



The Case for Supranational Arbitration –
Ideas and Prospects

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A European and a US Perspective"

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1. Introduction

- **EC remedy-related arbitrations:**
[...] the Commission has lately in some instances embraced arbitration as a credible procedural remedy in competition matters, either by accepting a commitment by undertakings to submit to independent arbitration a certain dispute with their competitors, or by directly imposing on them a similar condition or obligation to that effect. Recourse to arbitration on the one hand, appeases the objections of the Commission by providing for a procedural framework [] in which to offer substantive remedies to competitors or other concerned persons worthy of protection, while on the other hand, because of its confidentiality and informality, it is accepted more willingly by the companies that are interested in getting their business arrangement through in a time-efficient way. In those cases, the addressees of those decisions are under a duty to have recourse to arbitration if the party designed to be protected comes forward with an arbitration request, otherwise the benefit that the former accrue might be withdrawn by the Commission. This has been followed in Article 81(3) exemption decisions, and more often in merger decisions declaring a concentration to be compatible with the common market subject to some conditions or obligations, one of which is recourse to arbitration for certain competition-related disputes.
(A. P. Komninos, "Arbitration and the Modernisation of European Competition Law Enforcement", 24(2) World Competition (2001), pp. 211-36, at p. 217)



1. Introduction (cont'd)

- Are EC remedy-related arbitrations arbitration at all?
➢ "arbitration *sui generis*"?
➢ "arbitrage régional" ?
➢ a "new era" / "ère nouvelle" of arbitration?
- **Thesis:** "EC remedy-related arbitrations constitute a novel type of arbitration, namely **supranational arbitration**, giving rise at the same time to the nascence of the supranational arbitrator."



2. The Main Issue – The Public/Private Divide, Party Autonomy and Enforceability

- Inherent antagonism between:
 - widely-recognised private nature of arbitral proceedings and their in-built mechanism of party autonomy on the one hand and
 - Commission's public mandate as Community public prosecutor in EC competition law proceedings on the other
- Negative impact on enforceability of EC remedy-related arbitral awards?



2. The Main Issue (I) – The Public/Private Divide

- **Arbitration:**
 - "The international arbitrator is a private judge rendering an award, which is a private judgment."
 - recognised as "an institution dedicated to the administration of justice in its own right"
 - almost universal enforceability of arbitral awards under NYC
- **EC competition law proceedings:**
 - public administrative proceedings
 - EC Commission to act in defence of Community public interest
- **Supranational arbitrator** to co-operate with Commission to ensure enforceability of the award in light of:
 - supranational nature of the Community legal order
 - NYC



2. The Main Issue (II) – The Party Autonomy Rule

- "The principal characteristic of arbitration is that it is chosen by the parties. However fulsome or simple the arbitration agreement, the parties have ultimate control of *their* dispute resolution system. Party autonomy is the ultimate power determining the form, structure, system and other details of the arbitration."

(J. D. M. Lew, L. A. Mistelis and S. M. Kröll, *Comparative International Commercial Arbitration*, The Hague/London/New York, Kluwer Law International, 2003, at p. 4)

- Compromised in EC remedy-related arbitrations to the extent of the Commission's involvement as *amicus curiae*
- But arguable that:
 - arbitrating parties have agreed to Commission's involvement (i) as part of the original Arbitration Commitment and (ii) in light of their "legitimate expectations"
 - conscientious arbitrator committed to rendering an enforceable award



2. The Main Issue (III) – Enforceability under the NYC

- The ECJ's ruling in **Case C-126/97 Eco Swiss**:
 - “[...] [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] [...]”
 - Allows Member State court to grant application for annulment of award that infringes EC competition law provisions
- As member of a “Community court”, national judge compelled to give precedence to Community law over conflicting non-Community measures



3. The Foundations of Supranational Arbitration

- **Ideational origin in:**
 - the historical mandate of the European Union
 - the constitutional set-up of the Community legal order, which is “*sui generis* – of its own kind, peculiar and unique in the world”
- “**Supranationality** was Jean Monnet’s slogan for effectuating [European] integration.”
(A. von Bogdandy, “Constitutional Principles” in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (Oxford, Hart Publishing, 2006), at p. 40)
- The nuances of the **meaning of “supranational”** within the Community context



