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Panel Discussion

MODERATOR: CARL NISSER

PARTICIPANTS: THE RT HON SIR DAVID EDWAD KCMG, DR. PHILLIP LANDOLT, DR. CHRISTOPH LIEBSCHER AND WILLIAM ROWLEY QC

Carl Nisser: Many interesting issues have been raised today. We will try to deal with some of them and to have an interactive debate. From my right we have William Rowley. You are so well known here that I do not need to introduce you. Sir David is certainly well known and respected, not only here in London, but in other places in Europe as well. Neither Dr. Landolt nor Dr. Liebscher need an introduction.

I have probably been chosen to moderate this panel discussion, given that I am neutral: I am Swedish and have been a competition lawyer since the 60's, partly because in the early days of the Common Market, many Swedish companies were brought in as prey to the Commission long before Sweden became a member of the European Union. In any event, in those days, the Swedes used some "astute" means of conducting business and some of them were punished quite severely.

I would like to invite my colleagues on the panel to say a few words of introduction on some subject that they would like to touch upon in the context of arbitrating competition law issues. Can I invite you to start, Bill?

William Rowley, QC: We have talked about two types of competition law arbitrations this afternoon. The first concerns disputes where competition law issues may arise, should arise, should have been raised or definitely do arise. The second is where arbitration is chosen as a dispute resolution mechanism to police / adjudicate issues arising out of a competition law remedy agreed with an enforcement agency. They give rise to three questions.

The first question I have asked myself is whether either of these types of arbitration calls for a competition law specialist to be on the panel or to be the chair? My conclusion is that in the former type, that is probably not a bad idea, and in the latter type not necessarily so. That is perhaps counterintuitive, and I will say a word about that later.

The second question concerns whether arbitral tribunals ought to be worried about addressing competition law issues because they involve a, so-called, special science. A second component of this question is whether arbitrators should raise competition law issues of their own volition?

My answer to both of these questions is no. Arbitrators who come across competition issues need not worry too much about not being specialists. And generally speaking, they ought not to raise competition law questions of your own volition.

Of course, there are rare exceptions, such as when the Tribunal is being asked, or being used as a tool to enforce a cartel.

My third question has to do with whether we need a special set of rules for dealing with the second type of arbitration, the competition remedy arbitration? The answer is maybe, but they shouldn't be too involved, and we've probably got to more or less where we should be with the European Commission's approach today.

A few further words on the first question. When do competition law issues, other than those associated with competition law remedies, come up in arbitration? When can they be foreseen? These can occur, especially in Europe, where one of the parties has a very strong market position and has commercial arrangements dealing with another party which imposes restrictions on the relationship. Other obvious cases are joint ventures and co-operation agreements that provide for arbitration. To be ready for issues / disputes which may arise from these relationships parties will likely be well served by the use of a standard arbitration clause, rather than seeking to craft a clause with competition law issues in mind.

Should you have a competition law specialist on the tribunal when issues arise? In some cases it may help, but you certainly won't know whether one is needed until a dispute has arisen. This means you should not provide for one right at the beginning, because you don't know whether a dispute is really going to give rise to a competition issue. Wait until the time of appointment. Make sure your lawyers and your general counsel understand whether competition issues are likely to be pertinent and if competition law comes up in the dispute, then deal with it when you are selecting the tribunal.

As to whether it is advisable to have competition law experts involved in the remedy cases, where arbitrators will need to resolve issues arising out of an agreed undertaking, I think largely not. This is because, counterintuitively, the issues to be dealt with in these cases are generally not competition-law-specific – they usually have to do with performance of a competition law remedy. Thus, the questions such tribunals will face will relate largely to whether somebody has granted a licence agreement? Have they met certain terms? Have they done what they agreed to do? This is the kind of thing good commercial arbitrators deal with every day of the week. They don't need to be competition law specialists, but they do need to be able to deal with fact-intensive matters.

