II. ECO SWISS vs BENETTON (C126/97)
14/10/2015 - Dr. Cristina Alexe


ABOVE READINGS USED AND CITED FOR TOPICS OF DISCUSSION:
I. REFERENCES TO THE CJEU FOR PRELIMINARY RULINGS

ARBITRAL TRIBUNALS

- Apply European law as part of national law (unless empowered to act *ex aequo et bono*)

- No opportunity or obligation to submit disputed questions to the CJEU for preliminary ruling (Art. 267 TFEU see text) – **ARBITRATION TRIBUNAL IS A PRIVATE FORUM NOT ATTACHED TO A NATIONAL LEGAL SYSTEM, IRRESPECTIVE OF THE SEAT OF ARBITRATION** - question if ”court or tribunal” (only if statutory and acting as a mandatory dispute settlement mechanism

*Vassen v. Beambtenfonds* –

Nordsee v Reederei Mond (preliminary ruling required), ECJ - arbitral tribunal could not be considered to be “a court or a tribunal of a Member State”, however, arbitral tribunals are not free to ignore EU law but be observed in its entirety throughout the territory of the Member States.

ARBITRAL TRIBUNALS INTERPRET THEMSELVES AND DECIDE APPLICATION OF EU LAW/CONTROL FROM STATE COURTS IN REVIEW/SETTING ASIDE/RECOGNITION AND ENFORCEMENT PROCEDURES.

The controlling Member State national court can submit relevant question for preliminary ruling – CJEU rules on matter in post-award stage.
- Trends /literature for supporting right of arbitral tribunals to be deemed as “a court or a tribunal of a Member State” and for parties to arbitration to be treated equally as those to litigation before Member State courts.

- **ECJ clarified matter** through *Eco Swiss v Benetton* (1999) and maintained that arbitral tribunals are not a ”court of tribunal”


- **Difficulties/Incompatibilities**: which arbitral tribunals? Only those with a seat in a Member State? Or with a party national of a Member State? Are arbitral tribunals considered as courts “against whose decision there is no judicial remedy” (generally no appeal against arbitral awards) Can preliminary rulings be misused to halt arbitration proceedings? Any referral destroys
confidentiality of arbitration?

- **Indirect Referrals allowed** if permitted by national arbitration laws - arbitral tribunal refers question of law to national courts performing supportive or supervisory role of arbitration - and such court in its turn submits it to the CJEU (i.e. English Law – Arbitration Act 1996- Determination of preliminary point of law)

- Respect parties’ option when choosing arbitration to opt out of the court system (including CJEU preliminary ruling) risk misinterpretation of EU law. Answer in setting aside/enforcement stage, if the case may be.

**NATIONAL COURTS**

- National courts performing supportive or supervisory role of arbitration in a Member State are ”court or tribunal”
APPLICATION OF EUROPEAN COMPETITION LAW/OTHER PROVISIONS OF EU LAW BY ARBITRATORS

- Competition Law infringements/EU Commission principal authority to enforce EU Competition law

- Questions: Arbitrability of disputes involving alleged EU competition law violation? Arbitral tribunal held to apply EU competition law ex officio? Arbitral award on matters of EU competition law censored in appeal/setting aside and enforcement stage, CJUE ruling in Eco Swiss v Benetton (1999)

- Eco Swiss v Benetton (1999) Benetton appeal against partial award of arbitral tribunal sitting in the Netherlands requesting annulment of award by alleging public policy violation by virtue of nullity of license agreement under EC Treaty art. 81 (never raised in arbitration stage)
ECJ ruling in Eco Swiss v Benetton (1999):

(a) Article 81 mandatory provision of public policy character whose misapplication requires annulment of award and refusal of enforcement under New York Convention;

(b) Irrespective if a certain Member State considers that violation of national competition law is not an infringement of public policy;

(c) Actions for annulment of arbitral award can only be brought within the time period prescribed by national law or else res judicata. Res judicata/legal certainty justifies limitations on possibility of control of arbitral award;

(d) Disputes on alleged infringement of Article 81 are arbitrable. Exclusive powers of the Commission do not exclude the arbitrability of the dispute.
Arbitrability of Competition Law Disputes - Distinction between public sanctions and private sanctions. Private sanctions arbitrable. Arbitral tribunals cannot grant individual exemptions under Article 81 (3).

If concurrent investigations by Commission of agreement relevant to arbitration Stay proceedings? Or proceed?

Arbitral tribunals should not seek advice from the Commission in relation to application of competition law (negation of authority and responsibility of the arbitral tribunal and breach of confidentiality)

Ex officio application of Competition Law by arbitral tribunals In Eco Swiss the respondent did not raise the issue of invalidity of the agreement, therefore arbitral tribunal would have made an ultra petita award if raising sua sponte breach of EU competition law.
- Arbitral tribunals cannot go **beyond the relief sought by the parties**. Excess of jurisdiction ground for challenge/setting aside in most jurisdictions and refuse enforcement under New York Convention (Article V (1)(c)).

- If facts point to violation of competition law and matter not raised by the parties, **arbitral tribunal is not precluded to point out the matter as public policy matter** (public policy not left to the disposition of the parties), otherwise arbitration used to undermine application of EU competition law. Due process/allow equal opportunity to present case.
II. ARBITRATION EXCEPTION. JUDICIAL COOPERATION WITHIN THE EUROPEAN UNION. REGULATION (EC) 44/2001 AND REGULATION (EC) 1215/2012

Validity of arbitration agreement/Anti-suit injunctions/Lis pendens/enforcement/judgments from courts assisting/supporting arbitration Marc Rich v Impianti and Van Uden v Deco Line

See also C. Alexe, C. Donțu „Propunerile de modificare a Regulamentului (CE) nr. 44/2001 în materia arbitrajului”, Revista Română de Arbitraj nr. 3/2012

- Article 1.2 (d) of the Brussels I Regulation, arbitration is explicitly excluded from the scope of the legislation; but (in broad terms) that exception was contradicted by a series of court decisions - particularly in relation to court proceedings connected with arbitration. See Marc Rich/ Van Uden

- Regulation (EC) 1215/2012 clarifies the scope of the arbitration exclusion. The new provision states that EU Member State courts have the right to refer parties to arbitration, stay or dismiss proceedings, or examine the validity of an arbitration agreement.
Moreover, an EU Member State court ruling on the validity of an arbitration agreement is not subject to the rules of recognition and enforcement of the Brussels I Regulation, regardless of whether arbitration is a principal or incidental question.

EU Member State courts may recognise and enforce arbitral awards under the New York Convention, which takes precedence over the Brussels I Regulation, even if the arbitral award conflicts with another EU Member State court judgment (for example, if the court ruled that the arbitration agreement was invalid).
Preamble (12) of Regulation (EC) 1215/2012

”(12) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.
On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court’s judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation.

This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (‘the 1958 New York Convention’), which takes precedence over this Regulation.
This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.” (emphasis added)
RECENT CASES: The preliminary ruling procedure initiated by the Regional Court of Dortmund (Germany) in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV et al (C352/13)* - discuss article on Kluwer Arbitration Blog
Unilever Italia vs Central Food (C-443/1998)

In its judgment of 26 September 2000, in case C-443/98, Unilever, the Court of Justice points out that whilst it is true that a Directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual, that case-law does not apply where non-compliance by a Member State with an article of the Directive, which constitutes a substantial procedural defect, renders a technical regulation inapplicable.

**A national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted in breach of the article in question of the Directive.**
