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Courts in France and Belgium confirm limited review of awards under European competition law

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In holding that “Article 85 of the [EU] Treaty [now article 101 of the Treaty on the Functioning of the European Union – TFEU] constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market”, and that “the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention”, the European Court of Justice in *Eco Swiss (Case C-126/97, 1 June 1999)* has created the potential for a flood of challenges against awards for alleged misapplications of the law of competition. The risk caused for arbitration by the characterisation of European competition law as a matter of public policy under the New York Convention has further increased with the growing acceptance and importance of economics in competition policy and decision making, for economic thinking and economics models have never proven to be perfect guides, and may lead to highly unpredictable results. In addition, economic analysis is fundamentally fact-driven and the marriage between competition law and the doctrine of public policy in arbitration inevitably has the potential to lead the reviewing court to revisit the case on the merits. Being a matter of public policy, it may be considered that the arbitral tribunal’s findings should not bind the court reviewing the award. In addition, bad faith litigators are rewarded, as European courts will generally entertain a challenge based on competition law even if the complaining party never raised any such argument during the arbitration proceedings. Finally, given the broad scope of competition law, any award based on a contract of a certain importance may be challenged on the basis of a market power analysis showing that said contract has the effect of distorting the proper functioning of competition on the relevant markets. Then, instead of performing a limited review of the award, the court finds itself dragged into a complex dispute which may never have been argued before, where it is requested to review massive evidence, including expert reports, on market shares, structure of prices, etc...

It is clear that challenges of awards based on alleged distortions of competition have the potential of frustrating the parties of what they bargained for by agreeing to arbitrate: a one stop shop allowing them to resolve their dispute in a fast, efficient and final manner. A balance thus needs to be found between the principle of finality of awards and the public interest to an effective protection of competition. In France, the trend has been set by the famous *Thalès* case, where the Paris court of appeal found that an award can be quashed only where its solution entails an “effective and flagrant” violation of international public policy. Although criticised by certain authors as an undue limitation to the court’s powers to review the award under substantive public policy, the limited control posited by *Thalès* has now been endorsed in different ways by two recent court decisions in France and Belgium.

The first decision was rendered by the Court of Appeal of Brussels on 22 June 2009 and is part of the SNF v. Cytec saga. The other is from the French Court of Appeal of Paris and was handed down on 22 October 2009 in Halyvourgiki v. Linde. Both decisions confirm in different ways that courts should exercise restraint when entertaining a challenge based on an alleged breach of European competition law.

The SNF v. Cytec dispute (on which, A. Mourre and L. Radicati di Brozolo, *Revue de l'arbitrage*, 2007, 304 and A. Mourre, *Revue de l'arbitrage*, 2009, 594) arises from the termination by SNF of a long term supply agreement of a raw material called AMD, based on its alleged anti-competitive effects. The contract provided for ICC arbitration in Brussels. Cytec started an arbitration with the aim of challenging the contract's termination and seeking damages, and SNF alleged before the arbitrators that the contract not only violated Article 81 EC [now article 101 of the TFEU] but was also an abuse of its dominant market position. Two awards were rendered in Brussels in 2002 and 2004 under the aegis of the ICC rules. The arbitrators decided in a partial award that one of the contracts indeed violated Article 81 of the EC Treaty since it had the effect of foreclosing SNF from the AMD market. The tribunal also decided that both parties were responsible for the nullity of the contract and that liability should thus be equally shared between them. In the final award, the tribunal nevertheless held that SNF had not established its losses and thus awarded damages only to Cytec, in an amount that roughly matched those that such company had initially sought for the termination of the contract.

