

BONELLI EREDE PAPPALARDO

STUDIO LEGALE

Arbitration and Competition Law

Professor

Luca G. Radicati di Brozolo

GCLC April 17, 2008



The issues

- Arbitrability of disputes raising competition law issues
- The treatment of arbitration law by arbitrators
- The review of awards by courts
- The White Paper on Private Enforcement
- Arbitration and merger control commitments

Arbitrability

- Since the *Mitsubishi* judgment of the US supreme court (1985) disputes which raise issues of competition law are arbitrable in all modern legal systems. “Second look” doctrine.
- Antitrust issues arise more frequently in arbitration because of
 - greater awareness of the relevance of competition law, also as a tool in litigation ; and
 - focus on private enforcement in the wake of the “modernization” of EC competition law (Reg. EC 1/2003).
- In practice arbitration only where competition law is raised a defence (as a “shield”) and not in actions for damages (antitrust as a “sword”) which are actions in tort.

Review of awards by courts

- What is the extent of the review of arbitral awards by courts (setting aside and enforcement proceedings)
- A dilemma? Protection of competition *vs* respect for arbitration and finality of awards?
- “*Minimalist*” and “*maximalist*” approaches.

Review of awards by courts (cont'd)

- “Maximalist” approach emphasizes:
 - risks of violation of competition law, of arbitration being used as a tool to circumvent competition law;
 - fundamental nature of competition law
 - courts should be able to review the award in depth to ensure that competition rules have been “correctly” applied by the arbitrators (“second look?”).

Review of awards by courts (cont'd)

- “*Minimalist*” approach emphasizes
 - the principle of finality of awards,
 - courts cannot review awards on the merits,
 - awards should be overturned for reasons having to do with the merits only in case of serious breaches of public policy;
 - full-fledged review conflicts with the acceptance of arbitrability
 - trust in arbitration and arbitrators

Review of awards by courts (cont'd)

- Query:
 - are all violations of competition rules breaches of public policy (even bearing in mind that competition law is public policy according to *Ecoswiss*)?
 - are courts by definition better placed than arbitrators to decide when competition law is breached? to interpret and apply arbitration law “correctly”?
 - is minimal court review of competition law awards really a serious threat to competition enforcement?

Review of awards by courts (cont'd)

- The appropriate standard of review. The court:
 - should verify that the arbitrators have addressed competition law issues with reasonable diligence (if they have been raised before them) and have not reached a result which is shocking in terms of public policy (e.g. enforced an obvious hard core violation of competition law, like a price fixing cartel);
 - should not engage in a full-fledged review of the facts and of the legal analysis and conclusion of the award;
 - should not second-guess the arbitrators

Review of awards by courts (cont'd)

- *Query* : what is the standard of review when the arbitrators have not even considered the issue of competition law?
- What if this is due to the fact that the parties have not raised the applicability of competition law?

Review of awards by courts (cont'd)

- The case law
 - *Benetton v. Eco Swiss* (ECJ)
 - *Baxter v. Abbot* (7th Cir)
 - *Thalès v. Euromissile* (Court of Appeal of Paris)
 - *SNF v. Cytec* (Paris Court of Appeal / Court of Brussels)
 - *Tensacciai v. Terra Armata* (Swiss Federal Tribunal / Milan Court of Appeal)
 - *Marketing Displays v. VR* (Hague Court of Appeals)
 - *Schott* (Thüringer OLG)

Arbitrators and Competition Law

- Are arbitrators required / expected to apply competition law?
 - Nowadays the answer is usually : yes
 - *quid pro quo* for acceptance of arbitrability
- What is the source of the duty of arbitrators to apply competition law?
 - The *lex arbitri*?
 - The obligation to render an enforceable award?
 - The applicable competition law itself? (*Méthode des lois de police*)
 - An (implied) will of the parties?

Arbitrators and Competition Law, cont'd

- What competition rules should they apply?
 - The competition rules of the *lex arbitri*?
 - The competition rules of the *lex causae*?
 - The competition rules of the law of the place of enforcement?
 - The competition rules which “want to be applied”?

Arbitrators and Competition Law, cont'd

- Can arbitrators apply competition law absent an agreement of the parties? Yes
- Can arbitrators apply competition law *ex officio*? Yes, provided they give the parties the opportunity to address the issue.
- Risk of *ultra petitem*? No
- What should arbitrators do if the parties instruct them to disregard competition law?

Arbitrators and competition law, cont'd

- How should arbitrators apply competition law?
- Are they in a different position from national judges?
- Can they consult the EC Commission (under Article 15 Reg. EC 1/2003) or national competition authorities? (issues of confidentiality, agreement of the parties).

Arbitrators and Competition Law, cont'd

- What do arbitrators do in practice?
- They apply competition law when it is raised before them
 - E.g. *Terra Armata v. Tensacciai*
- They may be more reluctant to raise it *ex officio* if it is not invoked by one of the parties.

Arbitration and merger control

- Interesting new development: arbitration clauses in merger control commitments
- Nature of these arbitrations? “Normal” arbitration or “quasi-regulatory” tool with special prerogatives for the Commission?
- These arbitrations are merely a substitute for court litigation on the enforcement of the commitments. They do not replace the Commission’s ordinary enforcement role. They do not confer special powers on the Commission.

Conclusions for practitioners

- Do not expect that
 - raising anti-trust issues can torpedo an arbitration agreement;
 - Providing for arbitration can circumvent competition rules (they may be invoked by either party or by the arbitrators);
 - an award can be set aside simply for errors of competition law.
- Be prepared to litigate antitrust issues if they arise in an arbitration as they would be litigated in court.
- Do not hesitate to raise an antitrust issue if relevant to your case.
- Consider arbitration when negotiating merger control commitments

Bibliography

- *Arbitrage Commercial International et lois de police: autonomie de la volonté et conflits de juridictions*, in *Recueil des Cours de l'Academie de droit international de La Haye* (2005, vol. 315, pp. 269-494)
- «L'illicéité 'qui crève les yeux' : critère de contrôle des sentences au regard de l'ordre public international», *Revue de l'arbitrage*, 2005, p. 529 (note à Appel Paris, 18 novembre 2004, *Thalès c. Euromissile*)
- «L'insoutenable légèreté de l'ordre public : encore à propos du droit de la concurrence», note à Tribunal fédéral suisse, 8 mars 2006, *Revue de l'arbitrage*, 2006, p. 769 ss.
- «Chassés croisés franco-belge: à propos de l'affaire *Cytec*», in *Rev. Arbitrage*, 2007, p. 318 (note à Trib. Première instance de Bruxelles, 8 mars 2007) (avec A. Mourre)
- «Arbitration in EC Merger Control : Old Wine in a New Bottle», *European Journal of Business Law*, 2007, p. 7 ff.