FRANCE

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To: Members of the IBA Recognition and Enforcement of Awards Subcommittee

From: Charles Nairac

Public Policy and French Law of International Arbitration

I. Executive Summary

1. This memorandum was prepared in the context of the work of the IBA Recognition and Enforcement of Awards Subcommittee, which is currently exploring the notion of public policy. Per item 11 of the Minutes of the Telephone Conference of 24 July 2014, this memorandum analyses the notion of public policy in the context of French law of international arbitration.

2. Based on a review of French law, the following observations can be made:

- Public policy is a tool (rather than a substantive rule, or a set of substantive rules) that is used to prevent an award from being recognized or enforced in the domestic legal order.
- In France, this tool is used cautiously and the scope of public policy is interpreted narrowly by the courts.
- The precise scope of public policy as applied by the courts is currently the object of conflicting approaches by the Paris Court of Appeal and the Court of Cassation, which is the French supreme court in matters of private law, and has been the subject of extensive discussions among legal commentators.

3. This memorandum is organized as follows: Section II deals with the notion and scope of public policy. Section III broadly explains how the notion is understood by French law. Section IV focuses on the implementation of the notion by the French courts.

4. A list and schematic analysis of a selection of French court decisions relating to public policy is appended to this memorandum as Annex A.

II. Notion and Scope of Public Policy

(a) The Methodological Issue

5. *The methodological flaw / the absence of a methodology*: The challenges of defining public policy were recently illustrated in an article written by J. Nuss QC.[1] In this article, the author first attempts to define the notion of public policy. He explains that public policy "*refers to matters which the laws of a state or state courts have determined to be of such fundamental importance that contracting parties are not free to avoid or circumvent them*".[2] The author goes on to give an example of what public policy may be: "*[f]or instance […] public policy prohibits enforcing any agreement which has the effect of holding persons in a condition of bondage or perpetual*

[1] J. Nuss QC, "*Public Policy Invoked as a Ground for Contesting the Enforcement of an Arbitral Award, or for Seeking its Annulment*" (2013) 7 *Dispute Resolution International* 119.

[2] *Id.* p. 119.

servitude".[3] The "*method*" used by the author to define public policy can be categorized as "*topical*". In other words, the author explains what public policy refers to, by explaining what its function is, rather than providing a definition. This method, however, also requires providing an example. Thus, it seems that public policy cannot be explained or defined without reference to practical illustrations. This may be due to the various forms of public policy.

6. *Various forms:* Arguably, the attempt to properly define public policy is made difficult due to the many forms it can take. Recently, another author has explained that references to public policy have increased.[4] The importance or content of public policy varies according to the specific legal field in which it appears (international investment law, trade law, sports law, etc.). Further, the same author notes that differences appear in (i) the sources from which the notion is derived and (ii) the nature of the rules that are classified as public policy (international, national, supranational, etc.).[5]

7. *Public policy as a tool*: In light of these methodological difficulties, the best way to understand public policy is to conceptualize it as a "*tool*", rather than a set of substantive rules. In the words of R. Wolff, "*public policy serves the purpose of providing the Contracting States with a safety-valve allowing them to prevent the intrusion of awards into their legal system which they consider irreconcilable with it*".[6]

(b) Public Policy and Other Similar Notions

(i) Public Policy and *Lois de Police*

8. The notion of mandatory rules or "*lois de police*" emerges, at least in civil law systems, out of domestic law. They can be compared with permissive or default rules. Mandatory rules are the rules that the European Communities Rome Convention once defined as the rules of law "*which cannot be derogated from by contract.*"[7] In the context of conflict of laws, the concept of mandatory rules was developed to allow the transnational application of a mandatory norm irrespective of the choice of applicable law, in particular through the mediation of rules of conflict.[8]

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3 *Id.*

4 J.B. Racine, "*Les normes porteuses d'ordre public dans l'arbitrage commercial international*" in E. Loquin, S. Manciaux (dir.), L'ordre public et l'arbitrage, Actes du Colloque des 15 et 16 Mars 2013 (2014), pp. 7-35, at pp. 8-21.

5 *Id.*

6 R. Wolff, "*Public Policy, Article V(2)(b)*" in R. Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, A Commentary* (2012), p. 406, (emphasis added); *see also*, H. Arfazadeh, "*In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception*" (2003) 13 *American Review of International Arbitration* 43. A French author asserted in a more poetic way that public policy has to be considered as "*a sort of sentinel, an eager guardian with menacing eye, as a lokapala, a Shi-Tennô, who would protect the temple of the forum law, against foreign evil spirits*". G. Légier "*Les rapports familiaux et l'ordre public au sens du droit international privé*" (1999) Revue de recherche juridique 293, at p. 293.

7 Convention on the Law Applicable to Contractual Obligations (80/934/EEC), 19 June 1980, Article 3.3. The Rome Convention was superseded by the Rome I Regulation, which similarly refers to the notion of "*provisions of the law … which cannot be derogated from by agreement*" (Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 3.3. *See also*, P. Mayer, "*Mandatory rules of law in international arbitration*" (1986) 2 *Arbitration International* 274, at p. 275.

8 B. Audit, "*How do Mandatory Rules of Law Function in International Civil Litigation*", *in* G. Bermann (ed.), *Mandatory Rules in International Arbitration* (2011), p. 53.