SNF challenged the decisions on the basis that the award of damages to Cytec in an amount roughly equivalent to its initial claim amounted to giving effects to the annulled contract, and that in so doing the tribunal breached Articles 81 and 82. On 8 March 2007, the Tribunal of Brussels quashed the awards on the basis that the tribunal's reasoning was inconsistent for it had on the one hand admitted that the contract was contrary to public policy and on the other hand awarded Cytec damages in amount equivalent to those that it had initially sought to compensate its allegedly wrongful termination. It is worth noting that, in parallel, Cytec had sought the enforcement of the awards in France and obtained its exequatur from the court of Paris. After subsequent proceedings, the Paris court of appeal (23 March 2006) and the French Supreme Court (4 June 2008, *Clunet* 2008, 1107, note A. Mourre) rejected SNF's challenges against the exequatur by holding that enforcement of a foreign award could only be denied in case of a "flagrant and effective" violation of international public policy, that the solution given to the dispute by the awards did not materialise such a flagrant breach, and that SNF's allegations that the contract had anti-competitive effects amounted to an attempt to reopen a debate on the merits that had been finally settled by the arbitrators.

Indeed, at this stage of proceedings, the decisions of the French court of cassation and the Belgian first instance tribunal illustrated the stark opposition between the so-called minimalist and maximalist approaches of the award's scrutiny. The French position was certainly in accord with the dominant view, in and outside the European Union, that awards should only be quashed in case of manifest and egregious breaches of international public policy. In Switzerland, it is well known that the Swiss Federal Tribunal held in *Tensacciai* (TFS, 8 March 2006) that awards can only be quashed in case of breach of the most fundamental principles which form the basis of any legal order, and that competition law is not part of such "truly" international public policy. In the United States, courts have repeatedly upheld a pro-arbitration stance and decided that the award can only be quashed for breach of the law on competition if the arbitrator purposely ignored it when making the award (U.S. Court of Appeals, 5th Circuit, *American Central Eastern Texas Gas Company v. Union Pacific Resources Group and Duke Energy*). In another case, the 7th Circuit found that a

mistake in the arbitral tribunal's application of the competition law is not a ground on which to set aside an award (16 Jan. 2003, *Baxter International Inc. v. Abbott*). The High Court of New Zealand has also endorsed minimal review of awards under competition law (*Gvt. Of New Zealand v. Mobil Oil*, YCA 1988, 638). In Italy, both the court of appeal of Milan in *Tensacciai* (8 March 2006) and Florence (*Nuovo Pignone*, 21 March 2006) clearly stated that the scrutiny should be limited to verifying that the arbitrators duly considered the competition law issues and held that a misapplication of such rules is not tantamount to a violation of international public policy. In Sweden, the Svea court of appeal held in 2005 (*Rep. of Latvia v. Latvijas Gaze*) that the concept of public policy should be given a narrow application in the context of the review of an arbitral award and that a violation of competition law can only lead to an annulment in "obvious cases". Although there is to our knowledge no case dealing precisely with a challenge based on European antitrust law in England, the Court of appeal in *Westacre* has clearly set the yardstick in favour of finality. Case law in Germany is still unsettled, with decisions in favour (OLG Düsseldorf, 21 July 2004) and against (OLG Thüringen, 8 August 2007) an in-depth review of the arbitrators findings, but well known authorities have supported the Thalès approach (P. Schlosser, *Articles 81 and 82 EC-Treaty and Arbitration: A German Perspective*, *Cahiers de l'arbitrage*, 2009-1, 25). Likewise, in Spain, although we are not aware of any case on point, leading judges have clearly expressed the view that court review of awards should be limited to the most egregious breaches of public policy and should never lead the court to revisit the arbitrators' findings as to the facts of the case (*A. G. de Paredes, L'annulation des sentences arbitrales en Espagne: à propos de la non révision au fond des sentences et du contrôle du respect de l'ordre public en droit espagnol: Cahiers de l'arbitrage*, 2007-3, 27).

From that perspective, the stand of the Brussels court of first instance in *SNF* in favour of an in-depth review of the arbitrators' findings in order to ensure a proper application of the law on competition was certainly isolated. To our knowledge, only once has a court entered into the exercise of revisiting the arbitrators' findings in the merits (Court of appeal of The Hague, 24 March 2005, *Marketing Displays International*, for a critical analysis, A. Mourre and L. Radicati di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, *JOIA* 2006, 180). Belgian courts have however now joined the mainstream pro-arbitration approach by annulling the Brussels court of first instance ill-grounded annulment decision.

