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Austrian Supreme Court rejects competition law challenge of ICC award

Gordon Blanke (Blanke Arbitration LLC) · Saturday, November 7th, 2015

A ruling of the Austrian Supreme Court, the *Oberste Gerichtshof* in Vienna, Austria, of earlier this year (see ruling of 18 February 2015, 2 Ob 22/14w) raises anew the much debated question of the type and intensity of supervisory court review of European Union (EU) competition law awards. Readers may recall that EU competition law qualifies as a matter of public policy under European law (see in particular Case C-126/97, *Eco Swiss v. Benetton*, ruling of the Court of Justice of the European Union (CJEU) of 9 January 1999, which elevated Article 101 of the Treaty of the Functioning of the European Union, in shorthand TFEU, to the status of public policy within the meaning of Article V.2.(b) of the New York Convention on the recognition and enforcement of foreign arbitral awards, done at New York on 10 June 1958) and as such must be complied with by EU Member State courts in their capacity as curial and/or supervisory courts in the enforcement and nullification of awards that raise issues of EU competition law. Failure to comply may expose non-compliant Member State courts to actions for State liability under the so-called Köbler doctrine (see Case C-224/01 - *Köbler*, ruling of the CJEU of 30 September 2003). EU Member State courts are required to give effect to the provisions of EU law, including EU competition law more specifically: For that purpose, subject to prevailing requirements of national procedural autonomy (see Case C-453/99 - *Courage Ltd v Bernard Crehan*, ruling of the CJEU of 20 September 2001; and Joined Cases C-295/04 to C-298/04 - *Vincenzo Manfredi et al*, ruling of the CJEU of 13 July 2006), EU Member State courts must not make it exceedingly difficult or impossible through their own processes and procedures for those provisions to develop their full effect at the national level.

Within this context, the intensity of supervisory court review of awards that raise questions of EU competition law has been controversial for a while and essentially revolves around a supervisory court's preference for the "minimalist" or "maximalist" school of review: The minimalist school of review prioritizes the finality of arbitration awards and will only ensure compliance of the dispositive part of the award with requirements of public policy; this contrasts with the maximalist school of review, which requires a detailed examination of the reasoning and the dispositive parts of an award for full compliance with mandatory norms, including EU competition law. EU Member State courts have adopted varying degrees of review, the French courts (see in particular *Thalès v. Euromissile*, decision of the Paris Court of Appeal of 18

November 2004; and *SNF v. Cytec*, ruling of the Paris Court de Cassation of 4 June 2008) being best known for review minimalism, the German (see e.g. judgment of the OLG Düsseldorf of 21st July 2004), Belgian (see e.g. *La SNF SAS v. La CYTEC INDUSTRIE*, ruling of the Brussels Court of First Instance of 8 March 2007) and Dutch (see e.g. *Marketing Displays International Inc. v. VR Van Raalte Reclame B.V.*, ruling of the Court of Appeal of The Hague of 24 March 2005) courts having acquired a reputation for review maximalism. The extreme positions taken by the maximalist and minimalist schools of review respectively have given rise to a “Middle Way”, which seeks to steer a viable course between the minimalists and maximalists by facilitating an efficient and effective Member State court control of EU competition law awards (see in particular G. Blanke, “The ‘Minimalist’ and ‘Maximalist’ Approach to Reviewing Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last?” in D. Bray and H. Bray (eds), *Post-Hearing Issues in International Arbitration* (Juris Publishing, 2013), pp. 169-227). In practical terms, the Middle Way encourages a full substantive review of the award on the basis of the facts and evidence in the terms contained and digested in the text proper of the award, i.e. without (i) reopening the proceedings, (ii) re-hearing the evidence or even (iii) re-assessing the facts. In accordance with the Middle Way, a supervisory court will diligently review or examine (i.e. read) both the reasoning and dispositive parts of the award with a view to satisfying itself that the tribunal has accurately applied relevant EU competition law provisions in light of the underlying facts and the available evidence as reported in the narrative of the award. Only if the failure to apply or a manifest misapplication of relevant EU competition law issues may - in and of itself - lead to the distortion of the relevant underlying market will a court applying the Middle Way refuse enforcement of or set aside an award.

Returning to the ruling of the Austrian Supreme Court, it is little surprising that in reliance on its own ruling of 23rd February 1998 (3 Ob 115/95 SZ 71/26) and the CJEU’s ruling in *Eco Swiss*, the Austrian Supreme Court confirms that the EU competition law rules in the terms of Articles 101 and 102 TFEU form part of the national *ordre public* (read: public policy):

“Gemäß § 611 Abs 2 Z 8 ZPO [Austrian Civil Procedures Code] kann eine Klage auf gerichtliche Aufhebung eines Schiedsspruchs gestellt werden, wenn der Schiedsspruch Grundwertungen der österreichischen Rechtsordnung (ordre public) widerspricht. In der Entscheidung 3 Ob 115/95 SZ 71/26 (= RIS-Justiz RS0109633) hat der Oberste Gerichtshof die Auffassung vertreten, dass die zu den Grundlagen der Regelungen über den gemeinsamen Markt und zu dessen tragenden Grundsätzen gehörenden unionsrechtlichen Bestimmungen der (nunmehr) Art101 und 102 AEUV Teil des ordre public der Mitgliedstaaten sind. Klarstellende Ausführungen zur Ordre-public-Qualität des EU-Kartellrechts enthält das Urteil des Europäischen Gerichtshofs vom 9. 1. 1999, C-126/97, Eco Swiss/Benetton.” (2 Ob 22/14w, at para. 1; German in the original)