9. The notion of mandatory rules seems to be linked to the notion of public policy. Indeed, it is considered that an award in which mandatory rules have been disregarded may be contrary to public policy.[9]

10. The question is thus to what extent the violation of mandatory rules or "*lois de police*" allows for the annulment or non-recognition of an award on the basis that it is contrary to public policy. Mayer states that mandatory rules "*are a matter of public policy, and even reflect a public policy, which is so commanding that they must be applied although the general body of law to which they belong is not competent by application of the relevant rule of conflict of law*".[10] Seraglini develops a similar argument in his thesis arguing that all "*lois de police*" may pertain to public policy.[11] As explained in further detail below, French courts do not seem to consider that the breach of any and all mandatory rules justifies the annulment of an award.

(ii) Public Policy and Arbitrability

11. Like the notion of public policy, arbitrability has not been defined in international legal instruments. Under French law, the notion is understood to be the possibility for a given matter to be brought before an arbitral tribunal. As such, arbitrability has been described as a condition of lawfulness of the arbitration agreement and thus affects the jurisdiction of the arbitral tribunal.[12]

12. Here again it is important to acknowledge that the notions of public policy and arbitrability are connected, even if they relate to different ideas. Indeed, public policy is a tool that can be used to challenge the enforcement of an arbitral award in a legal system; whereas arbitrability is an attribute given to a certain subject-matter and according to which disputes arising out of such subject-matter can be settled through the means of arbitration.

III. Notion of Public Policy under French Law

(a) The Distinction between Public Policy, International Public Policy and Transnational Public Policy

13. Public policy is referred to in Articles 1492 5° and 1520 5° of the French Code of Civil Procedure. Article 1492 5° relates to domestic arbitral awards and provides that such awards can be challenged if they are contrary to "*public policy*". Article 1520 5° relates to international arbitration, and specifies that international awards can be challenged if they are contrary to "*international public policy*". The Code of Civil Procedure thus draws a distinction between (domestic) public policy and international public policy.

14. The Paris Court of Appeal has explained that Article 1520 5° "*refers to the French conception of international public policy, that is the rules and values which cannot be violated within the French legal order, even in the framework of situations of an international nature*".[13]

15. In light of the above, domestic public policy refers to rules that are only mandatory when the legal relationship or transaction brought before the court is governed by French law, whereas rules pertaining to international public policy are the ones that are mandatory even when the legal

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9 Bermann explains in this regard how the distinction between the two notions might be sometimes confusing: *"American lawyers, not particularly conversant with the term mandatory rules of law, may well find themselves translating the term in their minds as "public policy" – a term that manages to capture both of the conceptions of mandatory rules of law set out above. That is to say, "public policy" can both prevent application of "the otherwise applicable law" and also bar the possibility of party agreement to the contrary*." Bermann, (*infra* n.13) p. 4.

10 Mayer (*supra* n.7), p. 274.

11 C. Seraglini, *Lois de police et justice arbitrale internationale* (2001) Dalloz, Nouvelle Bibliothèque des thèses.

12 E. Gaillard & J. Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), para 532.

13 CA Paris, 14 June 2001, *SA Compagnie commerciale André v. SA Tradigrain France*.

relationship or transaction is subject to non-French law.[14] It is usually considered that international public policy is narrower than domestic public policy, as international public policy is deemed to be a constituent part of domestic public policy. In other words, some rules may belong to domestic public policy but not to international public policy.[15] Conversely, what is not part of domestic public policy can never be considered international public policy.[16]

16. It is also worth noting that some authors distinguish between international public policy and transnational public policy. The latter would result from the identification of rules that can be classified as "*public policy*" across multiple legal systems. Its content is therefore necessarily more limited.[17]

17. Finally, authors have emphasized the evolving nature of international public policy,[18] in the sense that its meaning and content can change over time. As a result, its content should be determined at the time when recognition or enforcement of an award is sought.[19] Indeed, authors argued that "*an award which does not comply with the French conception of international public policy at the time it is made may be considered as being in compliance with public policy when its enforcement is sought.*"[20]

(b) Practical Examples

18. Under French law, as in other legal systems, a distinction is usually made between procedural public policy and substantive public policy.[21]

(i) Procedural Public Policy

19. An award can be challenged on the basis of a violation of public policy if it violates basic and fundamental procedural rules. These rules include for instance:

- the principle of equality between the parties;[22]
- the principle of collegiality within the arbitral tribunal;[23] and
- procedural fraud.[24]

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14 Gaillard & Savage (*supra* n.12), para, para 1647. *See also*, G. Bermann, "*The Origin and Operation of Mandatory Rules*" *in* G. Bermann (ed.), *Mandatory Rules in International Arbitration* (2011) p. 4, describing how the notion of public policy in understood in the French legal system.

