Arbitration, European competition law and public order

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Introduction (1)

- Arbitration: narrow sense: «French: arbitrage juridictionnel » or « voluntary arbitration » (portuguese law 2011), and no all types of ADR, such as mediation, conciliation…, which raise other issues
- EU Competition Law:

- on most topics NCL raise the same type of issues
- EU competition law = not only, antitrust (art. 101 & 102 TFEU), but also mergers and State aids

Introduction (2)

* All these rules are mandatory

Is there some place for arbitration?

the « public order Damocles' sword »

* Two main obstacles:

- Concept of « public order » very broad, different meanings
- Furthermore, in CL, major distinction between public an private enforcement

Introduction (3)

- **Different role of arbitration in public and private enforcement**

- Public enforcement: the task of the Commission and the NCA

very few place for arbitration, but possible for a CA to introduce arbitration to monitor the commitments: specific issues (see, *Concurrences* 1/2012).

- Private enforcement: the task of national courts (« juges de droit commun »)

Introduction (4)

- The role of the national court is always the same:
- Apply competition rules as any rule of law and draw the « civil » consequences of the infringement, but
- With different extent according to the component of EU competition law (*ex post* vs *ex ante* controls)

- An arbitration tribunal cannot have more powers than a national court, but should not have less powers

Introduction (5)

- Public order and the use of arbitration in EU CL (I)
- Public order and the application of EU CL by the arbitrator (II)
- Public order and the control of the award (III)

I. Public order and use of arbitration in EU CL

1. Well-known issues
2. New issues

I.1. Classical issues

- Two meanings of « Public order »

- In EU competition law (and NL) = exclusive jurisdiction of CA
- In some N arb. Laws (F ex.) = the « public order clause » on arbitrability of claims

I. 1. Classical issues (1):
Public order and exclusive jurisdiction of CA

Exclusive jurisdiction of CA for public enforcement (detect, sue and punish antitrust violations; determine compatibility of merger and State aids)

- In ex ante controls: Reg. N° 139/2004 and State Aids

  Few room for arbitration, but not excluded (already discussed in some cases)

- Breach of the duty to notify: Merger and Aids
- Other specific issues: ancillary restraints in Mergers, restitution in Aids

I. 1. Classical issues (1): *Public order and exclusive jurisdiction of CA*

- In ex post control (art. 101 & 102 TFEU)

More room for arbitration: all civil consequences (validity of all legal acts (*actes juridiques;* not only contracts) and damages)

Enlarged by the regulation n° 1/2003 due to the adoption of the legal exception system and the suppression of the Commission 's exclusive jurisdiction for individual exemptions

I.1. Classical issues (2):
The « public policy clause » of Nat. Arbitration Laws

- **Old issue of « arbitrability »** in some N arb. laws, such as France (art. 2060 civ. c.; see also, Belgium)

- Lot of discussion in the eighties….

- Closed by a decision of the Paris Court of appeals (Labinal, case, 1993), not directly by the Cour de cassation for EU CL

  but recently confirmed (Cass. civ. 1ère, 8 July 2010), for title IV on restrictive practices

- Reform of arbitration law in January 2011 (no change for constitutional reasons)

I.2. New issues

New context: development of damages actions for violation of articles 101 & 102 TFEU. Consequences on arbitrability.

- Damages

- compensatory damages: OK, only issue with the scope of the arbitration agreement
- but, what if punitive damages are introduced (not at the european level, but only in some MS)? In some MS, a foreign judgment which gives treble damages is deemed to be contrary to public order

The US counter example: waiver of treble damages discussed

- Plurality of defendants; collective redress

II. Public order and the application of EU Competition Law by the arbitral tribunal

1. Substantive issues
2. Procedural issues

II. 1. Substantive issues

EU competition rules: mandatory rules

In a a situation where articles 101and/ or 102 are applicable (effects in EU + effect on trade between MS) (to be noted: caselaw on spatial application of art. L-442-I-5° in French law)

- In domestic arbitrations: no specific issue; EU rules = integral part of national law
- In international arbitration: applicable law (according to the choice of the parties or of the arbitrators)