In accordance with the maximalist school of thought, the Austrian Court also affirms that there is no room for a review on the merits (*révision au fond*) and that a challenge

for a violation of Austrian public policy pursuant to §611(2)8 of the Austrian Civil Procedures Code can only succeed if the outcome, i.e. the dispositive part of an award violates the fundamental values of the Austrian legal system (of which EU competition law form an integral part):

“Nach ständiger Rechtsprechung des Obersten Gerichtshofs bietet das Aufhebungsverfahren keine Handhabe für die Prüfung der Frage, ob und wie weit das Schiedsgericht die im Schiedsverfahren aufgeworfenen Tatfragen und Rechtsfragen richtig gelöst hat ([...]). Selbst die Prüfung, ob eine Ordre-public-Widrigkeit vorliegt, darf nicht zu einer (Gesamt-)Überprüfung des Schiedsspruchs in tatsächlicher und/oder rechtlicher Hinsicht führen (Unzulässigkeit einer révision au fond; [...]). Nur dann, wenn es mit dem Ergebnis des Schiedsspruchs zu einer unerträglichen Verletzung tragender Grundwertungen der österreichischen Rechtsordnung kommt, berechtigt dies zur Anfechtung des Schiedsspruchs nach § 611 Abs 2 Z 8 ZPO [...]. Maßgebend ist dabei das Ergebnis des Schiedsspruchs und nicht seine Begründung ([...]).” (2 Ob 22/14w, at para. 2; German in the original; original references omitted)

This being said, it is apparent from the text of the ruling of the Austrian Supreme Court that even though the Court itself – taking account of its own limits of review within the Austrian legal system – does not perform a detailed examination of both the reasoning and the dispositive parts of the underlying arbitration award, the lower Austrian courts did. From a review of the Austrian Supreme Court’s ruling, it appears that the lower courts ensured that the reasoning and dispositive part of the award did not violate prevalent provisions of EU competition law and hence qualify for adoption of the in Middle Way.

By way of background, in 1998 a Russian gas exporter and a Czech customer entered into a long-term gas supply agreement for the delivery of gas for onward sale in the Czech Republic (the “Gas Supply Agreement”). The Gas Supply Agreement imposed upon the Czech customer an annual minimum purchase obligation coupled with a volume reduction clause, which allowed the customer to reduce the volume of gas to be purchased on an annual basis by an amount corresponding to the supplier’s volume of direct annual sales to the customer’s end consumers. The Gas Supply Agreement was governed by Austrian law and provided for disputes to be referred to arbitration under the ICC Rules in Vienna, hence the present challenge proceedings before the Austrian courts as the curial courts of the arbitration. Put simply, a dispute arose between the Parties as to the validity of the volume reduction clause in relation to gas delivered over the period 2008 to 2010 and its compatibility with EU competition law. In the supplier’s submission, the volume reduction clause was invalid under EU competition law and the supplier was therefore entitled to full payment for the minimum annual volume of supply under the Gas Supply Agreement. By an award of 4 October 2012, the ICC Tribunal found in favour of the validity of the volume reduction clause and dismissed the supplier’s claim for payment.

On 9 January 2013, faced with this defeat before the ICC, the supplier initiated challenge proceedings before the Austrian courts on the basis that the volume reduction clause and the ICC award that found to the contrary were in violation of

Article 101(1) TFEU and therefore null and void ab initio under Article 101(2) TFEU. With this in mind, the award was to be set aside by virtue of §611(2)8 of the Austrian Civil Procedures Code. The Czech customer objected. At first instance, the Commercial Court of Vienna dismissed the supplier's application for nullification and affirmed the Tribunal's assessment of the validity of the volume reduction clause and its compatibility with EU competition law. At appellate level, the Vienna Court of Appeal affirmed the lower court's ruling and confirmed that if the supplier were correct in saying that the volume reduction clause were invalid under EU law, that invalidity - given the interdependence between the volume reduction clause and the customer's contractual obligations - would also affect the minimum take obligations under the Gas Supply Agreement and hence invalidate the supplier's claim for payment in any event. As a result, the Tribunal's dismissal of the supplier's payment claim was compatible with Austrian public policy. In the final instance, the Austrian Supreme Court affirmed the lower courts' rulings without reservation on the basis outlined above. By the same token, the Austrian Supreme Court dismissed an application by the supplier to the CJEU for a preliminary ruling on the compatibility of the volume reduction clause with EU competition law pursuant to Article 267 TFEU.

For further guidance on EU competition arbitration more specifically, see in particular G. Blanke and P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International, published in association with the Chartered Institute of Arbitrators London, 2011); and G. Blanke (ed.), *Arbitrating Competition Law Issues: A European and a US Perspective* (ed.), EBLR special edition (Kluwer Law International, 2008). Regular reporting by this commentator on the use ADR and arbitration in private competition law enforcement is also available from the *Global Competition Litigation Review*, published quarterly by Sweet & Maxwell.

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