



The role of arbitration in the new world of increased private antitrust enforcement in Europe

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The old antitrust – arbitration controversy

Jacques Werner (1995):

- *“Two EC companies enter a market-sharing agreement infringing Article 81 EC; Swiss law; arbitration in Switzerland; only one copy of the written agreement exists, deposited in a Swiss bank; arbitrators are asked to examine the agreement but not to mention it in their award”*

What to arbitrate? General

- **Article 101 TFEU – agreements**
 - most likely case in practice
 - **Typical case:** vertical agreement between producer and supplier
 - **Less typical case:** horizontal agreement between two competitors (e.g. R & D agreement)
 - **Atypical case:** contract with a third party (e.g. cartel member sells inflated priced goods to a third party)
- **Article 102 TFEU – abuse of dominant position**
 - less likely case
- **Merger control**
 - Numerous clearance decisions with arbitration remedies

Arbitrability and how to arbitrate

- **US – *Mitsubishi et seq.***
- **FR, D, I, B, CH, P (n.b. new generation laws – business nature)**
- **High Court in *ET Plus SA & Ors v. Welter & Ors* (Comm.), para. 51:**
 - *“there is no realistic doubt that ... ‘competition’ or ‘anti-trust’ claims are arbitrable; the issue is whether they come within the scope of the arbitration clause, as a matter of its true construction”.*
- **Wide arbitration clause – most formalised clauses are considered to be wide enough to cover competition law disputes**
- **Arbitration clause may cover also tort claims based on competition law**

Private actions in Europe - the current state of affairs

- European remedy (*Courage, Manfredi*)
- “constitutive conditions” of liability set by primary Union law
- “executive / procedural conditions” set by national laws
BUT under the effectiveness and equality EU law conditions
- White Paper 1998 – forthcoming Directive
- National laws

What does this mean for arbitration?

- EU law integral part of national (applicable) laws
- BUT Art. 4(3) TEU not applicable to arbitration

Arbitration – a private enforcement forum?

Issue No. 1

Can a private claim for damages be submitted to arbitration?

- Yes – *compromis*
- Yes – if pre-existing contract (direct purchaser situation), if clause wide enough
- Nature of dispute irrelevant (tort or contract)

Arbitration – a private enforcement forum?

Issue No. 2

Can parties contract out of the “European laws” through arbitration?

- Yes – if international arbitration (no forum)
- Yes – if choice of non-EU law
- A European forum state court would be bound to recognise the arbitration agreement, irrespective of the choice of law clause
- ECJ ?

Arbitration – a private enforcement forum?

Issue No. 3

Would the award be recognised?

- Why not ?
- Are the European remedies to be considered as rules of public policy ?
- Would recognition / enforcement contradict *ordre public international* ?

Issue No. 4

What about collective claims & class actions?

Arbitrators – Commission (Regulation 1/2003)

Art. 15(1) → not formally applicable to arbitration

Art. 15(2) → no duty to send copies of arbitral awards to the Commission

Art. 15(3) → power of the Commission (or of NCAs) to submit written or oral observations *ex officio* (*amicus curiae*) cannot be transposed to arbitration

- Reg. 1/2003 not applicable to arbitration
- unnecessary and disproportionately restrictive
- detrimental to the nature of arbitration and to the most fundamental principles of the arbitration process (privity, confidentiality, independence)
 - Exception: if the arbitrators give permission and both parties give their consent (OK for flexibility of the arbitral process, bad for policy reasons)

