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WHEN FRENCH JUDGES CONFIRM THE EXPANSION OF THEIR CONTROL OVER ARBITRAL AWARDS

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Introduction:

On 16 January 2018, the Paris Court of Appeal confirmed its trend for an extended control over arbitral awards within annulment proceedings, and more particularly on the grounds of violation of international public policy.

For the past several years, the French judges have clearly demonstrated their intent to carry an in-depth analysis when deciding on a request for setting aside an award on the basis of Article 1520 of the French Code of Civil Procedure, particularly on the first three grounds provided by such legal provision, i.e., as to the arbitral tribunal's decision on its jurisdiction, its constitution or its compliance with its mission. (1)

This time, the judges confirmed that their intent was not to limit their in-depth analysis to the first grounds for annulment but also to the violation of international public policy, and there is now very little doubt on the judges' intention to adopt a harmonized approach in controlling arbitral awards.

Whilst this extended control on the arbitral tribunals' awards could first be seen as an attempt to unduly interfere in the arbitrators' decisions, it should however be noted that this tendency contributes to the positive public image of arbitration, which unfortunately may still be considered as a means for parties to notably circumvent foreign mandatory laws protected in the international legal order. (2)

The decision of 16 January 2018 of the Paris Court of Appeal thus reminds practitioners and the public that judges are empowered to control, "*with no limitation*" whether the award "*manifestly, effectively and concretely*" violates international policy, by determining the content of such international policy and by characterising the violation that should be sanctioned.

The case started with the constitution in 2003, of Dao Lao, a Laotian company of which 70% was owned by MK Group, a Russian company, and 30% by Lao Geo Consultant, a Laotian company, for the exploitation of the country's gold resources, on the basis of a contract signed with the Laotian government.

In 2010, MK Group and a Ukrainian company – Onix – entered into a shareholders' agreement providing for the sale of 60% out of 70% of MK Group's shares in Dao Lao to Onix.

On October 2011, a Memorandum of Understanding ("MOU") was signed between MK Group, Lao Geo Consultant, Onix, and the administration endorsing the shares' transfer. Two versions of the MOU were drafted, one in English, the other in Laotian. It then appeared that the two versions were not identical, as the one submitted to the Laotian administration included as a condition for the transfer of the shares an obligation for Onix to further invest USD 12.5 million in the project. Such a condition was not included in the English version.

In 2012, a dispute arose and MK Group initiated an arbitral proceeding against Onix, claiming that the transfer of 60% of its shares in Dao Lao to Onix never occurred, since Onix failed to comply with the alleged condition precedent, i.e., to invest the additional USD 12.5 million.

In its award of 13 October 2015, the arbitral tribunal dismissed MK Group's claim, considering that the transfer of the shares did occur based on the shareholders' agreement and other documents – including the MOU.

MK Group filed a petition for the award's annulment before the Paris Court of Appeal, invoking *inter alia* a violation of international public policy pursuant to Article 1520 5° of the French Code of Civil Procedure (3):

> - First, MK Group alleges that the award was rendered on the basis of the false version of the MOU which does not include the condition precedent of the additional investment of USD 12.5 million and of a false certificate of the Register's Office of the Laotian Ministry of Justice according to which Onix would have been the owner of 60% of the shares in Dao Lao;
>
> - Second, MK Group states that by bypassing the condition set out in the MOU regarding the additional investment and imposing a partner to the Laotian State in violation of its investment regulations, the arbitral award disregarded Laotian sovereignty on its natural resources and thus violated international public policy.

Investigating into the facts submitted to the Court, the national judge considered that the existence of two versions of the MOU, and notably the one including the additional investment as a condition of the transfer, demonstrated the manoeuvers of Dao Lao's head management, who was also head management of Onix, to obtain the approval of the Laotian administration, since such condition was indisputably substantial for the latter.

In these circumstances, the Court considered that the award conferred to Onix a right, legally protected in the international order, to exploit natural resources whilst this right had been fraudulently obtained from the local administration. Since the Court considered that the local administration would have not granted the said permission without fraudulent manoeuver, as it would have potentially been in breach of its national law relating to the exploitation of natural resources, it ruled that the arbitral tribunal violated international public policy in a manifest, effective and concrete manner. As a consequence, the award should be annulled.

