also approved and adopted the widened scope of authority to review newly submitted factual evidence asserted by the Paris Court of Appeal.[15] It found that the Court of Appeal was not bound by the factual evidence submitted to the arbitral tribunal or findings resulting from the arbitral tribunal's fact-finding exercise with respect to allegations of corruption.[16]

The Cour de Cassation further clarified that the Paris Court of Appeal did not conduct a substantive review of the underlying merits of the original claims, i.e., it did not investigate the application of facts to the Kyrgyzstan-Latvia BIT or ascertain the validity of the parties' submissions.[17] Rather, it only considered newly submitted facts to determine the arbitral award's conformity with the principles of international public policy. [18]

Practical Implications

This decision is significant for two key reasons.

1. *It moves away from a non-interventionist approach by the French courts—at least concerning corruption and money laundering allegations.*

The ruling in *Belokon v. Kyrgyzstan* confirmed the French courts' move away from a non-interventionist or "light" standard of review to a more hands-on or "maximalist" approach in determining potential violations of international public policy in arbitral awards.

2. *It impacts the powers that French domestic courts can exercise in actions challenging international arbitration awards on the basis of international public policy.*

It appears that French domestic courts may be able to consider new facts or possibly even arguments not previously put before the arbitral tribunal, at least when important questions of international public policy concerning corruption allegations are at issue.

Conclusion

The Cour de Cassation decision in *Belokon v. Kyrgyzstan* brought an end, at least in France, to the lengthy period of uncertainty regarding the extent of judicial control of the compliance of arbitral awards on the grounds of alleged corruption. Subsequent decisions from the Cour de Cassation have approved and even expanded upon *Belokon*.[19]

However, this expanded scope of review calls into question the utility of arbitration as a forum where the dispute can be resolved with the assurance of relative finality. In a contrasting approach, the English High Court recently upheld the enforcement of an arbitral award in England and Wales, despite corruption allegations.[20] These material differences in approach between English and French courts highlight the lack of international consensus with respect to adopting a maximalist approach to the substantive review of cases.

It remains to be seen if the French courts will recognise further categories of international public policy subject to a "maximalist" judicial enforcement or annulment review in the future—but regardless, this ruling will be watched closely, particularly given that the judgement originated from a highly influential and popular seat of arbitration.

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[1] JEAN-LOUIS DELVOLVE, JEAN ROUCHE & GERALD H. POINTON, FRENCH ARBITRATION LAW AND PRACTICE 6-7 (2003).

[2] Jus Mundi (n.d.). *Belokon v. Kyrgyzstan, Judgment of the French Court of Cassation* (Mar. 23, 2022), JUS MUNDI, https://jusmundi.com/en/document/decision/fr-valeri-belokon-v-kyrgyz-republic-arret-de-la-cour-de-cassation-wednesday-23rd-march-2022.

[3] *Id.* § 10.

[4] *Id.* § 272.

[5] *Id*.

[6] Original judgement in English: producing substantial evidence of Manas Bank's involvement in money laundering. Original tribunal decision (upholding the investor's claims over Manas Bank and rejecting the state's claim), JUS MUNDI, https://jusmundi.com/en/document/decision/en-valeri-belokon-v-kyrgyz-republic-award-friday-24th-october-2014#decision_184.

[7] Paris Court of Appeal [Paris CA], *Belokon v. Kyrgyz Republic*, RG No. 15/01650 (Feb. 21, 2017), JUS MUNDI (and translated by Jus Mundi), https://jusmundi.com/en/document/decision/en-valeri-belokon-v-kyrgyz-republic-judgment-of-the-paris-court-of-appeal-tuesday-21st-february-2017.

[8] *Id.*

[9] Paris CA, *Belokon v. Kyrgyz Republic*, § 10.

[10] *Id.* § 15.

[11] *Belokon v. Kyrgyzstan*, *supra* note 2, § 272.

[12] *Id.* § 10.

[13] French Court of Cassation [Cass.] [supreme court for judicial matters], 1e civ., Mar. 23, 2022, *Belokon v. Kyrghyz Republic*, No. 17-17.981, § 11, translation provided by the French Court of Cassation, https://www.courdecassation.fr/print/pdf/node/10948.

[14] Cass., *Belokon v. Kyrghyz Republic*, *supra* note 7, § 9.

[15] *Id.* §10.

[16] *Id*. § 11.

[17] *Id.* §8.

[18] Cass., *Belokon v. Kyrghyz Republic*, *supra* note 7, § 10.

[19] Paris Court of Appeal [Paris CA], Apr. 5, 2022, *Republic of Gabon v. Groupement Santullo-Sericom Gabon*, RG 20/03242; *Sorelec v. Libya,* ICC Case No. 19329/MCP/DDA.

[20] *Alexander Brothers Limited (Hong Kong S.A.R.) v. (1) Alstom Transport SA (2) Alstom Network UK Limited* [2020] EWHC 1584 (Comm)).