

Kluwer Arbitration Blog

LIDW 2019: Competition Disputes, Arbitration and Egyptian Competition Law, 10 May 2019

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The last session of the London International Disputes Week discussed the resolution of competition disputes. Sir Peter Roth, The Honorable Mr Justice, President of the UK Competition Appeal Tribunal, gave the keynote speech. Sir Roth explained that, while most of these disputes are a follow up to EU Commission decisions and one must also take into consideration the provisions of the Recast Brussels Regulation, there are several reasons why the English courts tend to hear high profile competition disputes (e.g. Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others ([2016] CAT 11; Massive Trucks Claim etc.). The first reason, explained Sir Roth, is the disclosure procedure, given that access to evidence is a key element for most of the competition disputes. Related to this, Sir Roth noted that the English courts, unlike the other EU Member States courts, know how to deal with confidentiality, another element of competition disputes, and, in particular, of the disclosure proceedings. Second, English judges are known for the intensive case management, essential in such complex disputes, and more importantly, English judges ensure that expert evidence is comprehensively tested in the court. Sir Roth also referred to the English language, the specialist competition courts, the procedure for class actions etc, as other reasons which explain why English courts are preferred for competition disputes. On this note, the post below takes a look at arbitration and competition disputes under the Egyptian Law and first addresses the arbitrability of such disputes in Egypt.

Introduction

In general, competition authorities are responsible for the public enforcement of competition laws by detecting the anticompetitive practices in order to protect the competitive structure of the market as a whole. By contrast, private enforcement refers to private parties initiating litigation in order to obtain compensation or reliefs for infringement of competition law. In addition to its initial role of protecting private interests, private enforcement is considered as complementary to public enforcement, as it strengthens the effectiveness of competition law by increasing the deterrence and the awareness among lawyers, businesses and the public. As arbitration is one of the main types of private enforcement, the question of its application to competition law disputes is always raised. Globally, arbitrators fully recognize this duty and for the most part routinely apply competition law, at least as competently as most national courts.¹⁾

The Egyptian competition law ("ECL") is enforced by the Egyptian competition authority

(“ECA”), who is playing a key role in promoting competition, believing that an efficient free market economy where economic freedoms are fully respected creates a robust and innovation-based economy for the country. As for private enforcement, whether through courts or arbitration, the rules governing it and its interaction with public enforcement of competition law are well embedded in the Egyptian legal system. This is due mainly because the competition law infringements are of criminal nature and, thus, the general rules governing the civil consequences of criminal offences are applicable. Despite that, private enforcement is still underdeveloped in Egypt, as only one judgment ordering compensation for competition law infringements was rendered since the adoption of the ECL. The private enforcement being rare, arbitration of competition law is not mainstream in Egypt. In addition, arbitration decisions are not published. However, given the huge importance of arbitration as a mean of settling disputes between undertakings, the discussion of this matter is crucial.

Where the Egyptian arbitration law and the ECL are applicable, three issues are raised on the interaction between arbitration and competition law, which are the arbitrability of competition law matters, the role of the arbitrators and the parties and the opposability of ECA’s decisions and the courts’ judgments before the arbitrator.

1) The arbitrability of competition law issues

This question is raised especially in Egypt, not just because competition law is related to public enforcement, but also because competition law infringements in Egypt are subject to criminal law. The first consequence is that the execution of an arbitral award rendered in a direct violation of competition law would be annulled by the Egyptian courts, as it’s considered contrary to the public order²⁾. Of course, it is acknowledged that court review cannot systematically menace the finality of awards, which is the backbone of arbitration. Thus, an arbitral award should be set aside only if there is a concrete and serious violation of competition law principles. This would ensure the effectiveness of competition law and allay any concerns of competition law enforcers and, at the same time, would affirm the respect of arbitration principles and the finality of the arbitration award.

The second consequence is that criminal offences themselves are not arbitrable, but all their civil consequences can be raised before the arbitrator.³⁾ In addition, the fact that the economic courts in Egypt have exclusive jurisdiction over litigation on competition law matters does not preclude the arbitrator to decide on them.⁴⁾

2) The role of the arbitrator and the parties

The arbitrator is bound by the will of the parties and only discusses the questions that are raised by them.⁵⁾ However, the truth is that it is a misplaced idea that arbitrators are purely bound by the parties’ demands and can do nothing without their consent. On the international level, it is now admitted that arbitrators owe a broad duty also to the legal systems that recognize arbitration as a mechanism for the settlement of domestic and international commercial disputes on a par with the courts and that allow the arbitrability of competition matters that competition law will be respected and applied. In fact, respectable arbitrators are unlikely to accept to overlook a serious breach of competition law, even if it’s requested by the parties.⁶⁾

In the case where there are several defendants and not all of them have signed the arbitration

clause, which is frequent in competition law as usually a large number of companies are guilty of competition law infringements, the most suitable solution would be to estimate every conduct distinctly from the other for the arbitration body to be able to continue its recourse against the parties subject of the arbitration agreement. In all cases, follow-on actions are the most suitable for cartels due to the difficulty of proof, while stand-alone actions are more frequent in other anticompetitive practices such as abuse of dominance.

3) The opposability of ECA's and courts decisions before the arbitrator

If an infringement is found, the ECA can issue administrative decisions. In principle, these decisions cannot bound arbitrators. However, the arbitrator is bound by the injunction of the ECA ordering the nullity of a contract.⁷⁾ Regarding court's judgments, arbitrators are bound by such decisions and cannot render an arbitral award which contradicts a previous decision taken by the civil courts or the criminal courts in the same subject of the dispute, as this one of the conditions of the validity of the arbitration award in the Egyptian arbitration law.⁸⁾

Conclusion

The question of arbitration and competition law is a question of equilibrium between both of them in a way to ensure public enforcers that arbitration is an acceptable and useful mechanism for private enforcement on the same level as the action of the courts. This balance is extracted from the fact that both policies can be properly taken into account in the complementary phases of the arbitration itself and of the review process by the courts.⁹⁾ Regarding ECA and its efforts to promote competition law, there are additional efforts to increase the intervention of private enforcement as a way to compensate the victims of different anticompetitive practices. Arbitration as a mean of private enforcement is also backed by ECA in a way that assures that it is an acceptable and useful mechanism to strengthen public enforcement.

This post only reflects the personal views of the authors and it does not necessarily represent the official position of the Egyptian Competition Authority.

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This entry was posted on Saturday, May 11th, 2019 at 10:00 am and is filed under [Arbitrability](#), [Arbitration](#), [Arbitration Awards](#), [Arbitration Proceedings](#), [Competition Law](#), [International arbitration](#), [LIDW 2019](#), [London](#)

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