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# Arbitration and Competition Law

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# 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* (7<sup>th</sup> 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

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