LICENSING (WATCHES): THE BENETTON CASE

Subject: Licensing
Arbitration
National law
Procedure

Industry: Watches and clocks
(Implications for most industries)

Parties: Eco Swiss China Time Ltd
Benetton International NV
Bulova Watch Company Inc

Source: Judgment of the Court of Justice of the European Communities in Case C-126197 *(Eco Swiss China Time Ltd v Benetton International NV)*, dated 1 June 1999

(Note. Essentially, this case is concerned with two points of law. The first is whether an arbitration award can be annulled on the grounds that it is contrary to public policy, where the public policy concerned is the enforcement of Article 81 of the EC Treaty, bearing in mind that under Dutch law an award is contrary to public policy only if it conflicts with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application. The Dutch Supreme Court referred the matter to the Court of Justice under Article 234 (formerly 177) of the EC Treaty for a preliminary ruling, asking whether the position was governed by the ruling given in Case C-430/93, Van Schijndel, from which it appeared that Article 81 was not a mandatory rule of such a fundamental nature. The Court of Justice distinguished the Van Schijndel case and held that Article 81 of the EC Treaty, read in conjunction with Article 3(1)(g), constituted a fundamental provision essential for the accomplishment of the tasks entrusted to the Community.

As to the second point of law, the question arose, whether the arbitration award could be challenged, even though the time limit for challenging it had passed, or whether it was in the nature of res judicata. Under national law in the Netherlands, application for annulment had to be made within a period of three months following the lodging of that award at the appropriate court registry. The Court of Justice took the view that this period was not unduly short and that the principle of legal certainty should prevail. Community law did not therefore require a national court from applying those procedural rules. If no application had been made for annulment within the prescribed time period, the award acquired the force of res judicata. Nor could it be called into question by a subsequent arbitration award, even if this was necessary to examine, in

proceedings for annulment of a subsequent arbitration award, whether an agreement which the earlier arbitration award had held to be valid in law was nevertheless void under Article 81 of the EC Treaty.

Two points are worth adding. One is that the Court offered a reminder that an arbitration tribunal constituted on the basis of agreement between the parties was not a "court or tribunal of a Member State" within the meaning of Article 234 of the EC Treaty. The other is that four Member States - the Netherlands, France, Italy and the United Kingdom, - thought the issues raised by what was in fact litigation between private parties sufficiently important to provide written observations to the Court; their costs were not recoverable.)

Judgment

1 By order of 21 March 1997, received at the Court on 27 March 1997, the Supreme Court of the Netherlands referred to the Court for a preliminary ruling under Article 234 EC (formerly Article 177) five questions on the interpretation of Article 81 EC (formerly Article 85).

2 Those questions have been raised in proceedings brought by Benetton International NV (Benetton) for stay of enforcement of an arbitration award ordering it to pay damages to Eco Swiss China Time Ltd (Eco Swiss) for breach of a licensing agreement concluded with the latter, on the ground that the award in question was contrary to public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure by virtue of the nullity of the licensing agreement under Article 81 EC (formerly Article 85).

[Paragraphs 3 to 8 refer to the provisions of Netherlands law on arbitration.]

The main proceedings

9 On 1 July 1986 Benetton, a company established in Amsterdam, concluded a licensing agreement for a period of eight years with Eco Swiss, established in Kowloon (Hong Kong), and Bulova Watch Company Inc (Bulova), established in Wood Side (New York). Under that agreement, Benetton granted Eco Swiss the right to manufacture watches and clocks bearing the words "Benetton by Bulova", which could then be sold by Eco Swiss and Bulova.

10 Article 26A of the licensing agreement provides that all disputes or differences arising between the parties are to be settled by arbitration in conformity with the rules of the Netherlands Institute of Arbitrators and that the arbitrators appointed are to apply Netherlands law.

11 By letter of 24 June 1991, Benetton gave notice of termination of the agreement with effect from 24 September 1991, three years before the end of

the period originally provided for. Arbitration proceedings were instituted between Benetton, Eco Swiss and Bulova in relation to the termination of the agreement.

