Report by Marc Blessing (Zürich), for the British Institute of International and Comparative Law, 12 June 2006

Arbitrating Competition Law Issues

Structure of the Presentation

Part I: Basic Issues
Part II: Some Particular Topics
Part III: New Perspectives Presently Discussed
Part IV: The Specific Trouble with Art 81 (3)
Part V: The Specific Trouble with Art 82 EC
Part VI: Merger-Related Arbitrations
Part VII: Critical Review of MC-Decisions
Part VIII: An Arbitration sui generis
Part IX: The Model Arbitration Commitment

Part I: Basic Issues
Where do we stand .... ?

- **Public enforcement**: Investigation by the Competition authorities; the goal is deterrence, by the threat of sanctions.
- **Private enforcement**: Dispute resolution by State courts and arbitral tribunals; the goal is the pursuit of corrective justice through civil law remedies, compensation/damages.
- Private enforcement is now on top of the agenda of the European Commission.
- Significant interest of the EU Commission to see more private enforcement through court proceedings and arbitration.

The Commission’s Green Paper of 19 Dec 2005

  - Extensive comments submitted by the IBA Working Group in May/June 2006.
- However: the Green Paper makes no reference whatsoever to arbitration.
- Emil Paulis explained that he could not deal with both: court litigation and arbitration; indicated that the Commission intends to focus on arbitration subsequently.
  - In my view, the Commission is betting on the wrong horse.
  - Because 90 plus percent of all international contracts provide for arbitration, not court litigation.

Reflection on Enhancing Private Enforcement

- In Europe, private enforcement through national courts and arbitral tribunals is rather under-developed.
  - Only few successful damage judgments by national courts.
  - And only a few arbitrations have really produced a relief for antitrust injury.
- Hence, there is much reflection on how to improve the situation:
  - 2 aspects: Procedural and substantive.
  - **Procedural**:
    - Main difficulty: the arbitral tribunal lacks the investigative tools and powers; moreover:
      - Difficult access to relevant market information
      - Difficult burden of proof: should the threshold be lowered?
      - Should a preponderance of evidence be a sufficient standard, and a reasonable estimate of damage suffered?
        - Or even reversing the burden of proof, as the Commission did in many merger-related cases?
      - Availability of class action (but for class actions, the smallish businesses have no chance).
Reflections ... cont

- On the substantive level:
  - Should there be a double damage ticket (as was suggested for increasing the incentive and the sanction), at least in case of hard core infringements (horizontal agreements)?
  - Passing-on should no longer be a defence
    - There is very much debate on this issue!
    - See also the Ashurst Report, p.78; issue whether the Hanover Shoe/United Shoe Machinery – rule should be followed (leading US case); see also Illinois Brick v/ Illinois
  - Disgorgement of illegitimate profits: availability under national laws?
  - Unification of national laws regarding damages will be important, for avoiding forum shopping.

Some Reasons Why Private Enforcement is Important

- Administrative proceedings at best provide "income" to the Competition Authority by way of fines
- But they do not solve the contractual or civil law aspects as between the parties
- Hence, private law remedies are crucially important and are only available
  - through arbitral proceedings,
  - or through litigation.

Some Reasons Why Private Enforcement is Difficult for the Parties

- Low incentive for raising an antitrust claim:
  - In contrast to the USA: no perspective or "hope" to recover 3x the antitrust injury, hence: little incentive to denounce anticompetitive behaviour and the raising of a claim
  - From the perspective of the infringer: very little deterrence, because the risk to end up paying damages is relatively low
  - Hence the present discussion in Europe, whether the damage should at least be doubled
- Limited tools regarding evidence: no pre-trial discovery
  - Many cases "die", because the claiming party does not get access to documents; prompts the question regarding reversal of the b.o.p.
- Availability of the passing-on defence (in contrast to the US)
  - There is a lot of discussion on this truly crucial aspect ongoing in Europe
- No class-action (collective action; representative action) available: the smallish distributor or customer suffering antitrust injury can never risk a lawsuit against the supplier; he would risk his own bankruptcy
  - The possibility of forming a class action would be truly indispensable (see below)
Some Reasons Why Private Enforcement is Difficult for the State Court

