

To Arbitrate or Not To Arbitrate... Competition Law Disputes

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Abstract

During a long time, the arbitrability of competition law has been the center of debates in the European as well as in the American doctrine. The non-supporters based their view on the confidential character of arbitration, which was to them inappropriate for resolving the competition law related issues, as it was considered that competition law protects the public interest and that few business behaviors can affect the interest of a lot of people. Even though the arbitrability of disputes related to competition is not anymore an issue, arbitration lacks some of the facilities granted by the European legislator or national legislators to national judges or to national competition authorities. Hence, since there was no legal framework or regulation for the arbitrators, there would not have any possibility to consult the Commission in connection with the correct application of the EU rules. Even if legal regulations do not mention expressly the possibility of the consultation of the Commission by the arbitrators, this option already exists, of course, subject to prior consultation of the parties.

Keywords : competition, arbitration, dispute resolution, European Commission

1. Introduction

Arbitration is based on the agreement of the parties expressed either in the arbitration clause or in the arbitral convention. In the case of an understanding between undertakings the issue with arbitration arises in the eventuality of the express consent of the parties in what regards the settlement by arbitration of the eventual conflicts arising in relation with the implementation of their convention. The existence of such an agreement is unlikely, when we are discussing a secret understanding between undertakings. In the case of abuse of dominance, the possibility of the eventual conflict resolution by arbitration is unlikely as well, first of all because we are talking about a unilateral conduct of the enterprise and secondly because this would imply the existence of an agreement between the dominant undertaking and the victim of the abusive behavior.

The plea that a certain dispute is not arbitrable because it pertains to public rules on the protection of free competition has been heard quite often by arbitrators and has been invariably rejected. In all of these cases, the usual approach taken by arbitrators is that competition law is arbitrable and therefore the arbitration clause itself is fully operative and gives the power to the arbitral tribunal to hear arguments and decide a dispute that also involves competition law.

The 1999 *Eco Swiss*¹ ruling of the Court of Justice by implication also supports this proposition². The Court, by deciding on the duties of national courts to safeguard the effectiveness of EU competition law and to refuse to recognize or to set aside arbitral awards that offend against the public policy (*ordre public*) of the forum, implicitly ruled on the arbitrability of those rules³. The arbitrability of competition law in European jurisdictions is long established and well documented. By way of example, as early as 1966, there were reported arbitration awards under review before the German courts in relation to competition law matters, none of which set aside on grounds of inarbitrability. In those same years there were authors that thought that arbitration and competition law would be an explosive mix gone wrong.

The European Union and the United States have different views when it comes to consumer welfare-based antitrust enforcement. While in the United States, arbitration has been used extensively to resolve antitrust claims. In the European Union, there is a different approach. Jurisprudence will be used to shed light on the two views and that is the

¹ Case C-126/97, *Judgment of the Court of 1 June 1999, Eco Swiss China Time Ltd v Benetton International NV*

² *Radicati di Brozolo, "Arbitrato, diritto della concorrenza, diritto comunitario e regole di procedura nazionali"*, 9 *Riv. Arbitrato* 665 (1999), p. 670 et seq.; P. Landolt, *Modernised EC Competition Law in International Arbitration* (The Hague, 2006), p. 101; J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (London, 2007), p. 298.

³ Case C-126/97, *Judgment of the Court of 1 June 1999, Eco Swiss China Time Ltd v Benetton International NV*

purpose the following cases serve.

2. US Law Context

2.1 *Mitsubishi Motors v Soler*

2.1.1 *The Scherk⁴ Case*

Before there was Mitsubishi Motors there was Scherk. A Delaware corporation had brought suit against Fritz Scherk, a German citizen, accusing him of violating the Securities and Exchange Act of 1934⁵. Due to the parties contractually agreeing to submit controversies of this nature to arbitration, Scherk moved to dismiss and initiated arbitration proceedings. The district court denied Scherk's motion to dismiss and granted a preliminary order enjoining Scherk from proceeding with arbitration. In doing so the court relied upon the holding in *Wilko v. Swan*, that "*an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933, in view of the language of §14 of that Act*"⁶.

The Court's decision suggests that courts should narrowly construe the Convention provisions that can avoid enforcement of an arbitration agreement, especially when domestic policies conflict with those of the Convention. In light of the proliferation of international transactions and the United States' desire to foster their growth, the Supreme Court has not insisted upon the preeminence of U.S. national concerns regardless or the repercussions that such a position might have on foreign relations.

