Kluwer Arbitration Blog

Is an arbitration agreement “null, void” or “inoperative” if it applies a foreign law which does not give effect to mandatory principles of EU law?

Kate Davies (Allen & Overy LLP) · Tuesday, June 16th, 2015 · YIAG

Accentuate Ltd v. ASIGRA Inc. [2009] EWHC 2655; Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc [2014] EWHC 2908 (Ch)

In 2009, a senior libel judge sitting in the English High Court held that an arbitration agreement was “null and void” or “inoperative” because it purported to apply a foreign law which did not give effect to mandatory principles of EU law. More recently, a judge sitting in the Chancery Division appears to have endorsed that approach (albeit *obiter*). These decisions, neither of which was reviewed by the Court of Appeal, appear to be at odds with a seemingly long and settled line of authority on the arbitrability of mandatory principles of EU law. They also give rise to certain drafting considerations when entering into an arbitration agreement.

Background

The decision in *Accentuate Ltd v. ASIGRA Inc.* (***Accentuate***) relates to the alleged wrongful termination by the defendant (licensor) of an agreement with the claimant (distributor) for the distribution of software products (the **License**). The License was governed by the laws of Ontario and the federal laws of Canada and contained an agreement to arbitrate all disputes with the arbitration to be sited in Ontario. The claimant notified the defendant that it was preparing a claim for breach of the License and a further claim for compensation under Articles 17 to 19 of the Commercial Agents (Council Directive) Regulations 1993 (the **Regulations**). The defendant promptly filed a notice of arbitration seeking a declaration that the distributor had no claims against the licensor under the License. A month later, the distributor issued a claim in the English court for breach of contract and for compensation under the Regulations and ordered that the defendant be served out of the jurisdiction (the **Order**). The defendant applied to set aside the Order and for a stay of the English proceedings pursuant to section 9 of the English Arbitration Act 1996 (the **Act**).

The English court at first instance granted the defendant’s application on the basis that it did not have jurisdiction to hear the distributor’s claims. The distributor appealed to the High Court. The distributor’s principal case was that an arbitration clause purporting to apply a foreign law that does not give effect to a mandatory provision of EU law is void and the parties therefore could not be a “party to an arbitration agreement” for the purposes of section 9(4) of the Act. The distributor relied for this proposition on an Opinion of the Advocate General and the decision of the CJEU in

Ingmar GB Ltd v Eaton Leonard Technologies Ltd [2000] ECR I-9305 (***Ingmar***). The relevant principles arising from this case are that (a) Articles 17 to 19 of the Regulations are mandatory in nature, and (b) a principal (such as the licensor) cannot evade mandatory EU law such as found in Articles 17 to 19 "by the simple expedient of a choice-of-law clause" (*Ingmar*, at [25]). The distributor therefore argued that any contractual choice by the parties that has the practical effect of depriving the commercial agent of his compensation "will fall foul of the mandatory Reg. 17". The distributor further argued – in reliance on *Case C-126/97 Eco Swiss* [1999] ECR I-3055 (***Eco Swiss***) and *Elisa Maria Mostaza Claro v. Centro Móvil Milenium* SL, C-168/05 [2006] E.C.R. I-10421 (***Claro***) – that any arbitration award "offending against a mandatory rule of EU law would itself have to be refused recognition by national courts in Member States".

Tugendhat J. appears to have concurred with the distributor and allowed the appeal; in so doing, he held that an "arbitration clause would be 'null and void' and 'inoperative' within the meaning of s.9(4) of the Arbitration Act, in so far as it purported to require the submission to arbitration of 'questions pertaining to' mandatory provisions of EU law".

While declining to follow *Accentuate* on a separate issue, Mann J. in *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* (***Fern***) appears to have endorsed the approach adopted by Tugendhat J. to the question of the validity of the arbitration agreement in that case, which he described as "consistent with" the principle that the Regulations do not affect the proper law of the contract, except to the extent that the proper law purports to override the Regulations, in which case the Regulations prevail.

Arbitrability of mandatory EU law

These two decisions are difficult to reconcile with what are widely viewed as settled principles regarding the interplay between an arbitration agreement and the jurisdiction of an arbitral tribunal to consider and apply mandatory principles of EU law.

It is axiomatic that some rules of EU law are mandatory in nature and form part of the public policy that the national courts of EU Member States and arbitral tribunals must apply, where relevant. This was the effect of the decision reached in the seminal *Eco Swiss* case, on which the distributor in *Accentuate* relied.