2004 Co-operation Notice

- **Para. 1: Intention was to exclude arbitrators BUT**
 - the Commission probably intended to exclude arbitration only from the specific procedural framework of the new co-operation Notice
 - The Commission can and does co-operate with arbitration tribunals informally on an *ad hoc* and fully discretionary basis
- **Only the arbitrators should decide if contacts with the Commission are desirable**
- **Can arbitrators do this *ex officio*? → Question of the law governing the arbitration proceeding and of the arbitration clause itself**
- **Problem with privity and confidentiality of the arbitration proceedings**
- **Arbitrators should show extreme diligence - possible**
 - if one of the parties has filed a complaint with the Commission, thus having brought the matter already to its attention
 - If there is a proceeding open before the Commission
 - if both parties consent or
 - if the terms of reference of the arbitration allow so
- **Specific consultations with and hearing of all parties**

Article 16 Reg. 1/2003

- Arbitrators not bound by Art. 4(3) TEU (*Masterfoods*)
- Arbitrators merely resolve disputes *inter partes*
- International arbitration has no forum
- BUT
- *de facto* the tribunal will have to be extremely cautious
- Distinction between hard-core and rule of reason type of decisions
 - If Decision condemns hard-core behaviour → possible *ordre public* violation
 - If Decision finds an infringement as a result of a rule of reason analysis → departure from Commission in itself not an *ordre public* violation

Corrective Mechanisms?

- **Duty of national courts to review arbitral awards that have manifestly violated EU competition law (irrespective of *ultra petita*)**
- **EU competition law → public policy**
- ***Ex officio* application of EU competition law by arbitrators (?) and by courts reviewing the arbitral awards**
- **Open question: What exactly is a violation of public policy? → hard core restrictions, complete disregard**
- **“Minimalist” – “Maximalist” approaches (F, D, I, B, S, GR – NL, D)**
- **Brussels I Regulation parallel (*Renault*)**

Exceptional Corrective Mechanisms

Commission injunction not to enforce → truncated arbitral awards

- *Old Preflex/Lipski case*
- See also pharmaceutical sector inquiry → specific questions in the Commission's questionnaires about arbitration proceedings and awards between originators and generics
- 2012 *Siemens/Areva* commitments decision → non-compete obligation (NCO) reduced to 4 years by ICC arbitral award → Commission taking issue → commitment not to enforce NCO as set by the award

Arbitration – internal mechanism to a cartel

- Arbitration clause itself illegal
- Arbitrators “undertakings” in the Art. 101 TFEU sense and liable to fines (*Treuhand*)

Arbitration-Competition Law: Practical Issues

Negotiations stage

- Inclusion and Drafting of the Arbitration Clause?
- Awareness or ignorance of the competition law issue?
- Choosing a “maximalist” or a “minimalist” forum (with setting aside actions in mind)?
- Possibility to exclude the competition rules?

Arbitration stage

- Competition law issue raised or not raised?
- Whose State’s competition laws? *lex contractus*? Third States?
- If raised, should arbitrators apply a third country’s competition rules?
- Should arbitrators raise and apply *ex officio* the competition rules?
- Can/Should Arbitrators seize the Commission, an NCA, the ECJ?

Arbitration-Competition Law: Practical Issues

Enforcement stage

- What if neither party challenge an award upholding an anti-competitive practice?
- Can a party raise a competition law issue for the first time before the state courts?
- Should a court review an award in a case involving competition law? How extensive should that review be?
- What is the scope of the ECJ *Eco Swiss* ruling? What amounts to a public policy violation?
 - No application of competition law *ex officio*?
 - Misapplication of competition law?
 - Erroneous application?
 - Is there a distinction between hard core and other restrictions?

Practical Lessons

- ❖ **Arbitration is the natural forum for most significant commercial disputes**
- ❖ **Competition law is arbitrable**
- ❖ **Arbitrators should and do respect the competition rules and are usually very competent in the application of those rules**
- ❖ **Parties can influence the arbitral and post-arbitral proceedings through appropriate forum and law selection clauses**
- ❖ **Arbitrator selection can be important**
- ❖ **A hard core restriction of competition (e.g. a cartel) is very unlikely to be upheld by an arbitral tribunal**
- ❖ **Arbitrators remain the masters of the arbitral proceedings but must exercise caution**