ARBITRATION, EUROPEAN COMPETITION LAW AND PUBLIC ORDER*

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Abstract: *This paper, building largely on the 2010 OECD Hearings on competition and arbitration, discusses the key concept of public order ('ordre public') and its significance and relevance for the application of EU competition rules by arbitral courts in the wake of various ECJ rulings, namely the "Eco Swiss" ruling of 1999. It also addresses the conditions to submit competition law problems to arbitration in light of relevant EU Member States case law (in Germany, France and other Member States) to conclude that although a considerable theoretical discussion persists in this domain more and more frequently conditions are being met to have EU competition law issues extensively discussed before arbitral courts.*

Summary: 1. Public order and the use of arbitration in EU competition law. 1.1. Classical issues. *1.1.1. Public order and exclusive jurisdiction of Competition Authorities. 1.1.2. Public order and the "public policy" provision of national arbitration laws. 1.2.* New issues. 2. Public order and the application of EU Competition Law by the arbitral tribunal. 2.1. Substantive issues. 2.2. Procedural issues. 3. Public order and the control of the award. 3.1. Existence of the control. Reality of the control.

1. To introduce the topic, two preliminary remarks on the title are useful. First, the word "arbitration" will be used in the narrow sense, in other words only to designate "voluntary arbitration" according to Portuguese and French

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Laws. It means that other types of ADR, such as mediation, conciliation…, which raise other issues, will not be dealt with. As far as "competition law" is concerned, the following developments will focus on EU Competition law, but one does not have to forget that national competition laws raise the same type of issues on most topics. Furthermore, EU competition law not only means antitrust (art. 102 & 102 TFEU), but also covers merger control and State aids control. All these rules are of course mandatory and that's the reason why there is kind of "public order Damocles'sword" on arbitration.

2. In such a context, is there a place for arbitration? There are two main obstacles. First, the concept of "public order" is very broad and may have different meanings. Second, in all competition laws, a major distinction shall be made between "public enforcement" and "private enforcement".

In public enforcement, which is in Europe the task of the Commission and the National Competition Authorities (NCA), arbitration should be fully excluded. However, any CA may introduce arbitration to monitor some commitments, mainly of behavioural nature. It's a rather new trend, which raises some specific issues and has already been studied in other contexts. It is sufficient to say here that, in such a situation, the arbitrator is mainly a public enforcement assistant.

On the contrary, private enforcement of CL is the task of ordinary national courts, and therefore, as there is a kind of competition between national courts and arbitral tribunals, arbitration may have a role to play. In all components of EU competition law, the role of national courts is always the same. They shall apply the law, including competition rules as any rule of law and draw the so-called "civil" consequences of the infringement (nullity, damages…), but with different extent according to the component of EU competition law at stake. It is clear that an arbitral tribunal cannot have more power than a national court, but it shall not have less power.

3. The concept of "public order" will intervene at each of the three traditional stages of arbitration: first, when the parties decide to choose arbitration (1); second, when the arbitral tribunal applies EU competition law (2); third, at the final stage of the control of the award before a national court (3).

1. PUBLIC ORDER AND THE USE OF ARBITRATION IN EU COMPETITION LAW

4. If some issues are now well known (1.1), new problems recently appeared (1.2).

1.1. Classical issues

5. Some issues are already well known. At this preliminary stage, the concept of "public order" may have two different meanings. If we take into account the EU approach, it evokes the exclusive jurisdiction of Competition Authorities (Commission and NCA), but, for arbitration law, it raises the issue of arbitrability of claims.

1.1.1. Public order and exclusive jurisdiction of Competition Authorities

6. Nobody contests the fact the exclusive jurisdiction of CA for public enforcement cannot be set aside by arbitration. The consequences are not exactly the same in *ex ante* controls and in *ex post* controls.

7. In *ex ante* controls, such as merger control and State aids control, CA have exclusive jurisdiction to appreciate the compatibility of the operation. Therefore, in ex ante controls, there is very little room for arbitration. However, it is not fully excluded, and two examples can be given.

In both cases (merger control and State aids), if there is a breach of the duty to notify, an arbitral tribunal, like any national court, may draw the civil consequences of the violation. For instance, in State aids, an arbitral tribunal may examine a measure to determine whether, or not, it is a State aid under article 107, paragraph 1, TFEU. There are some cases unhappily confidential.

It is true that, in merger controls, the situation is different since the firms generally fully respect the obligation to notify and, to my knowledge, so far, the civil consequences have never been discussed before any judge. However, there is a specific issue, which is in practice very important: the issue of ancillary restraints. For instance, the qualification of a non-compete clause as an ancillary restraint can be discussed before an arbitration tribunal as before any national court.

