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Arbitrators' Power and Duty to Apply Competition Law Provisions Ex Officio

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AGENDA

- Should arbitral tribunals be allowed to adjudicate disputes on the basis of legal grounds different from those submitted by the parties?
- Are EU competition rules of “public order”?
- Does the public policy exception cover any violation of EU competition law?
- Standard of review applied by domestic courts to awards allegedly breaching EU public policy due to violations of EU competition law
- Practical issues arbitral tribunals face while verifying that their award complies with competition law:
 - The scope of the review of the compatibility of the award with competition rules from *substantive* and a *jurisdictional* standpoint; and
 - The way(s) in which in the arbitral tribunal should ascertain the content of the competition rules under which the review of the award will be carried out
- Compliance with core principles of arbitration law

WHETHER TO APPLY LEGAL REGIMES EX OFFICIO: A DIFFICULT QUESTION

- Whether arbitral tribunals should be allowed to adjudicate disputes on the basis of legal grounds different from those submitted by the parties is a question that is subject to considerable debate in the international arbitration community.
- On the one hand, arbitration is a creature of contract and arbitral tribunals should be careful not to exceed the mandate that has been extended to them by the parties. Moreover, arbitral tribunals are bound by the principle of impartiality and should therefore avoid to be perceived as siding with one of the parties by raising, on their own initiative, legal grounds that may advantage that party.
- On the other hand, there may be circumstances where the ignorance of certain legal regimes may be fatal to the validity and enforceability of the award, and where the tribunal may thus well be advised to raise the applicability of such regimes even if the parties failed to do so. That is, for instance, the case of “public policy” rules

EU COMPETITION RULES ARE PUBLIC POLICY RULES

- The CJEU has ruled in *Eco-Swiss* that EU competition provisions are rules of public policy within the meaning of Article V(2)(b) of the New York Convention.
- As a result, several national courts of EU Member States have set aside or refused to enforce arbitral awards on the ground that by violating EU competition law they constitute a breach of public policy.
- Circumstances may therefore arise where an arbitral tribunal has to decide whether to invoke EU competition rules *ex officio* when the parties have voluntarily or involuntarily failed to do so, as otherwise the award might be declared invalid or unenforceable by domestic courts.
- Whether arbitral tribunals should raise EU competition rules on their own motion largely depends on the circumstances of each case and, as will be discussed below, arbitral tribunals should be guided by pragmatism rather than theoretical considerations.

DOES THE PUBLIC POLICY EXCEPTION COVER ANY VIOLATION OF EU COMPETITION LAW?

- From a competition law standpoint, the answer should be yes:
 - The competition law provisions included in the TFEU and in secondary legislation do not distinguish between serious and minor violations of competition law.
 - The *Eco Swiss* judgment does not distinguish between different breaches of EU competition law.
 - In its recent Opinion in the *Genentech* case, Advocate General (“AG”) Wathelet rejected the distinction between by “object” and by “effect” infringements as a tool to identify infringements of EU competition law that would be serious enough to amount to public policy breaches.
- Now, domestic courts should be guided by pragmatism when claims are made that the awards that they are asked to review breach public policy on the ground they violate competition law. They should pay special attention to agreements or conduct that are particularly likely to harm the general interests protected by EU competition law, i.e. consumer welfare and the completion of the internal market.

STANDARD OF REVIEW APPLIED BY DOMESTIC COURTS TO AWARDS ALLEGEDLY BREACHING EU PUBLIC POLICY

- This is an issue on which the minimalist and maximalist schools of thought diverge significantly.
- In its *Eco-Swiss* judgment, the CJEU did not take a strong position on the standard of review that should be adopted by domestic courts reviewing arbitral awards for an alleged breach of public policy. It should therefore be no surprise that the standard of review applied by domestic courts may vary considerably.
- In its Opinion in *Genentech*, AG Wathelet considered that:

“limitations on the scope of the review of international arbitral awards such as those under French law — namely the flagrant nature of the infringement of international public policy and the impossibility of reviewing an international arbitral award on the ground of such an infringement where the question of public policy was raised and debated before the arbitral tribunal — are contrary to the principle of effectiveness of EU law.”
- AG Wathelet thus makes it clear that the minimalist standard of review adopted by the French courts is incompatible with the principle of effectiveness of EU law . This issue was, however, ignored by the CJEU.

