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NEW TRENDS IN FRENCH ARBITRATION LAW

A narrower control of the compatibility of international arbitration awards with international public policy?

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France has long ago adopted one of most international arbitration awards-friendly legal systems. An element of this favorable policy, the sanctified principle that courts may not review the substance of an award, has traditionally led French courts to perform, from a comparative standpoint, an uncommon, narrow control of compatibility of awards with substantive international public policy, one of the very limited reasons for which they may be set aside under Article 1520 of the French Code of Civil Procedure. **(1)**

In recent decisions relating to international arbitration, however, the sustainability of this approach, described as "minimalist", has been called into question: a trend seems to appear towards a greater control of the compatibility of international awards with French substantive international public policy, which gives rise to uncertainties as regards the standard of review of international awards. **(2)**

THE TRADITIONAL FRENCH CONTROL OF INTERNATIONAL AWARDS' COMPATIBILITY WITH SUBSTANTIVE INTERNATIONAL PUBLIC POLICY: A DECRIED MINIMALIST APPROACH

Article 1520 of the French Code of Civil Procedure, in line with the 1958 New York Convention on the recognition and enforcement of international arbitration awards, provides that such awards may only be set aside for five reasons and, notably:

"[...]

(5) recognition or enforcement of the award is contrary to international public policy."

As regards this fifth ground for setting awards aside, French courts have adopted a minimalist approach: when assessing whether *"recognition or enforcement of the award"* -as opposed to the award itself- *"is contrary to* [substantive] *international public policy"*, the control performed was limited to flagrant, effective and concrete violations.[1]

The rationale behind the French courts' stance was that the decisions of arbitrators were to be trusted, at least in a first stage, to enforce international public policy, keeping in mind that their decisions may subsequently be controlled by the judges at the challenge, recognition and/or enforcement stage. The justifications of this system were, at the time, twofold: an economy of means, and favor to arbitration.[2]

However, the narrowness of this control has been and continues to be decried by some scholars,[3] relying notably on the following arguments:

- By adopting such a narrow control, and especially the requirement of a "flagrant" violation, the courts were, in essence, voiding the requirement of Article 1520, 5° of any effect and its control had become *"an illusion"*;[4]
- A larger control would not lead to the review of awards in fact and in law and hence would not be contrary to the principle of non-review of awards on the substance;[5]
- Such a larger control already exists for the assessment of the compatibility of international awards to procedural international public policy;[6]
- From a comparative law standpoint, the French position differs from that of other countries which adopted a more maximalist approach. However, such a difference is not necessarily in favor of French arbitration since arbitration users could refuse to choose France as a seat of the arbitration precisely because of its permissive approach as regards international public policies.[7]

A maximalist approach has also been advocated by the European Court of Justice ("ECJ"). For example, in the famous *Ecoswiss* case,[8] the ECJ decided that (i) an award should be set aside if it gave effect to an agreement containing undertakings contrary to the competition law provision of Article 101 of the Treaty on the functioning of the European Union ("TFEU"), which pertains to European public policy, and (ii) since the

European principle of mutual trust between Member States, which has notably as a consequence that decisions of a court of a Member State are deemed compliant with European law and hence do not in principle necessitate any review, is not applicable to those of arbitral tribunals that are not courts of a Member State, a control of the compatibility of arbitration awards is required.

In their latest rulings, French courts seem to have taken these criticisms into account and to have reinforced their control of international awards.

RECENT DECISIONS TOWARDS A GREATER CONTROL OF INTERNATIONAL AWARDS' COMPATIBILITY WITH FRENCH SUBSTANTIVE INTERNATIONAL PUBLIC POLICY

In several decisions issued since 2012, the Paris Court of appeal seems to have abandoned the requirement of "flagrancy" when assessing the compatibility of awards with French international public policy.[9] However, no landmark decision explicitly reversing its position has been issued yet. The French *Cour de cassation*'s position in this regard remains uncertain.

However, the recent *Genentech v. Hoechst* case[10] may be interpreted in such a way as to confirm the French trend towards a greater control of compatibility of international awards with French substantive international public policy.

In a much awaited decision issued further to the Paris Court of appeal's referral for a preliminary ruling, the ECJ rendered a judgment on 7 July 2016 relating to the Member States' control of the compliance with public policy of international arbitration awards.