- Extremely little experience of State court judges
- Should there be specialized courts?
- Training programme for judges is available, sponsored by the European Commission
  - The training programmes are popular with judges; yet: the individual judge probably has at best a 1% chance to ever get a case, whatever his residual life-expectation may be!
- Extensive evidence gathering: this is not the best-loved "hobby" of State courts!
- Significant involvements of economists is in most cases necessary
  - However, State court procedures are normally ineffective an highly unsatisfactory for such purpose
- Procedures take an incalculable amount of time or years
- One or two appeals are possible, and reference to the ECJ (which will absorb another one or two years)
- Unless many improvements are installed, State court procedures are an almost "hopeless" option

Some Reasons Why Private Enforcement is Difficult for Arbitral Tribunals

- Paucity of truly experienced arbitrators, experienced in antitrust matters
- Procedural difficulties:
  - access to market data
  - burden of proof
- Substantive difficulties:
  - There is almost in all cases a heavy agenda of economic issues on markets, market share, regression models, damage models
- Difficult evaluation of efficiencies; see the Part on Article 81 EC
- Difficult analysis of what constitutes an "abuse" under Article 82 EC; see the Part on Article 82 EC

Part II: Some Particular Topics
Discussions Within the ICC TF on the Following Topics:

1. Most importantly: The institutional contribution and role of the ICC
   - Training programmes for arbitrators (PIDA-Seminars)
   - Possibly a Best Practice Note of the Institution
2. Regarding the lack of investigative powers:
   - Seeking assistance from the Comm under Art. 15 of Reg 1/2003: not possible on a no-name basis!
   - directly, or via the ICC, or via a national court?
   - or from the EC?
3. Amicus curiae briefs filed by the Commission
4. Regarding access to documents: how to deal with parallel proceedings, confidentiality of documents?
   - Requests for the production of documents filed in parallel investigations by the European Commission or an NCA

TF Discussion Topics, cont.

5. Ex officio examination, where there are some apparent elements prompting a concern. Based on experiences by most commentators
6. Conclusions to be drawn from the Thalès/Euromissile Judgment of the Paris Court Appeals, of 18 November 2004
7. Importance of interim measures
8. Jurisdiction to award treble damages where US antitrust laws have to be applied
9. Private International Law issues: Connecting factors for applying antitrust laws alongside with the law chosen by the parties; effects doctrine
10. Standard of the burden of proof under Article 81 EC, and standard under Article 81 (3) EC

TF Discussion Topics, cont.

11. Impact on the procedure and evidence-gathering due to the criminalization of antitrust infringements; a significant concern!
12. Parallel proceedings: Quod, in case of parallel application of a party to a NCA; suspension?
13. Relevance of an NCA Decision for an arbitral tribunal involved in respect of the same subject matter
14. Quantification of damages: Difficulty of the assessment; economic "but for" scenarios and regression damage models; no in pari turpitudine defence (see Courage/Chehan)
   - Behavioural commitments will need to monitored; role for arbitral tribunals, role for experts and trustees
Part III: The Trouble with Article 81 (1) EC

Basics: The Trouble with Art. 81 EC

- The abolition of the notification systems removes the possibility for the parties to notify agreements and, in return, to be safe from the risk of being fined
- Parties will run the risk of their own self-assessment, and this possibility for the whole duration during which a practice had been used (in contrast to the old regime!)
- So far, a somehow consistent case-law on the application of Art. 81 (3) EC was fostered by the Commission (although the "goal-posts" sometimes were rather a moving target)
- The direct and decentralised applicability of Art. 81 (3) EC may result in a wide spectrum of divergent decisions by courts and arbitral tribunals (despite the ECN)
- Arbitral decisions will largely depend on what the parties are pleading
- Allocation of the burden of proof: the new Art. 2 of Regulation 1/2003 provides:
  - The claimant party will have to prove the elements under Art. 81 (1) EC
  - The respondent will have to prove the exemptions under Art. 81 (3) EC

Claimant’s Proof: The Arbitral Tribunal will have to Examine Questions such as:

- Art. 81 (1) in particular necessitates an economic analysis:
  - Does it restrict inter-brand competition?
  - Or intra-brand competition?
  - Would the agreement have been concluded without the restraints?
  - Whether the parties have market power, particular bargaining powers?
- Whether the agreement creates, maintains or strengthens market power
- Whether there are particular entry-barriers etc.
- Two types:
  - Restrictions by object: per se restrictions (these are easy to deal with)
  - Restrictions by effect: these are very difficult to assess, as this requires a detailed analysis of competitive constraints and the impact of the agreement.
Five years ago, there was very little economic analysis for these questions; a formal anticompetitive wording in a contract made it caught under Art. 81 (1) EC.

