Arbitrability of Competition Law Issues Reinforced

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A number of decisions of various national courts have dealt with the issue whether a competition law dispute may be referred to arbitration. Although the case law tends to favour a positive answer, it is still an issue that is being continuously brought up in litigation as an easy way out of arbitration clauses. This is supported by the reasoning that mandatory rules implementing public policy goals, such as competition law, should protect important social interests and their enforcement should not be left to uncontrolled national or international arbitral bodies. Still, a steady line of case law continues to accrue and reinforce the view that competition law may be (and should be) arbitrable, which was very recently upheld by a Spanish court decision of 18 October 2013.

The Decision of 18 October 2013

According to the 18 October 2013 decision of the Madrid Court of Appeal (Section 28) under the case between a Spanish truck dealership company Camimalaga and the local subsidiary of a Dutch truck manufacturer, the Spanish court has confirmed that the dispute could be decided by arbitral tribunal as originally provided in the contract between the companies.

The dispute between the companies concerned issues of unfair competition. The dispute resolution clause provided for arbitration in The Netherlands while Camimalaga applied to the Spanish courts arguing that the clause should be stricken down as invalid on various grounds. Inter alia, Camimalaga submitted that Article 2.1 of the Spanish Arbitration Act does not encompass competition law since under Spanish law the only arbitrable disputes are those where the subject matter of the case may be disposed of by the parties.

The Madrid Court of Appeal refuted these considerations and confirmed that Spanish law does not preclude the arbitrability of such disputes. As long as the seized arbitral tribunal is called upon to apply the substantive law in its full texture, including the mandatory competition law rules, there should be no bar to the effect of the arbitration clause and the arbitrability of the particular dispute.

The Court also discussed EU Regulation 1/2003 regarding the implementation of competition law and policy under the Treaty for the Functioning of the European Union. According to the decision, the Regulation does not impose prohibition on referring competition matters to arbitration. Moreover, the Court relied on express provisions of EU Regulation 1400/2002 on vertical agreements and concerted practices in the motor vehicle sector. According to Article 3(6) of this Regulation, disputes concerning rights and obligations arising out of vertical agreements in the motor vehicle sector may be referred

to an arbitrator or independent expert. Given the fact that such vertical arrangements are focal point for alleged prohibited antitrust conduct, the Regulation may be interpreted to the extent that the EU law has granted its explicit consent for arbitrating agreements that are likely to bring up competition issues to the front of a potential dispute. Hence, the Madrid Court of Appeal held the view that neither domestic Spanish law nor EU antitrust law precludes referring an unfair competition claim to arbitration.

Revisiting the arbitrability of competition law

The Spanish court decision brings up a number of issues in the area which may be revisited against its background.

How is competition law arbitrable?

Competition law is a system of mandatory rues. Being regulatory law, it is foremost related to the governmental apparatus of supervision over market practices purporting to prevent and/or sanction abusive actions in the forms of antitrust agreements and abuse of dominant position, in broad terms. Hence, competition law is primarily enforceable by designated regulatory bodies. By far and most, the complexity and effect, which anticompetitive practices may have, are most appropriately handled by governmental bodies, on national or supranational level (as it is the case with the European Commission).

In spite of that, both doctrine and case law confirm that competition law may be subject to private enforcement. This has been continuously held by different courts since the seminal *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), US Supreme Court decision where the Court confirmed that obligations arising out of statutory rules would be arbitrable to the same extent as contractual duties. This constitutes private enforcement of competition law since private claims are allowed to seek sanctions for breaches of statutory competition rules (though private enforcement may lead only to a single remedy – compensation).

However, the most common manner of private enforcement would be tortuous claims for damages caused by anticompetitive behaviour. Given that picture, arbitration does not seem to fit since it is a contractually devised mechanism. If an aggrieved party would seek damages for a competition law tort, it is difficult to imagine that it would manage to reach an agreement with its counterpart to arbitrate this claim. Competition law arbitration does nevertheless arise but it is limited to two types:

> This happens if a party contends before the arbitral tribunal that the contract (where the arbitration clause is inserted as well) has anticompetitive implications. This is what matches the facts of the Court of Justice of the European Union (then ECJ) *Eco Swiss v Benetton International* case where the dispute arose out of licensing agreement between the parties to the case.
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> The second (and more common) instance encompasses the situation where the arising dispute does not concern competition issues prima facie but, when applying the law applicable to the substance of the dispute, the arbitral tribunal would have to apply rules of competition law part and parcel with the rest of the rules of the applicable law.

Does potential arbitrability of competition law mean evasion of its mandatory nature?

International arbitral awards are subject to scrutiny on a number of grounds under the New York Convention, public policy being one of them. If the arbitrability of competition issues is expressly excluded by the domestic law at the place of enforcement, under Article V (2)(a) the court of

exequatur would be able to prevent enforcement on this basis. If the enforcement of an award would mean to bring a result contrary to competition law, for instance to give effect of a prohibited anticompetitive agreement, public policy would be able to prevent this, too. As it has been ruled in the *Eco Swiss* decision, competition law would be able to fall within the scope of public policy, and more specifically, the EU regime on competition law constitutes part of the public policy of the EU Member States. Therefore, even if the arbitral tribunal has erred (by application or non-application of competition law), it would still be possible to correct this at the enforcement stage.

The same conclusion counters the potential argument that arbitration is a non-state mechanism and poses risk to the consistency of the application of the EU law (or at least in its competition sector). Since any award is inevitably subject to national state courts' scrutiny, national courts are entitled to "control" the result of enforcing arbitral awards, although they cannot interfere with the very arbitral procedure and the substance of the award issued. This reasoning applies to the possible contention that unlike national courts of EU Member States, arbitral tribunals are not entitled to request from CJEU a preliminary ruling on the EU law. Even though arbitral tribunals do not enjoy such powers, the exequatur court, being in doubt over the compatibility of an award with the EU law, is capable of seeking CJEU's ruling on that. The major caveat in this respect, however, is that this would possibly make the resolution of the dispute far lengthier (and costly) than what the parties have originally envisaged in the course of their commercial pre-contractual dealings and negotiations and their choice to insert an arbitration clause in their agreement.