Should arbitrators be worried about competition law issues arising in commercial arbitrations? The answer is no, and despite the early view based on *Eco-Swiss* that the courts will not hesitate to review awards based on error of competition law, the more recent case law suggests deference to tribunals of the normal sort. Judge Dominic Hascher, of the Paris Court of Appeal, said last year in the OGE MID discussions,¹ “[a]rbitrators should not be loath to tackle with [sic] competition law

¹ Judge Hascher made these comments in February 2005 as part of the on-line discussion within the Oil-Gas-Energy-Mining-Infrastructure Dispute Management website.

issues because of possible violations of public policy in their award". He went on to state that it was the long-standing policy of the Paris Court of Appeal (as one of the major judicial centres of arbitration) not to review the merits of the arbitrator's decision, including on competition law. I would suggest most courts would follow a similar line.

Do we need special rules when arbitrating competition remedy cases? Arguably yes, but what should they be?

I started with three and a half rules and I am up to four and a half because Johannes Lübking brought one to our attention earlier this afternoon, which I think might be a good thing. The first rule and a half has to do with cases where the agency is, in effect, the client which has insisted on an arbitration, because it doesn't want to be involved in post-remedy disputes. To the extent that the agency needs to be involved, within reason, it should be. So by all means let the agency have sight of the documents, let it file an *amicus* brief if necessary, but don't give it oversight of the award. Let it see the documents, waive the confidentiality that normally applies, but, for goodness sakes, don't agree to a term where the tribunal needs to consult the agency. That's senseless and it detracts from the tribunal's proper jurisdiction. That's rule one and a half. That *amicus* briefs should be permitted from the relevant agency, was my second rule but I have included in the first, making it one and a half.

My second rule concerns the shifting of onus when a claimant establishes a *prima facie* case. It can be a useful concept when the respondent may be expected to have control of most of the documentation which may be relevant to the dispute. If you have a situation where you have one of the parties (arguably in a dominant position or a merged entity) that has all the documents and if you want to avoid getting too deeply into lengthy documentation disclosures disputes, there may be some merit in seeking and agreeing to a reverse onus. In such a situation, if a *prima facie* case is made by the claimant, the burden shifts to the respondent to prove its defence.

My third rule involves the use of an institution to manage these types of cases. An institution adds great effectiveness to the process. I put in a plug for the LCIA because John Merritt, who was here representing the ICC, has left early. The LCIA will do things very quickly and give you a very effective arbitration, and institutional rules will add rigour to the process.

Finally, I think Johannes' suggestion that awards in these cases be made public, for transparency reasons has merit. If necessary, awards can be redacted to remove commercially sensitive material. This is because these cases are quasi-public policy, public purpose arbitrations and it makes sense to ensure the public can see that agreed competition remedies are being enforced.

Thank you.

Carl Nisser: Sir David do you have any specific issues that you would like to discuss?

The Rt Hon Sir David Edward, KCMG: I was going to mention four points. The first is simply to agree with Renato Nazzini about the meaning of *Eco Swiss*.² As to the first question, is competition law and is Article 81 EC a matter of public policy? Answer yes. And then if you actually look at the passage from *Eco Swiss* which was cited by Gordon Blanke in his presentation³, what the court said was that, where its domestic rules for procedure require a national court to grant an application for annulment of an arbitral award where such an arbitration or award is founded on a failure to observe national rules of public policy, then (and this is the ordinary rule of Community law) equivalence and effectiveness require that the same thing be done in the case of a breach of Community law. I don't see any difficulty about that, but it's important not to take *Eco Swiss* any further than it goes.

Secondly, the question was raised about exemption. Does an arbitrator have power to grant an exemption? My view, I may be wrong, is that the effect of Regulation 1/2003⁴ is that it's no longer a question of exemption. The question at the end of the day for the deciding judge or arbitrator is, has there been a breach of Article 81? And in order to determine whether there has been a breach of Article 81, one has to ask, first, does it fall within Article 81(1) and, second, does it satisfy the conditions of Article 81(3)? At the end of the day, it is not a question of granting an exemption, but of simply saying there is no breach because the conduct satisfies the conditions of Article 81(3).