2.1.2 *The Mitsubishi Motors v Soler⁷ Case*

On October 31, 1979, Soler Chrysler-Plymouth, Inc. (Soler), a Puerto Rican corporation, entered into a Distributor Agreement with Chrysler International, S.A. (CISA), a Swiss corporation. Pursuant to this agreement, Soler was to sell, within a designated area of Puerto Rico, vehicles manufactured by Mitsubishi, an entity formed by CISA and Mitsubishi Heavy Industries, Inc., a Japanese corporation. At the same time, CISA, Soler, and Mitsubishi entered into a Sales Agreement, which provided for the direct sale of Mitsubishi products to Soler.

Paragraph VI of the Sales Agreement, labeled "Arbitration of Certain Matters" provided:

All disputes, controversies or differences which may arise between Mitsubishi and Soler out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association 1971⁸.

Due to a slack in the new-car market in early 1981, Soler was having difficulties meeting its minimum sales volume and in the spring of that year requested that Mitsubishi delay or cancel shipment of several orders. At the same time, Soler tried to arrange for the transshipment of automobiles to the continental United States and Latin America. Mitsubishi, however, denied permission to so divert the vehicles. Mitsubishi eventually withheld shipment of 966 vehicles, responsibility for which Soler disclaimed in 1982.

Mitsubishi sued Soler in the United States District Court for the District of Puerto Rico for an order to compel arbitration before the Japan Commercial Arbitration Association. Soler denied the allegations and counterclaimed against Mitsubishi and CISA alleging that they had violated the Sherman Act by conspiring to divide markets in restraint of trade. The district court ordered that all of the issues in the complaint and counterclaim that fell within the parties' arbitration clause be submitted to arbitration. With regard to the antitrust charges, the court, relying upon Scherk, held that the international character of the Mitsubishi-Soler undertaking required that these claims should also be arbitrated.

The court of appeals reversed the district court citing *American Safety Equipment Corp. v. J.P. McGuire & Co.*⁹ for the proposition that antitrust claims are not subject to arbitration. The court reasoned that

⁴ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270

⁵ Pub.L. 73-291, 48 Stat. 881, enacted June 6, 1934, codified at 15 U.S.C. § 78a et seq (Amended through P.L. 111-72, approved Oct. 13, 2009)

⁶ *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168

⁷ *The Judgment of U.S. Supreme Court of July 2nd 1985*, 473 U.S. 614, *Mitsubishi Motors Corporation vs. Soler Chrysler-Plymouth, Inc.*

⁸ *Ibid para 4*

⁹ *American Safety Equipment Corp. v. J.P. McGuire & Co.*, 391 F.2d 821 (CA2)

"neither Scherk, nor the Convention required the abandonment of this doctrine in an international setting. Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement"¹⁰.

Citing Bremen¹¹ and Scherk and the United States' implementation of the Convention, the Court noted the strong federal policy in favor of arbitration dispute resolution. The Court also expressed skepticism about the American Safety Equipment doctrine¹². The Court reasoned that if a contract which generated an antitrust dispute was in fact a contract of adhesion, a party could directly attack its validity on grounds such as fraud, undue influence or overwhelming bargaining power. In response to the American Safety Equipment concern that the potential complexity of antitrust disputes makes them ill adapted to the arbitral process, the Court noted that antitrust disputes are not inherently unsusceptible to resolution by arbitration. The Court also noted that parties entering an arbitration agreement assume that streamlined proceedings and expeditious results will best serve their needs.

Moreover, believing that competent and impartial arbitrators can be obtained; the Court also discounted the argument that decisions on the antitrust regulation of business should not be vested in arbitrators who are often members of the business community. Finally, the Court reasoned that treble damages, available in antitrust proceedings, could be sought in an arbitration tribunal. If an arbitration panel did not accord this statutory claim proper attention, a U.S. court could, pursuant to Article V(2)(b) of the Convention, refuse to enforce a resultant arbitral award as contrary to U.S. public policy. Therefore, the Court held that the elements of the American Safety Equipment doctrine were not compelling enough to outweigh the United States' policy favoring the resolution of disputes through the arbitration process.

3. EU Law Context

In its evaluation of the case, the ECJ was very careful not to interfere with arbitration and the finality of arbitration awards. As much so that it limited the required material review of arbitration awards to review for public policy violations. By its decision in the Eco Swiss the ECJ, and to follow the EU legal order, accepts the arbitrability of EU competition law. Courts in various EU Member States have pronounced their respective competition law to be arbitrable. There is nothing in EU law, which would prevent the legal order of an EU Member State from treating EU competition law as inarbitrable, but no EU Member state has done so, so far.