15 C. Seraglini & J. Ortscheidt, *Droit de l'arbitrage interne et international* (2013), para. 543.

16 Gaillard & Savage (*supra* n.12), para. 1647.

17 Seraglini & Ortscheidt, (*supra* n.15), para. 816.

18 Gaillard & Savage (*supra* n.12), para. 1650.

19 CA Versailles, 2 Oct. 1989, *Société des Grands Moulins de Strasbourg*.

20 Gaillard & Savage (*supra* n.12), para. 1650.

21 J.F. Poudret, S. Besson, *Comparative Law of International Arbitration* (2007), paras. 815-817.

22 According to Gaillard & Savage, this principle "*should not be given a strictly mechanical meaning […]. What matters is that a general balance be maintained and that each party be given an equal opportunity to present its case in an appropriate manner.*" Gaillard & Savage (*supra* n.12), para. 1654. *See also*, Seraglini & Ortscheidt, (*supra* n.15), para. 980. For instance, the Court of Cassation has ruled that this principle requires that each party bears the same rights in the nomination of the arbitral tribunal members. *See*, Civ. 1e, 7 Jan. 1992, *BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction.*

23 CA Paris, 16 January 2003, Rev. arb. 2004. 369; Cass. Civ. 1, 8 July 2009, D. 2009. 2959.

24 CA Paris, 1 July 2010, *Thalès v. Euromissile*; CA Paris, 30 Sept. 1993, *European Gas Turbines.*

20. Conversely, the rules according to which arbitrators have the obligation to justify their decisions,[25] or the rule whereby an action to annul an award will lead to a stay of proceedings, are not covered by procedural public policy.[26]

(ii) Substantive Public Policy

21. An award that does not abide by the following rules and principles, at the merits stage, would contravene public policy and could therefore be challenged before the French courts:

- absence of corruption;[27]
- the basic principles of competition law, and notably EU Competition law;[28]
- the principle of insolvency law whereby any action against a person subject to insolvency proceedings shall be stayed;[29]
- the incompatibility of an award with a decision that has been declared enforceable in France.[30]

IV. Implementation of the Public Policy Exception under French Law

(a) The Scope of the Public Policy Control

22. In the previous sections, public policy has been presented as a tool that can be used to prevent an award from being enforced within a given legal system. This section explains how this tool is used in France.

23. Pursuant to Article 1520 of the French Code of Civil Procedure, an arbitral award can be challenged on the ground that its recognition or enforcement is contrary to international public policy. This provision reads as follows:

> *"An award may only be annulled where:*
>
> *[…]*
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> *5° recognition or enforcement of the award is contrary to international public policy."*

24. The wording of this article is important. Indeed, the reference to the "*recognition or enforcement of the award*" rather than "*the award*" itself suggests that a French court cannot reopen the case and cannot assess whether the reasoning of the arbitral tribunal is compliant with public policy; rather it can only check whether the solution of the award is compliant.[31] This type of control, which is limited and which has been recognized by French courts, is usually referred to as a "*concrete*" control.

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25 Civ. 1e, 22 Nov. 1966, *Gerstlé v. Merry Hull.*

26 CA Paris, 17 Dec. 1991, *Gatoil.*

27 CA Paris, 30 Sept. 1993, *European Gas Turbines v. Westman;* CA Paris, 4 Mar. 2014, *Gulf Leaders.*

28 CA Paris, 18 Nov. 2004, *Thalès v. Euromissile* ; CA Paris, 23 Mar. 2006, *Cytec* ; CA Paris, 22 Oct. 2009, *Linde.*

29 Civ. 1e, 5 Feb. 1991 *Almira Films v. Pierrel ;* CA Paris, 7 Apr. 2011, *Fizpatrick.*

30 CA Paris, 9 Sept. 2010, *Jnah*; CA Paris, 17 Jan. 2012, *Planor Afrique.*

31 CA Paris, 14 June 2001, *SA Compagnie commerciale André v. SA Tradigrain France*; CA Paris, 18 Nov. 2004, *Thalès v. Euromissile.*

(b) Admissibility and Waiver of Challenges

25. Can the challenge of an award on grounds which a party had the opportunity to raise during the arbitral proceedings, but failed to, be upheld by French courts? In the past, in several cases, the Paris Court of Appeal agreed to assess whether awards were in compliance with public policy, even if the parties failed to raise a public policy argument during the arbitral proceedings.[32]

26. However, the 2011 reform of French arbitration law introduced a new provision that arguably invites French courts to reconsider their approach. Indeed, Article 1466 of the Code of Civil Procedure provides that "*[a] party which, knowingly and without a legitimate reason, fails to object an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity*".

27. Some authors have argued that because this provision does not specifically refer to public policy, and since the preservation of the international public policy is of particular importance, French courts should continue to declare that challenges are admissible pursuant to Article 1520 5°, even if international public policy has not been discussed during the arbitral proceedings.[33]

28. In recent decisions, French courts have ruled that a party is precluded from invoking a violation of public policy at the annulment stage if it had not raised the issue before the arbitral tribunal (if and when it had the opportunity to do).[34] The rationale is that, by raising an argument based on public policy at the annulment stage rather than at the merits stage, the challenging party was, in fact, inviting the annulment court to re-open and decide the case anew.[35] It remains to be seen whether this approach will be upheld in the presence of a proven and serious violation of public policy.

(c) Intensity of the Control

(i) Evolution of the Control and Current Approach

29. Over time, the public policy control exercised by French courts has gone through varying degrees of strictness and flexibility.[36] At least three periods can be identified.