In this case, German company *Behringwerke AG* (*"Behringwerke"*, subsequently replaced by German company *Hoechst*), which specializes in biotechnologies, had conceded in 1992 to *Genentech*, an American company, a global non-exclusive license for the use of a human cytogalovirus (HMCV) enhancer, in compensation of, notably, a "running" royalty of 0.5 % levied on the amount of sales of "finished products" (the "License Agreement"). *Genentech* never paid the running royalty and, in 2008, it notified the termination of the License Agreement to one of *Hoechst*'s subsidiaries.

Hoechst and *Sanofi-Aventis Deutschland* then initiated ICC arbitration proceedings before a sole arbitrator who rendered notably (i) a partial award holding that *Genentech* had breached the License Agreement in 2012 and (ii) in 2013, a final award on the sums *Genentech* was to pay *Hoechst* which has later been amended.

Genentech challenged all the awards before the Paris Court of appeal on the basis of Article 1520, 5° of the French Code of Civil Procedure, arguing that they were contrary to international public policy for breaching EU competition public policy, notably for violating Article 101 of the TFEU.

The Paris Court of appeal noted that, in the matter at issue, the sole arbitrator's decision could be contrary to Article 101 TFEU for infringements of free competition, and thus referred the issue to the ECJ, requesting an interpretation of this provision in the following terms: *"Must the provisions of [Article 101 TFEU] be interpreted as precluding effect be given, where patents are invoked, to a licence agreement which requires the licensee to pay royalties for the sole use of the rights attached to the licensed patent?"* This referral to the ECJ confirms that French courts no longer seem to consider that the violation of substantive public policy should be "flagrant", or -by definition- they would not have requested the ECJ's interpretation on substantive provisions of EU competition law.

While the ECJ answered the question above by the negative, it may be regretted that, in providing its interpretation, it did not take the opportunity to also discuss the Advocate General Wathelet's Opinion who argued, *inter alia*, that the French legal system's limitations on the scope of the review of compliance with public policy of international arbitration awards are contrary to the principle of effectiveness of EU law. While some commentators opine that this decision is a *"missed opportunity"* to rule on this issue, it may also be considered that the ECJ's intent was to have French courts take their responsibilities regarding the *"exception française"* that is their narrow control of the international awards.

The matter is currently again pending before the Paris Court of appeal, the decision of which is much awaited as regards the intensity of the control it will perform.

ABOUT ALTANA'S TEAM

The arbitration & mediation team has outstanding experience in the resolution of complex, technical disputes, as counsel and arbitrators in domestic and international arbitrations. It intervenes notably in disputes in the construction, distribution, IP/IT, transport, raw materials, oil & gas, JVs, sale/purchase agreements, insurance sectors. Its lawyers appear in institutional (ICC, EDF, LCIA, CCAT, CEPANI, CRCICA, AFA, AAA) and ad hoc arbitrations governed by a wide range of European, North African and Middle Eastern laws. The team was notably featured in Décideurs Stratégie Finance et Droit 2015 [Leaders League], *Option Droit et Affaires 2015* and Legal 500 2016.

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[1] C.Cass. Civ. 1ère, 29 January 2000, Rev. arb. 2001.804; Paris, 18 November 2004, JDI, 2005.357; Paris, 23 March 2006, Rev. arb. 2006.483. [2] E. Gaillard, « La jurisprudence de la *Cour de cassation* en matière d'arbitrage international », Conference given at the French Cour de cassation on 13 March 2007. [3] See notably, C. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international*, Montchrestien, 2013, para. 984; E. Loquin, S. Manciaux (dir.), *L'ordre public et l'arbitrage*, Actes du colloque des 15 et 16 mars 2016 – Dijon, LexisNexis, 2014/42, *passim*. [4] C. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international*, Montchrestien, 2013, para. 984 [5] C. Kessedjian, in Loquin, S. Manciaux (dir.), *L'ordre public et l'arbitrage*, Actes du colloque des 15 et 16 mars 2016 – Dijon, LexisNexis, 2014/42, p. 234. [6] Paris, 1st July 2010, Rev. arb. 2010.857. [7] C. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international*, Montchrestien, 2013, para. 983 [8] ECJ, 1 June 1999, Case No. C-126/97, ECLI:EU:C:1999:269. [9] Paris, 17 January 2012, Rev. arb. 2012.569; Paris, 26 February 2013, Rev. arb. 2014.82; Paris, 26 February 2013, Rev. arb. 2014.82; Paris, 4 March 2014, n°12/1768; Paris, 9 September 2014, n°13/02594; Paris, 14 October 2014, n°13/03410; Paris, 4 November 2014, n°13/10256; Paris, 25 November 2014, n°13/11333. [10] ECJ, 7 July 2016, Case No. C-567/14, ECLI:EU:C:2016:526.