8. In antitrust, CA have exclusive jurisdiction to detect, sue and fine infringements to articles 101 and 102 TFEU and national equivalent rules. However, there is more room for arbitration since an arbitral tribunal may draw all civil consequences of an infringement to articles 101, paragraph 1 and 102 TFEU. If there is an arbitration agreement, it will have jurisdiction to examine the validity either of the contract in its entirety, or of some provisions which raise competition issues, like non compete clauses, and to attribute some damages.

Moreover, the powers of arbitral tribunals have been enlarged by the regulation n.º 1/2003 due to the adoption of the so-called "legal exception system" and the suppression of Commission's exclusive jurisdiction to grant some individual exemptions following a notification of the agreement. It is now a full *ex post* control and arbitral tribunals, like ordinary National courts, may examine whether or not, the conditions of article 101, paragraph 3 TFEU, are fulfilled.

1.1.2. Public order and the "public policy" provision of national arbitration laws

9. If we look now at the national arbitration laws, the concept of "public order" may raise an issue of arbitrability, if it is used as a criteria to determine whether, or not, it is possible to use arbitration. That was the solution adopted in some Member States, such as France or Belgium, which keep this concept of "public policy" in article 2060 civil code.

In France, there were a lot of debates in the eighties to determine whether or not a tribunal arbitral may examine competition issues. It is not necessary to come back on this point since the issue has been solved by a decision of the Paris court of appeals in the famous *Labinal* case in 1993. The French Supreme court did not directly confirm the solution for articles 101 and 102 TFEU, only quite recently for title IV on restrictive practices of French competition law. However, there is no more discussion on this point.

10. As in Portugal, we had a major reform of arbitration law in January 2011. No change was introduced in article 2060 civ. code, but it's only for constitutional reasons since the reform was made through a decree and not a law.

Portuguese Law is more modern since, according to article 1, paragraph 1, of the new law of November 2011, the parties may submit "any disputes involving economic interests to arbitration".

However, even if this problem doesn't exist any more in Europe, some new issues recently occurred.

1.2. New issues

11. New issues are linked to the attempts to develop private enforcement within the European Union, mainly damages action since contractual actions are already frequent. Even if there is nothing new since the White Paper of 2008, there is a new tendency among victims of infringements to articles

101 and 102 TFEU to introduce claim damages before national courts. This development could have an impact in the future on arbitrability issues.

12. It is without any doubt possible to go before an arbitral tribunal to bring an action for compensatory damages, as long as this type of claims is covered by an arbitration agreement, according to the ordinary rules of arbitration.

However, it could be more difficult to bring claims for punitive damages. It is true that the European Commission gave up the idea to introduce such a rule at the European level, but a Member State could admit this type of damages in its national law. It is not sure that it could be subject to arbitration since in some other Member States, punitive or treble damages are deemed to be contrary to their conception of public policy.

It is interesting to observe, that, in the USA, the issue is exactly opposite. The legality of the waiver of treble damages is being discussed.

13. Another new issue is specific to damages actions following a cartel case. In such a situation, there are always a lot of defendants, and very often a lot of claimants. The plurality of parties doesn't fit to a classical arbitration. Here again, the situation in the USA is interesting since a new concept of class arbitration has been developed. In Europe, we have not yet generalised collective redress before national courts. Therefore, it is difficult to imagine class arbitration, but we will have to face this issue maybe in the future.

2. PUBLIC ORDER AND THE APPLICATION OF EU COMPETITION LAW BY THE ARBITRAL TRIBUNAL

14. Once it is admitted that it is possible to use arbitration in spite of competition law issues in the action, the arbitral tribunal will face both substantive (2.1) and procedural issues (2.2.).

2.1. Substantive issues

15. Everybody agrees on the fact that EU competition rules are mandatory. If articles 101 or/and 102 TFEU are clearly applicable because there are both some effects on the territory of the European Union and an effect on trade between Member States, the situation is different according to the type of arbitration.

If it is a domestic arbitration, there is no specific issue. EU rules are integral part of national law of each Member State and the arbitral tribunal

has no choice. It shall apply them. If we accept the idea according to which an arbitrator is in the same situation as a national judge, it can be asserted that there is a duty to apply articles 101 and 102 TFEU following article 3, paragraph 1 of regulation n.º 1/2003.

16. The situation is more complicate if the arbitration is of international nature. First, the arbitral tribunal has to determine the applicable law. It is bound by the choice of the parties, but failing any designation of the law by the parties, the solutions vary according to the national laws on arbitration. For instance, in French law, the arbitral tribunal is free to choose the applicable law, but, in Portuguese law, it shall apply the law of the State to which the subject matter of the dispute has the closest connection. However, it is not sure that the practical results will be so different. Furthermore, there is an agreement on the fact that the arbitral tribunal is not bound by international conventions or European regulations, such as the so-called regulations "Rome I" and "Rome II", but it may apply them since they express a kind of consensus.