30. During the first period, the control of public policy was relatively thorough. As noted by the Court of Cassation in the seminal *Pyramids* case, the courts had to review "*in fact and in law, all the elements allowing to confirm whether or not the rule pertaining to public policy had been applied*".[37] Without such control, the court's assessment would have been considered "*inefficient, and without purpose*".[38]

31. During the second period, French courts, following an increasingly pro-arbitration doctrine of "*non-revision of arbitral awards"*, started to limit the scope of their control, by asserting that an award could be annulled only if it misapplied rules pertaining to public policy in a "*flagrant, effective and concrete*" manner.[39] The philosophy was that the control should not be used to

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32 *See e.g.*, CA Paris, 14 June 2001, *SA Compagnie commerciale André v. SA Tradigrain France*; CA Paris, 23 Mar. 2006, *Cytec*; CA Paris, 22 Oct. 2009, *Linde.*

33 Seraglini & Ortscheidt, (*supra* n.15), para. 979.

34 *See e.g.*, CA Paris, 25 Feb. 2014, *Janville Distribution*, Rev. arb. 2014. 234; CA Paris, 10 Sept. 2009, *Schneider*, Rev. arb. 2010. 548 (upheld by the Court of Cassation in Civ. 1e, 12 Feb. 2014).

35 *Id.*

36 For a recent review of the case law and its evolution over time, *see* C. Jarrosson, "*L'intensité du contrôle de l'ordre public*" in E. Loquin, S. Manciaux (dir.), *L'ordre public et l'arbitrage, Actes du Colloque des 15 et 16 Mars 2013* (2014), pp. 161-176.

37 Civ. 1e, 6 Jan. 1987, *Plateau des pyramides*.

38 CA Paris, 30 Sept. 1993, *European Gas Turbines* ; *see also*, Civ. 1e, 6 Jan. 1987, *Plateau des pyramides*.

39 CA Paris, 18 Nov. 2004, *Thalès v. Euromissile* ; CA Paris, 22 Oct. 2009, *Linde.*

decide anew what the arbitral tribunal already decided and that the control should therefore remain "*extrinsic*".[40] Referring to this case law, French scholars qualified the control as "*minimalist*", and considered that its effect was "*illusory*" in practice.[41] Several eminent commentators took the position that the pendulum should swing back and the courts increase their level of scrutiny.[42]

32. The third period – which is ongoing – features a disagreement between the Paris Court of Appeal and the Court of Cassation. While the former seems to acknowledge the call for a stricter control, the latter recently re-affirmed that the threshold should remain unchanged.

33. The first case in which the Paris Court of Appeal appeared to take a stricter position is the *Linde* case.[43] In *Linde*, the Paris Court of Appeal re-affirmed that the breach of public policy rules should be "*flagrant, effective and concrete*" in order to trigger the annulment of an award.[44] Nonetheless, the Court also stated that when a party raises a public policy challenge, the court could "*carry out an assessment, in fact and in law, of the elements contained in the award*".[45] Thus, interestingly, the Court of Appeal referred to the "*Pyramids formula*", an expression that French courts had not used since what we have called the first period, when the control of French courts was relatively strict.[46]

34. The trend in the case law of the Paris Court of Appeal has become clearer since 2013. In February 2013, the Court rendered a decision in which it declared that the breach of public policy should be "*effective and concrete*".[47] The Court of Appeal omitted to mention the "*flagrant*" condition. In March 2014, in the *Gulf Leader* case, the Court of Appeal, again, did not refer to the flagrancy requirement.[48] In that case, the Court was asked to annul an award because the contract that contained the arbitration clause had allegedly been concluded further to the payment of bribes. The Court affirmed that, pursuant to Article 1520 5° of the Code of Civil Procedure, it had "*to investigate, in fact and in law, all the elements allowing to rule upon the invalidity of the arbitration clause and to confirm whether the recognition or enforcement of the award would constitute an effective and concrete breach of public policy*".[49] Similarly, in a case handed down by the Paris Court of Appeal on 14 October 2014, the Court stated that "*when it is alleged that an award gives effect to a contract procured through corruption, the court, seized of an annulment action pursuant to Article 1520-5 of the Code of Civil Procedure, must investigate all the legal and factual elements that are relevant to deciding the alleged illegality and to determine whether the recognition or enforcement of the award effectively and concretely violates international public order.*"[50]

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40 CA Paris, 23 Mar. 2006, *Cytec.*

41 Seraglini & Ortscheidt, (*supra* n.15), para. 982.

42 C. Seraglini, "*Le contrôle de la sentence au regard de l'ordre public international par le juge étatique : mythes et réalités*", Gazette du Palais, 21 Mars 2009, No. 80, *see also*, P. Mayer, "*L'étendue du contrôle, par le juge étatique, de la conformité des sentences aux lois de police*" in *Mélanges Gaudemet-Tallon* (2008), p. 459. P. de Vareilles-Sommières, "*Lois de police et politiques législatives*" (2011) *Revue Critique de Droit International Privé* 207.

43 CA Paris, 22 Oct. 2009, *Linde.* For a detailed discussion of this case, *see* F.X. Train, "*Note - CA Paris, 22 Oct. 2009*" (2010) *Revue de l'Arbitrage* 124.

44 CA Paris, 22 Oct. 2009, *Linde.*

45 *Id.* (emphasis added).

46 *See supra*, para. 30. For an analysis of this case in light of the previous case law, *see* Jarrosson (*supra* n.36), para. 13.