My third point is a question. It seems to me that one of the points which we ought to consider, and it applies both to mediation and to arbitration, is the extent to which violation of competition rules has become a penal offence. There is a professional obligation on mediators and arbitrators not to allow themselves to become parties to an illegal result. One can see this most obviously in the case of mediation, because if two commercial parties want to achieve a settlement in the process of mediation, what's easier than for them to say "*well, you take the Italian market and I'll take the German market and we'll have a deal*". Now is a mediator entitled to say "*that's a good deal, yes, now we'll wrap up*"? And it seems to me that there are a number of questions about professional obligation and also personal responsibility including criminal responsibility in the involvement of mediators and arbitrators in competition law problems.

² Case C-126/97 – *Eco Swiss China Ltd and Benetton International NV*, Judgment of the European Court of Justice of 1 June 1999, [1999] ECR I-3055.

³ *Ibid*, at paras 39 and 37: "[...] [T]he provisions of Article 85 [now Article 81] of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention. [...] where its domestic rules for procedure require a national court to grant an application for annulment of an arbitration award where such an arbitration is founded on a failure to observe national rules of public policy, it must also grant such an application where it is founded on a failure to comply with the prohibition laid down in Article 85(1) EC [now Article 81(1) EC] [...]"

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1, 04.01.2003, pp 1–25 (the "Modernisation Regulation").

And, a further sub-question is, as regards professional responsibility, does it make a difference if the arbitrator or mediator is a member of a professional body which has rules of deontology, and is it better to have an arbitrator who isn't because he or she will not feel quite the same reticence? I don't know. But I think that these are questions that ought to be faced.

Finally, it seems to me that there is a more fundamental question about the procedure, which is now launched by the Commission. For the time being, there is no power for an arbitrator to refer to the Court of Justice under Article 234 EC. If there is no power to refer, and the Commission has the right to intervene or can be asked for a ruling, does that make the Commission effectively the final decision-maker on an issue of law which cannot be subject to judicial review? In other words if the arbitrator is bound, you now have a legal act of the Commission which apparently is not subject to review. So the question I would ask is, might it be subject to review under Article 230 EC as an act of the Commission which must be subject to review? The alternative point of view, which was discussed in one of the presentations is, *is it evidence?* Well that's a very common law attitude. The question *is it an attackable act?* would be a very French administrative law way of looking at the problem. But it does seem to me to be necessary at some point to ask some more detailed questions about whether we are talking about private law or public law, and the extent to which these two aspects of the law are intermingled. What is this, a purely private procedure, or is it a public law procedure? If the Commission is intervening in a decision-making fashion, then it seems to me to be a public law procedure, and one has to face the fact that it is no longer purely private arbitration *inter partes*.

Carl Nisser: Thank you very much, I have a question for you but would like to invite the other gentlemen to make some comments of their own first.

Dr. Phillip Landolt: Well, three or four points. The first one is, one of the major themes today, what does the European Union legal order expect of international arbitration? The Commission has maintained a determined silence on this, so we are really dealing with Hamlet without the Prince of Denmark. It is the Commission who are to be furnishing the answers to this, and there is really to date nothing said on it. In the White Paper on Modernisation nothing was said – not a word on arbitration. The Modernisation Regulation itself says nothing. The Green Paper on damages, as was mentioned today, does not breath a word as to the fact that damages awards for competition violations can be obtained through international arbitration.

Why is this question so important? Well, the answer to this question will ultimately determine what arbitrators can do, what courts will do with arbitration awards, specifics such as whether arbitrators need to raise competition laws and competition questions of their own motion.

There are indirect indications. For example, everybody knows that the whole motivation behind Modernisation is to relieve the Commission of the great bur-

den and expense of enforcing competition law itself. So private enforcement of EC competition law is sought to be enhanced, to bear part of that burden. We also know that disputes are very often taken out of the jurisdiction of Member State courts and put before arbitrators. This is, for example, especially the case in the oil and gas sectors, and we know that the Commission is particularly concerned about competition in EU energy markets. Commissioner Kroes has made public her concerns about the oil and gas markets, the infirmities, the distortions to competition, and, as Bill Rowley mentioned today, that there are more and more arbitrations in the oil and gas sectors. In almost all big disputes in these sectors, competition questions come before international arbitrators and not before courts such as those of EU Member States, which are the Commission's darling. So the Commission certainly will want to look into what is properly to be expected of international arbitration. These are some indirect indications that the Commission requires or will require at least something of international arbitration.

