

## INTERNATIONAL ARBITRATION LAW

BY EMMANUEL GAILLARD

### *Extent of Court Review of Public Policy*

It is universally accepted that court review of arbitral awards at the seat of the arbitration or in the country where recognition and enforcement is sought includes an examination on the ground of that particular jurisdiction's conception of international public policy. This principle has been embodied, in particular, in Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

The content of international public policy may, however, vary from one jurisdiction to the other, both as regards public policy requirements concerning the merits of a dispute and as regards public policy requirements concerning the arbitral procedure (see E. Gaillard and J. Savage (eds.), *FOUCHARD GAILLARD GOLDMAN*, Kluwer, 1999, paragraphs 1645-1662 and 1710-1713). Each jurisdiction's understanding of international public policy encompasses the set of fundamental values a breach of which could not be tolerated by that particular legal order, even in international cases.

#### **Economic Public Policy**

The question of the content of international public policy may arise in some areas more acutely than in others, in particular as regards economic public



policy. In European Union countries for example, European antitrust law, as embodied in particular in the provisions of European Commission (EC) Treaty Articles 81 and 82, is regarded as a matter of public policy. EC Treaty Article 81 prohibits "as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market..." EC Treaty Article 82 in turn provides that "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States."

As fundamental requirements of European economic public policy, these provisions must be applied by arbitral tribunals, in order for the resulting award to be fully enforceable in member states of the European Union, in any dispute to which the antitrust rules of the European Union apply. This principle results in particular from the *Eco Swiss* decision of the European Court of Justice (ECJ) (*Eco Swiss China Times Ltd. v. Benetton International NV*, June 1, 1999, available on the ECJ Web site):

35. ... it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.

36. However,...Article 81 EC (ex Article 85) 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. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 81(2) EC (ex Article 85(2)), that any agreements or decisions prohibited pursuant to that article are to be automatically void.

37. It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC (ex Article 85(1)).

38. That conclusion is not affected by the fact that the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member States provides that recognition and enforcement of an arbitration award may be refused only on certain specific grounds [reference to Article V(1)(c) and (e)].

39. For the reasons stated in paragraph 36 above, the provisions of Article 81 EC (ex Article 85)

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may be regarded as a matter of public policy within the meaning of the New York Convention.

The courts of a nonmember state may refuse to recognize European antitrust law as falling within their conception of international public policy. Of particular interest is, in this respect, the Judgment of March 8, 2006 rendered by the Swiss Federal Tribunal in the case of *Tensacciai SpA v. Freyssinet Terra Armata R.L.* (see English translation and commentary by Charles Poncet, in *WORLD ARBITRATION & MEDIATION REPORT*, vol. 17, No. 7, July 2006, 221, at 227):

After reviewing once again the concept of public policy...and after examining further the nature of European Competition Law...this Court holds that there is no more room for doubt: the provisions of competition laws, whatever they may be, do not belong to the essential and broadly recognized values which, according to the concepts prevailing in Switzerland, would have to be found in any legal order. Consequently, the violation of such a provision does not fall within the scope of art. 190(2)(e) PILA. The possibility of such a violation affecting one of the principles that case law deducted from the concept of material public policy is hereby reserved...As European or Italian competition laws do not belong to the realm of public policy as stated in art. 190(2)(e) PILA, this appeal can only be rejected without further analysis of the way in which that law was applied by the Arbitral Tribunal.

Conversely, in European Union countries, where European antitrust law is regarded as a matter of economic public policy, the question would arise as to the extent to which the application of European antitrust law by the arbitrators must be controlled by the courts when determining whether an award complies with international public policy. This particular question was tested recently in parallel court proceedings in France and in Belgium in the matter of the ICC arbitration *SNF SAS S.A. v. Cytec Industries*.

