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International Arbitration and French Insolvency Proceedings: French Supreme Court Reiterates Importance of Public Policy

Christophe von Krause (White & Case LLP) · Wednesday, October 28th, 2009 · White & Case

On May 6, 2009, the French Supreme Court rendered a decision relating to the consequences of insolvency proceedings commenced in France against a party to pending international arbitration proceedings (Jean X. v. International Company For Commercial Exchanges (Income), May 6, 2009, Case no. 08-10281).

A French company had signed three contracts for the sale of crystallized sugar with an Egyptian company. Pursuant to the contracts, the parties were to refer any disputes thereunder to arbitration. The Egyptian company initiated arbitration proceedings on October 5, 2001 to settle a dispute in connection with the performance of the contracts. On May 20, 2003, while arbitration proceedings were ongoing, a French court issued a bankruptcy ruling against the French company and, on July 1, 2003, ordered the French company's assets to be liquidated.

On February 9, 2004, the arbitral tribunal rendered its award, ruling in favor of the Egyptian company and ordering the French company to pay damages. The Egyptian company obtained an order of enforcement (ordonnance d'exequatur) of the award from a French court. The liquidator appealed against such order on, inter alia, the ground that the arbitral tribunal had violated public policy in ordering an insolvent party to pay a sum of money.

On November 8, 2007, the Paris Court of Appeal rejected the appeal and held – reiterating its famous reasoning in the Thales decision (Thales v. Euromissile, November 18, 2004) – that the recognition or enforcement of an arbitral award can only be considered contrary to public policy if the violation is flagrant, actual and concrete. However, in this case, the Egyptian company had, in the course of the appeal proceedings, waived its right to enforce the award and, in any event, the French company was not able to pay damages given that it had been liquidated. Therefore, the arbitral award could not produce any effects in practice. The Court of Appeal decided that the violation was purely "formal" and, thus, upheld the award.

The liquidator brought the matter before the French Supreme Court (Cour de cassation), which overruled the Court of Appeal's reasoning on public policy. The Supreme Court held that the arbitral tribunal had violated public policy because it had ordered an insolvent party to pay damages, instead of limiting itself to validating and quantifying these damages. The Supreme Court held, in substance, that, pursuant to French bankruptcy law, and as a matter of public policy, legal proceedings (including arbitration) against an insolvent party in bankruptcy proceeding should be stayed until the claimant has filed a declaration of its claim with the liquidator and,

thereafter, legal proceedings should be limited to the validation and the quantification of claims.

The French decision confirms a number of previous decisions (Almira v. Ema Films, February 5, 1991, Case no. 89-14382; Industry et al. v. Alstom Power Turbomachines, June 2, 2004, Case no. 02-13.940). The coexistence of international arbitration and bankruptcy proceedings is a recurring issue and, in the context of the recent financial downturn, one can expect that this kind of situations will occur more frequently. It is therefore useful to know how insolvency proceedings will affect arbitration proceedings.

The French Supreme Court's comes shortly after two decisions regarding the same subject, one rendered by the English High Court (Syska (Elektrim SA) v. Vivendi Universal SA, October 2, 2008, Case [2008] EWHC 2155 (Comm)), the other by the Swiss Federal Supreme Court on March 31, 2009 (Vivendi SA et al. v. Elektrim S.A. (Poland), March 31, 2009), which considered, among other things, whether an arbitration agreement involving an insolvent party should be annulled because of its insolvency.

In contrast, the French decision does not focus on the insolvent party but on the power – or duties – of the arbitral panel, and, thus, confirms that insolvency is not, per se, an obstacle to international arbitration.

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