This decision confirms clearly the current trend of the French judges to increase their control over arbitral awards and international public policy, notably by stating that they have an unlimited power to assess all the relevant factual and legal elements of the case in order to verify whether the award complies with it (4).

The Court also seemed to take the opportunity to remind that international public policy has to be interpreted as being the French conception of international public policy, meaning the principles and values which cannot be violated even in an international context, specifying that foreign mandatory provisions can be part of French international public policy.

- **The intensity of the Courts' control over the award's conformity with international public policy**

If for the last years the French judge had made clear that they consider themselves empowered to extensively control the first three annulment grounds out of the five provided for by the French Code of Civil Procedure, i.e., jurisdiction, proper constitution of the tribunal and respect of the tribunal's mandate, they have also now made clear that they will apply the same extensive degree of control over the conformity of arbitral awards to international public policy, i.e. the fifth ground of annulment. (5)

Indeed, the Court strongly reaffirmed, at the beginning of its analysis, its power to refer to any relevant factual and legal elements without any limitation to analyse the violation to international public policy.

> "*Considering that if the mission of the Court of Appeal, pursuant to article* [now 1520] *of the Code of Civil Procedure, is limited to the examination of the defects enumerated by this text, no limitation is brought to the power of this jurisdiction to seek in law and in fact all the elements concerning the defects in question*". (4)

This position had been established for years, in the same wording, i.e., since 1987 with the *Plateau des Pyramides* case related to an issue of the arbitral tribunal's jurisdiction,(6) and further reiterated, as for example in the *Westman* case in 1993 related to a violation of international public policy. (7)

If for years the question of the nature of the violation of international public policy that had to be sanctioned remained undetermined, as of beginning of the 2000s, the French *Cour de Cassation* limited the characterisation of the violation of international public policy (8) to *flagrant, effective and concrete* violations only, thus seemingly limiting its in-depth analysis to the sole control of a flagrant violation.

The triptych of "*flagrant*", "*effective*" and "*concrete*" has been interpreted as:

> *"To be flagrant, the violation of public policy, as a* flagrante delicto*, must be committed before the judge's very eyes. When the matter has been submitted to the arbitrator, this implies that the award contains ingredients of the violation and brings them to the attention of the control authority. The solution likely to violate public policy is then the one given to a dispute whose component elements are delimited by the factual findings of the arbitrator and his assessment of the rights of the parties.*
>
> *To be effective, the violation of public policy must be translated into an action that is contrary to public policy… The arbitrator who wrongly declares wrongful a contract which was not does not go against public policy, even if, in so doing, he misapplies the rule of public policy.*
>
> *Finally, to be concrete, the breach of public policy must lead to a solution which, materially, is incompatible with it. It will not be so under the equivalence theory* ('théorie de l'équivalence") *when the arbitrator fails to observe a rule of public policy by finding lawful a contract that was not, but refuses to make it produce effects for another reason, termination for fault or lack of consent for example".* (9)

In 2004, the Paris Court of Appeal in the *Thales* case confirmed the trend and followed the *Cour de Cassation*'s wording, adding that:

> "[the judge] *cannot rule on the substance of a complex dispute that has never been argued or adjudicated before an arbitrator concerning the mere possibility of the illegality of certain contractual stipulations*". (10)

Obviously, at the time, the judges not only intended to strictly limit the characterisation of the violation of international public policy, but also their right to rely on any legal and factual elements within their control, since the Court considered that judges shall not base their decision on elements that were not argued by the parties before the arbitrators.

This approach was considered by some scholars as constituting a "minimalistic" control (11) when others consider that it did not limit the control of national courts but only the nature of the violation to international public policy that the judge will sanctioned. (12)

In any event, this approach was highly criticized:

> "*In the name of the prohibition of the review on the substance of the arbitral award*, [the Court] *is limited to an illusory control of the appearance of conformity or of the obvious violation of the international public policy*". (13)

In particular, scholars consider that the "*flagrancy*" criteria implies that the national judge's control is limited to examine the award "*as it is*", "*without calling into question the legal qualification of the litigious facts by the arbitrators, nor the appreciation that they made of the parties' rights in light of the legal dispositions invoked, and even less the relevancy of the legal reasoning on which they rely to rule on the questions submitted to them*". (14)

