Competition Law Hotline

October 30, 2015

SWEDISH SUPREME COURT UPHOLDS ARBITRABILITY OF COMPETITION LAW DISPUTES

- The Swedish Supreme Court rejected Systembolaget's request for a preliminary ruling from European Court of Justice with respect to an arbitral award on the ground that there was "*excessive application*" of competition law.
- Court upholds an arbitral award that ruled on claims of anti-competitive practices.
- There is a clear trend in favour of arbitrability of statutory rights as an efficient mechanism of resolving disputes rather than taking recourse to civil courts.

BACKGROUND

The Swedish Supreme Court ("**Supreme Court**") in its recent decision between Systembolaget AB ("**Systembolaget**") and Absolut Csompany AB (formerly V&S Vin & Sprit AB[1], ("**Absolut Company**") held that if an arbitral award does not violate competition law provisions, it will not be annulled on the ground of public policy. The Supreme Court rejected the challenge by Systembolaget and re-affirmed the Court of Appeal decision awarding damages to Absolut Company due to Systembolaget's abuse of dominant position in the Swedish purchasing market of alcoholic beverages. Even in developed jurisdictions such as Europe, this counts as among the few rulings that upholds arbitrability of competition law.[2]

FACTS

Systembolaget operated in the Swedish market and had allegedly acquired a monopoly in retail of liquor, wine and beer market. Systembolaget had partially terminated its contract with one of its suppliers, Absolut Company for breach of its obligations under the contract on the ground that certain employees of Absolut Company were prosecuted on charges of bribery. Absolut Company challenged the termination and invoked arbitration alleging that Systembolaget abused its dominant position and unilaterally imposed unreasonable and discriminatory conditions and invoked arbitration. The arbitral tribunal upheld the termination, however, directed Systembolaget to pay compensation for violation of competition law provisions ("**Award**").

Systembolaget challenged the Award before the Court of Appeal and requested for a preliminary ruling from European Court of Justice ("**ECJ**"). An important ground for challenge to the Award was that the Arbitral Tribunal did not have jurisdiction to examine issues relating to violation of competition law. The Court of Appeal rejected the challenge and request for preliminary ruling from ECJ and directed Systembolaget to compensate for litigation costs leading to the present appeal.

ISSUE

The Supreme Court dealt with the same issue as the Court of Appeal - whether the Arbitral Tribunal exceeded the limits set by competition law.

JUDGMENT

The Supreme Court examined the scope of the Swedish Arbitration Act (1999:116, "**Arbitration Act**") and the powers of the arbitral tribunal and concluded that an Arbitral Tribunal could examine issues relating to anti-competitive practices. In upholding the jurisdiction of the arbitral tribunal, the Supreme Court examined the provisions of the Arbitration Act, the Swedish Competition Act (2008:579, "**Competition Act**") and Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**").

The Supreme Court observed that an Arbitral Tribunal could not give a finding on competition law if Swedish law precluded determination of an issue by the tribunal. Further, it would also not be permissible for an Arbitral Tribunal to give a finding on an issue which would be contrary to the Competition Act. Therefore, it would be permissible for an Arbitral Tribunal to examine an issue relating to competition law and further a court examining such an issue would only review the reasonableness of the decision of the Arbitral Tribunal. The Supreme Court relied on the *Eco Swiss Case*[3] to reason that in respect of an issue where the provision of law was uncertain, an arbitral award on such an issue would be invalid only if the award lacked legal reasoning, or the conclusions were not reasonably grounded.

Having concluded that arbitrability of an issue relating to competition law was not *per se* contrary to the Arbitration Act[4], the Supreme Court examined Systembolaget's allegation on 'excessive application' of competition law[5] and maintainability of the request for preliminary ruling from ECJ.

The Supreme Court concluded that the Arbitral Tribunal's reasoning could not be said to be contrary to the provisions of Competition Act or competition law of European Union. Systembolaget's obligation under TFEU had to be given effect to and consequently it could not be said that the arbitral tribunal had excessively applied competition law in the Award. Consequently, the request for preliminary ruling from ECJ was rejected.

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ANALYSIS

With the rise in allegations of anti-competitive agreements, the need to protect private rights of parties assumes significance. Private enforcement of competition law is an established and efficient mode of enforcement in United States of America ("USA") and Europe. Action for damages due to anti-competitive behavior is also common in Europe and USA.