12 In their award of 4 February 1993, entitled Partial Final Award (the PFA), lodged at the registry of the District Court of 's-Gravenhage on the same date, the arbitrators directed *inter alia* that Benetton should compensate Eco Swiss and Bulova for the damage which they had suffered as a result of Benetton's termination of the licensing agreement.

13 When the parties failed to come to agreement on the quantum of damages to be paid by Benetton to Eco Swiss and Bulova, the arbitrators on 23 June 1995 made an award entitled Final Arbitral Award (the FAA), which was lodged at the registry of the District Court on 26 June 1995, ordering Benetton to pay US $23,750,000 to Eco Swiss and US $2,800,000 to Bulova by way of compensation for the damage suffered by them. By order of the President of the District Court of 17 July 1995, leave was given to enforce the FAA.

14 On 14 July 1995, Benetton applied to the District Court for annulment of the PFA and the FAA on the ground, inter alia, that those arbitration awards were contrary to public policy by virtue of the nullity of the licensing agreement under Article 81 EC (formerly Article 85), although during the arbitration proceedings neither the parties nor the arbitrators had raised the point that the licensing agreement might be contrary to that provision.

15 The District Court dismissed that application by decision of 2 October 1996, whereupon Benetton appealed to the Regional Court of Appeal of 's-Gravenhage, before which the case is pending.

16 By application lodged at the registry of the District Court on 24 July 1995 Benetton also requested that court to stay enforcement of the FAA and, in the alternative, to order Eco Swiss to provide security.

17 By order of 19 September 1995 the District Court allowed only the alternative claim.

18 Benetton lodged an appeal against that decision. By order of 28 March 1996 the Regional Court of Appeal essentially allowed the primary claim.

19 The Court of Appeal took the view that Article 81 EC (formerly Article 85) was a provision of public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure, infringement of which might result in annulment of an arbitration award.

20 However, the Court of Appeal considered that, in the proceedings before it for stay of enforcement, it was unable to examine whether a partial final

award such as the PFA was in conformity with Article 1065(1)(e) of the Code of Civil Procedure, since Benetton had not lodged an application for annulment within three months after the lodging of that award at the registry of the District Court, as required by Article 1064(3) of the Code of Civil Procedure.

21 Nevertheless, the Court of Appeal took the view that it was able to examine the FAA in relation to Article 1065(1)(e), particularly as regards the effect of Article 81(1) and (2) EC (formerly Article 85(1) and (2)) on the assessment of damage, since to award compensation for damage flowing from the wrongful termination of the licensing agreement would amount to enforcing that agreement, whereas it was, at least in part, void under Article 81(1) and (2) EC (formerly Article 85(1) and (2)). The agreement in question enabled the parties to operate a market-sharing arrangement, since Eco Swiss could no longer sell watches and clocks in Italy and Bulova could no longer do so in the other countries which were then Member States of the Community. As Benetton and Eco Swiss acknowledge, the licensing agreement was not notified to the Commission and is not covered by a block exemption.

22 The Court of Appeal considered that, in the procedure for annulment, the FAA could be held to be contrary to public policy, and therefore decided to grant the application for a stay in so far as it related to the FAA.

23 Eco Swiss appealed to the Supreme Court against the decision of the Court of Appeal and Benetton lodged a cross-appeal.

24 The Supreme Court observes that an arbitration award is contrary to public policy within the meaning of Article 1065(1)(e) of the Code of Civil Procedure only if its terms or enforcement conflict with a mandatory rule so fundamental that no restrictions of a procedural nature should prevent its application. It states that, in Netherlands law, the mere fact that, because of the terms or enforcement of an arbitration award, a prohibition laid down in competition law is not applied is not generally regarded as being contrary to public policy.

25 However, referring to the judgment in Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF*, the Supreme Court wonders whether the position is the same where, as in the case now before it, the provision in question is a rule of Community law. The Supreme Court infers from that judgment that Article 81 EC (formerly Article 85) is not to be regarded as a mandatory rule which is so fundamental that no restrictions of a procedural nature should prevent it from being observed.