A second point I would like to raise is my concern about the ability of judges to review what international arbitrators do with competition law. As mentioned by Prof. Van Houtte today, on 8 March 2006, the Swiss Supreme Court rendered a judgement essentially saying that competition law is not made up of values the infringement of which could constitute violations of public policy. So no incompatibility with competition law of any type, even Swiss competition law, can lead to a Swiss annulment of an arbitration award, rendered in Switzerland as contrary to public policy, and it appears that Switzerland will not treat international awards contrary to competition law as public policy grounds to refuse enforcement under the New York Convention. That is very significant. It seems to me that the ability of Swiss judges to assess EC competition law problems is very limited. They are terrific judges, they are very aware of what is happening in Europe, but it must be said that European Union law is a particularly sophisticated system and competition law itself is very fact-driven. It is not really an open book, I mean the Commission's practice is not known up to date by everybody, and how are the judges in Mon Repos, outside of Lausanne, to deal with that. Switzerland is very much institutionally able to deal with EC competition law better than arbitrators. It is a relative thing is it not, with EC competition law, foreign competition law in general? Much would depend on the circumstances. If, for example, the arbitral tribunal had been presided over by Professor Richard Whish, judges of a court outside of the EU would wish to exercise particular deference. Perhaps, the answer is that the treatment of competition law, including foreign competition law, should be subject to public policy annulment, but the actual review in the particular case will properly vary, to take into account, among other things, who sat on the arbitral tribunal and the reviewing court's acquaintance with the public policy in question. Swiss competition law is modelled upon EC competition law...

It may also be that the emphasis should be placed elsewhere than with court review, that is, it should be with the arbitrators themselves. If competition law is to be seriously applied by international arbitrators for the greater benefit of arbitration,

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the long term benefit of arbitration, it is probably because arbitrators themselves deem that it is within their own scope of duties, their scope of reference, to apply competition law. I would like to suggest that the approach here should be modelled on that in Article 7 of the Rome Convention⁵ on the law applicable to contractual matters. This is, of course, essentially an EU instrument – no State but a Member State can join that convention and all EU Member States must. If there is a close connection between a contract and a State, a mandatory norm of that State may be “given effect”, which is broader than simply applying that norm. There is a discretion whether the close connection is present, and what effect is to be given.

Of course, the Rome Convention does not apply directly to arbitrators, it is inserted into the private international law of the EU Member States and it is, of course, trite law that arbitrators are not subject to the requirements of any private international law system, subject of course to party agreement.

So I would suggest that, because court review of the treatment of competition law in arbitration awards is so fraught with difficulty, one must really start with the arbitrators themselves. It is perhaps, as Marc Blessing says, a question of educating arbitrators about EC competition law, but it is also coming to a consensus about the basis upon which competition law is to apply. In England, of course, the approach to the application of mandatory norms which I have just outlined is very controversial. England has not accepted that part of the Rome Convention. It has applied a derogation. So have Germany, Ireland and Luxembourg, but I understand that England’s reason for derogating from that was that the test for a close connection was insufficiently definite, and not because there was any disagreement in principle.