Eco Swiss is entirely silent on the issue of standard of review. Subsequent cases dealing with the review of international arbitration awards add extremely little. This is not the same as saying that the EU legal order makes no demands as regards Member State courts' standard of review. Rather, the matter is almost entirely open and on appropriate occasion will be settled by the ECJ.

Another case that has been very important was the case of Mostaza Claro¹³ which is often taken to have built upon the achievements in Eco Swiss, though Mostaza Claro is a case where EU law norms apply to require Member State courts pro-actively to ensure consumer protection by raising such matters of their own motion. In that case the consumer participated in the arbitration, and did not there impugn the arbitration clause as unenforceable under the directive until the stage of enforcement before the Spanish courts. So the significance of Mostaza Claro is limited to consumer arbitrations.

On the other hand, Asturcom does build upon Eco Swiss in the sense that it is relevant to international arbitration generally, and not just in the consumer protection context. This is because it operates upon the principle of equivalence, which of course is generally applicable in relation to Member State review of international arbitration awards. It would appear to stand for the proposition that the court requested to enforce an arbitration award is required to raise the public policy point of its own motion¹⁴, *"where it has available to it the legal and factual elements necessary for the task"¹⁵* and insofar as *"under national rules procedure, it can carry out such an assessment in similar actions of a domestic nature"¹⁶*.

¹⁰ The Judgment of U.S. Supreme Court of July 2nd 1985, 473 U.S. 614, *Mitsubishi Motors Corporation vs. Soler Chrysler-Plymouth, Inc.*

¹¹ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972)

¹² *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (CA2)

¹³ Case 168/05 *Elisa Maria Mostaza Claro v Centro Movil Milenium SL* [2006] ECR I-nyr 26 October 2006 (ECJ)

¹⁴ Judgment of the Court (First Chamber) of 21 February 2013 *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, Case C-472/11, ECR 2013

¹⁵ Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Györfi* (ECJ)

¹⁶ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*

The source of the limitation where it “has available to it the legal and factual elements necessary for the task¹⁷” is an earlier consumer protection case relating to choice of court jurisdiction (and not arbitration). It would appear that this wording would be relevant when the question of the standard of Member State public policy review of international arbitrations finally arrives before the ECJ.

3.1 *Thales v Euromissile*

In the *Thalès* case, the Paris Court of Appeal, a court particularly experienced both in competition law and arbitration, accepted that, while EU competition law is a matter of public policy, the violation of public policy in an international arbitration case must be “*flagrant, effective and concrete*”, in order to lead to the setting aside of an arbitral award¹⁸. In this case, an arbitral award awarded damages to Euromissile on the basis of a licensing agreement, which stipulated that Euromissile would hold for twenty years the exclusive right to produce and sell a missile in Europe.

A dispute arose when *Thalès* decided to proceed itself to the production of the missile, through a subsidiary. Euromissile brought the dispute before an ICC arbitration tribunal, which rendered a partial award in 2000 and a final one in 2002. The arbitrators awarded € 108 million to Euromissile and *Thalès* applied to the Paris Court of Appeal to set the award aside, because the licensing agreement was allegedly incompatible with the EU competition rules and thus null and void. In particular, *Thalès*’ competition argument was based on the allegedly excessive duration of the exclusivity arrangement and on the market-sharing elements therein. The competition law question had not been raised by any of the parties (or the arbitrators themselves) during the arbitration proceedings, and it was only at the review stage that *Thalès* relied upon it to make the public policy argument. The parties had expert legal advice throughout the arbitration proceedings and the arbitrators were experienced, yet the competition issue never arose.

The Court of Appeal noted this rather inconsistent behavior of the plaintiff (*venire contra factum proprium*) and was not impressed by the EU competition law point. Although it did accept that the competition law arguments were not totally frivolous, it held that they required a detailed examination of the substance, for which the court and the setting aside procedure were ill-suited, otherwise this would mean reviewing the merits of the case (*révision au fond*), which French law, like most modern arbitration laws, do not allow for. It is evident from the judgment that the court considered the competition law argument not totally frivolous but, at the same time, not “*eye-catching*” enough to substantiate a violation of public policy. The infringement of the competition rules had to be “*manifest*” for the setting aside action to be successful.

3.2 *Mostaza Claro*¹⁹

In the center of the case is a Spanish woman protected by the EU consumer protection directive who had entered into a contract with a telecoms supplier with an arbitration clause in it. She took part in the arbitration, and did not raise the unfair contract terms point. She then sought the annulment of the arbitration award on the basis that the arbitration clause was an unfair contract term and therefore not binding on her.

