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For Galakis the Bell Tolls: Is the SMAC v Ryanair Decision the End of Arbitration for Public Entities in France?

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57 years ago, the French Cour de Cassation's *Galakis* decision (Civ. 1re, 2 May 1966) laid down the principle that French public entities may, exceptionally, submit to arbitration disputes arising from international contracts. Some would even consider that this principle was already in existence with the *San Carlo* case (Civ. 1re, 14 April 1964) where the Cour de Cassation considered that the prohibition on recourse to arbitration by public entities is a matter of domestic public policy and therefore inapplicable to international contracts.

As described below, for *Galakis*, the bell tolled as in *SMAC v Ryanair*, the French Conseil d'Etat – the top administrative court – recently stroke down this rule by applying over another rule: the prohibition for public entities to have recourse to arbitration.

The Endless Ordeal of the LCIA Award

It all began in the 1980s with the construction of an airport in Angoulême (a small southwestern French city) that was supposed to handle 200,000 passengers a year, but never exceeded 10,000. In 2008, the Syndicat mixte des aéroports de Charente ("SMAC"), which manages the Angoulême airport, signed several contracts with Ryanair and its affiliate, Airport Marketing Services ("AMS"), to create three weekly routes between London-Stansted and Angoulême. Two years later, Ryanair unilaterally terminated the agreements, on the ground of falling revenues, as allowed under the contracts which provided for LCIA arbitration in London. A single arbitrator tribunal confirmed the validity of the termination of the agreements.

The Conseil d'Etat quickly dismissed the SMAC annulment request considering that it could not annul a decision rendered by a foreign tribunal. On the other hand, the Conseil d'Etat considered that administrative courts would be competent to hear an application for *exequatur* of a foreign award (CE, 19 April 2013, No. 352750).

Despite this clear stand, Ryanair's parallel *exequatur* request led to a seven-year long jurisdictional ping pong between the judicial and administrative courts which had jurisdiction to annul and declare *exequatur* of the award. On 22 May 2012, the President of the Paris Tribunal de Grande Instance granted the *exequatur*. An appeal was lodged with the Paris Court of Appeal, which took into consideration the Conseil d'Etat's 2013 decision and declined jurisdiction to enforce the award

(Paris CoA, 10 September 2013, No. 12/11596).

This decision was however bashed by the Cour de Cassation which considered that refusing the *exequatur* of the award on the basis of a lack of jurisdiction of judicial courts was a violation of the 1958 New York Convention. The case was therefore returned to the Versailles Court of Appeal, which decided to refer the matter to the Tribunal des Conflits, in charge of ruling who between judicial and administrative courts have jurisdiction over a certain type of case, which confirmed that administrative courts have jurisdiction over annulment and *exequatur* of awards concerning public procurement contracts and public domain occupation contracts (TC, 24 April 2017, C4075).

The *exequatur* proceeding launched by Ryanair had to restart again before administrative courts and was denied both by the Administrative Tribunal of Poitiers (TA Poitiers, 20 December 2020, No. 1900269) and by the Administrative Court of Appeal of Bordeaux (CAA Bordeaux, 30 March 2022, No. 21BX00596) before reaching the Conseil d'Etat.

The End of the Contract's Internationality Criterion

Since the *Galakis* decision, there was an exception to the principle of impossibility for public entities to have recourse to arbitration when the dispute concerned a contract entered into for the purposes of international commerce. This exception was considered a material rule of private international law which are classically defined as rules that immediately provide a solution to a matter instead of applying conflict-of-law rules.

In *SMAC v Ryanair*, the Conseil d'Etat put an end to this almost 60-year-old exception. This decision can be seen as an application of its approach in *Fosmax* (CE, 9 November 2016, No. 388806), where it defined a three-step control over international arbitration awards:

- first, administrative courts must verify the arbitrability of the dispute: in accordance with the principle set out in the first paragraph of Article 2060 of the French Civil Code, which prohibits public bodies from resorting to arbitration, they may only compromise in cases provided for by law or international conventions;
- second, they must verify that the arbitral award was made following due process;
- third, they should verify that the award complies with the rules of public policy and notably mandatory rules of French public law (*lois de police*).