In a 22 June 2009 decision, the Brussels' Court of appeal (*Revue de l'arbitrage* 2009, 574, with a note by A. Mourre), has in fact clearly confirmed that "the judge before which the award is challenged should not verify the accuracy of the arbitrators' reasoning and cannot substitute his own valuation of the case to that of the arbitral tribunal. The Court of appeal adds that "the mission of the judge reviewing an award is to verify the regularity and the legality of the award: as a matter of principle, the review has to be performed to the exclusion of any revisiting of the merits of the case and only on the limited grounds set by Article 1704 of the Judicial Code if any such ground has been invoked". And it rightly concludes that "the grounds developed by a party which pursues a complete revisiting of the merits of the case by asking the judge to reassess the consequences of the nullity of a contract in a manner different than the arbitrators' appraisal are not part of public policy".

The Brussels Court of appeal approach is thus very close to that of French courts, as confirmed by a very recent and unpublished 22 October 2009 decision of the Paris Court of appeal in *Linde Aktiengesellschaft v. Halyvourgiki*. The two companies had entered into an agreement for the production of liquid gas by Linde in a steel plant belonging to Halyvourgiki, the gas being destined to the industrial needs of said plant. While Halyvourgiki argued that the contract included an

implied exclusivity provision preventing Linde to sell the gas to other customers, Linde submitted that no such exclusivity provision had been agreed between the parties. Linde however raised before the arbitral tribunal no argument based on the invalidity of the alleged exclusivity agreement under the rules of competition. In its award, the arbitral tribunal found that, based on trade customs in these type of contracts for the production of gas on the customer's site, the manufacturer is indeed under the obligation to reserve the full production made on site to the owner of the plant. The award was challenged before the Paris Court of appeal by Linde, who raised at this stage and for the first time the argument that the implied exclusivity agreement was a vertical restraint and that, given the parties' shares of the relevant market, it did not fall under the relevant block exception. Linde also submitted that the implied exclusivity provision had the effect of distorting the operation of the liquid gas market in Greece and led to an increase in prices and to reinforcing the market power of its main competitors. The argument was based on lengthy and highly complex expert reports analysing the structure of the liquid gas market in Greece and in Europe, the structure of the prices, and the evolution of the main gas manufacturers' market shares over a span of several years both in Greece and in Europe. Linde's argument was disputed by Halyvourgiki both on the basis of arbitration law (the alleged misapplication of European competition law is not ground for quashing the award) and on the ground of competition law (as Halyvourgiki disagreed with Linde's economic analysis, notably the identification of the relevant market and the parties' market shares).

It should also be noted that the case was much more driven by economic analysis than *Thalès* was, for the exclusivity in dispute was a vertical restraint (as opposed to a horizontal one) which did not imply any breach per se of the law on competition but an alleged illegality based on the economic effects of the transaction.

In its decision, the Court of appeal fully endorsed the *Thalès* doctrine and held that the challenge amounted to an attempt to reopen a debate on the merits which should have taken place before the arbitral tribunal, that the control was restricted to the solution given to the dispute by the arbitral tribunal in its award, and that the alleged anti-competitive effects of the agreement in dispute did not amount to a flagrant and manifest breach of international public policy.

The thrust of both the Brussels and Paris courts decision is that the award, if rendered by a competent arbitral tribunal in a regular procedure where both parties had the benefit of due process, has an intrinsic authority which should be acknowledged and recognised as such by the reviewing judge. There is nothing revolutionary there, as this is exactly the basis upon which the doctrine of private international law has established limited review of foreign judgments since more than fifty years. From that perspective, the limited review of awards under substantive public policy differs from the control performed by courts as to the jurisdiction of the tribunal. In fact, the authority of the award supposes that it has been rendered on a valid arbitral agreement. This explains why the nature of the limited review of awards under substantive public policy is sometimes characterized as "extrinsic", as opposed to the review of the arbitral tribunal's jurisdiction, which is "intrinsic" in the sense that it implies a review of the reasons given by the arbitrators to establish their jurisdiction.

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