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Arbitrating Competition Law Disputes: a matter of policy?

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A commentary on the OECD Competition Commission conclusions on using arbitration to effectively resolve competition law disputes
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There has been increasing use of arbitration to resolve disputes involving competition law issues in recent years. However, it is surprising that the number is not even greater given that arbitral processes are particularly suited to this type of complex, multi-jurisdictional dispute. Claimants can be nervous that the validity of such awards might be challenged on public policy grounds, however, in practice there are only limited circumstances in which a civil claim based upon competition law is likely to also engage public policy concerns. Indeed, a recent paper from the Organisation for Economic Co-operation and Development ("*OECD*") concludes that the tide is turning and that arbitration is likely to take greater prominence as part of the toolkit for resolving disputes involving allegations that competition law has been infringed.

The OECD Competition Committee conducted a hearing in October 2010 on the role of arbitration in competition policy and practice and has now published its report on that hearing (https://www.oecd.org/dataoecd/58/40/49294392.pdf) along with two publications drafted by experts in the field that were discussed at the hearing. The paper sets out the key findings of the Committee as to the advantages and disadvantages of arbitration for both claimants and defendants in the context of a competition law dispute, commenting upon: the arbitrability of competition claims; the duty of arbitrators to apply competition law; the ability of national courts to review an arbitral award; and the use of arbitration clauses in merger remedies. The OECD concludes that concerns that arbitration might somehow undermine effective enforcement of competition law or that challenges to arbitral awards on competition law issues might subvert established principles on the review of awards are unjustified.

Enforceability and other issues – are there still hurdles to arbitration?

Competition law as a matter of public policy does not generally deal with the compensation of private parties adversely affected by an infringement but with the investigation and punishment of infringements so as to deter such behaviour in future. As a matter of principle, it is clear that competition issues can be arbitrated without raising public policy concerns (As confirmed by Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 723 F.2d 155 (1983), Case 126/197 Eco Swiss v Benetton [1999] ECR I-03055) and civil actions ought not to transgress upon public policy in the vast majority of cases.

Nonetheless, as civil actions may require determination of whether an infringement has occurred (an area overseen by national competition authorities and affected by the application of public policy) parties can be concerned that an arbitration award will be vulnerable on enforcement if it is inconsistent with public policy. The OECD paper notes that a court will only in very exceptional circumstances set aside or refuse to enforce an arbitral award on the basis of fundamental breach of public policy. The OECD paper also makes clear that, even if such a challenge is raised, the courts should not engage in an in-depth review of the merits of the case but simply verify that arbitrators have addressed competition law issues with reasonable diligence and not reached a conclusion that seriously contradicts public policy. We agree with the OECD position but note that arbitrators must still be live to public policy issues in this area when addressing such claims. For example an arbitral award could potentially be problematic if damages were awarded on a punitive or exemplary basis rather than simply to compensate the claimant. Whilst this measure of damages would be permissible under US law, it is contrary to the policy of the vast majority of EU Member States and so might be overruled as a matter of principle in these jurisdictions.

We consider that it may be difficult to persuade all national courts that a pre-dispute arbitration clause was intended to cover all contractual and non-contractual competition claims. National courts in some European states have tended to define the scope of choice of forum clauses by reference to the types of dispute that the parties are likely to have had in mind when agreeing the terms. Parties are unlikely to be construed to have had in mind at the time of agreeing the arbitration clause that their counterparty might be in a cartel or subjecting them to an abuse of dominance. Arbitration clauses tend to be construed more generously than choice of court clauses, but this may still be an issue. Furthermore, it is unlikely to be commercially acceptable to explicitly draft the clause to cover such a possibility, except in limited circumstances.