Today, the situation is different: the wording as such is only a "minor" element;

the crucial and much more important question is to assess the economic impact, and the impact on competition
  • Hence, the economists have become more important than the lawyers!

Difficult and controversial quantification of damages: complex economic models are the rule today! However:
  • Legal issue currently debated: only recovery of actual damages sustained?
  • Or availability of exemplary damages (as a function of deterrence)?
  • Disgorgement of wrongly-obtained gains?
  • Double damages: the IBA Working Group is opposed to that; it may encourage the bringing of non-meritorious claims; moreover, double damage recovery would not be needed in follow-on claims brought subsequent to a successful public enforcement
  • Pre-judgment interest available from the date of infringement onwards.
  • The IBA working Group has proposed to the Commission to establish guidelines on the quantification of damages (such guidelines to be subjected to a public consultation process).

The IBA Working Group has not taken a fixed position on this defence in its submission to the EU Commission

Where the passing-on defence is allowed:
  • Effect: the direct purchaser will be unsuccessful in claiming damages, because the infringer will be able to invoke the passing-on defence
  • Indirect purchasers will also be unsuccessful, because they will be unable to show if and to what extent damages are passed on along the supply chain
  • Hence, as the Commission notes: the defence allows the infringer to escape some or all liability.

The IBA WG therefore considered the two options:
  • The P-on def is excluded and only direct purchasers can sue the infringer
  • The P-on def is excluded but both the direct purchaser and the indirect purchaser can sue the infringer; this entails the risk that the infringer has to pay twice
  • A two-step procedure whereby the passing-on defence is excluded, the infringer can be sued by any victim, and the overcharge is distributed to all parties having suffered a loss; this option is technically difficult, but provides for a fair repartition and compensation.
Protection of Consumer Interests?

- Special provisions for safeguarding consumer interests are lacking
- Hence, the vast majority of claims for damages will never be brought
- Should consumer class actions be allowed therefore? IBS WG is hesitant; transaction costs will be high; lawyers will take a major share for compensating the risk they are taking
- Should SME’s have the right to file a class action?
- IBA WG suggests a court authorization system (similar to US), with certification
- Should associations be allowed to bring claims on behalf of a group of claimants
- There should be an opt-in model (not an opt-out model) for participating in a class
- Unsuccessful claimants should only pay costs if they acted in a manifestly unreasonable manner

Difficult Symmetry to Be Applied By a Tribunal

- A rigorous and tough application of Art. 81 (1) requires on the other hand a more careful appreciation of pro-competitive effects under Art. 81 (3)
- Otherwise, there would be an over-enforcement of Art. 81 (1) by the arbitral tribunal
- whereas a generous application of Art. 81 (3) would lead to an under-enforcement.
- The appropriate balancing of anti-competitive and pro-competitive effects is a difficult task for the arbitrator
- The more restrictive an agreement, the greater must be the countervailing benefits
- The Tribunal has to apply a market-for-market analysis, which increases the difficulty of the task!

Part IV: The Specific Trouble with Article 81
(3) EC

Part IV:
The Specific Trouble with Article 81 (3) EC
Direct Applicability of Article 81 (3) EC: Why is it more difficult than 5 Years Ago?

- The welfare standard to be protected is the consumer welfare, not the entrepreneur’s welfare
- Again, 5 years ago it was sufficient that the defending party invoked some vague economics of scale for justifying a restrictive agreement
- And even in Commission Decisions, one could find very little exploration of what that would really mean or “do” in a particular case
- Today, all of this has changed dramatically changed!
- Cumulatively, four tests will have to be met:

First and Second Test: Efficiencies and Indispensability

Test 1

1. Efficiencies: The Respondent must identify the economic benefits flowing from a restrictive agreement:
   - Cost efficiencies
   - Qualitative efficiencies (innovative products, improved products)

Test 2

2. Indispensability: Respondent must be able to show that the restrictions contained in an agreement are reasonably necessary to produce these efficiencies
   - Or else: Could the efficiencies also be achieved otherwise?
   - Could there be a less restrictive solution?
   - Can Respondent demonstrate that the agreement is more effective WITH the restrictive provision than without?
   - It is obvious that a convincing showing of these elements is very difficult!