PRACTICAL ISSUES ARBITRAL TRIBUNALS FACE WHILE VERIFYING THAT THEIR AWARD COMPLIES WITH COMPETITION LAW

- The verification by an arbitral tribunal that its award is consistent with competition rules raises a series of practical issues that do not necessarily have a straightforward answer.
- These issues include:
 - The scope of the review of the compatibility of the award with competition rules from *substantive* and *jurisdictional* standpoints; and
 - The way(s) in which in the arbitral tribunal should ascertain the content of the competition rules under which the review of the award will be carried out.

JURISDICTIONAL SCOPE OF THE REVIEW OF THE AWARD WITH COMPETITION LAW

- A first practical issue is whether the arbitral tribunal should check its award against the competition rules of the seat of the arbitration and/or of the jurisdictions in which the award is likely to be enforced.
- An arbitral tribunal facing such a scenario should first determine:
 - Whether the competition rules of the seat of the arbitration are rules of public policy: it cannot be determined in the abstract whether the competition rules of the seat of the arbitration are of public policy as the answer to this question varies across jurisdictions;
 - Whether these rules apply to the case at hand: it is not because the competition rules of the seat of arbitration are of public policy that they will necessarily apply to the award in question. The parties could, for instance, agree that the seat of the arbitration is in Paris even if the contract at stake in the arbitration produces no effect in the France.
- Once the arbitral tribunal has determined that the award is compatible with the competition rules of the seat of the arbitration (assuming these rules apply), it must still decide whether it should push its inquiry further and verify whether the award is compatible with the jurisdiction(s) in which the award is likely to be enforced.

SCOPE OF THE REVIEW OF THE COMPATIBILITY OF THE AWARD WITH COMPETITION RULES: SUBSTANTIVE ASPECT

- A second practical question is whether the arbitral tribunal should verify that the award does not amount to a major breach of competition law or whether it should push its inquiry further to ensure that the award is in full compliance with the full body of the relevant competition law(s).
- As the objective of the arbitral tribunal when checking the compatibility of the award with competition law is to produce an award that is valid and enforceable, the answer to that question depends on the type of control that will be exercised by the court(s) that may be called to review the award.
- Even if the courts exercise a fairly strong degree of control, this does not mean that the task of the arbitral tribunal will be impossible:
 - First, the vast majority of arbitral proceedings raising competition law issues concern horizontal or vertical agreements. The issue at stake in these proceedings will thus be to assess whether the agreement that is at the core of the dispute complies with Article 101 TFEU.
 - Second, the role of arbitrators is not to engage in a complex investigation of the competition law issues that may arise in the context of disputes that have been asked to handle as if they were competition law enforcers, but to raise the flag if they have suspicions that such issues may affect the validity and enforceability of the award, even if they have intentionally or unintentionally not been raised by the parties in their pleadings.

ASCERTAINING THE CONTENT OF COMPETITION RULES THE TRIBUNAL INTENDS TO APPLY

- A third important practical issue relates to the ways in which the arbitral tribunal should ascertain the content of the competition laws against which it intends to assess the compatibility of the award. In most instances, arbitral tribunals will not know the details of the competition laws that their award might potentially violate.
- Several options are open to them to perfect their knowledge of these laws, which are of course not unique to the competition law field.
 - One approach is for the tribunal to undertake its own researches to ascertain the content of these laws, a task that might be facilitated when a member of the arbitral tribunal has expertise in competition law (which will often be the reason why in the first place the tribunal detected the risk of an antitrust infringement).
 - Another approach is to appoint one or several experts to inform the tribunal about the content of these laws.
 - A third approach is to ask the parties to inform the tribunal about the content of these laws.

COMPLIANCE WITH CORE PRINCIPLES OF ARBITRATION LAW

- While arbitral tribunals may wish to invoke competition rules to reduce the risk of annulment or of unenforceability of the award, they should not, at the same time, ignore core principles of arbitration, if only because in many cases their disregard can also render the award invalid and/or unenforceable.
- Arbitral awards based on grounds, including competition law grounds, which were not pleaded by the parties, may be at odds with three key principles of international arbitration:
 - the parties' right to be heard,
 - the arbitrators' obligation not to grant reliefs *ultra petita partium*; and
 - the arbitrators' obligation of impartiality.

CONCLUSION

- The challenge faced by arbitral tribunals, while applying competition law provisions on their own motion, is twofold.
 - On the one hand, they must use their best endeavours to reduce the risk of annulment or non-enforceability of the award for being incompatible with competition law provisions that are, at least within the European Union, considered to be part of public policy.
 - On the other hand, arbitral tribunals must ensure that their proactive application of such provisions to the case at hand is not violating any of the fundamental procedural rights of the parties, such as the right to be heard and their obligation of impartiality, as otherwise they would again expose their award to being set aside and/or declared unenforceable by reviewing courts.

Thank you.



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