The OECD paper also notes that the private nature of arbitration has also led to criticism of its use in competition law claims. The concern is that those engaged in hard-core cartels will use private proceedings to prevent national authorities becoming aware of the conduct. Generally, arbitrators should not refer competition issues to national competition authorities, whether for assistance or determination, without the consent of the parties as this would violate the confidentiality of the arbitration. However, the OECD paper makes clear that arbitrators are not purely at the service of the parties and can raise competition law issues of their own motion if they consider it warranted. Further, it is clear that an agreement to arbitrate claims that anti-competitive behaviour has caused a party damage or should otherwise be stopped does not prevent a separate complaint being made by the affected party to the relevant national competition authorities. Certainly, the fact of a matter being subject to arbitration will not inhibit or prevent a national competition authority from investigating any alleged violation of competition rules. In our view, it is very unlikely that arbitration arrangements will deter those involved in a cartel from seeking leniency from competition authorities or otherwise “blowing the whistle” on a cartel, given the regulatory benefits (and penalties) attached to doing so. Arbitration of such claims is therefore unlikely to have a chilling effect on infringements coming to public attention.

We think that a more pertinent issue is that it may be easy for claimants in cartel claims to avoid the effect of arbitration clauses by suing defendants with whom they had no contractual relations and thus no arbitration agreement. A participant in a cartel is usually deemed to be jointly and severally liable for all loss caused by all participants in the cartel, and thus can be sued by the customers of other cartelists and not just by its own customers. In the US, the Second Circuit got round this problem by holding that a defendant’s arbitration clauses with its customers are binding on non-customers seeking to sue it for losses caused by a cartel (JLM Industries, Inc. v. Stolt-

Nielsen SA, 387 F.3d 163 (2d Cir. 2004). It is probably less likely that this approach would be followed in the UK and other EU jurisdictions.

In these circumstances where a defendant is jointly and severally liable for the whole loss, we consider that it may also encounter difficulties recovering contributions from the other cartelists. Defendants generally prefer to have the claimants' total damages and the split between cartelists decided in the same proceedings and at the same time in order to avoid delay and inconsistency of approach. This may not be possible where customers claim in an arbitration as there is unlikely to be a pre-dispute arbitration agreement that can be relied on to compel the other cartelists to join the arbitration.

Another concern noted by the OECD paper is the potential limitation on the ability to compel disclosure of certain information in arbitration. National courts may be able to request assistance or information from national competition authorities in circumstances where an arbitrator cannot and courts also have specific powers over parties to litigation. However, in most jurisdictions, disclosure in litigation is in any case limited (the US and UK being notable exceptions) and arbitrators in any case are often able to ask for judicial assistance in compelling the production of documents. We do not therefore see a significant difference in pursuing civil claims by arbitration as compared to litigation when considering access to information and disclosure. However, this inability for arbitrators to refer questions to other authorities may have more significant implications. When a novel situation is encountered in a civil court, it has the ability to refer the issue to the European Court of Justice for determination, but this power does not extend to arbitrators (Nordsee v Rederei Mond [1982] ECR 1095). There is therefore a risk that principles of EU law will be applied inconsistently by different arbitrators.

When to arbitrate?

The OECD paper highlights several situations where it may be appropriate to use arbitration in a competition law context:

1. Stand-alone contractual claims – for example, where one party alleges that an exclusive supply agreement or restrictive covenant illegally restricts competition in breach of Article 101 of the Treaty of the Functioning of the European Union (TFEU) but there is no underlying regulatory finding that supports the allegation.

2. Follow-on damages claims that rely on an infringement finding by a competition authority in order to establish the liability of the defendant (meaning that the claimant need only establish the measure of damages). For instance, where a group of manufacturers have been found to have been fixing wholesale prices at a particular level, in breach of Article 101 TFEU, and an affected retailer or distributer decides to bring a follow-on damages claim for losses resulting from the inflated prices. Alternatively the manufacturer may have abused its dominant position in breach of Article 102 TFEU by engaging in predatory pricing (i.e. deliberating selling at less than cost in the short term so as to foreclose rivals from the market), in which case a competitor may bring a follow on damages claim. Both these types of claim typically involve a simple assessment of damages, in which case an expeditious, private arbitration may be more advantageous to the parties than a case in the Courts that can be prolonged by way of jurisdiction challenge and procedure delay.

3. In respect of merger remedies, where parties have been asked to make certain commitments in order to remedy competition concerns in order to clear the transaction. An example of where

arbitration may be appropriate is where access commitments have been imposed, and the commitment obliges the parties to grant third parties "fair and reasonable" access to physical infrastructures or intellectual property rights to stimulate competition. Any disputes relating to the terms and conditions of those access rights, or what is "fair and reasonable", can be dealt with by arbitration if an arbitration clause is included in the commitment agreement.