26 Moreover, since it is not disputed that the question whether the licensing agreement might be void under Article 81 EC (formerly Article 85) was not raised in the course of the arbitration proceedings, the Supreme Court considers that the arbitrators would have gone beyond the ambit of the dispute

if they had inquired into and ruled on that question. In such a case, their award would have been open to annulment pursuant to Article 1065(1)(c) of the Code of Civil Procedure, because they would have failed to comply with their terms of reference. Furthermore, according to the Supreme Court, the parties themselves could not have raised the question of the possible nullity of the licensing agreement for the first time in the context of the proceedings for annulment.

27 The Supreme Court states that such rules of procedure are justified by the general interest in having an effectively functioning arbitration procedure and that they are no less favourable to application of rules of Community law than to application of rules of national law.

28 However, the Supreme Court is uncertain whether the principles laid down by the Court in *Van Schijndel and Van Veen*, cited above, also apply to arbitrators, particularly since, according to the judgment in Case 102/81 *Nordsee v Reederei Mond*, an arbitration tribunal constituted pursuant to an agreement under private law, without State intervention, is not to be regarded as a court or tribunal for the purposes of Article 234 EC (formerly Article 177) and cannot therefore make references for a preliminary ruling under that article.

29 The Supreme Court explains that, under Netherlands procedural law, where arbitrators have settled part of a dispute by an interim award which is in the nature of a final award, that award has the force of *res judicata* and, if annulment of that interim award has not been sought in proper time, the possibility of applying for annulment of a subsequent arbitration award proceeding upon the interim award is restricted by the principle of *res judicata*. However, the Supreme Court is uncertain whether Community law precludes the Court of Appeal from applying such a procedural rule where, as in the present case, the subsequent arbitration award, the annulment of which has been applied for in proper time, proceeds upon an earlier arbitration award.

30 In those circumstances, the Supreme Court of the Netherlands decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

"(1) To what extent is the ruling of the Court of Justice in Joined Cases C-430/93 and C-431/93, *Van Schijn del and Van Veen v SPF*, applicable by analogy it in a dispute concerning a private law agreement brought before arbitrators and not before the national courts, the parties make no reference to Article 85 of the EC Treaty and, according to the rules of national procedural law applicable to them, the arbitrators are not at liberty to apply those provisions of their own motion ?

(2) If the court considers that an arbitration award is in fact contrary to Article 85 of the EC Treaty, must it, on that ground and notwithstanding the rules

of Netherlands procedural law [according to which a party may claim annulment of an arbitration award only on a limited number of grounds, one ground being that an award is contrary to public policy, which generally does not cover the mere fact that through the terms or enforcement of an arbitration award no effect is given to a prohibition laid down by competition law], allow a claim for annulment of that award if the claim otherwise complies with statutory requirements ?

(3) Notwithstanding the rules of Netherlands procedural law [according to which arbitrators must not go outside the ambit of disputes and must keep to their terms of reference], is the court also required to allow such a claim if the question of the applicability of Article 85 of the EC Treaty remained outside the ambit of the dispute in the arbitration proceedings and the arbitrators therefore made no determination in that regard ?

(4) Does Community law require the rules of Netherlands procedural law set out in paragraph 5.3 above [according to which an interim arbitration award that is in the nature of a final award acquires the force of *res judicata* and is open to appeal only within a period of three months following lodgement of the award at the registry of the District Court] to be disapplied if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which an interim arbitration award having the force of *res judicata* has held to be valid may nevertheless be void because it conflicts with Article 85 of the EC Treaty ?

(5) Or, in a case such as that described in Question 4, is it necessary to refrain from applying the rule that, in so far as an interim arbitration award is in the nature of a final award, annulment of that award may not be sought simultaneously with that of the subsequent arbitration award ?"

The second question

31 By its second question, which is best examined first, the referring court is asking essentially whether a national court to which application is made for annulment of an arbitration award must grant such an application where, in its view, that award is in fact contrary to Article 81 BC (formerly Article 85) although, under domestic procedural rules, it may grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which, according to the applicable national law, is not generally to be invoked on the sole ground that, because of the terms or the enforcement of an arbitration award, effect will not be given to a prohibition laid down by domestic competition law.

32 It is to be noted, first of all, that, where questions of Community law are raised in an arbitration resorted to by agreement, the ordinary courts may have to examine those questions, in particular during review of the arbitration award,

which may be more or less extensive depending on the circumstances and which they are obliged to carry out in the event of an appeal, for setting aside, for leave to enforce an award or upon any other form of action or review available under the relevant national legislation *(Nordsee,* cited above, paragraph 14).