Third and Fourth Tests: Consumer Pass-On and Non-elimination of Competition

Test 3

3. Consumer Pass-On: Respondent must show that the consumers receive a fair share of the benefits; the additional “Euro” must end up in the pocket of the consumer, and not in the pocket of the entrepreneur or shareholder

Test 4

4. No elimination of Competition: Respondent must be able to assess and demonstrate the competitive constraints and the impact of the agreement:
   - On actual competition, and
   - On potential competition; hence Respondent must be able:
     - To substantiate any entry-barriers, exit barriers, incentives for new entrants and potential expansion for existing competition.
   - In any event, competition must not be eliminated!
- Again: these are very difficult burdens of proof to meet!
The Difficulties of Proof

- Parties, in particular Respondent, have to support their positions by:
  - Extensive market data: on product market and geographical market
  - Extensive economic analysis, and
  - Expert opinions
- A very efficient and capable leadership by the Tribunal’s Chairperson will be required (otherwise one risks to get lost)
- A modern hearing technique is required; certainly - in my view and experience - no examination of commercial and economic experts in isolation, but only in the presence of all others
- Often: expert conferencing – technique!

Moreover: Effect-on-Trade-Test

- This test is necessary due to the parallel applicability of EC law and national competition law
- There exists an extensive body of Commission cases, most of which however date back to the 1960s and 1970s
- They are today arguably no longer “good practice”
- The Commission will yet have to foster a new case-law in accordance with its Commission Notice which entered into force as of 1 May 2004.

Part V: the Trouble with Article 82 EC

Part V: The specific Trouble with Article 82 EC
The Trouble with Art. 82 EC

Arbitral tribunals have an exacting “plate” of highly difficult issues to examine:

- What is the relevant product and geographic market?
- Running the SSNIP-test and other economic tests
- Is one party dominant on the defined market, so that it can “act independently” of its other competitors?
- Quid, in a regulated market, such as the pharmaceutical market (where even an undertaking controlling a 90% market-share does not enjoy “the power over price”)?
- Does it use – or abuse – its position? Or does it merely show a regular market behaviour?
- Is there an appreciable impact on the market and on competition?
- All this requires extensive economic analysis
- Impact (effect and significance of exclusionary IP-rights - The better the protection, the narrower the market, the greater the likelihood of dominance!)

Art. 82 EC – Problems, cont.

Typically disputed issues:

- Are the royalties due under a licence agreement excessive, hence an emanation of the licensor’s market dominance?
- Should the Tribunal grant a forced licence, or prolong a licence, and on what commercial terms?
- Is there an unlawful tying
  - See Hilti; Tetra Pak; Microsoft’s € 500 Mio fine
- Would there be alternative sources of supply available?
- Substitutability?
- Does the dominant party control an essential facility
  - A network, an infrastructure,
  - Or a core technology?
- Should the Tribunal grant a forced access to a network?
  - If so: what would be the fair and non-discriminatory terms for such access?
- In most cases, a tribunal is asked to issue an Order for Interim Relief.

Arbitration Under Article 9 of Reg One

Reg 1/2003 contains a novel provision (but reflecting previous practice) whereby a prohibition decision can be avoided by the party concerned offering commitments meeting the concerns expressed by the Commission

The Commission may make these commitments binding on the party

Such commitments may have to be monitored by a trustee who will have to report to the Commission

However, a third party relying on the commitment may elect to initiate arbitral proceedings where the commitment (similar to merger-related commitments, see below) contains an offer to arbitrate.
Part VI: Merger Related Arbitrations

The point de départ

- In a critical review of the Commission Decisions which I had submitted to the iai – Conference in Paris in October 2003, I concluded that most of the arbitration provisions so far used or accepted by the EU Commission were "flawed or "pathological''.
- This triggered a considerable amount of debate.
- Creation of the ICC Taskforce in early 2003.
- Quite a number of discussions with senior officers of the Commission.
- The new reflections did bear fruit; as can already be seen from the subsequent Commission Decisions rendered in 2003 and 2004, e.g.:
  - News corp/Telepiù, 2003
  - Daimler-Chrysler/Deutsche Telecom, 2003
  - GE/Instrumentarium, 2003
  - Alcatel/Péchiney, 2003
  - Air France/KLM, Feb. 2004
- A major and disappointing set-back was the decision in
  - Piaggio/Aprilia, Nov 2004: a "disaster!"
- This decision showed us how important it was to discuss a principled approach!
- For the Commission Decisions in 2005/2006, see the detailed account in Part VII.