47 CA Paris, 26 Feb. 2013, *Sprecher*.

48 CA Paris, 4 Mar. 2014, *Gulf Leaders.*

49 *Id.*

50 CA Paris, 14 October 2014, *Republic of Congo vs. S.A. Commissions Import Export*.

35. It remains to be seen whether this trend championed by the Paris Court of Appeal is specific to matters involving corruption (which was the case in the *Gulf Leader* and *Congo* decisions cited above), which cannot be seriously investigated without delving into all the relevant factual and legal elements underlying the solution given by the arbitral award, or whether it will be applied in all situations where a violation of public policy is alleged.[51]

36. The trend followed by the Paris Court of Appeal has, to date, not been embraced by the Court of Cassation, which has recently restated that the control should be limited: in the February 2014 *Schneider* case, the Court of Cassation did not use the "*flagrant, effective and concrete*" formula *per se*, but referred to the impossibility for the court of appeal to "*revise*" the arbitral award.[52] This statement appears to refer to the three conditions mentioned above and, thus, it seems that the Court of Cassation continues to adhere to the "*flagrant, effective and concrete*" formula.[53]

37. These recent decisions fuel a debate that is still on-going between French legal scholars. This debate, relating to the intensity of the court's control, can be used to understand how public policy might be interpreted in the years to come.

(ii) Scholarly Debate and Way(s) Forward

(A) Scholarly Debate: Non-revision Principle vs Clear, Concrete but Measured Control

38. The debate is between the advocates of the doctrine of non-revision of arbitral awards and the promoters of a limited but more effective control, which must be based on clear and predetermined conditions.[54]

39. Pursuant to the doctrine of non-revision, the annulment court cannot decide a case anew, even if it considers that the arbitral tribunal has not reached the proper result. In other words, an action to annul an award on the basis of an alleged breach of public policy cannot be used as an opportunity for another adjudicator to decide the case again.[55]

40. However, there are limits to this principle. Assessing whether the award does not contradict public policy involves examining what the arbitrator did.[56] The court has to look at the factual evidence presented by the parties and the legal arguments they developed.

41. Several authors have thus argued that reference to the doctrine of non-revision is irrelevant to discussions on the court's control of public policy.[57]

42. The same authors have also tried to establish a set of guidelines for the courts, explaining that the minimalist approach developed by the French courts might not necessarily be supportive of international arbitration. This minimalist control might for example be perceived as giving the arbitrator leeway to disregard public policy rules.[58] Parties could thus arguably be tempted to

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51 *See* S. Bollée in "*Panorama Droit du commerce international, août 2013-juillet 2014*," Dalloz 2014 at p. 1976.

52 Civ. 1e, 12 Feb. 2014, *Schneider*.

53 D. Mouralis, "*Conformité des sentences internationales à l'ordre public : la Cour de cassation maintient le principe d'un contrôle limité*" (21 Apr. 2014), *La Semaine Juridique*, 475.

54 *See, e.g.*, C. Jarrosson (*supra* n.36), pp. 161-176. *See also*, Seraglini (*supra* n.42).

55 On this question, *see generally* V. Chantebout, *Le principe de non-révision au fond des sentences arbitrales*, Thèse Paris II (2007).

56 *See*, in this sense, S. Bollée "*Observations - Société Varassedis v. Société Prodim*" (2007) *Revue de l'Arbitrage*, 97, at para. 3. L.C. Delanoy, "*Le contrôle de l'ordre public au fond par le juge de l'annulation : trois constats, trois propositions*" (2007) *Revue de l'Arbitrage* 177, at para. 34.

57 Seraglini & Ortscheidt, (*supra* n.15), para. 982; Bollée (*supra* n.56), para. 3.

58 Seraglini & Ortscheidt, (*supra* n.15), para. 983.

think that arbitration could allow them to circumvent these mandatory rules. As a consequence, States – which will not accept such circumventions – might be drawn to adopting a restrictive policy towards international arbitration.[59]

43. The suggestions of these authors are summarized below.

(B) Way(s) Forward

44. *A workable definition*: The first suggestion worth mentioning here is the need for a clear understanding and "*classification*" of the norms than underlie public policy. Seraglini explains that the public policy definition given by the International Law Association is interesting and could be used in this respect. This definition provides:

> *"The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules"; and (iii) the duty of the State to respect its obligations towards other States or international organizations."*[60]

45. French courts have not attempted to provide such a clear definition of what the rules pertaining to public policy may be. As explained at the beginning of this memorandum, public policy is generally seen as a tool rather than a set of substantial norms. For various reasons already discussed, it is impossible to list exhaustively all the norms pertaining to public policy. Yet, it is possible to provide guidance on how to identify whether a given rule may or may not be used by a court to prevent an award from being enforced. One may argue that French courts should be clearer in that respect and outline a method to determine which norm is to be considered a public policy norm.

46. *A well-established threshold*: Because a violation of public policy can trigger the annulment of an award, there is consensus among French scholars that public policy cannot be interpreted too broadly. The three criteria used by the Court of Cassation – flagrant, effective and concrete – address this concern. However, many scholars have argued that these conditions, and particularly that of flagrancy, can empty the control of its substance and should therefore be changed.

47. *Two-step process and a verification more than a control*: Finally, some French scholars have tried to identify a method to be used by the courts to better determine whether an award breaches public policy, without taking the risk of revising it. This solution focuses notably on the factual and legal inquiry a court may undertake. To what extent, for instance, should courts consult evidentiary materials submitted by the parties in the arbitral proceedings? To what extent should they take into account the appreciation made by the arbitral tribunal of these materials? These are the types of questions raised in legal literature, which require answers to clarify the role of the courts.

48. Seraglini and Ortscheidt suggest that courts should operate a two-tier review. The first step would be to assess, *prima facie*, if the award may breach, in a manifest way, international public policy.[61] If the court considers that this *prima facie* assessment results in the finding of a possible breach, then it would have to confirm this breach by looking more deeply into the relevant facts as

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59 For instance, P. Mayer argues that if the State fails to better draw the lines of the extent of control, the legislator might intervene, and this intervention could be problematic for the entire arbitration community. Mayer (*supra* n.42), p.468.