In each of the above scenarios, there are several key advantages for parties in using arbitration as highlighted in the OECD paper:

• *Confidentiality*: Unlike litigation, arbitration proceedings are conducted in private. Not only is any information disclosed as part of the proceedings confidential but so is the fact of proceedings taking place and the amount of any final award or settlement. This has clear advantages in respect of damages claims, particularly for defendants, as third parties will not be have access to information potentially helpful to their own claims or be attracted or encouraged to make a claim if an award or settlement results.

• *Jurisdiction*: Competition litigation before EU national courts has been marked by jurisdictional wrangles as to who may be sued and where. An arbitration clause does not allow a defendant to hide behind place of domicile or force claimants to draw innocent subsidiaries of an infringer into a claim in order to anchor it in their jurisdiction of choice. The OECD notes that this detachment from a particular legal order can also be useful by separating the arbitral proceedings from any investigation by competition authorities in particular jurisdictions.

• *Flexibility over the process*: The parties have the ability to choose a specialist arbitrator, or panel of arbitrators, and the legal rules and principles for the procedure itself. Given the complexity of competition cases, and the frequent need to consult expert economists and competition specialists, parties may be better able to tailor the resolution of the dispute with the aid of their choice of judges and experts on the panel.

• *Speed of the procedure*: the complexity of issues at play in a competition dispute can slow the litigation process significantly and arbitration can offer a faster solution (both by virtue of greater control over selection of the decision-makers by reference to availability and flexibility of the process).

• *Enforceability of the arbitral award*: An arbitral award will be recognised in a number of jurisdictions, due to the international conventions that govern arbitration, to an extent not possible with court judgements (which often must be recognised and subject to further proceedings to be enforced). For example, the New York Convention requires courts of the 145 contracting states to recognise and enforce arbitration awards made in other states.

Practical tips to avoid potential pitfalls

The OECD paper reassures parties contemplating arbitration of competition law claims that the risk of an arbitration award being challenged successfully on policy grounds can be minimised. Practical tips in this context include:

1. Arbitrators only have the power to determine issues that parties have agreed to arbitrate, so it is important to specify when drafting an arbitration clause or agreeing to arbitrate whether it is intended that the agreement to arbitrate encompasses claims involving competition law issues (ET Plus S.A. v Welter [2005] EWHC 2115 (Comm) [2006] 1 Lloyd's Rep 251, paragraph 51).

2. The parties might consider when appointing an arbitrator whether that individual is competent (and confident) in determining competition law issues. It may be that, although there is a competition element to the claim, the question of whether an infringement has occurred is established and so the expertise required is in fact in determining the economic effect of such an infringement. Choosing an arbitrator equipped to address these issues and who has a clear understanding of the evidence required to form a view on them may well speed the process overall and minimise the costs of making the case.

3. Competition claims are often multi-jurisdictional and may be based on tort or an underlying contract. Conflict of laws issues accordingly can result and parties should give thought to the seat of arbitration as this may be crucial in determining the law applicable to the arbitral proceedings.

4. If the arbitration agreement involves the US, careful consideration should be given to specific issues under US law. US competition law ensures that claimants must not be deprived of their statutory rights to claim damages, including the right to claim treble damages and instigate opt-out class actions. These latter claims will be precluded from arbitration in the US if the agreement to arbitrate is silent on the issue.

Conclusion

The OECD paper clearly sets out the advantages and disadvantages of arbitration and addresses concerns regarding the enforceability of awards that determine competition law claims. Competition law disputes often involve multi-jurisdictional issues, exchange of highly confidential information on market position and turnover, and production of expert economic evidence as to the defendant's market position and profit margin. As such, these disputes raises procedural issues that the flexibility and confidentiality of the arbitral process is uniquely suited to answer – a point that has even been acknowledged by the English Court of Appeal Attheraces [2007] EWCA Civ 38 at paragraph 7).

Therefore, as the OECD concludes, not only does the arbitration of competition claims not undermine the enforcement of competition law or principles of arbitration but arbitration can be a particularly useful method in resolving competition law claims. As such, we are likely to see a continued increase in the use of arbitration, and other alternative dispute resolution mechanisms, to determine competition law disputes.

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