The Commission’s View and Requirement:
Where does the Commission "come from"?

- Dr. Johannes Lüskelng of the Commission stressed (in his paper prepared for the ICC Taskforce in December 2004) the exclusive competence for assessing concentrations and for monitoring the implementation of commitments; hence, this implies:
  - The mandate given to an arbitral tribunal does not amount to a delegation of the powers, or to an out-sourcing
  - Hence, the Commission says: "an involvement of the Commission in the arbitral procedure is necessary"
  - The Commission stresses the notion that this is a very specific type of arbitration (Lüskelng at the TF-Meeting)
  - Hence, the arbitral Tribunal has to honour the very specific purpose pursued by the imposed commitments.
  - This type of arbitration is not based on a contract between private parties, but originates from the commitments that had to be conceded for obtaining clearance of the concentration.
The Commission’s View, cont.

- The parties are bound vis-à-vis the Commission to submit themselves to an arbitral procedure approved by the Commission (and otherwise the Commission would apply the sanctions provided for in the ECMR)
- The merging parties will obviously also have approved the clear implication that a resulting arbitration will not be behind secretly closed doors, but will somehow be under the scrutiny of the Commission.
- Luebking confirmed specifically that the merging parties never so far had any objection or even concern with the supervisory function of the Commission in the framework of such an arbitration.
- The concern raised in discussions of the TP does not appear to be a real concern.
- The time frame must be fixed and must be met; fast-track as a rule.
- Tribunal, when rendering its award, will have to apply and give effect to the Commitments.

The Commission Requires to be informed on:

- The Commission must be supplied with the final award because, as the Commission stresses, the award "has an impact on the Commission's position" when assessing whether or not a breach of a commitment has been sufficiently "redressed in fact and in law".
- The Commission is minded to work out a Model Text for the commitment to arbitrate.
- Third parties are of course not bound; they can bring complaints before the nationals court (but would probably be ill-advised to do so).
- Hence, the Commission may request to be furnished with some documentation regarding the arbitration, such as a copy of the Request for Arbitration and the Answer thereto, copies of Orders or Directions of the Tribunal, including Terms of Reference and Procedural Timetable, and Order on Interim Relief
- Interim Relief is to be ordered within one month from the constitution of the tribunal, or on shortest time-frame, as may be necessary
- Commission wants to have the possibility to file an amicus curiae brief to the Tribunal

Commission Requirements, cont.:

- Timeframe: extensions only in exceptional cases
- Copy of the Final Award to be notified to the Commission
- The Award is non-binding on the Commission
- The Commission wants to now establish a Model Arbitration Clause acceptable to it in future merger cases.
- The Commission seems interested in providing for institutional arbitration, foremost the ICC (but will be open-minded to include others, such as LCIA).
- In my personal view, the involvement of a prime arbitral institution (of which foremost the ICC, but also the LCIA can significantly contribute to the quality and authority of the arbitral decision.
- The ICC, certainly, will do the utmost to provide the top-effective administration.
The Model Arbitration Commitment may contain the following elements:

- A consultation phase of 15 business days; if this fails:
- Determination of the place of arbitration and language
- Provision on Notice/Answer
- Nomination, and confirmation of Arbitrator(s) by the institution
- Provision on the procedure
- Organizational conference and Terms of Reference plus Timetable
- Ruling on conservatory measures within a very short timeframe (basically 1 month)
- Explicit power for the Tribunal to appoint experts
- Power of the Tribunal to request further documents from the Parties
- Confidentiality; confidentiality advisor
- Allocation of the burden of proof, with the prima facie evidence rule being used (as in previous cases)
- Commission to be kept informed (as per the previous slide)
- Tribunal may seek assistance from the Commission re: interpretation of the Commitments
- Tribunal may ask the Com’s opinion (but no obligation)
- Comm may at any time submit an amicus curiae brief
- Comm reserves the right to approve time extensions
- Comm reserves the right to review the Commitments, and may ask the Tribunal for making a recommendation
- Award obviously non-binding for the Commission

What’s Next ....?