Regulations « Rome I » and « Rome II » not compulsory, but can be taken into account

II.1. Substantive issues

- **the applicable law is a MS law**; no specific issue; application of EU CL well admitted by arbitral tribunals, in contractual matters

- **the applicable law is a Non EU State law**; is there a duty or not to apply EU competition rules? Depends on the recognition of the theory of mandatory rules (« théorie des lois de police »)

  The *Ingmar* (ECJ, 2000) precedent but in another context

II.2. Procedural issues

- Impact of an « amiable composition clause »?: no (Swiss exception)

- **Silence of the parties on competition issues**: Should the arbitrator raise *ex officio* the issue of competition law?

- Nothing prevents to do as long as there is a contradictory discussion on the competition issue

- Is it a duty? Discussion. *Eco Swiss* (1999)

  but *Mostaza Claro* (2006) and *Asturcom* (2009) in consumer cases (for personal position, see comments in Rev. arb.)

III. Public order and the control of the award

Well-known discussion since the famous *EcoSwiss* case (CJ1999), but renewed since *Thalès* case (F.2004) and many other national cases; lot of litterature

1. Existence of the control
2. Reality of the control

III.1. Existence of the control (1)

- **Legal basis**

In all texts (either international; N.Y convention; national laws)

Provisions on the control of the award through the recognition and enforcement procedures

Public order may intervene at two levels:

- Validity of the arbitration agreement; *Mitsubishi* case (1985), but in the very specific US context, and no more discussion on arbitrability (except maybe on specific points)
- Compatibility of the award with public order

III.1. Existence of the control (2)

- **The criteria**
- **What is public order in arbitration laws?**

- domestic arbitration, no issue; always public order of required State
- international arbitration? Sometimes, « international public order » (F. art. 1520-5° Proc. Civ. C.), but no difference; always conception of the required State

- **Is there a special status for EU public order?** *Eco Swiss*

III.1. Existence of the control (3)

- **For a MS court, shall EU public order be stricter than national public order**? *Eco Swiss*

- « minimalist approach »: exactly the same
- But can be discussed: need to have a uniform system

+ *Eco Swiss* case; no discussion on competition issues, what about the duty to raise *ex officio* (pt 40)
+ *Marketing Displays case* (N, 2005): contract with foreign law applicable; award outside EU, but enforcement in EU

III.1. Existence of the control (4)

- **For NMS court, is it possible not to take into account EU public order?** *Terra Armata* case (CH, Fed. Sup. Ct, 2006); award which refuses to take into account art. 101 TFEU not contrary to the Swiss international public order. Very critical decision (against a previous caselaw of 1992)

- Competition lawyer's view: existence of an agreement worldwide on the need of CL, specially on hard-core cartels
- PIL lawyer's view: applicable law was Italian law.. And what about theory of mandatory laws?

III.2. Reality of the control (1)

- **What is a violation of EU public order?** Caselaw in MS (F (*Thalès, Cytec, Linde*), B (*Cytec*), N (*Marketing Displays*), G, I (*Terra Armata*)).

- In the EU, different methods:

+ either, true control: N, G, I, B (sometimes critical)

+ either very limited control: F, violation « flagrante, effective et concrète », (confirmed for EU law *Cass. civ. 1ère, June 2011, Sté Smeg*); = no control!

- May lead to contradictory solutions; the *Cytec* case, but happy end

III.2. Extent of the control (2)

What is the point of view of the competition lawyer?

No general rule, but distinctions

- **Control within the EU**; true issue is not between maximalist and minimalist… but whether or not the competition issue has been discussed

+ If discussed (*Cytec*): no discussion on the merits; obvious violation is enough

+ If no discussion (*Thalès, Linde*): no discussion = obvious violation; contrary to the EU caselaw. Duty to raise ex officio

III.2. Extent of the control (3)

- **Control outside EU:** theory of mandatory rules may help to solve the issue with next countries, which share the same conception of competition rules (EEE, Ch, candidates)

Conclusion

Many theoretical discussion

But globally, it works

And if it was no more true, the CA may intervene….

Thank you for your attention