The ECJ in *Eco Swiss*[6] implicitly acknowledged the principle of arbitrability of competition law aspects and held that arbitrators could apply competition law rules of European Union. This principles was adopted in *ET Plus SA v Welter*[7], where claims alleging a breach of Articles 81 and 82 (Article 82 prohibits the abuse by an undertaking of a dominant position) were held to arbitrable if they fall within the scope of a contractual arbitration clause. In USA in the *Mitsubishi* judgment[8], it was held that as long as the litigant can effectively vindicate its statutory cause of action in the arbitral forum, arbitration shall be permitted. This principle was applied / upheld in *GKG Caribe Inc. v. Nokia-Mobira, Inc.*[9] and *Gemco Latino-america, Inc. v. Seiko Time Corp.*[10] where the older *American Safety* doctrine[11] was rejected and arbitration of domestic anti-trust issues was allowed. The Swiss Tribunal Fйdйral (Supreme Court of Switzerland) in the past has confirmed on the arbitrability of competition law issues.[12] The usage of arbitration as means to resolve competition law issues is permissible only if it is not prohibited by law and parties consent to the same. It is pertinent to note that application of competition law to Systembolaget is case specific as sale of alcohol is regulated in the Swedish markets and occupying dominant position is permissible but not on a generalised basis.

The concept of private enforcement of competition law has not made much headway in India. The question arises whether existence of Competition Commission of India ("**CCI**") curbing anti-competitive acts and protecting consumers, would prevent private parties from approaching the Courts and arbitral tribunals to seek reliefs. The Delhi High Court in *Union of India v. CCI*[13] dealt with the issue of maintainability of proceedings before CCI in case of existence of an arbitration agreement between the parties and held that scope of proceedings and focus of investigation and consideration before CCI was different from the scope of an enquiry before an arbitral tribunal. The court held that an arbitral tribunal would not have the mandate expertise nor the ability to conduct an investigation necessary to decide issues of abuse of dominant position by one of the parties to the contract. In view of the above, disputes on abuse of dominance were held non-arbitrable.

Interestingly, not just competition laws, courts in India have also held that allegations of oppression and mismanagement fall outside the purview of an arbitration agreement due to the nature and scope of arbitration proceeding. The powers of Company Law Board ("**CLB**") are plenary and expansive and it may refer disputes to arbitration if a petition for oppression and mismanagement is *mala fide* and issues addressed are within the realm of an arbitration agreement.

The Indian legal system is subsidized through tax payer funds and is time consuming. Arbitration reduces the burden on the Indian legal system. Resolving disputes relating to abuse of dominance and unfair trade practices in arbitration is efficient for parties and the Indian legal system. The Indian legal system should learn from developed jurisdictions that permit private enforcement of disputes relating to competition law claims and encourage resolving such disputes through arbitration. After all, long before the Indian Competition Act was enacted, the Indian Contract Act recognized the principle that unfair terms and unfair bargains would vitiate a contract.[14] With the recent progressive changes in the Arbitration and Conciliation Act, 1996 in India, we are hopeful that Indian jurisprudence on private enforcement of statutory rights shall develop soon.

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You can direct your queries or comments to the authors

[1] Case No. T - 5767-13.

[2] The Absolut Company wins Supreme Court dispute against Systembolaget, June 18, 2015, available at http://www.mannheimerswartling.se/en/news/news/the-absolut-company-wins-supreme-court-dispute-against-systembolaget/.

[3] Case No. C – 126/197, European Court of Justice.

[4] Supreme Court relied on Section 1, paragraph 3 of the Swedish Arbitration Act.

[5] Court adjudicating on issues of competition law beyond its jurisdiction

[6] ibid

[7] [2005] EWHC 2115 (Comm)

[8] Mitsubishi Motors Corp v. Soler Plymouth Inc. 473 U.S. 614 (1985)

[9] 725 F.Supp. 109, 110-113 (D.P.R. 1989)

[10] 671 F.Supp. 972, 979 (S.D.N.Y. 1987)

[11] American Safety Equipment v. J.P. Maguire & Co. 391 F. 2d 821, at 827 (2nd Cir., 1968).

[12] Tribunal Fйdйral Suisse, 13 Nov 1998. [1999] ASA Bull 529 and 455, where the Court stated:
'One cannot require the arbitrator to be aware of or systematically search for the mandatory rules of law (such as Art 85 EC for example) in each of the legislations showing signs of significant points of contact with the relationship in the dispute.'

[13] W.P. (C) 993 of 2012 & C.M. Nos. 2178-79 of 2012

[14] Sections 23 and 27 of the Contract Act, 1872 pertain to contracts being void if without lawful consideration or in restraint of trade and voidable if entered without free consent.

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