### The SNF Awards

The French company SNF SAS SA (SNF) had entered in 1993 into an agreement with Dutch company Cytec Industries BV (Cytec) for the purchase of acrylamide monomer, a chemical component used for water treating, paper, mining, and oil field chemicals, coatings and adhesives. The 1993 agreement replaced a previous three-year agreement of 1991. In 2000, Cytec initiated arbitration proceedings after SNF sought the termination of the 1993 agreement based on

its breach of EC Treaty Articles 81 and 82. The arbitration was subject to French law and had its seat in Brussels (Belgium).

In a partial award on the principle of liability dated Nov. 5, 2002, the Arbitral Tribunal held that the 1993 agreement was null and void ab initio because its object and purpose was to prevent SNF from accessing for eight years the European market of acrylamide monomer and thus constituted a restriction of competition within the common market in breach of EC Treaty Article 81. The tribunal further held that Cytec had not abused a dominant position within the meaning of EC Treaty Article 82.

The tribunal also determined that the parties had shared responsibility as both SNF and Cytec should have known that their agreement was null and void. In its final award of July 28, 2004, the tribunal granted damages exclusively to Cytec, covering the unsold volumes of acrylamide monomer on the basis of the 1991 agreement and the applicable higher purchase price, as well as damages for the period from July 1995 to January 2000 under the 1993 agreement. Compound interest at the rate of 7 percent was applied on the entire amounts awarded to Cytec until June 30, 2004. SNF's compensation requests were rejected in their entirety on the basis that SNF had not established that it could have obtained from Cytec more favorable purchase conditions than those under the 1993 agreement or that it could have purchased acrylamide monomer at better prices from other producers.

SNF challenged the two awards separately before the French courts where enforcement was sought and the Belgian courts of the seat of the arbitration. Before the Paris Court of Appeals, SNF appealed on Oct. 6, 2004 against two enforcement orders of Sept. 15, 2004 by the president of the Paris Tribunal de grande instance relating to the two awards of 2002 and 2004. Before the Brussels Tribunal de première instance, SNF applied on May 19, 2005 for the setting aside of the two awards of 2002 and 2004. SNF's applications in both instances were based, among others, on the awards being contrary to European antitrust law as a matter of public policy, as embodied in the provisions of EC Treaty Articles 81 and 82.

*before the French Cour de cassation.*

### 'Manifest' Violations

In the French proceedings, SNF's application was rejected and the Paris Court of Appeals confirmed the enforcement orders. The Court held in essence that:

Considering that although it is correct, as reminded by company SNF-SAS, that under Article 1502 of the New Code of Civil Procedure, the Court of Appeals exercises its power of review on the basis of the enumerated grounds by seeking in law and in fact, and without limitation, all factors establishing a breach, the Court, which is not sitting in judgment of the trial but of the award, exercises only an extrinsic control as regards the breach of international public policy as only the recognition or the enforcement of the award is examined in light of its conformity with international public policy at the time it is presented to the judge.

The court held that the tribunal had complied with international public policy in applying European antitrust law and declaring the 1993 agreement null and void on the basis of EC Treaty Article 81 and rejecting SNF's allegation relating to Cytec's abuse of dominant position. The court further held that the assessment of the elements of fact and law in light of Articles 81 and 82 came within the tribunal's power and that it could not substitute its own assessment for that of the tribunal without engaging into a review of the merits, and that the consequences in terms of damages did not fall within the court's control under Article 1502, 5°, of the New Code of Civil Procedure.

The court, however, recognized that SNF was challenging the "result" of the awards rather than the tribunal's ability to understand and apply European antitrust laws. It is, indeed, not the abstract rule of law applied by the arbitrators which must be measured against the requirements of international public policy, but the actual result reached by the arbitrators, as established by the Paris Court of Appeals' decision in the *Reynolds* case (Paris Court of Appeals, *Lebanese Traders Distributors & Consultants LTDC v. Reynolds*, Oct. 27, 1994, 10 INT.'L ARB. REP. E7 (February 1995); see also FOUCHARD GAILLARD

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*Whether control of public policy should be restricted only to "manifest" violations or should concern any violations is a question*

GOLDMAN, cited above, paragraph 1649): ...the scrutiny of the Court...must bear not upon the evaluation made by the arbitrators with regard to the cited requirements of public policy, but on the solution given to the dispute, annulment only being incurred if enforcement of that solution violates the aforementioned public policy.