Ten years later, the Paris Court of Appeals not only abandoned the "flagrancy" requirement in the *Gulf Leaders* case of 4 March 2014, but it also reaffirmed that the judge deciding on an annulment request should look at all relevant factual and legal elements that would enable to characterise the alleged corruption (see also *Congo v. Commisimpex* and *SAS Man Diesel*):

> "*When it is claimed that an award gives effect to a contract obtained by bribery, it is up to the judge, pursuant to article 1520-5° of the Code of Civil Procedure, to seek in law and in fact all the elements making it possible to rule on the alleged violation by the convention and to assess if the recognition or the execution of the sentence violates in an effective and concrete way the international public policy*". (15)

This case-law announced the new trend in favour of a stronger control from the national judge over the conformity of the arbitral tribunal with international public policy.

In 2017, the Court had a new opportunity to clarify its position in the *Belokon* case: following the judgment rendered on 14 June 2016 (16), the Court replaced the "*flagrant*" criteria with the "*manifest*" criteria, and reasserted that the judges could rely on all factual and legal elements to assess a violation of international public policy:

> "*Considering that this analysis, carried out for the purpose of defending international public policy, is not limited to elements of proof presented to the arbitrators, nor bound by the tribunal's findings, assessment or characterisation*"
>
> (…)
>
> "*Considering that the recognition or enforcement of the award, which would have the effect of giving Mr. X. the benefit of the proceeds of criminal activities, violates manifestly, effectively and concretely the international public order*". (17)

In front of such power of investigation, an author commented that:

> "*The Court proceeds to a new and thorough investigation of the case by repeating point by point each of the elements discussed of the allegation of money laundering*". (18)

Moreover, the "*manifest*" criteria has been defined as:

> "*The 'manifest' nature of the breach of public policy does not amount to its 'flagrant' nature, since it is based here on a new, in-depth analysis of the elements of the debate on the merits*". (19)

Some authors nevertheless expressed doubts as to the scope of the judges' extensive control after the *Belokon* case:

> "*One could wonder indeed if the judges intended to reinforce their*

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control only in certain matters, limited to the most important aspects of public policy – first of them, corruption – or if all the components of public policy were now subjected to this new approach". (20)

In its decision of 16 January 2018, the Court of Appeal reiterated its prerogatives to rely on every factual and legal element it deems useful, without having to limit its reasoning to the findings of the arbitral tribunal, using such extensive power to analyse whether there was a "*manifest, effective and concrete*" ("*flagrant*" having definitively disappeared) violation of foreign mandatory rules.

Indeed, the Court has carried out a thorough analysis of the facts of the case comparing the English and Laotian versions of the shareholders' agreement and the statutes' modification related to it. The Court concluded that the English version reflected the real intent of the parties, i.e., that the additional investment was not a condition precedent to the transfer of share, while the Laotian version was intended for the Laotian administration, making the additional investment a suspensive condition, in order for the administration to give its permission. It is on the basis of this extreme in-depth analysis of the facts that the French judges considered that this manoeuver was intended to mislead the Laotian administration and constituted fraud in view of breaching foreign mandatory rules.

As explained by Professor S. Bollée, the *MK Group* case constitutes the "*resurrection*" of the *Plateau des Pyramides* case-law:

"*This word-for-word recovery of the ratio decidendi of the famous Plateau des Pyramides case-law is a strong act. It marks a clear stop to the minimalist conception of the judge's control derived from the Thalès case-law*". (21)

To our knowledge, the question of whether the parties raised the issue of international public policy during the arbitral proceedings is uncertain. However, the French Court considered that the arbitral tribunal was aware of the existence of two different versions of the MOU, and goes further by analysing the consequences of that discordance with respect to mandatory Laotian laws. Should one consider that the national judge implicitly suggests, as Professor Bollée seems to indicate, that the arbitral tribunal should have raised this issue by its own initiative? (22)

This position contributes to the positive image of arbitration by showing that parties cannot circumvent mandatory rules by choosing another forum to resolve their dispute, in line with scholars who indicate that arbitrators shall not be complicit of a deliberate fraud to foreign mandatory provisions (23). However, one may fear that such position may result in arbitrators making in-depth analysis as to the compliance with local mandatory rules even when the Parties did not discuss it during the arbitral proceedings, knowing that the French judge will be able to rely on any factual and legal elements to render its decision on annulment.