In *Eco Swiss*, the CJEU held that for the purposes of enforcement/recognition of an arbitral award, Article 85 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the EU, dealing with competition law issues) "may be regarded as a matter of public policy within the meaning of the New York Convention" and that "a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is, in fact, contrary to Article [101]".

There follow from *Eco Swiss* and related case law three fundamental and well-settled principles – principles which the decisions in *Accentuate* and *Fern* appear to ignore.

(a) First, questions of EU law – including those that are mandatory in nature, such as competition law issues – are, in principle, arbitrable (in addition to *Eco Swiss* itself, see e.g. the decision of the U.S. Supreme Court in *Mitsubishi v. Soler Chrysler-Plymouth*).

(b) Second, parties cannot avoid the application of mandatory EU law by choosing a non-EU national law as the law governing the substance of their relationship (see *Ingmar*). However, as the

decision in *Eco Swiss* demonstrates, this does not render the choice of law clause (or arbitration agreement) null and void. It simply means that a court or tribunal seised of the matter is required to apply mandatory principles of EU law, regardless of the parties' express choice of law.

(c) Third and perhaps most crucially, an arbitral tribunal which fails to apply those mandatory rules of EU law risks having its award set aside or refused recognition/enforcement in an EU Member State court. This is the key principle in *Eco Swiss* and it is one which applies not just in relation to EU competition law but also, for example, to unfair terms in consumer contracts (see *Claro*).

In *Claro* (referred to in *Accentuate*), the CJEU held that, on an action for annulment of an award relating to a consumer contract, a Member State court must determine of its own motion, whether the underlying arbitration agreement was void by virtue of Council Directive 93/13/EEC (the **Directive**). In reasoning which the court in *Accentuate* appears to have overlooked, the CJEU reached this conclusion because the Directive contains a list of "indicative terms" which "may be regarded as unfair", including a term that "requires the consumer to take disputes exclusively to arbitration …". In other words, an arbitration agreement in a consumer contract may itself be an unfair term and, if so, must be treated as being void in accordance with the terms of the Directive.

Comment

These are the principal reasons why the decisions in *Accentuate v* and *Fern* should be treated with caution.

Certainly, there is nothing in these principles outside of the specific context of consumer contracts to suggest that parties can render their arbitration agreement "null and void" because the law chosen by them to govern their agreement does not recognise or incorporate certain mandatory EU rules or because the subject matter of the dispute is not arbitrable. As noted above, an arbitral tribunal is under a duty to apply certain mandatory norms irrespective of the parties' choice of law (and this is the effect not just of the decision in *Eco Swiss* but also of generally-applicable choice of law provisions such as in the Rome Convention/Rome I Regulation). While failure to do so may result in an award that is set aside or unenforceable, that failure does not render the arbitration agreement "null and void". Similarly, the effect of a particular type of dispute being found to be non-arbitrable still leaves parties with a valid and binding arbitration agreement; it is simply that the particular dispute or category of disputes falls outside the agreement.

The decision in *Accentuate* not only conflates the substantive validity of the arbitration agreement with public policy/non-arbitrability. It also implies that even an award dealing with such issues would be unenforceable either because the arbitration agreement was not valid under the applicable law or because the award was contrary to public policy (under s. 103(2)(b) or s.103(3) of the English Arbitration Act 1996 respectively); indeed, the English court made passing reference to s. 103(3) in its judgment. This appears to be contrary to the key finding in *Eco Swiss* and threatens to undermine the long-held view that claims or defences which require application of mandatory rules of law are fundamentally arbitrable.

Until such time as the Court of Appeal has an opportunity to review the principles arising out of *Accentuate* (and *Fern*), there is unfortunately a risk of meddlesome claims about the enforceability of arbitration agreements and even arbitral awards where EU law is at play. In an attempt to minimise these risks, parties should consider carefully their choice of law when drafting an arbitration agreement, if mandatory principles of EU law are likely to have a significant impact on

any future disputes. This might be the case, for example, in a distributorship agreement or any other contract where the Regulations might be engaged or any contract where competition law issues are likely to arise.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*

Wolters Kluwer

This entry was posted on Tuesday, June 16th, 2015 at 2:15 pm and is filed under Arbitrability, Arbitration, Arbitration Agreements, Enforcement of an arbitration clause, European Law
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.