33 In paragraph 15 of the judgment in *Nordsee,* the Court went on to explain that it is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 234 EC (formerly Article 177) in order to obtain an interpretation or assessment of the validity of provisions of Community law which they may need to apply when reviewing an arbitration award.

34 In this regard, the Court had held, in paragraphs 10 to 12 of that judgment, that an arbitration tribunal constituted pursuant to an agreement between the parties is not a "court or tribunal of a Member State" within the meaning of Article 234 EC (formerly Article 177), since the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator.

35 Next, it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.

36 However, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(l)(g) EC), Article 81 EC (formerly Article 85) constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 81(2) EC (formerly Article 85(2)), that any agreements or decisions prohibited pursuant to that article are to be automatically void.

37 It follows that, where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC (formerly Article 85(1))

38 That conclusion is not affected by the fact that the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member States, provides that recognition and enforcement of an arbitration award may be refused only on

certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Article V(1)(c) and (e) and II(b) of the New York Convention).

39 For the reasons stated in paragraph 36 above, the provisions of Article 81 EC (formerly Article 85) may be regarded as a matter of public policy within the meaning of the New York Convention.

40 Lastly, it should be recalled that, as explained in paragraph 34 above, arbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law. However, it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied (Case C-88/91 *Federconsorzi*, paragraph 7). It follows that, in the circumstances of the present case, unlike *Van Schijndel and Van Veen*, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 81(1) EC (formerly Article 85(1)) should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.

41 The answer to be given to the second question must therefore be that a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC (formerly Article 85), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

The first and third questions

42 In view of the reply given to the second question, there is no need to answer the first and third questions.

The fourth and fifth questions

43 By its fourth and fifth questions, which can be examined together, the referring court is asking essentially whether Community law requires a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be

called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of the subsequent award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (formerly Article 85).

44 According to the relevant domestic rules of procedure, application for annulment of an interim arbitration award which is in the nature of a final award may be made within a period of three months following the lodging of that award at the registry of the court having jurisdiction in the matter.

45 Such a period, which does not seem excessively short compared with those prescribed in the legal systems of the other Member States, does not render excessively difficult or virtually impossible the exercise of rights conferred by Community law.

46 Moreover, domestic procedural rules which, upon the expiry of that period, restrict the possibility of applying for annulment of a subsequent arbitration award proceeding upon an interim arbitration award which is in the nature of a final award, because it has become *res judicata,* are justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of *res judicata,* which is an expression of that principle.

47 In those circumstances, Community law does not require a national court to refrain from applying such rules, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (ex Article 85).

48 The answer to be given to the fourth and fifth questions must therefore be that Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (formerly Article 85).

Costs

49 The costs incurred by the Netherlands, French, Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the

national court, the decision on costs is a matter for that court.

Court's Ruling

The Court hereby rules:

1 A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC (formerly Article 85), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

2 Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (formerly Article 85). □

The "relevant market" may be world-wide

In a pertinent passage in its XXVIIIth Report on Competition Policy, the Commission gives us a salutary reminder that, as the globalisation of markets progresses, competition analysis is increasingly carried out on markets which are not confined to Europe. It takes account of the geographical market and, in doing so, may examine the competitive situation in geographical areas outside the relevant market when analysing potential competition. It is largely as a result of merger controls that the Commission has tended to identify world markets, as it did in twenty cases in 1998. In the *Boeing / MacDonnell Douglas* case, the Commission considered that the market for large commercial jet aircraft was a world market. In the *Gencor / Lonrho* and *AngloAmerican Corporation / Lonrho* cases, the Commission recognised the existence of world markets in platinum and rhodium. In the *Saint Gobin / Wacker-Chemie / NOM* case, relating to silicon carbide, the Commission looked at potential competition from companies based in China and in eastern Europe. Some sectors by their very nature involve European and non-European activities. This is particularly true of transatlantic shipping lines (the *TACA* case being an example) and international telecommunications (as in the *Atlas / Global One* case). These considerations underline the need to intensify plans for international cooperation on competition policies.