Lastly, I would just like to say that, in terms of applying competition law in international arbitrations, one thing that is specific and different from other competition practice is that one is often looking backwards. So this is the case where it is good to be of some vintage, to have some experience of competition law in the past. In competition practice it is often the case that you are trying to assess the forward-looking consequences of an agreement. That is particularly and uniquely the case in mergers practice. But in arbitrating competition issues, what one often finds oneself doing is trying to reconstruct the situation say 15 years ago, when you know, a distributor was paying royalties and should not have because the basis for it entailed a violation of Article 81 EC, and wants to recover the money, the value of those royalties. One quite interesting question is, of course, what if an individual exemption had not been applied for. Should an arbitrator not simply make Article 81 (3) EC retroactively available to the party who could benefit by its application. On the other hand, one recalls perhaps vaguely today, that, in the past, block exemptions were treated very formally. So, what competition practitioners in Europe used to do was to take the text of the block exemption, match it up

⁵ EC Convention on the law applicable to contractual obligations, made in Rome on 19 June 1980 (OJ 1980 L 266/1 of 9 October 1980).

with the agreement, and if the wording corresponded, the agreement was within the block exemption, and if it did not, even to a very slight degree, unfortunately the block exemption could not avail. Now, is that what we today in an arbitration ought to be doing, or should we accept the benefit of the modernised view of EC competition law and simply apply modern principles and not that formalism? Competition practitioners would probably say that you have to look back and apply the law as it was when the facts of the case were unfolding. I suspect that the answer from some arbitration practitioners may be squarely the opposite. In brief, an arbitrator analysing the question on the analogy of Article 7 of the Rome Convention might deny that that formalism of a bygone age comprises a set of values worthy of giving effect to, and may prefer to apply, anachronistically, the modern economic approach to EC competition.

Dr. Christoph Liebscher: I would like to come back to the question: What will the state courts do when asked to decide on the challenge of an award? What will they do when confronted with competition law issues in this context? In a US-European comparison, their reaction is likely to depend not only on the applicable domestic arbitration law, but – to a considerable degree – also on the competition law system applicable in the respective court’s jurisdiction.

Take the example of remedy limitations. This pure US issue deals with the question to what extent limitations of remedies available to claimants in private enforcement actions before a court are valid in case such actions are referred to arbitration. Why does this issue seem to be a non-issue in Europe? The answer is simple: Public enforcement is the main enforcement route for competition law in Europe. Private enforcement of antitrust rules in Europe has practically no significance. This example indicates the importance of the “competition law world” to understand the issues that arise in the context of arbitration.

It is a widely accepted rule that competition law issues may only be addressed at the challenge stage within the public policy domain. Under this principle, the way legal rules were applied (or not) by the arbitral tribunal, cannot be reviewed by the state court. In this respect, arbitral tribunals have the same authority as the supreme courts in these countries. Is this statement shocking? Not at all, it does not imply that arbitral tribunals can do what they want. Supreme Court judges cannot be sanctioned if they get the law wrong. Still nobody doubts that they have the duty to apply the law properly. The same is true for arbitrators.

Where now is the border of the public policy territory? General statements that the borderline is drawn by the fundamental principles of a legal system are not of much practical assistance. They just clarify that not all mandatory rules, ie rules which parties cannot waive, pertain to public policy, but only a more limited group of legal rules.

What are the answers to this question in competition law? One clear recent European voice was raised by the Swiss Federal Supreme Court: Competition law is not part of Swiss public policy. This is in contrast to several decisions of US and European Courts, not least the ECJ in *Eco Swiss*, which confirmed the public pol-

icy character of competition law. However, the question remains: Is every single rule of competition law of fundamental importance for the respective legal system and – thus – may its application be reviewed by the state courts during challenge actions?

Is there a core group of competition law issues – competition public policy – and a second group of simple competition law rules? There is really no guidance on that. Some authors have attempted to draw such a distinction; as far as I can see, the courts have remained silent on this issue so far. Still, it may be useful to take a brief look at the “public policy attitude” in several European countries, namely Austria, England, France, Germany and Switzerland.

Starting with the host country of this conference, it is slightly surprising for the non-English lawyer that the first decision on a public policy challenge of an award under the Arbitration Act 1996 (*Soleimany v Soleimany*⁶) set aside the award because of a violation of Iranian export regulations. The fundamental principle is international comity. It could be argued that such a “foreign policy consideration” is a remnant of Britain’s former world policy. The other four jurisdictions would, in the end, refer to the legal principles applicable in their own legal system, although the term used may be “international public policy”. Switzerland is the most unwelcoming to integrating administrative rules with relatively short life spans, such as currency and market regulations, into the realm of public policy. Switzerland mainly refers to fundamental contractual principles as part of public policy, which have been known since the Romans. France, on the other hand, shows rather great reverence to such administrative rules. Finally, Austria and Germany greatly stress the public policy character of competition law in particular. Again, their recent past may well be one of the explanations for the strong symbolic character of this area of law to demonstrate democracy in the economic field.