The ECJ’s judgment does not give any explicit reasoning as to why the annulment court considered the arbitration clause an unfair contract term. The case brings up concerns that had originally been stated in *Eco Swiss* about limiting the scope of review of arbitration awards, and making interference with them available only in exceptional circumstances.

The case determines that where the arbitration clause is an unfair contract term, a EU Member State court should annul the award, even though the objection was not taken before the arbitral tribunal. This determination turns on and is limited to the particular case of consumer protection. The ECJ accepted that the consumer’s possible weakness and ignorance result in a situation where the court must supply the consumer’s failure to invoke this right.²⁰ The one thing that *Mostaza Claro* adds to *Eco Swiss* of relevance to general arbitration is that, unlike *Eco Swiss*, *Mostaza Claro* uses the language of “mandatory provision”.²¹

At the time of the rise of the dispute, Spanish Law on Arbitration stated that “*An objection to arbitration on the ground that the arbitrators lack objective jurisdiction or on the grounds of the non-existence, nullity or expiry of the*

¹⁷ Case C-397/11, *Erika Jörös v Aegon Magyarország Hitel Zrt.* para 7

¹⁸ CA Paris, 18-11-04, *Thalès v. Euromissile*, (2005) Rev.Arb. 750.

¹⁹ Case 168/05 *Elisa María Mostaza Claro v Centro Movil Milenium SL*[2006] ECR I-nyr 26 October 2006 (ECJ)

²⁰ *Ibid.* para 30-31

²¹ *Ibid.* para 36

*arbitration agreement must be raised at the same time as the parties make their initial submissions*²²."

The Spanish Court asked one single question, whether the consumer protection provisions of Directive 93/13²³ imply that the national court seized to annul an arbitration award should examine the validity of arbitration agreement, and in the case that the court finds that this agreement constitutes unfair term (as defined by the Directive), whether it should annul the said award, even though the nullity of the arbitration agreement had never been raised by the consumer during the arbitration proceedings until the stage of review. Among the grounds for annulment of the award provided by the same law were nullity of arbitration agreement and the arbitral award being against public policy.

The CJEU just analogically applies the reasoning of *Eco Swiss*, when it continues to note that the consumer protection provisions are important enough for the EU legislator to regulate the unfair terms in consumer contracts so that they do not bind the consumer. The court pronounces Article 6(1) of the Directive 93/13 to be a mandatory provision 81 that "is essential to the accomplishment of the tasks entrusted to the Community"²⁴ in the same way and on the same basis as competition laws. If a court annuls an award based on its incompliance with national public policy, it should do so when the award is not in accord with the similar EU provisions.

The nature of (European) public policy seems to be granted to consumer protection regulations. The obligation of the court to assess ex officio the possibility of a term of contract being unfair and thus null and void is stressed. The question of the Spanish Court is then answered affirmatively. This is the only deviation from *Eco Swiss* where the national procedure was not tampered with. "A national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment."²⁵

Mostaza Claro seemed to widen the range of provisions considered as public policy. Moreover, the court does not pronounce the consumer protection provisions to be public policy like it did in *Eco Swiss*. It merely uses the term mandatory rule (in French "disposition impérative"), and one could ask if this means that a breach of every EU mandatory rule gives the right to review of an award the same way the public order ground allows it. Nevertheless, in protecting these provisions, this time the procedural law of a Member State in regards to arbitration in the stage of annulment was deemed as inapplicable.

3.3 *Asturcom*²⁶

Asturcom, unlike *Mostaza Claro*, is not based on an interpretation of substantive rights under the consumer protection directive, but rather on the principle of equivalence. Here the consumer does not even participate in the arbitration concerning her telecommunications contract, and does not even participate in the court proceedings to enforce the award.²⁷

The seat of the arbitration, Bilbao, was not indicated in the contract, and was so far away from the residence of the consumer that it the expenses in order to attend the arbitration were much more greater than the value in dispute. Moreover, the body administrating the arbitration is the body that creates the model contract used by the telecommunications company claimant. EU law requires EU Member State Courts to raise EU points of their own motion under some circumstances. The enforcing court was required to raise the unfair contract term point of its own motion, "where it has available to it the legal and factual elements necessary for the task" and in so far as "under national rules procedure, it can carry out such an assessment in similar actions of a domestic nature."²⁸

The consumer was not participating at all in the court proceedings. This would seem to make for a less constrictive than the limitation in *Van Schijndel* that a Member State court does not need to raise matters of its own motion where to do so would go beyond the ambit of the dispute as defined by the parties. When the arbitration clause is an unfair