60 International Law Association, New Delhi Conference (2002), Committee on International Commercial Arbitration, Recommendation 1(d), p. 6.

61 Seraglini & Ortscheidt, (*supra* n.15), para. 984; *see also*, Seraglini (*supra* n.42).

available in the arbitral award (which should be presumed to present the facts accurately, unless a party demonstrates otherwise) and, if necessary, in the facts presented in the parties' submissions during the arbitral proceedings.[62] Seraglini and Ortscheidt further suggest that the court should only accept to review new facts and documents on an exceptional basis, if such new elements are essential to the demonstration and were not available at the time of the arbitration.[63]

49. In a recent study on this issue, Jarrosson argues that not all breaches of public policy rules should be sanctioned. He notes that the courts correctly look at the result of the possible breach and not at the reasons behind it.[64] In that sense, the courts should *assess* rather than *control* the compliance of the award with public policy. To illustrate his argument, Jarrosson compares arbitral proceedings to a marathon run by the arbitral tribunal, with the court acting as referee. The role of the referee is not to run the race alongside the competitors to make sure that they do not cheat, but rather to assess, according to standards and signposts, and at given moments during the course of the race, if specific transgressions (such as taking a shortcut) have occurred.[65]

50. As to the use of evidence submitted by the parties during the arbitration, Jarrosson considers that in many cases, the court does not have the capacity to review the entire arbitration file. In his view, however, it is sufficient to consider that the party challenging the award has the responsibility to select the most pertinent evidence in support of its case. Citing the *Linde* case, Jarrosson notes that the applicant bears the burden of proof. The applicant must produce concrete materials, rather than theoretical demonstrations, in order to establish the breach.[66]

51. According to this author, such process would result in a concrete but measured control. This control would thus be similar to the one undertaken by other jurisdictions, including the European Court of Justice, following the *Eco Swiss* case, in which it stated that "*it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances*."[67] ⊕

62 Seraglini & Ortscheidt, (*supra* n.15), para. 984.

63 Seraglini & Ortscheidt, (*supra* n.15), para. 984.

64 Jarrosson (*supra* n.36), paras. 22-28.

65 *Id.*, para. 24.

66 *Id.*, para. 27.

67 Jarrosson (*supra* n.36), paras. 28, citing *Eco Swiss*, ECJ Case C-126/97, ECJ Report p.1-3092.

Annex A Selection of French Cases Related to Public Policy

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
Cass., Civ. 1, 22 November 1966, *Gerstlé v. Merry Hull*	The applicant argued that an arbitral award issued in the State of New York, which did not set out the arbitral tribunal's reasoning, violated international public policy and should on that basis not be recognized in France. The Court found that a failure to give reasons is not "*in itself contrary to French international public policy*".		X		X
Cass., Civ. 1, 5 February 1991, *Almira Films v. Pierrel*	The arbitral tribunal had found that the time period to issue the award under the applicable rules of arbitration had been interrupted and started anew, through the application of principles of French insolvency law, and issued its award after the expiry of the time period provided in the applicable rules of arbitration. The applicant argued, *inter alia*, that the Court of Appeal had failed to determine that international public policy required the arbitral tribunal to declare the time period to be interrupted. The Court confirmed that certain rules on insolvency proceedings are part of French international public policy. These rules prevail even if the arbitration proceedings in France are not subject to French law.	X			X

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
CA Paris, 30 September 1993, *European Gas Turbines v. Westman*	The applicant argued that the arbitral award at issue violated international public policy because (i) it upheld a contract signed between EGT and Westman for the specific purpose of procuring, through undue influence/corruption, the granting to EGT of a contract for the supply of gas turbines; and (ii) the award relied, as a basis for its findings both on liability and quantum of damages, on a fraud by Westman, who had submitted to the arbitral tribunal a statement of costs allegedly incurred in performing the contract with EGT, when in reality it had not incurred any of the costs reflected in the submitted document. On the first point, the CA affirmed that procuring a contract through corruption is contrary to international public policy and that, in assessing whether there is a violation of international public policy, the court must control "*in fact and in law all the elements pertaining to the application of international public policy and, in such a case, to assess the legality of the agreement*." The Court added that proceeding otherwise "*would deprive the scrutiny of the judge of efficiency and, therefore, would deprive such scrutiny of its* raison d'être." The CA proceeded to a review of the relevant elements, both those produced in the arbitration and for the first time before the court, and came to the conclusion that there was no evidence of corruption. On the second point, the court found that Westman's maneuvers constituted a procedural fraud which had influenced the arbitral tribunal's decision on EGT's liability as well as the quantum of damages.	X	X	X	

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
Cass., Civ. 1, 19 December 1995, *Westman*	See above. Westman argued that, while procedural fraud could form the basis for a request for revision, it could not serve as a ground for an annulment action because international public policy as a ground for annulment can only concern the solution of the arbitral award, not the arbitral procedure. The Court found that procedural fraud can be sanctioned within the scope of procedural international public policy which is a ground for annulment of arbitral awards.		X	X	
CA Paris, 14 June 2001, *Tradigrain*	The applicant argued that contracts for the sale of flour at issue in the arbitration, because they did not give rise to actual delivery, in reality constituted a form of financial transaction covered by mandatory laws and, as such, had to involve a financial institution. By upholding the transactions even though no financial institution was a party, the award violated such mandatory laws which reflected international public policy. The CA noted that the international public policy argument had not been raised in the arbitration, but that the defense of the French conception of international public policy could require that the annulment judge exercise its powers even if the argument had not been raised in the arbitration. The CA examined the transactions at issue and found that they did not enter the scope of the mandatory laws relied on by the applicant. The CA noted that in these conditions it did not need to consider whether such mandatory laws reflected international public policy.	X			X

