On 16 January 2018, the Paris Court of Appeal (the Court of Appeal) rendered an interesting decision in which it applied the international public policy doctrine to annul an ICC arbitral award rendered in 2015 in a dispute between a Russian company (MK Group) and Ukrainian companies (including Onix). The case concerned the litigious transfer of 60% of the shares of Dao Lao (Dao Lao), a Laotian company active in gold mining in Laos.

In 2010, MK Group had agreed to sell 60% of the shares of Dao Lao to Onix. This share transfer was then approved in 2011 through a memorandum of understanding (MoU) entered into by both MK Group and Onix as well as the relevant Laotian authorities. The MoU nevertheless subjected the transfer of the shares to the investment, by Onix, of USD 12.5 million in the project.
Onix, however, never invested the promised amount. This omission led MK Group to initiate arbitral proceedings in 2014 seeking a declaration that the 60% of the shares of Dao Lao had never been transferred to Onix. Relying on the 2010 share transfer agreement, the arbitral tribunal, however, ruled against MK Group and confirmed the transfer of the shares in favour of Onix.

MK Group then challenged the arbitral award before the Court of Appeal alleging essentially that this award violated international public policy (as referred to in Article 1520 5° of the French Code of Civil Procedure). MK Group’s allegations referred, more specifically, to the facts that:

– Onix provided falsified documents to the arbitral tribunal since (i) out of the two versions of the MoU that Onix gave to the arbitral tribunal, only one expressly mentioned the condition relating to the Onix’s USD 12.5 million investment; and (ii) Onix also provided a falsified ownership certificate from the Laotian Ministry of Justice according to which it owned 60% of the shares of Dao Lao.

– The arbitral tribunal had unlawfully disregarded Laotian law and Lao’s sovereignty by finding that Onix owned 60% of the shares in Dao Lao despite the fact that Laotian investment law expressly provides that foreign investments are subject to an official approbation by the Government (which, in the case at hand, was only granted after Onix had agreed to the USD 12.5 million investment).

In answer to those claims, the Court of Appeal referred to the 1962 UN General Assembly Resolution on Permanent Sovereignty over Natural Resources (the Resolution on Sovereignty over Natural Resources). According to the Court of Appeal, the Resolution on Sovereignty over Natural Resources made it possible to infer a general consensus, under international law, that sovereign States have the right to make the exploitation of their natural resources conditional on the
holding of a prior authorisation. The Court of Appeal then went on to find that that general consensus formed an integral part of the notion of international public policy.

The Court of Appeal then noted that all the linguistic versions of the MoU had the same legal value since the MoU was established in two original languages (English and Laotian). However, since only the Laotian version contained a provision regarding the USD 12.5 million investment, the Court of Appeal found that it was a strong indication that this investment was viewed by the Laotian authorities as a “substantial condition” to the share transfer.

Consequently, the Court of Appeal held that the award violated international public policy since the arbitral tribunal had, when ruling on the case, relied almost exclusively on the share transfer agreement of 2010, without paying due care to the “substantial condition” that the Laotian authorities were entitled to impose pursuant to the Resolution on Sovereignty over Natural Resources.

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This decision by the Court of Appeal confirms the greater and extensive application of the notion of international public policy by French courts in arbitral awards annulment proceedings. As you may be aware, this new trend was initiated a couple of years ago by the Court of Appeal in Gulf Leaders. Until then, French courts had a tendency to apply international public policy only in cases of flagrant and obvious violations.

The current decision is also interesting as it implies that public international law (and UN resolutions, in particular) is likely to have a greater impact on the scope and boundaries of international public policy.