However, it seems unclear whether in *SMAC v Ryanair*, the Conseil d'Etat applied the first test (arbitrability) or the third test (*lois de police*). At first the Conseil d'Etat stated that:

> "*The enforcement of an arbitration award rendered in the context of the application of a contract concluded between a French public-law entity and a foreign-law entity, performed on French territory but involving the interests of international commerce, cannot be authorized by the administrative judge if it is contrary to public policy.*"

It then further considered that:

> "*subject to derogations* […] *legal entities governed by public law may not evade the rules determining the jurisdiction of national courts by deferring to the decision of an arbitrator the settlement of disputes to which they are a party*."

Those initial statements suggest that the third step of the test was applied. This is confirmed in the following paragraph where the Conseil d'Etat clearly sets aside the *Galakis* decision, confirming that the mere fact that a contract has been entered into by a public entity for the purposes of international commerce does not allow it to derogate from the principle that public entities are prohibited from resorting to arbitration. This suggests that the application of a *loi de police* has priority over the material rule of private international law created by the *Galakis* decision: the contract's internationality criterion as an exception justifying public entities recourse to arbitration.

Yet, when dismissing Ryanair's claim that refusing the exequatur would violate the 1958 New York Convention, the Conseil d'Etat seems to apply the first step of its test in *Fosmax*, making the recourse to arbitration by public entities a matter of arbitrability. Indeed, the Conseil d'Etat relies on Article V(2) of the 1958 New York Convention, without distinguishing between (a) inarbitrability of the dispute and (b) violation of public policy, to consider that "these provisions do not prevent the administrative judge from refusing to enforce an arbitral award relating to a dispute that was not arbitrable".

Although the Conseil d'Etat mentions explicitly the inarbitrability of the dispute, the reference to both (a) and (b) of Article V(2) of the New York Convention and not only (b), creates confusion as to the basis of its decision.

Conclusion: The End of Arbitration for French Public Entities?

"Get off my lawn!" that's basically what the Conseil d'Etat said to the arbitration community in *SMAC v Ryanair*. Drawing out its long rifle, the Conseil d'Etat head shot the *Galakis* decision by affirming that public entities could not resort to arbitration including in the context of international contractual relations. This is however not the complete end of arbitration for French public entities as several exceptions remain in the law and in international conventions.

Most of the exceptions to the prohibition for public entities to have recourse to arbitration are listed in Article L. 311-6 of the French Code of Administrative Justice ("CAJ") which refers to the possibility, e.g.:

- for public entities to arbitrate disputes relating to the financial performance of public works and supply contracts (Article L. 2197-6 of the Public Procurement Code) and to include arbitration agreements in public-private partnerships so far as French law applies (Article L.2236-1);
- for scientific and technological public establishments to be authorized to arbitrate by decree in the event of disputes arising from the execution of research contracts signed with foreign organizations (Article L. 321-4 of the Research Code);
- for the Société Nationale des Chemins de Fer ("SNCF"), SNCF Réseau and SNCF Mobilités to arbitrate their disputes (Articles 2102-6, L. 2111-14 and L. 2141-5 of the Transports Code);
- for La Poste, in charge of French postal services, to arbitrate (Article 28 of law no. 90-568 of July 2, 1990).

Several laws also regularly create exceptions in the context of the organization of sports events in France, such as the 2016 European Football Championship (Article 3 of law no. 2011-617 of 1 June 2011) or the 2024 Olympic and Paralympic Games (Article 6 of Act no. 2018-202 of 26 March 2018).

International law also provides several exceptions. Specific agreements for the construction of cross-border infrastructures or international public projects have long provided for recourse to arbitration. Such is the case with the Franco-Italian agreement of 14 March 1953 concerning the Mont Blanc Tunnel, the Canterbury Treaty of 12 February 1986 concerning the Channel Tunnel, and the Agreement of 6 March 2007 concerning the Abu Dhabi Universal Louvre Museum.

On a larger scale, the 1961 European Convention of International Commercial Arbitration provides that public entities may have recourse to arbitration for the settlement of disputes arising from international commerce. This last exception was put forward by Ryanair in the SMAC case, but the Conseil d'Etat rightly considered that the Irish company did not have its head office in a state party to the convention. Overall, the *SMAC v Ryanair* decision may be paving the way for corporate restructuring to benefit from the 1961 Convention akin to what is sometimes seen in investment arbitration.

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