In any event, the ground related to the violation of international public policy is now treated similarly to the first grounds of annulment. Some scholars already speak of a "*unitary approach*" of the judge's control. (24)

- **Clarification of the scope of French international public policy**

Not only this case confirms the extension of the intensity of the judge's control over the arbitral awards within annulment proceedings, but it also clarifies the scope of French international public policy.

Article 1520 5° related to annulment proceedings of international arbitral awards only refers to "*international public policy*" without defining it.

In the *MK Group* Case, the Court of Appeal used its usual formulation stating that the award is being controlled through the notion of "*international public policy*" as interpreted by French law, but also added that such notion can also include foreign mandatory rules:

> "*Considering that the international public policy under which the judge of the annulment rules is understood to mean the French legal order conception of the international public policy, that is to say, the values and principles that the French legal order cannot suffer the ignorance even in an international context; and it is only to that extent that foreign mandatory provisions can been considered as being part of international public policy […]*". (25)

Looking into the facts, the Court thus considered that the Laotian foreign mandatory rules were to be included in the scope of analysing the French international public order, all the more since it was based on (i) an international instrument, i.e., a UN Resolution and (ii) an international consensus on the States' sovereign right to subject the exploitation of natural resources on their territory to prior administrative authorisation and to submit foreign investments to their control. Thus, the Court specifically referred to the *1962 UN General Assembly Resolution on Permanent Sovereignty over Natural Resources* ("the Resolution") as a tool to extend Laotian mandatory provisions into the French international legal order.

The Court of Appeal echoed here a decision it had rendered last year in the *Belokon case* in which the Court of Appeal, in order to assess whether the claimant was liable for money laundering, referred to the *2003 UN Convention Against Corruption* characterising an international consensus of 140 States (including France) on the anti-corruption battle.

With this decision, it appears that French judges express the will to increasingly take foreign mandatory laws into consideration.

This position is in line with scholars, who have long considered that:

> "*Indeed, article 1520 of the [French] Code of Civil Procedure refers to French public policy and not foreign public policy. Nonetheless, the judge can, through his own conception of international public policy, consider the respect by the arbitrator of foreign mandatory laws*". (26)

> "*Traditionally, international public policy is constituted of the fundamental principles of the French legal system as well as the French public policy laws that could be applicable to the case subjected to arbitration, and even foreign public policy laws*". (27)

Following this approach, Professor E. Gaillard even commented that the reference to the UN Resolution could have been avoided since the Court could have limited its reasoning to the sole prohibition of fraud, which is, in any event, a breach of French international public order:

> "*The spectacular reference to the principle of sovereignty over natural resources conceals the application of a more ordinary, but less controversial, rule of prohibition of States' rights fraud. The court having found that the apparent act, submitted to the State, did not correspond to the actual act, which it considered to have been in breach of the rights of the State, it inferred from this that the sentence violates the French conception of the international public policy as it conferred a title 'on an investment realized by means of the fraudulent obtaining of an administrative authorisation'. This motivation would have been sufficient in itself*". (28)

Such position is not shared by Professor S. Bollée who considers that it is actually the point of view of the mandatory foreign provisions that mattered: "*in the hypothesis in which the investment would have been legally made under Laotian law, or at least if it could have been regularized, it would have been absurd to be more papist than the Pope by nevertheless sanctioning fraud*".

In any event, this decision of the Court is in line with the current trend to "*internationalize*" French international public policy and to extend the judges' control towards foreign mandatory provisions

Conclusion:

Not only does this decision confirm the extended control of the national judge over arbitral awards and specifies the outlines of international public policy, but the MK Group case is also a reminder that parties cannot opt for arbitration in order to avoid foreign mandatory provisions protected in the international legal order that would have been applied by national courts.

This is a particularly topical subject, which has also been raised for the issue of economic sanctions in the European Union and their relation to arbitration.

Thus, recently, scholars have been asking "*whether third-country sanctions should be applied as a legal norm or should they be taken into consideration at the level of substantive law*" by arbitral tribunals, reminding that some tribunals give effect to economic sanctions "*as a fact which is considered as a ground for force majeure that exonerates parties from performance*", particularly because "*by ignoring an economic sanction, arbitrators assume the risk that their award will be annulled by the competent national court*" (29).

