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Court Review of Antitrust International-Arbitral Awards

In his article "Extent of Court Review of Public Policy" published in these pages on April 5, 2007, Emmanuel Gaillard elucidates the problems arising on account of the recent conflicting French and Belgian treatments of the awards in the *SNF SAS v. Cytec Industries* International Chamber of Commerce (ICC) arbitration. The underlying issues are important in the United States as well.

Arbitration continues to grow at a rapid pace; antitrust cases in particular are increasingly being arbitrated; and the law is still evolving in relation to the tension between the legitimate aims of antitrust policy and arbitral finality.

The purpose of this article is to underline and extend the debate to American and other European contexts.

Arbitrability of Antitrust Claims

It has for some time been clear, both in the United States and the European Union (EU), that antitrust cases are arbitrable. In the 1985 landmark case of *Mitsubishi v. Soler Chrysler-Plymouth*, (473 US 614), the U.S. Supreme Court rejected an array of arguments aimed at showing the incompatibility between antitrust claims and international arbitration—including that antitrust cases are too complex for the arbitral process, and too important to be left to arbitrators rather than judges. The Court's willingness to embrace arbitrability was conditioned on a judicial review at the time the arbitral award would come to be enforced:

> [S]o long as the prospective litigant effectively may vindicate its statutory [antitrust] cause of action in the arbitral forum, the [antitrust] statute will continue to serve both its remedial and deterrent function. (*Mitsubishi* at 633-4)…[T]he national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The [New York] Convention reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to the public policy of that country'…(*Mitsubishi* at 636-7)

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In the EU as well, "[t]here is no realistic doubt that such 'competition' or 'antitrust' claims [Articles 81/82 EC] are arbitrable" (per Gross J in *ET Plus SA v. Welters*, English High Court, Commercial Division, Nov. 7 2005 at ¶51). The European Court of Justice (ECJ) implicitly acknowledged arbitrability in 1982 in *Nordsee Deutsche Hochseefischerei* (Case 102/81), and more definitively in 1999 in *Eco Swiss China Time Ltd/Benetton International NV* (Case C-126/97). As in the United States, the ECJ contemplated that arbitration awards would be subject to later national court review at the award enforcement stage, and that vacating offensive awards would not violate the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*Eco Swiss/Benetton* at ¶39,40).

> *Absolute arbitral finality is inimical to a rational system of private competition law enforcement, and unnecessary to an effective international arbitral system.*

Judicial Review/Enforcement

Although the premise of the ECJ cases is that arbitral awards will be judicially reviewed to an appropriate extent at the enforcement stage to ensure compliance with Articles 81/82 EC, actual practice in some member states to date (particularly France) has missed the mark.

The issue is the extent to which a reviewing court should scrutinize an award to ensure its compatibility with applicable antitrust law. This is a difficult matter because at its root lies a clash between two different public policies, both enshrined by treaty—that of ensuring an undistorted internal market throughout the European Community, on the one hand; and that of ensuring arbitral efficiency and finality, on the other. Erring on either side disserves the other.

The French courts have come down strongly in favor of arbitral finality and appear to have paid little more than lip service to the antitrust side of the balance. This is particularly odd because the obligation to implement community competition policy is unconditional under Article 10 of the EC Treaty, but the obligation to recognize and enforce international arbitral awards is subject to an explicit public policy reservation in Article V(2)(b) of the New York Convention. The position was unsatisfactory even before the recent *SNF/Cytec* case, and is especially so now.

It is often said in common-law countries that bad facts make bad law. And perhaps the adage applies at least in this context also in France. *Thales Air Defence BV v. GIE Euromissile et al.* (Paris Court of Appeals, Nov. 18, 2004) concerned an arbitration in respect of a contract in which the parties failed to raise any antitrust claims during the arbitration itself. The arbitrators did not probe Article 81 EC issues sua sponte. The award was thus free of references to competition effects and law. Article 81 incompatibility was averred only later. The Paris Court of Appeals upheld the award. There was room for doubt about the genuineness of the competition concerns raised so belatedly, and indeed about whether Articles 81/82 should enable an unsuccessful party to set up an ex post facto antitrust claim in order to avoid its liabilities under an otherwise unassailable arbitration award. To the extent this was the underlying motive for upholding the award, the result in itself may be unobjectionable.

The problem is rather with the Court's expressed rationale. It ruled that an award could be set aside

only if its public policy violation were "blatant [or "manifest"], specific and concrete" ("flagrante, effective et concrète"). An award free of competition effects and law references can perforce have no facial antitrust errors, so failing this "blatant, specific and concrete" test is virtually inevitable.

Adopting it therefore enabled the Court to avoid launching fresh factual and legal enquiries (that ought to have been determined in the first place), while also giving the impression of having taken its EC Treaty obligations in relation to Article 81 into account.

The "blatant, specific and concrete" approach, however, actually fails to address the extent of a reviewing court's duties to establish the public policy compatibility of an award that is altogether silent on those issues; and even more so in cases where those issues were arbitrated punctually and vigorously, but decided wrongly in arbitration awards whose competitive effects are perverse.

'SNF/Cytec'

SNF/Cytec is precisely such a case. At issue was a long-term supply agreement for an intermediate chemical product which SNF contended violated Articles 81 and 82. The matters were arbitrated in bifurcated ICC proceedings in Brussels.

In the first phase (liability), the arbitral tribunal found no Article 82 violation (because Cytec lacked sufficient market power to be dominant), but held that the disputed agreement violated Article 81 and therefore was void and unenforceable.