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
CA Paris, 18 November 2004, *Thalès*	The applicant argued that the performance of the award, which gave effect to certain provisions of the contract at issue, violated European Union competition law. The CA accepted that the requirements of European Union competition law reflect international public policy. It noted that the court must perform its own legal and factual assessment of the award referred to it, but that the EU competition law argument had not been raised before the arbitral tribunal and that it is not for the court to resolve the merits of a dispute that was not referred to the arbitral tribunal. The CA concluded that the applicant had not demonstrated a "*flagrant, effective and concrete*" violation of international public policy.	X			X
CA Paris, 23 March 2006, *Cytec*	On an appeal of a decision recognizing foreign arbitral awards, the applicant argued that the arbitral tribunal had made an incorrect application of European Union competition law. The CA agreed that the requirements of European Union competition law are part of international public policy, but that the applicant had failed to demonstrate that there was a "*flagrant, effective and concrete*" violation of the same.	X			X
CA Paris, 22 October 2009, *Linde*	The applicant argued that the performance of the contract at issue, as interpreted by the arbitral tribunal, violated European Union competition law. The CA noted that the court must perform its own legal and factual assessment of the award referred to it, but that the EU competition law argument had not been raised before the arbitral tribunal and that it is not for the court to resolve the merits of a dispute that was not referred to the arbitral tribunal. The CA concluded that the applicant had not demonstrated a "*flagrant, effective and concrete*" violation of international public policy.	X			X

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
CA Paris, 10 September 2009, *Schneider*	The applicant argued that the award at issue violated international public policy because (i) the arbitral tribunal found jurisdiction over a claim for which it had previously denied jurisdiction, thus violating the principle of *res judicata*, (ii) the arbitral tribunal failed to draw proper conclusions from facts which characterized the existence of fraud, thus violating the principle of *fraus omnia corrumpit* and (iii) the award upheld a contract which participated in a corrupt scheme. The CA noted that when a violation of international public policy is alleged, it only reviews the compatibility of the solution in the award with international public policy, controlling the "*flagrant, effective and concrete*" character of the alleged violation. The CA found that (i) as regards the *res judicata* argument, that there was in reality no inconsistency between the awards at issue; (ii) as regards the fraud argument, that the argument had not been raised before the arbitral tribunal and it was not for the court to judge the case anew; (iii) as regards the corruption argument, that the arbitral tribunal had reviewed the argument and concluded that there was no evidence of corrupt acts.	X	X		X

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
CA Paris, 11 May 2010, *Thalès v. Taiwan*	The applicant argued that an arbitral award on jurisdiction should be annulled because the respondent in the arbitration had not benefitted from a level playing field with the claimant, given that the claimant had presented arguments, supported by classified documents, which the respondent could not adequately respond to as doing so required relying on classified documents which, unlike the claimant, it was not at liberty to produce. The CA found that the principle of equality among the parties in matters of presentation of evidence had to be examined "*in concreto*", based on specific substantive arguments, as opposed to "*in abstracto*". In the context of the arbitral award at issue, which only decided a jurisdictional objection and stated that issues with the production of documents would be examined at the merits stage of the arbitration, the award did not feature any "*flagrant, effective and concrete*" violation of international public policy.		X		X
CA Paris, 1 July 2010, *Thalès v. Frontier*	The applicant argued that the arbitral tribunal had been deliberately misled by the "*fraudulent maneuvers*" (submission of forged evidence) of the claimant in the arbitration. The Court found that the arbitral award, which reflected findings based on the claimant's "*fraudulent maneuvers,*" was for this reason contrary to international public policy.		X	X	
CA Paris, 9 September 2010, *Jnah*	The applicant argued that failure to apply the *res judicata* doctrine constituted a breach of international public policy. The Court of Appeal held that it had not been demonstrated, let alone alleged, that the award contradicted a decision that was enforceable in France. It therefore concluded that there could be no breach of international public policy.		X		X

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
CA Paris, 7 April 2011, *Equatorial Guinea*	The claimant company was liquidated in Equatorial Guinea after initiating arbitral proceedings against the State of Equatorial Guinea, in circumstances which suggested that the respondent's procedural rights had not been observed. The arbitral tribunal had accordingly decided that the company would continue to be represented by its original management, as opposed to the appointed liquidator. The State sought to have the award annulled on various ground including the tribunal's violation of international public policy through its refusal to take account of the liquidation judgment. The CA recognized that principles of insolvency belong to international public policy but that, before applying the international public policy exception, the arbitral tribunal needed to verify that the insolvency judgment itself did not violate international public policy. On the facts of the case, the CA found that the applicant had failed to demonstrate that there was a "*flagrant, effective and concrete*" violation of international public policy.	X			X
CA Paris, 17 January 2012, *Planor*	The applicant argued that the arbitral award at issue was incompatible with court decisions issued in Burkina Faso, which enjoyed automatic *res judicata* in France pursuant to an international treaty. The CA held that such incompatibility constituted a "*real and concrete*" violation of international public policy.	X		X	
Cass., Civ. 1, 28 March 2012, *Seribo*	The applicant argued that the CA had upheld the recognition of a foreign arbitral award, even though the institution under which the award originated had not been designated as the institution in charge of the arbitration of disputes under the parties' agreement, and thus violated international public policy. The Court held that the CA had failed properly to address the applicant's argument that the recognition of the award was contrary to international public policy.		X	*[Court of Appeal decision upholding the recognition was quashed and remanded for further decision.]*	