1. Note by Prof. S. Bollée, in *Journal du droit international* (Clunet) n°3, juillet 2018, 12, para.10
2. Tamas Szabados, EU Economic Sanctions in Arbitration, in Maxi Scherer (ed), Journal of International Arbitration, Kluwer Law International 2018, Volume 34 issue 4, pp. 439-462
3. Article 1520 of the French Code of Civil Procedure provides that :

"*An award may only be set aside if* :
the arbitral tribunal wrongly accepted or declined jurisdiction;
(2) the arbitral tribunal was not properly constituted;
(3) the arbitral tribunal ruled without complying with the mandate conferred upon it;
(4) due process was violated; or
(5) recognition or enforcement of the award is contrary to international public policy"

All quotes in the present article are freely translated from French to English.

4. « *Considérant que si la mission de la cour d'appel, saisie en vertu de l'article 1520 du code de procédure civile, est limitée à l'examen des vices énumérés par ce texte, aucune limitation n'est apportée au pouvoir de cette juridiction de rechercher en droit et en fait tous les éléments concernant les vices en question* »

"*Considering that if the mission of the court of appeal, pursuant to article 1520 of the Code of Civil Procedure, is limited to the examination of the defects listed in this text, no limitation is brought to the power of this jurisdiction to seek in law and in fact all the elements concerning the defects in question*"

5. Note by Prof. S. Bollée, in *Journal du droit international* (Clunet) n°3, juillet 2018, 12, para.10:

« *L'arrêt MK Group signe, sous ce rapport, le retour à une appréhension commune des cas d'annulation*. »

"*The MK Group case reveals, in this respect, the return to a common apprehension of annulment cases*"

6. Cass. Civ 1ère, 6 janvier 1987, n°84-17274

« *si la mission de la cour d'appel, saisie en vertu des articles 1502 et 1504* [aujourd'hui 1520] *du nouveau Code de procédure civile, est limitée à l'examen des vices énumérés par ces textes, aucune limitation n'est apportée au pouvoir de cette juridiction de rechercher en droit et en fait tous les éléments concernant les vices en question* »

"*Considering that if the mission of the court of appeal, pursuant to article 1502 and 1504* [now 1520] *of the Code of Civil Procedure, is limited to the examination of the defects listed in this text, no limitation is brought to the power of this jurisdiction to seek in law and in fact all the elements concerning the defects in question*".

7. Société European Gas Turbines SA v. société Westman International Ltd, Cour d'appel de Paris (1Ch. C), 30 September 1993 :

« *un contrôle de la sentence, par le juge de l'annulation, portant en droit et en fait sur tous les éléments permettant notamment de justifier l'application ou non de la règle d'ordre public international et dans l'affirmative, d'apprécier, au regard de celle-ci, la licéité du contrat ;*
Qu'en décider autrement aboutirait, en effet, à priver le contrôle du juge de toute efficacité et, partant, de sa raison d'être»

"*a review of the award, by the judge of annulment, in law and in fact on all the elements notably allowing to justify the application or not of the rule of international public policy and in the affirmative, to appreciate, regarding the latter, the lawfulness of the contract;*
To decide otherwise would, indeed, deprive the judge's control of any effectiveness and, consequently, of his raison d'être"

8. Cass. Civ.1ère, 21 mars 2000, pourvoi 98-11.799
9. Y. Derains, Chronique de jurisprudence française: SA Gallay v. Société Fabricated Metals Inc, 2001 Rev. Arb. 805, 815–16.

« *Pour être flagrante, la violation de l'ordre public, telle un flagrant délit, doit être commise sous les yeux du juge qui la constate. Lorsque la question a été soumise à l'arbitre, ceci implique que la sentence contienne des ingrédients de la violation et les porte à la connaissance de l'autorité de contrôle. La solution susceptible de heurter l'ordre public est alors celle donnée à un litige dont les éléments constitutifs sont délimités par les constations de fait de l'arbitre et son appréciation des droits des parties. Pour être effective, la violation de l'ordre public doit se traduire dans une action qui heurte l'ordre public... l'arbitre qui déclare à tort illicite un contrat qui ne l'était pas ne consacre pas une solution contraire à l'ordre public, même si, ce faisant, il procède à une mauvaise application de la règle d'ordre public. Enfin, pour être concrète, la violation de l'ordre public doit aboutir à une solution qui, matériellement, est incompatible avec ce dernier. Il n'en sera pas ainsi, en vertu de la théorie de l'équivalence, lorsque l'arbitre méconnaît une règle d'ordre public en estimant licite un contrat qui ne l'était pas, mais se refuse à lui faire produire des effets pour un autre motif, résolution pour faute ou vice de consentement par exemple* »