In the second phase (damages), the tribunal awarded damages to Cytec on the ground that SNF had no other effective source of supply, and but for the void agreement, Cytec could have extracted even higher prices from SNF.

SNF objected that the liability and damages awards were self-contradictory and that the damages award in particular actually (and "blatantly") extended rather than eliminated the antitrust violation previously adjudicated, and thereby seriously violated public policy. It did so in defense of enforcement proceedings which Cytec brought in France and in nullity proceedings which SNF itself brought in Belgium. The French and Belgian courts reached opposite conclusions.

The Paris Court of Appeals enforced the award. Having confirmed that the antitrust issues had been addressed, it refused to consider the merits at all. Although it purported to apply the (already-suspect) "blatant, specific and concrete" test, it effectively eviscerated it because the award was a paradigm of a "blatant, specific and concrete" violation. It is difficult to imagine any circumstance when a perverse award would be set aside in France on current form: if the Articles 81/82 issues were not addressed, violations could not be "blatant" or "manifest"; and if they were addressed, no further review is permitted.

By sharp contrast, the Court of First Instance in Brussels actually examined the awards, held that they were self-contradictory, and annulled them. It found that it was simply not possible to void an agreement for violating Article 81, and then to award damages in even greater amounts than would have been payable had the void agreement been performed. Indeed, the arbitral tribunal had voided the agreement under Article 81 because it prevented SNF itself from entering the relevant market, but then awarded damages to Cytec based on SNF's failure to have achieved precisely this market entry. The effect of the awards was to enforce the very illegality determined. Hence the annulment.

The Right Approach

In annulling the *SNF/Cytec* awards, the Brussels court explicitly rejected the "blatant, specific and concrete" approach in *Thales/Euromissile*. It considered itself bound to carry out a substantive and not merely formal review of the awards:

> Review for conformity with public policy provisions assumes that the reasoning of the decision is examined, in fact and in law, not only from a formal point of view but also as to substance. (p. 10)

Of course the Belgian decision does not address (or need to have addressed) a range of other related questions, but its basic approach—to undertake a substantive review of the award rather than merely to confirm that the relevant issues were addressed—must be the right one.

Absolute arbitral finality is inimical to a rational system of private competition law enforcement, and unnecessary to an effective international arbitral system.

A Different View

The tension between antitrust policy and arbitral finality has not been resolved conclusively in the United States either. It has not been addressed by the Supreme Court since *Mitsubishi*. At appellate level, the U.S. Court of Appeals for the Fifth Circuit had no hesitation in undertaking an antitrust merits review in 2004 in *American Central Eastern Texas Gas v. Union Pacific Resources Group*, (93 Fed.Appx. 1), but in 2003 a divided U.S. Court of Appeals for the Seventh Circuit held in *Baxter International v. Abbott Laboratories*, (315 F3d 829), that no such review should be carried out.

The majority view was that a court should do no more than confirm that the arbitral tribunal "took cognizance of the antitrust claims and actually decided them." No further inquiry into the merits should be entertained. Even if the award is erroneous, this "does not condemn the public to tolerate a monopoly. If [such monopoly]…really does offend the Sherman Act, then the United States, the FTC, or any purchaser…is free to sue and obtain relief." (Id at 832) The minority differed: antitrust claims are not merely private claims, but "quasi-public claims" designed also to protect the rights of consumers and the public, for which explicit provision is made in Article V(2)(b) of the New York Convention. Arbitration awards in antitrust cases cannot therefore be immune from scrutiny. (Id at 833)

The *Baxter* majority's indifference to antitrust inadequacies of arbitration awards is at odds with *Mitsubishi's* insistence on a judicial review of the "vindication" of antitrust claims at the enforcement stage. Its justification—that the federal antitrust enforcement agencies and injured third-party consumers may sue notwithstanding the award—does not fly. Government agencies cannot and do not pursue all antitrust complaints: they have limited resources and therefore broad discretion to decide which cases to pursue and not to pursue. (See, e.g., the Justice Department's "Antitrust Division Manual," Chapter III, §B.1, which limits new investigations to resource availability.) And consumer cases are expensive and not in themselves a reliable means of discharging competition policy. As explicitly noted in *Mitsubishi* itself, private enforcement has played "a pivotal role in aiding governmental enforcement of the antitrust laws," (473 US 614, 633, 636), and its expansion in the EU is the subject of the European Commission's recent "Green Paper—Damages actions for breach of the EC antitrust rules" (SEC [2005] 1732). As explained by the ECJ in *Bernard Crehan v. Courage Ltd.* (Case C-453/99):

> The full effectiveness of Article 85 [now Article 81] of the Treaty…would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. …Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community. (¶26, 27)

The *Baxter* majority effectively removes private actions from the public policy calculus in arbitration cases without judicial or evidentiary support. That cannot be right.

Conclusion

Balancing the conflicting aims of competition policy and arbitral finality is difficult. If the antitrust claims were addressed and decided in an international arbitration, but (allegedly) wrongly, a court should satisfy itself that the tribunal's antitrust determination was not perverse. The review should be "more or less extensive depending on the circumstances" (per *Nordsee*), but in any event as nonintrusive as possible.

Failing to undertake this review as a matter of principle—whether on the ground that antitrust harms may be remedied elsewhere (as in *Baxter*), or that antitrust reviews are inherently too difficult for courts to undertake (as in *Thales/Euromissile*)—is an abdication of public policy whose accommodation Article V(2)(b) of the New York Convention was designed to preserve. The judgment of the Brussels Court of First Instance in *SNF/Cytec* shows that a meaningful and efficient review is feasible.

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