The Paris Court of Appeals' reluctance to go beyond an "extrinsic control" of public policy in order to avoid engaging in a review of the merits dates back to its well-known decision in the *Euromissile* case of 2004 (Paris Court of Appeals, *SA Thales Air Défense v. Euromissile*, Nov. 18, 2004, French version in 2005 REVUE DE L'ARBITRAGE 751). In an award of Oct. 23, 2002, the tribunal in that case held Thales liable for unlawful breach of contract under its contractual arrangements with *Euromissile*, but did not declare such arrangements null and void pursuant to EC Treaty Article 81. Considering that the effect given by the tribunal to such arrangements was contrary to the prohibition of restrictions of competition laid down in Article 81, Thales sought the annulment of the award on the basis that the award's recognition or enforcement would be contrary to international public policy under Article 1502, 5°, of the New Code of Civil Procedure.

The Paris Court of Appeals noted in *Euromissile* that the parties had never raised the issue of the conformity of their contractual arrangements with EC Treaty Article 81 before the Arbitral Tribunal but that Thales could nevertheless challenge the conformity of its contractual arrangements with European antitrust law to the extent that the enforcement of the award would result in a violation of Article 81. At the same time, the court laid emphasis on its control being confined to situations where the recognition or enforcement of awards would breach the French legal order "in an unacceptable manner," such breach constituting a "manifest" violation of an essential rule or a fundamental principle such as Article 81.

The court held, however, that it was not in a position to assess the parties' arguments in light of European antitrust law without a legal and economic analysis and that, in the context of annulment proceedings, it could not conclude whether the arrangements between Thales and *Euromissile* constituted a restriction of competition within the common market in breach of Article 81.

The court concluded that "the violation of international public policy within the meaning of Article 1502, 5°, of the New Code of Civil Procedure must be manifest, actual and specific [flagrante, effective et

concrète]," and that, although it could, within its powers, make a determination in fact and in law, it could not determine the merits of a complex dispute regarding the possible illegality of contractual arrangements that had never been argued by the parties and never assessed by the arbitrators (for a similar reasoning by Italian courts as regards European antitrust law, see Florence Court of Appeals, *X. S.A. v. Y.*, March 21, 2006, summarized in French GAZETTE DU PALAIS, Oct. 15-17, 2006, at 57).

The expression used by the Paris Court of Appeals in *Euromissile* seems to have been introduced by the French Cour de cassation in an unpublished decision of March 21, 2000, holding that the "violation of international public policy within the meaning of Article 1502, 5°, of the New Code of Civil Procedure, assessed at the time when the recognition and the enforcement of the award is sought, must be manifest, actual and specific [flagrante, effective et concrète]."

This reasoning has been approved by a number of authors (see, in particular, the commentaries of the *Thales v. Euromissile* decision by L. G. Radicati di Brozolo, *L'illicéité 'qui crève les yeux': critère de contrôle des sentences au regard de l'ordre public international (à propos de l'arrêt Thalès de la Cour d'appel de Paris)*, 2005 REVUE DE L'ARBITRAGE 529; T. Clay, 2005 DALLOZ Pan. 3050; A. Mourre, 132 JOURNAL DU DROIT INTERNATIONAL 357 (2005)) and criticized by others (see also commentaries of the *Thales v. Euromissile* decision by E. Loquin, 2005 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 263; C. Seraglini, *L'affaire Thalès et le non-usage immodéré de l'exception d'ordre public (ou les dérèglements de la dérèglementation)*, 2005 GAZ. PAL.-LES CAHIERS DE L'ARBITRAGE 5 (No. 2); S. Bollée, 2006 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 111).

