

# Two recent Belgian cases on the review of motivation of arbitral awards at the annulment and enforcement stages

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On 13 January 2011, the Belgian Supreme Court (*Cour de cassation/Hof van cassatie*) ruled that an arbitral award could be set aside by a Belgian judge on the basis of a contradiction in the award's motivation. In so ruling, the Belgian Supreme Court took a view opposite to that of the French Supreme Court (*Cour de cassation*), which, reversing its previous case law on this point, has ruled since 1999 that contradictions in motivation of arbitral awards may not by itself justify their annulment, be it under the regime governing national arbitration or under the one governing international arbitration.

The grounds for annulment of arbitral awards in Belgium are laid down in Article 1704, 2, of the Belgian Code of Civil Procedure. In contrast with France, Belgium does not have a separate regime governing national and international arbitration. Amongst the available grounds for annulment are the classical breach of public policy, inarbitrability and absence of valid arbitration clause. Article 1704, 2, further provides that an award can be set aside if it is not motivated (1704, 2, i) and if it contains contradictions in its "*dispositions*" (FR)/"*bepalingen*" (NL) (Article 1704, 2, j).

The word "*dispositions*" (FR)/"*bepalingen*" (NL) is somewhat ambiguous. It can be argued, under a broad interpretation, that this notion refers to all decisive or conclusive parts of a judgment or an award, and therefore includes its entire motivation. However, in a stricter sense this notion refers only to the operative part, i.e. the decisions taken by the court or the tribunal at the very end of a judgment or an award, granting or dismissing the various claims and counterclaims at issue. There exists another provision of the Belgian Code of Civil Procedure – governing an exceptional recourse against judicial decisions (Article 1138, 4) – which also contains this notion of "*dispositions*" (FR)/"*bepalingen*" (NL), and which has been interpreted by the Belgian Supreme Court for many years as referring only to the operative part of the judgment (see O. Caprasse and F. Henry, "*Note sous Cass. Belgique, 13 janvier 2011*", *Rev. arb.*, pp. 1065 to 1067).

In the case at issue, the judgment of the Brussels Court of Appeal, which was brought before the Supreme Court, declared that the award for which annulment was requested contained contradictions in its motivation and was therefore to be set aside, on the basis of Article 1704, 2, j. In its judgment of 13 January 2011, the Supreme Court did not itself rule on the accuracy of this legal basis. The Supreme Court upheld the Court of Appeal's judgment, ruling that the decision to annul the award on the basis of contradictions in its motivation was a matter of factual assessment which could not justify

cassation. In so ruling, the Supreme Court thus decided that a review of contradictions in the motivation of arbitral awards was allowed under Belgian law. Interestingly, the Supreme Court further ruled that, once the annulment judge had found that there were contradictions in the award's motivation, it could not subsequently analyse whether the contradictory elements were sufficiently significant and hence whether the award could not be justified notwithstanding the contradictions. According to the Supreme Court, this assessment of the significance of contradictory elements would amount to a review of the merits of the award, which is proscribed, except in a case of breach of public policy.

If, for a long time, eminent authors have advocated a strict interpretation of *littera j* of Article 1704, 2, many have argued that an award containing contradictions in its motivation is to be considered as invalidly motivated and, on this basis, subject to annulment under *littera i* of Article 1704, 2 (see H. Boularbah, "Ouvertures à cassation des décisions judiciaires et causes d'annulation des sentences arbitrales", *Mélanges J. Kirkpatrick*, Bruxelles, Bruylant, 2004, pp. 104 et seq.).

Others, by contrast, submit that contradictions in the motivation of awards should never justify annulment, since contradictions in motivation neither amount to an absence of motivation (*littera i*), nor to contradictions in the operative part (*littera j*). The rationale behind the latter position is that a review of contradictions in the motivation of a judgment boils down, at least in most instances, to reviewing the merits of the award, which – as was recalled by the Supreme Court itself in the decision at hand – is prohibited (see the comprehensive study of O. Caprasse and F. Henry, *op. cit.*, pp. 1046 to 1067).

The Belgian Supreme Court will most probably continue reasoning by analogy with the cassation control it exercises over state court's judgments. Judgments are indeed open to cassation on the basis of a lack or an absence of motivation when their motivation rests on contradictory elements. But in that case, if the contradictory elements are not significant and if the court's decision can be justified on the basis of other grounds, which are not contradictory, the judicial decision is to be upheld.

In relation to the issue of motivation of arbitral awards under Belgian law, it is also interesting to point to another recent decision of the Brussels Court of First Instance of 30 March 2011. The Court of First Instance was seized of a request for enforcement of a foreign award rendered in California and which did not contain any motivation but where the absence of motivation was expressly provided for in the arbitration clause. This notwithstanding, the Brussels Court ruled that the award could not be enforced in Belgium because it was in breach of public policy under Article V.2 of the New York Convention. By contrast, in France, the enforcement of a foreign award may not be refused because the award does not contain any motivation, when the absence of motivation has been agreed to by all parties, unless it would reveal a breach of the parties' rights of defence (see, *inter alia*, Court of Appeal of Paris, 18 November 2010, Rev. arb., 2010, p. 982 et seq.; see also the comprehensive study of the Brussels Court's judgment by C. Verbruggen, "Le refus d'exequatur d'une sentence arbitrale étrangère dépourvue de motivation", *R.D.C.*, 2012, pp. 189 et seq.).

Thus, although state rules governing national and international arbitration tend to converge increasingly, room remains for important controversies across jurisdictions, even between those having a legal regime close to one another.

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