²² Article 23(1) of Spanish Law 36/1988 on Arbitration

²³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

²⁴ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC

²⁵ Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, para 39

²⁶ Judgment of the Court (First Chamber) of 6 October 2009, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, Case C-40/08, ECR 2009 I-09579

²⁷ Landolt & Koch, *Eco Swiss and its Ramifications*, Vienna Arbitration Days 2012

²⁸ Judgment of the Court of 1 June 1999. - *Eco Swiss China Time Ltd v Benetton International NV*, Case C-126/97, ECR 1999 I-03055, para 21

contract term the consumer does not even have to put in an appearance for a EU Member State court to be required to annul, or refuse to enforce. Nevertheless for as long as there is no action for annulment, the arbitral award becomes *res judicata* as far as the EU is concerned. This however does not mean that EU Member State are alleviated from their obligation under EU law to refuse to enforce on the basis of a violation of public policy courts just due to the fact that an award has become *res judicata*.

4. Conclusion

The relation between arbitration and competition law has been one where tensions between the experts of the two areas of law have been present at the starting steps of this new process. On one hand, competition professionals used to see arbitration as a threat to effective competition law enforcement. On the other, arbitrators and arbitration specialists feared that the need to ensure the respect of competition law could become a Trojan horse to subvert well-established principles on the nature of the review of arbitral awards and of party autonomy.

An apparent difficulty arises because the arbitrators' jurisdiction to apply Art.101(3) is not clearly provided for in Regulation 1/2003. On the contrary, Articles 5 and 6 of the Regulation only explicitly provide for the power of the national competition authorities and the national courts to apply Art.101(3). It would have been rather strange if an ad hoc provision for arbitrability had been part of the Regulation 1/2003. Arbitral tribunals derive their jurisdiction from agreements sanctioned by the national laws of the Member States. It is for the Member States to set the boundaries to arbitrability and make provisions for governing the arbitral procedure.

Another possible objection to the arbitrability of disputes under Art.101 (3) is that the application of this provision may be rather difficult in practice. In earlier times, even the ability of national courts themselves to deal with such issues had been doubted, but arbitral tribunals may be considered to be in an even worse position than national courts since they do not benefit from the co-operation mechanisms under Regulation 1/2003.

The argument that issues under Art.101 (3) are not arbitrable because they are too complex for tribunals to analyze and decide is misconceived. We can give a few arguments why this is a misconstruction.

- a- Issues under Art.101(3) are not more difficult than issues under Arts 101(1) or 102. If courts were able to deal with these issues, there is no reason for believing that arbitrators will be less able to do so.
- b- Appropriate measures can be taken before issuing arbitral proceedings or in the course of the arbitration in order to ensure that issues under Art.101(3) are correctly addressed in the same way as in any other arbitrable dispute raising complex technical questions.
- c- One way to avoid as much as possible a doubtful situation is to consider appointing arbitrators who have very specific expertise in competition law. This is, of course, only possible when it is clear from the start that the arbitration will involve some significant competition law issues. There have been cases where one of the arbitrators had a prior career at the European Commission Directorate General Competition.
- d- Whether or not the arbitrators have been appointed because of their competition law expertise, the parties to the dispute generally have a good understanding of the markets and access to the relevant information. Parties to arbitral proceedings are under a duty to co-operate in the fact-finding process.
- e- Taking the case that none of the arbitrators is an expert or had prior work experience in the field of competition law, the role of the experts and the advocates will be crucial to review and examine the evidence submitted by the parties.

Although the primary attraction of arbitration is to avoid the delays, expenses and vexation of ordinary litigation, the view of the ECJ expressed in the *Eco Swiss* case does not help to advance this position. In the United States, competition/antitrust arbitration is treated equally with any other commercial maritime arbitration. The public policy interests implicated in antitrust arbitration can be safeguarded during award review.

The Commission has made a significant attempt to refresh and enhance through its Modernization Regulation the enforcement of EC competition law. Adding arbitration to this extreme series of weapons of EC competition law as an alternative for the solution and enforcement of competition law issues is a happy coincidence that matches the wish of the Commission to enact a new and modern regime . The direct implication of such an acknowledgment is the legal issues resulting from the application of Articles 101 (as a whole) and 102 TFEU by international arbitrators.

However, arbitration as we know it will change forever and this new and fresh species of arbitration will need time to get into a definite form and then to be full. Until then, we may have to just hang around and be content with studying the evolution of this new development, and to follow step by step the debates and different point of views concerning the real nature and actual dimensions of this very fascinating field of law that has all the scholars puzzled and divided.

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