17. At the end of the process, we face two main situations.

If the applicable law is the law of a Member State, the arbitral tribunal will apply EU competition rules as in domestic arbitrations. There is no specific issue. There are a lot of awards in which the arbitrators have applied without any reluctance article 101 TFEU in contractual matters.

However, if the applicable is the law of a non Member State, to determine whether there is, or not, a duty for the arbitrators to apply EU competition rules is more debated. Some practical considerations have to be taken into account. Of course, it will be easier to admit this application if the applicable law on the merits belongs to a European State, such as Switzerland, or if the arbitrators are European lawyers. Anyway, from a theoretical point of view, the result depends on the recognition by the arbitrators of the theory of mandatory rules ("lois de police"). At the European level, we only have the precedent of the *Ingmar* case of the Court of Justice in 2000, but in another context.

So far, it is more a procedural issue than a substantive one.

2.2. Procedural issues

18. A first issue is to determine whether the authorisation given to the arbitrators to decide *ex aequo et bono* has an impact on the application of EU competition rules. It depends on the law, which is applicable to arbitration. For instance, in French arbitration law, any arbitrator has a duty to apply

mandatory rules. The exemption to apply rules of law do not concern mandatory rules. On the contrary, in Swiss law, the exemption is general.

19. A second issue has a more important practical impact, even if, nowadays, it becomes less frequent due to the better knowledge of competition rules. If the two parties are silent on competition issues and applicability of articles 101 or/and 102 TFEU, shall the arbitral tribunal rise *ex officio* the issue of competition law and ask for the parties to exchange on this point?

It is clear that nothing prevents it to do so as long as there is a contradictory discussion on the competition issue and many European arbitrators follow this practice.

However, it is more difficult to determine whether there is a duty to rise *ex officio* the point. There is nothing new strictly speaking in competition law since the famous decision of the Court of Justice in the *Eco Swiss* case of 1999, which has been interpreted in some different ways. My personal view is that there is a duty to do so, which has been reinforced by the *Mostaza Claro* (2006) and *Asturcom* (2009) cases in consumer law cases. This point will be developed in the third part, since there is clear link with the crucial issue of the control of the award.

3. PUBLIC ORDER AND THE CONTROL OF THE AWARD

20. The issue of the control of the award is well known since the *EcoSwiss* case of the European Court of Justice of 1999, but it has been renewed since the French *Thalès* case of 2004, followed by many other national cases. There is a lot of literature on this topic with different views expressed. To be as clear as possible, a distinction can be made between all the issues which are linked to the existence of the control (3.1) and those which concern the reality of the control (3.2.).

3.1. Existence of the control

21. First point, the legal basis of the control based upon public order doesn't raise in itself any issue. In all texts, either international conventions, such as the New-York convention, or national arbitration laws, there are some provisions which enable a control of the award by State courts through recognition and enforcement procedures.

The concept of public order may intervene at two different levels of the control. First, it may be made though the control of the validity of the arbitration agreement. A good example was given in the past in the United

States by the famous Mitsubishi case in 1985, and there are again some discussions on arbitrability issues in the US case law. However, it's specific to the US system, and in Europe, this ground, which always exists (for instance, art. 56.1 b) i of Portuguese law; art. 1492.1.º and 1520.1.º French proc. civ. c.) is presently no more used in Europe for competition law. Second, the concept of public order may be used for the control of the award strictly speaking since, in all texts, the award shall not be contrary to the public order of the requested State (art. 46.3, b. ii), 54 and 56.1. b) ii of Portuguese law; art. 1492.5.º and 1520.5.º French proc.civ. c.).

22. Second point, it is more important to define the relevant criteria, in other words, to define what is "public order" at the stage of the control of the award.

In domestic arbitration, the solution is clear. "Public order" always corresponds to the conception of public order adopted by the controlling court. It's the national public order of the requested State.

However, for international arbitration, some national laws, such as French law, introduce a difference, and, instead referring to "public order", add "international" public order. In France, this precision was kept in 2011 in spite of the brilliant demonstration of Pierre Mayer who explained that it was not necessary. When a national court controls an award, in the field either of a domestic arbitration or of an international one, it is always the conception of public order of the requested State, which shall prevail. The concept of "international public order" has no sense for State court.

The Portuguese law adopts a slight different point of view when it refers to the "principles of international public policy" both for domestic arbitration and international arbitration. It is more coherent than French law since it assumes that there is no reason to introduce a distinction between the types of arbitration. It 's also more coherent since, in referring in all cases to "international public policy", it focuses on the fact that the conception of public order is lighter in the field of arbitration than in other matters.

23. The third point is to determine if there is, or not, a special status for a kind of third concept of "European Union public order". The problems are not the same before a Member State court and a non Member State court.