3.1 The meaning of “supranational” (I): The historical mandate of the European Union

- Creation and maintenance of **peaceful relations** between the Member States through the creation of supranational institutions
- **Objectives of the Community** pursuant to Article 2 of the EEC Treaty:
“by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.”
- **Competition law provisions** of the EC Treaty to be understood as instrumental in achieving these objectives



3.2 The meaning of "supranational" (II): The European Community public interest

- "The promotion of effective competition in the Community can be regarded as a major EC policy goal, which is related to economic considerations. The objective is to enhance efficiency, in the sense of maximising consumer welfare and achieving the optimal allocation of human resources."

(D. Hildebrand, *The Role of Economic Analysis in the EC Competition Rules: The European School* (The Hague, Kluwer Law International, 2002, 2nd edition), at p. 14)

- "[...] EC competition law has been ordained chiefly to protect the public interest."

(P. Landolt, *Modernised EC Competition Law in International Arbitration* (Kluwer Law International, 2006), at para. 2-10)

- Commission mandated to protect the public European economic good
- "To ignore this objective of the Community's competition policy in the making of arbitral awards would not only expose such awards to a heightened risk of unenforceability before the Member State courts, but also constitute a plain affront to the very essence of the project of European integration itself."



3.3 The meaning of "supranational" (III): The constitutional set-up of the Community legal order

- "[T]he term '**supranationalism**' fits the sui generis nature of the European Communities perfectly."

(K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union* (London, Sweet & Maxwell, 2005), at para. 1-013)

- **Supranational characteristics** of Community legal order

- independent Community institutions and independent decision-making, including the European Commission:
 - supranational arbitrator is "**a regulatory extension of the Commission**"
 - "the duty owed to the Parties and the EU Commission to determine whether or not the commitments have been honoured. For this task, the arbitrator has to carry out a regulatory function. He serves as the prolonged arm of the Commission and, to some extent, has to 'wear the eye-glasses' of the [C]ommissioner."

(M. Blessing, *Arbitrating Antitrust and Merger Control Issues* (Helbing & Lichtenhahn, Swiss Commercial Law Series, 2003), at p. 172)



3.3 The meaning of "supranational" (III): The constitutional set-up of the Community legal order (cont'd)

- implementation and supervision of decisions on the basis of Articles 10 and 211 of the EC Treaty:
 - European Commission as "**guardian of the Treaties**" under Article 211 EC
 - duty of **loyal co-operation** under Article 10 EC, binding in particular the Member State courts for matters within their jurisdiction
 - Member State courts bound to give effect to Community law over and above conflicting arbitral awards
 - supranational arbitrator to take heed accordingly
- Separate and autonomous legal order:
 - doctrine of **direct effect**
 - doctrine of **supremacy** of Community law
 - Member State courts bound to give effect to Community law over and above conflicting arbitral awards
 - supranational arbitrator to take heed accordingly



4. The Unique Features of Supranational Arbitration and the Supranational Arbitrator

- High level of technicality of the proceedings
- Request of interpretation and information to the Commission
- Binding interpretations by the Commission
- The Commission's role as *amicus curiae*
 - acting upon request for information and interpretation
 - making submissions of its own motion
 - acting as fact or expert witness before the tribunal
- General reporting requirement to the Commission
- Finality of the award



5. Conclusion

- "the transformation of international arbitration and the emergence of the supranational arbitrator"
- Exact parameters of rights and duties of supranational arbitrator not yet sufficiently tested
- "The defining difference between traditional international commercial arbitration and supranational arbitration is arguably the degree to which the protection of the Community public interest requires the supranational arbitrator to compromise the sacrosanct party autonomy rule as well as the strict precepts of privacy and confidentiality reified by the international commercial arbitrator."
- "Supranational arbitration with its unique trade-off between the traditional precepts of international commercial arbitration and the pre-requisites of EC antitrust/merger control and the Community public interest is bound to mark the way forward for efficient alternative dispute resolution in the interest of the protection of workable competition within the European Union."


