

Practical Experiences Re Competition Law and Arbitration

13 November 2009

Introduction

- During an arbitration, questions of competition law usually arise:
 - 1) in relation to the partial or entire invalidity of a contract; and
 - 2) the pecuniary consequences of such invalidity between the parties.
- Competition law can be invoked either as a defence by the respondent or as a basis for the claimant's claims.

- After an arbitration, the arbitral award's alleged non-compliance with competition law can be used in an attempt to avoid enforcement.
 - Contrariety to competition law may result in setting aside the award due to public policy considerations.

Competition Law Defence by Respondent

- Generally, an attempt to invalidate the parties' contract or to affect its interpretation.
 - Increasingly common defensive argument, but not always credible.
- Example: Central Chamber of Commerce of Finland arbitration over a long-term crossborder electricity trading contract.
 - Claimant A claimed compensation for non-delivery by respondent.
 - Respondent B alleged that due to the unbundling of the electricity market in the EU, respondent was not allowed to engage in electricity trade and that the acceptance of A's contract interpretation would amount to a breach of the Electricity Market Directive, competition law and "EU public policy".
 - The arbitral tribunal was not persuaded and held that when entering into a contract "it primarily rests with [B] to decide whether it can trade or not."
 - B did not challenge the award.

Extraterritoriality Problems in the Competition Offensive

- Claims for damages/restitution due to a breach of competition law (=private enforcement claims) can be covered by an arbitration clause.
 - See, e.g., Swedish Supreme Court 19 Feb 2008, T 2808-05.
 - Cf. *Provimi Ltd. v. Roche Products Ltd and others* [2003] EWHC 961.
- Example: a global technology licensing agreement between licensor X (American) and licensee Y (European).
 - A competition authority in Europe began investigating A's licensing practices as a potential abuse of X's dominant market position.
 - Y began preparing a private enforcement claim against X for the restitution of excessive license payments.
 - The claim fell under the arbitration clause in the licensing agreement ("any dispute... arising out of or related to this Agreement...").

- The place of arbitration was in US state A and the *lex contractus* was the law of A. Y's claim, however, was based on the breach of EU competition law (and the law of Y's domicile).
 - In theory, arbitrators are only bound to apply the *lex contractus* and the public policy of the seat -> the arbitral tribunal was not bound to apply the laws on which Y's claim was based.
 - Under the circumstances, however, such application would have been likely.
 - See also partial award in ICC case no 7673 (6(1) ICC Bull 57 (1995) 58).
- An award not respecting EU competition law is likely not to be set aside for public policy reasons outside the EU.
 - See, e.g., Swiss Tribunal Fédéral ruling of 8 March 2006 (4P.278/2005).
- Even the likely place of enforcement would have been outside the EU.
- Had the case not settled, Y could have been deprived of a remedy.

Public Policy Challenges and Competition Law

- The ECJ's findings in *Eco Swiss* (C-126/97) have been interpreted differently in different countries.
 - In France, the courts have insisted on a narrow minimalist approach.
 - Dutch and Belgian courts appear to conduct a proper review of the merits where competition law issues are at stake.
- A minimalist approach seems to have been taken by Finnish courts, see Helsinki Court of Appeal, 22 Aug 2003, Dnro S 01/1007.
 - The dispute related to a contract for the sale of fuel. Seller S had unilaterally changed the price mechanism claiming it breached competition law.
 - Buyer B commenced arbitration. Awarding B damages, the tribunal found it did not even need to apply competition law.
 - S challenged the award claiming contrariety with public policy.
 - The courts contented themselves with noting that the tribunal had seen no need to apply competition law to resolve the dispute and rejected the challenge.

Thank you!

Aapo Saarikivi
Dispute Resolution

Tel. +358 400 377 093

Fax +358 20 506 6100

aapo.saarikivi@roschier.com

Keskuskatu 7 A
00100 Helsinki
Finland