24. In the first situation, *EcoSwiss* remains the leading case. The Court of Justice had to determine whether, before a Member State court, the EU public order should be stricter than the national conception of public order. Here there are two readings of the decision of the Court of Justice. For

the so-called minimalist approach, the answer is negative. EU competition rules have exactly the same status as national competition rules. It's the consequence of the "principle of equivalence". I do not agree personally with this view. When it applies the so-called procedural autonomy principle and leaves the issue to the national procedural rules, the Court of Justice also introduces another limit, which is the "principle of effectivity". The application of procedural national rules shall not impede an effective application of EU rules, and it is clear that we need a uniform and efficient system in the field of competition.

In practice, we meet again the same two issues as in the second stage before the arbitrators. The first one has a procedural nature and is illustrated by the *Eco Swiss case*. In this case, the competition issue had not been discussed. The true problem was to determine whether or not the arbitral tribunal had a duty to raise it *ex officio*. My reading is that the Court gives a positive answer at the point 40 of the decision. The second issue has a substantive nature and is illustrated by the Dutch case *Marketing Displays* in 2005. In this affair, the applicable law to the licensing contract was a Non Member state law and the award, which had been adopted outside the EU, should be enforced within the EU. For the Dutch court, UE competition rules were applicable as mandatory rules.

25. Before a Non Member State court, the problem is quite different. The requested judge has to determine whether it may ignore EU public order, or not. In 2006, the Swiss Federal Supreme Court adopted a very controversial decision in the *Terra Armata* case. It ruled that the presumed violation of article 101 TFEU was not contrary to the Swiss conception of international public order. There are at least three reasons to criticize this view.

First, in 1992, in a previous case, the same court ruled exactly in the opposite way. Second, the result is quite shocking for a competition lawyer since there is an agreement worldwide on the need to have competition rules to control mainly horizontal agreements and hardcore cartels, such as public bid rigging, which was at stake. Furthermore, Swiss competition law is modelled on EU competition rules. Third, the solution is also strange for a specialist of arbitration and international private law. The applicable law was the Italian law. It 's difficult to understand why the court didn't take into consideration EU rules.

26. Although it is there, when we agree on the contents of the concept of "public order", still it is necessary to wonder about the reality of the control.

3.2. Reality of the control

27. It's still more difficult to determine what is a violation of EU public order. The comparative perspective is interesting and we have now a lot of case law in different Member States, such as France (*Thalès, Cytec and Linde cases*), Belgium (*Cytec case*), the Netherlands (*Marketing Displays case*), Germany, Italy (*Terra Armata*, case). Two general observations can be made.

It is clear that the method adopted by the court has an important impact. Even if everybody agrees on the fact that revision on the merits is excluded, there are clearly two groups of countries. In most of them, mainly the Netherlands, Germany, Belgium, Italy, the court exercises a true control on the award. On the other side, in France, the control is excessively limited to the "flagrant, effective, and concrete violation". In spite of some critics, the solution was still confirmed by the French *Cour de cassation* in June 2011 for EU rules, but outside the field of competition, in the *Société Smeg* case. In practice, with such a requirement, there is no control at all in French law.

Furthermore, these different views on the extent of the control made by the State court may lead to contradictory solutions. It happened in the famous *Cytec* case between Belgium and France at the first stage, but happily, after the review by the Court of Appeals in Belgium, the solutions were equivalent on the two sides of the border.

28. From a competition lawyer's perspective, the situation is not adequate, but the discussion cannot be summarized in an opposition between the so-called minimalist doctrine and maximalist doctrine, as it is often made following the analysis of *Luca Radicati di Brozzolo*. There is no general rule and some distinctions shall be made.

If the control of the award takes place within the EU, the true issue is to determine whether or not the competition issue has been discussed before the arbitral tribunal. If it has been duly discussed as in the Cytec case, it is clear that we shall avoid introducing a review on the merits. The award cannot be set aside without an obvious violation of EU competition rules. On the other side, if the competition law issue has not been debated before the arbitral tribunal, like in the *Thalès* and *Linde* cases in France, one shall consider that there is an obvious violation of public policy order. There is a duty for arbitrators to raise *ex officio* the competition issue.

On the other side, if the control of the award takes place outside the EU, the situation is different. The admission of the theory of mandatory rules is the only one, which may help to solve the problem. It may be admitted in the

relations with the countries, which share the same conception of competition rules, mainly EFTA Member States, Switzerland, candidates to the adhesion. It's much more difficult in the relations with the USA, because we have a completely different view, not of competition rules, but of international private law.

29. To finish, I would like to conclude on an optimistic view. It's true that there is a lot of theoretical discussion, but globally the system works. In more and more cases, EU competition issues are extensively discussed before arbitral tribunals and the awards are fairly executed without being necessary for the winner to go before a State court. If this conclusion did not remain true in the future, the firms shall remember that the Competition authorities may always intervene.

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