Arbitral Awards Violating European Antitrust Laws: French Courts Cannot Help

Are French courts willing to review arbitral awards on the ground that arbitrators violated European antitrust laws? As a matter of principle, French courts are extremely reluctant to review arbitral awards on the merits. In theory, an exception remains when the award violates French international public policy, but actual instances where French courts have found such violations are very few.

Now, on June 1999, the European Court of Justice held in *EcoSwissChina* that member states ought to consider that article 81 of the EC Treaty belongs to their public policy for the purpose of reviewing arbitral awards. In that case, however, Dutch courts had been unable to review the compatibility of the award with EU antitrust law because the plaintiff had failed to challenge the award in a timely fashion. The ECJ held that it did not intend to change the procedural laws of the member states and that the obligation under Dutch law to initiate the challenge proceedings within 3 months was such procedural rule which could prevent an actual verification of the proper application of antitrust laws.

Is that changing anything to the French position? Not if the reluctance to review awards can be presented as the consequence of the application of a French procedural rule. Question: could that be a procedural rule which prevents review not only in some cases (say when the plaintiff did not act in a timely fashion), but in all cases? For instance, what about a local rule of procedure providing that courts only review the most obvious violations of public policy rules?

In November 2004, the Paris Court of Appeal had ruled in *Thales Air Defense v. GIE Euromissiles* that there was such a procedural rule in France. The French rule was that only violations of French public policy which were "obvious, actual and concrete" (*flagrante, effective et concrete*) would be sanctioned. As a consequence, in *Thalès*, the Court had dismissed a challenge in a case where the parties had arguably shared the relevant European market. The issue of the validity of the contract had not been raised during the arbitration.

SNF vs CYTEC

In a judgement of June 4, 2008, the French Supreme Court for private matters (*Cour de cassation*) addressed the issue for the first time.

The parties were two European chemical companies, Dutch Company CYTEC and French company SNF. The business of SNF was to sell a given chemical product, PMD, which could only be produced by using another chemical product, AMD. CYTEC was one of the sole producer in Europe of AMD, so SNF had to get it from CYTEC. In the early 1990s, the parties concluded successive exclusive purchase agreements (one in 1991, one in 1993) whereby SNF undertook to purchase AMD exclusively from CYTEC for 8 years. The contract provided for ICC arbitration in Brussels, Belgium, in case of dispute.

In January 2000, SNF stopped purchasing from CYTEC arguing that the contract violated European antitrust laws (Art 81 and 82 of the European Treaty). In May 2000, CYTEC initiated arbitral proceedings seeking compensation for breach of contract. In a counterclaim, SNF argued that the contract was contrary to European antitrust laws and as such ought to be set aside.

In a first award rendered on 5 November 2002, the tribunal found that the contract did violate article 81 of the European Treaty, as by obliging SNF to purchase exclusively from CYTEC, the exclusive purchase agreement prevented SNF from accessing the market of AMD. The tribunal set aside the contract and held that the parties were equally liable for it. In a second award made on 28 July 2004, the tribunal ruled on the financial consequences of the nullification of the contract but ordered solely SNF to compensate CYTEC.

In that case, competition law issues had been discussed before the arbitrators, so much so that the contract had been annuled on the ground that it violated it. This was not, however, the end of the story. SNF argued that, by compensating CYTEC only, the tribunal had managed to have the contract indirectly produce effect, and had thus violated antitrust laws anyway. It thus challenged the validity of the award before Belgian courts (as the seat of the arbitration was Brussels). On 8 March 2007, the Brussels first instance court accepted the argument and set aside the arbitral awards on that ground (SNF went on to sue the ICC in Paris for failing to verify whether the arbitrators had properly complied with public policy. The French judgement dismissing the action can be found here (in French, at p. 30)).

Meanwhile, however, CYTEC had sought enforcement of the awards in France, where they were declared enforceable in 2004. One after the other, all French courts found that the awards were not contrary to French public policy, as the violations were not obvious. The *Cour de cassation* confirmed last the position of French courts by ruling that no evidence of an "obvious, actual and concrete" violation of public policy had been provided. Note that, from a French point of view, the fact that the awards were eventually set aside by Belgian courts is irrelevant, as the French doctrine is that international arbitration is delocalized.

Interim conclusion: do not provide for arbitration in Brussels for disputes arising out of this kind of contract. Also, avoid rue de la Loi or rue Joseph II.

A critical difference between the *Thales* case and the *CYTEC* case is obviously that, in the *CYTEC* case, EU competition law had been applied. The judgment of the *Cour de cassation* puts this forward as one of the reasons for its decision. Remarkably, the judgment also says that the amount of compensation falls outside of the scope of the public policy ground for review. French judgments are always very short and subject to interpretation, but it seems that the Court rules that it will never find a violation of EU antitrust laws where a party was denied damages as a consequence of an antitrust violation. So, in this case, there was no chance whatsoever it would deny recognition to the awards. Why should compensation be excluded from public policy? The court does not say.

Final conclusion: one wonders what European institutions will think of all these subtle distinctions.