10. CA Paris, 1er ch., Section C, 18 novembre 2004 (n°2002/19606), SA Thalès Air Defense c/ GIE Euromissile et EADS

Le juge de l'annulation ne peut « *statuer au fond sur un litige complexe qui n'a jamais encore été ni plaidé, ni jugé devant un arbitre concernant la simple éventualité de l'illicéité de certaines stipulations contractuelles* ; »

11. L.-Ch. Delanoy, « Le contrôle de l'ordre public au fond par le juge de l'annulation : trois constats, trois propositions », in *Rev. arb*., 2007, p. 177
12. E. Gaillard, in *Journal du droit international* (Clunet), n°3, juillet 2018, 13:

« *L'intensité de la violation et sa preuve sont deux questions distinctes, que la jurisprudence – à la différence de la doctrine – n'a jamais confondues. L'arrêt MK Group en fournit un nouvel exemple. La fraude viole de manière « manifeste, effective et concrète » l'ordre public international mais se prouve par tous moyens*. »

"*The intensity of the violation and its proof are two separate issues that caselaw - unlike doctrine - has never mistaken. The MK Group case provides a new example. Fraud "manifestly, effectively and concretely" violates public international policy but can be proven by any means*."

13. J. Ortscheidt et C. Seraglini, Droit de l'arbitrage interne et international, Lextenso, 2013, p.892 :

« *au nom de l'interdiction de révision au fond de la sentence par le juge de l'annulation, elle est conduite à n'opérer qu'un contrôle illusoire, limité aux seules apparences de conformité, ou aux seules évidences de contrariété, de la sentence à l'ordre public international* »

14. L.-Ch. Delanoy, « Le contrôle de l'ordre public au fond par le juge de l'annulation : trois constats, trois propositions », in *Rev. arb*., 2007, p. 177 ;

« *en l'absence de toute vérification de la qualification des actes litigieux par les arbitres, de l'appréciation qu'ils ont faite des droits des parties au regard des dispositions d'ordre public invoquées, et de la pertinence du raisonnement juridique par lequel ils se sont prononcés sur les questions dont ils étaient saisis* »

15. CA Paris, 4 mars 2014, n°12/17681

« *Lorsqu'il est prétendu qu'une sentence donne effet à un contrat obtenu par corruption, il appartient au juge de l'annulation, saisi d'un recours fondé sur l'article 1520-5° du Code de procédure civile, de rechercher en droit et en fait tous les éléments permettant de se prononcer sur l'illicéité alléguée de la convention et d'apprécier si la reconnaissance ou l'exécution de la sentence viole de manière effective et concrète l'ordre public international* »

16. CA Paris, 14 juin 2016, n°14/16113
17. CA Paris, 21 février 2017, n°15/01650

« *Considérant que cette recherche, menée pour la défense de l'ordre public international, n'est pas limitée aux éléments de preuve produits devant les arbitres, ni liée par les constatations, appréciations et qualifications opérées par ceux-ci;*
Considérant que la reconnaissance ou l'exécution de la sentence entreprise, qui aurait pour effet de faire bénéficier M. Z du produit d'activités délictueuses, viole de manière manifeste, effective et concrète l'ordre public international »

18. X. Boucobza et Y.M. Serinet, « L'intensité et la nature du contrôle de conformité de la sentence arbitrale à l'ordre public international », in *Revue des contrats*, n°2, Lextenso, 1er juin 2017, p. 304 :

« *C'est en effet à une véritable nouvelle et complète instruction de l'affaire que procède la cour d'appel de Paris en reprenant point par point chacun des éléments discutés de l'allégation de blanchiment* »