### Control, 'Manifest' Violations

By contrast, in the Belgian proceedings, the Brussels Tribunal de grande instance clearly distanced its approach from that of the Paris Court of Appeals and held that any violation of international public policy must be sanctioned under the applicable provisions of Belgian law (Article 1704, 2°, of the Judicial Code), and not only "manifest, actual and specific" violations within the meaning of the *Euromissile* decision of the Paris Court of Appeals:

Pursuant to Article 1704, 2°, any violation of public policy must be sanctioned by the annulment of the award and not only violations that are manifest, actual and specific

[flagrantes, effectives et concrètes] (terms of the *Thales* Decision, Paris, Nov. 18, 2004 [references]).

Applying this approach, the Brussels Tribunal decided that the Tribunal had rightly decided that in the circumstances of the case an abuse of dominant position by Cytec had not been established pursuant to EC Treaty Article 82. However, as regards the conformity of the awards with EC Treaty Article 81 and SNF's argument that the enforcement of the awards resulted in implementing illicit agreements at higher prices than if the agreements had not been declared null and void, the Brussels Tribunal decided to set aside the awards in their entirety on the basis that the Arbitral Tribunal's reasoning was contradictory in essence. Indeed, the Brussels Tribunal determined that the Arbitral Tribunal could not decide, on the one hand, that the 1993 agreement constituted a restriction of competition because it was intended to prevent SNF from entering the common market as a producer of acrylamide monomer and was thus null and void ab initio pursuant to Article 81 and, on the other hand, that in free market conditions SNF would have nevertheless continued to purchase acrylamide monomer from Cytec for the same period, at higher prices and without being in a position to enter the production market of acrylamide monomer. The Brussels Tribunal concluded that such contradiction undermined the effectiveness of European antitrust law because, as a result of the annulment of the 1993 agreement, Cytec ended up obtaining in damages higher amounts than those it would have obtained if the agreement had continued to be implemented while SNF, who had sought the annulment of an agreement contrary to public policy, ended up in a worse situation than it would have been in had it continued the implementation of the 1993 agreement.

Importantly, the Brussels Tribunal found that the anticompetitive nature of the 1993 agreement was not related to the fact that the agreed prices were below market prices, but resulted from the fact that "it prevented, for a long time, SNF from entering the production market of acrylamide monomer." The annulment of the awards is based on the Brussels Tribunal's determination that the awards were "contrary to EC Treaty Article 81 to the extent that, through their *solution* to the dispute, they result[ed] in giving effect to an agreement that was determined to be anti-competitive" (emphasis added).

The tribunal thus measured the actual result reached by the arbitrators against the requirements of public policy embodied in European antitrust law.

The disparity between the two lines of reasoning in light of European antitrust law as a matter of public policy—annulment by the Brussels Tribunal of the awards based on the violation, by the solution reached, of Article 81, as compared to the refusal by the Paris Court to enter into what it considered to be a review of the merits—is all the more remarkable in that the two courts were seized of exactly the same facts and the same legal arguments. The Paris Court's reluctance can be justified even less when one considers the court's own jurisprudence establishing an *in concreto* control of public policy in light of the "solution given to the dispute" by the arbitrators (*Reynolds* case cited above). Under the "manifest violation" test, on the other hand, the very notion of public policy would be undermined as a violation of economic public policy would almost never be "manifest."

## Conclusion

The question of whether the control of public policy should be restricted only to "manifest" violations or whether it should concern any violations is now a question before the French Cour de cassation, SNF having appealed from the Paris Court of Appeals' decision to the French supreme court. Considering that court control of compliance with international public policy is already carried out very sparingly, it is hoped that the Cour de cassation will decide that there is no room for a further attenuation of public policy, in particular of economic public policy, by restricting the court's review to only "manifest" violations.