Systematically, once the scope of public policy rules in competition law is established, the next question to be addressed is the scope of review. However, compared to their silence as regards the content of competition public policy, courts have rather eloquently spoken out on the scope of review. The picture which the five jurisdictions, Austria, England, France, Germany and Switzerland, present is quite varied. Most recently, France (in *Thalès*⁷) gave proof of rather considerable restraint in reviewing awards under competition law. The Court of Appeal confirmed that in antitrust disputes, the courts are not there to replace the actual judge of the merits, the arbitral tribunal. It would take a very exceptional case for the French courts to intervene. The principle of full review, of the law and the facts, is defended in particular by the German courts, the Austrian following. However, if one looks at the actual cases, the behaviour of the courts does not seem to be too far away from *Thalès* or, in the US, *Baxter*.⁸ The Swiss Federal Supreme Court

⁶ [1999] Q.B. 785 (C.A. 1998).

⁷ Cited supra.

⁸ Cited supra.

would also show great restraint in principle; however, as competition law is not part of Swiss public policy, the issue of the scope of review has no relevance in Switzerland. Finally, in England it is – in any case for the non-English lawyer – not obvious to understand the attitude of the courts, not least because of a lack of cases concerning competition law.

These few thoughts show that the notion of “public policy” is not devoid of parochial idiosyncrasies, which – in most cases – do not seem to be fundamental pillars of society in the end, but rather the result of a particular – historically determined – view of the world.

Carl Nisser: I thank you all very much. I would like to ask you a question, Sir David. Aren't we going to see a new trend of forum-shopping here? Incidentally, as lawyers in this country we have to conduct the Know-Your-Client procedure with respect to money-laundering before we act for a client and if we do not do that properly, the criminal sanctions can be very severe, indeed with up to 13 years imprisonment. Our rules are much stricter than in many of the other European countries. As you mentioned, and someone else mentioned earlier today also, should a mediator be helpful in negotiating an agreement between the parties, then he might be exposing himself to criminal sanctions in the UK, Ireland, France and a few other countries, but not in Sweden.

I would like to raise another issue that Johannes and one or two other speakers mentioned. There is the time pressure to come up with a solution, and arbitration is not known for being a very speedy way of resolving issues. Marc Blessing stressed that he wanted at least six months not one month. Could we not make the case that mediation would be a better way of moving forward, as a mediator could address the issues earlier and quicker, and then make sure that a mediated settlement is enforceable?

The Rt Hon Sir David Edward, KCMG: To answer the first question, I think there is certainly a danger of forum-shopping, and indeed both questions illustrate, I think, the fact that this scheme (it was rather the same with Regulation 1/2003⁹) has been launched by the Commission as a way of relieving itself of burdens, which one can perfectly well understand, because the Commission in this respect as in all other respects is underfunded and undermanned. But in adopting these solutions to disburden itself of problems, it is creating the problem somewhere else. In particular, it does seem to me that there are a (I raised some of them) number of unanswered questions, and just to respond to Phillip Landolt, I can foresee a situation in which the question is raised in an arbitration, was there a breach of Article 81, not now, but seven years ago when Regulation 1/2003¹⁰ was not in force and when the exemption had to be granted by the Commission if not covered by a block

⁹ Cited supra.

¹⁰ Cited supra.

exemption? I can perfectly well see that a party might say "*I'm not interested in whether you think article 81(3) applies now, the issue between me and my opponent is whether Article 81 applied then, and since there was no exemption, forget it, forget Article 81(3)*". And I don't think you can say, well I'm going to take a very modern view and start applying Article 81(3), because the issue between the parties may very well not include that.