19. Ibid.

« *Le caractère « manifeste » de la violation de l'ordre public ne se ramènerait pas à son seul caractère « flagrant » puisqu'il repose ici sur une nouvelle analyse approfondie des éléments du débat sur le fond*. »

20. Note by Prof. S. Bollée, in *Journal du droit international* (Clunet) n°3, juillet 2018, 12 :

« *On pouvait se demander, en effet, si les juges entendaient renforcer le contrôle au moyen de solutions sectorielles, limitées à certains aspects prioritaires de l'ordre public – au premier chef la lutte contre la corruption – ou si c'était vraiment l'intégralité de l'ordre public qui faisait l'objet d'une approche renouvelée*. »

21. Ibid.

« *Cette reprise mot pour mot de l'attendu de principe du grand arrêt Plateau des Pyramides* […] *représente, dans une perspective de politique jurisprudentielle, un acte fort. Elle marque une rupture on ne peut plus franche avec la conception minimaliste du contrôle, ayant pour porte-drapeaux les arrêts Thalès* »

22. Note by Prof. S. Bollée, in Journal du droit international (Clunet) n°3, juillet 2018, §6
23. Y. Derains, « L'ordre public et le droit applicable au fond du litige dans l'arbitrage international », in *Rev. Arb*., 1986, Issue 3, p.407, §51 :

« *tout conduit à penser qu'un arbitre devrait également ne pas accepter de se faire le complice d'une fraude délibérée à une loi de police dont les titres d'application lui paraissent incontestables*»

"*all of this leads us to thing that an arbitrator should also not accept to be the complicit of a deliberate fraud to a mandatory law of which the application appears indisputable*"

24. Note, S. Bollée, in *Journal du droit international* (Clunet) n° 3, Juillet 2018, 12 :
« *plus largement, l'ensemble du contrôle exercé par le juge au titre de l'article 1520 fait désormais l'objet d'une approche unitaire* »
"*more generally, the judge's control in its entirety as per article 1520 is subjected to a unitary approach*"
25. « *Considérant que l'ordre public international au regard duquel s'effectue le contrôle du juge de l'annulation s'entend de la conception qu'en a l'ordre juridique français, c'est-à-dire des valeurs et des principes dont celui ci ne saurait souffrir la méconnaissance même dans un contexte international; que ce n'est que dans cette mesure que des lois de police étrangères peuvent être regardées comme relevant de l'ordre public international, de sorte qu'il est en principe indifférent que la sentence soumise au juge français ait fait l'objet d'un refus d'exequatur pour violation de l'ordre public dans l'Etat dont les dispositions de police s'appliquent au contrat litigieux* »
26. Ch. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international*, Montchrestien 2013, p. 817 et 818 :
« *En effet, la réserve de contrariété à l'ordre public international français visée à l'article 1520.5° du Code de procédure civile peut constituer un mécanisme adéquat pour assurer un tel contrôle* [...] *le juge peut, à travers sa proper conception de la reserve d'ordre public international, envsager le respect par l'arbitre de lois de police étrangères* »
27. Eric Loquin, *L'arbitrage du commerce international*, Joly Editions, 2015, page 440, §538 :
« [l]*'ordre public international ainsi visé est classiquement constitué des principes fondamentaux de l'ordre juridique français et des lois de police françaises qui revendiquent leur application au litige soumis aux arbitres, voire même d'une loi de police étrangère* »
28. Note by Prof. E. Gaillard, in *Journal du droit international* (Clunet), n°3, juillet 2018, 13 :
« *La référence spectaculaire au principe de souveraineté sur les ressources naturelles dissimule en effet l'application d'une règle plus banale, mais moins controversée, de prohibition de la fraude aux droits des États. La cour ayant en effet constaté que l'acte apparent, soumis à l'État, ne correspondait pas à l'acte réel, qu'elle a estimé passé en fraude des droits de l'État, elle en a déduit que la sentence heurtait la conception française de l'ordre public international en ce qu'elle a conféré un titre « sur un investissement réalisé grâce à l'obtention frauduleuse d'une autorisation administrative ». Cette motivation se serait suffi à elle-même* »
29. Tamas Szabados, EU Economic Sanctions in Arbitration, in Maxi Scherer (ed), *Journal of International Arbitration*, Kluwer Law International 2018, Volume 34 issue 4, pp. 439-462