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
Cass., Civ. 1, 19 December 2012, *Botas*	The applicant argued that the arbitral tribunal had failed to apply principles of good faith and estoppel in the performance of a contract. The Court held that such matters, in the absence of any procedural fraud, did not constitute one of the grounds for annulment provided by the Code of Civil Procedure; the applicant had failed to demonstrate how the solution adopted by the arbitral tribunal violated international public policy; the annulment judge may not review the merits of an arbitral award.	X			X
CA Paris, 25 June 2013, *Sirec v. Metalmonde Steel*	The applicant argued that the award was contrary to international public policy because it upheld a money laundering scheme allegedly apparent from the structure of the transaction at issue. The CA reversed the lower court decision granting exequatur, on grounds which differed from those raised by the applicant: the CA found that the arbitral tribunal had sanctioned a procedural fraud when it accepted, in response to a request for correction of a clerical error, to substitute in its award the name of an individual in place of that of one of the original claimants, which had been liquidated. *[The nature of the fraud is not further explained in the case, which has been criticized by commentators for its lack of clarity.]*		X	X	
Cass., Civ. 1, 12 February 2014, *Schneider*	The applicant argued that the arbitral award at issue upheld a contract which participated in a corrupt scheme. The Court held that the task of the annulment judge is to decide whether or not an arbitral award is to be inserted into the French legal order, not to judge anew the merits of the dispute. The Court held that the CA had correctly found that, through its annulment action, the applicant had in reality sought to have the case decided anew.	X			X

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
CA Paris, 25 February 2014, *Janville Distribution*	The applicant argued that in its award the arbitral tribunal had failed to apply mandatory provisions of the French Commercial Code (Art. 442-6) protecting a party against abusive commercial imbalance. The CA held that a party is precluded from invoking a violation of public policy at the annulment stage if it had not raised the issue before the arbitral tribunal (if and when it had the opportunity to do so).	X			X
CA Paris, 4 March 2014, *Gulf Leaders*	The applicant argued that the award gave effect to a contract obtained by corruption. The CA held that, seized of an annulment action based on an argument that the award gives effect to a contract procured through corruption, the annulment judge must investigate all the legal and factual elements that are relevant to deciding the alleged illegality of the contract and to determine whether the recognition or enforcement of the award violates international public policy in an "*effective and concrete*" manner.	X			X
CA Paris, 14 October 2014, *Republic of Congo*	The applicant argued that the award gave effect to a contract procured through corruption. The CA held that, seized of an annulment action based on an argument that the award gives effect to a contract procured through corruption, the annulment judge must investigate all the legal and factual elements that are relevant to deciding the alleged illegality of the contract and to determine whether the recognition or enforcement of the award violates international public policy in an "*effective and concrete*" manner.	X			X

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
CA Paris, 4 November 2014, *Man Diesel*	The applicant argued that the award gave effect to a contract that facilitated a corrupt scheme. The CA held that, seized of an annulment action based on an argument that the award gives effect to a contract procured through corruption, the annulment judge must investigate all the legal and factual elements that are relevant to deciding the alleged illegality of the contract and to determine whether the recognition or enforcement of the award violates international public policy in an "*effective and concrete*" manner. The CA held that the applicant failed to prove the existence of corruption.	X			X
CA Paris, 25 November 2014, *Electroputere VFU Pascani*	The applicant alleged that the award violated the principle of the binding force of contracts. The CA held that an international arbitral award can only be annulled if its recognition or enforcement violates international public policy in an "*effective and concrete*" manner and that the applicant was in fact requesting the annulment judge to review the merits of the award, which is beyond the scope of an annulment action.	X			X
CA Paris, 20 January 2015, *Alcatel Lucent*	The applicant argued that the arbitration agreement was fraudulently signed by its former director who was in reality acting on behalf of another company, which should therefore have been involved in the arbitration. The CA found that no fraud was demonstrated, such that the applicant failed to show how the recognition and enforcement of the award would violate international public policy in a "*manifest and concrete*" manner.	X			X

Réf.	Summary of the Public Policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
CA Paris, 24 February 2015, *Arab Potash Company*	The applicant argued that the recognition of the award was contrary to international public policy for three reasons: (i) the respondent had allegedly waived its right to rely on the award by starting ICSID arbitration proceedings after annulment of the award at the seat of arbitration, (ii) the respondent's contradictory behavior amounted to estoppel, and (iii) the second ICSID award had a *res judicata* effect and was incompatible with the award at hand. Concerning the first argument, the CA ruled that the waiver of the right to rely on the award was an enforcement issue and that the recognition of the award could not be likely, on this basis, to violate international public policy in a "*manifest, effective and concrete*" manner. It also examined the merits of the other arguments and rejected them as unfounded.	X	X		X
TOTAL		**18**	**10**	**6**	**19**