- The European Commission is, as I understand from discussions, working on a draft package, probably consisting of
  - A new Notice on Remedies
  - A new Best Practice Notice on the monitoring of merger-related commitments through trustees and arbitral tribunals
  - A Model Arbitration Commitment
  - A Model Arbitrator’s Mandate
- Time frame: initially planned for Summer 2004; but now realistically towards the end of 2006 or beginning of 2007
- The Commission’s draft will undergo the usual public consultation process.

Part VII: Critical Review of Com Decisions

Most of the arbitration clauses adopted or approved by the Commission are "quite special" or somehow flawed or even pathological, and may need to be rescued. **Examples:**

- **Campari-Milano:**
  - the Commission reserves its right to review the arbitral award
  - Q: Is this justified?
- **UIP:**
  - ICC Rules, but appointment by the president of the court of Appeals
  - EBU to fix deposits (!)
  - Q: Is this justified?
- **EBU:**
  - "arbitration by an independent expert"; mixing two different animals!
  - EBU to inform the Comm on the procedure and on all decisions
  - Q: Is this justified?
- **Elf/Thyssen:**
  - "arbitration by mutually agreed independent experts …"

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**British Airways/TAT:**
- Appointment of the arbitrator in case of disagreement: by BA alone (!)
- Highly problematic!
- Not subject to confirmation by the European Commission
- Q: Is this justified?

**Swissair/Sabena:** same provision!
- the arbitrator is pre-designated (the manager of the European Space Agency)
- within 15 days;
- award within 2 months;
- Comm to be informed and award to be submitted to it
- Q: Is this justified?

**Carrefour/Promodes:**
- award within 3 months;
- Carrefour must notify the arbitration provision to all suppliers, with copy to the Commission
- Q: Is this justified?

**BSkyb/Kirch:**
- Reversal of the burden of proof ("prima facie evidence rule")
- Q: Is this at all feasible, is it really necessary?
- arbitrators to fix the advances (although the ICC Rules apply)
- Q: Incompatible!

**Telia/Sonera:**
- Prima facie evidence rule; Q: Is this justified?
- procedure either in Finnish or in Swedish;
- award within 1 month Q: Feasible?

**Shell/SAP/JV-Nico:**
- Pendulum arbitration (Russian roulette)

**Vodafone/Mannesmann:**
- reversal of the burden of proof ("prima facie evidence rule")
- award within one month
- Q: Is this all feasible, is it really necessary?

**Glaxo Wellcome/SmithKline Beecham:**
- LCIA rules,
- but appointment by the President of the Law Society (!)
- Incompatible!

**Vivendi/Canal+/Seagram:**
- Prima facie evidence rule;
- sanction for not submitting information;
- award within 1 month; Q: Is this feasible?
- arbitrators to fix the advances (although the ICC Rules apply) Q: Incompatible!
Salient/Striking Elements of Arb – Provisions IV

- **SEB/Moulinex:**
  - Award within 4 months,
  - but the a party can challenge the award by submitting the challenge to the President of the Commercial Court of Lyon as a referred case.
- **Air France/KLM:**
  - ruling on interim relief within 1 month → Feasible?
  - ICC Rules;
  - final award within 6 months;
  - prima facie evidence rule;
  - interpretation of the commitments: Commission to be asked (Q); the Commission is allowed to file *amicus curiae* briefs.
  - – Is this justified?
- **Danish Crown/Slagterier:**
  - arbitrator to decide in case of contradicting expert opinions
- **Sanitec/Sphinx:**
  - the nominated arbitrator to be approved by the Commission → Is this justified?

Salient/Striking Elements of Arb – Provisions V

- **Allied Signal/Honeywell:**
  - unlimited duration of certain commitments;
  - arbitrator to be approved by the Commission (if necessary: permanent arbitrator);
  - → Is this justified?
  - Commission to be kept informed on the procedure;
  - special expert powers on investigation, access to documents and interim measures;
  - written submissions to be copied to the European Commission;
  - arguments to be submitted within 15 days.
  - → Is this justified?
  - mixed panel (with copy to the Commission) → Feasible?
  - no possible appeal;
  - compliance monitored by an expert: concurrent appointment of arbitrator and expert (the expert may probably take part in the arbitral proceedings as a silent listener/observer).
  - → Is this justified?
  - Comm has an almost full and water-tight control on the compliance with behavioural undertakings.

Salient/Striking Elements of Arb – Provisions VI

- **Dow Chemical/Union Carbide:** (M.1671)
  - Erga omnes - offer to grant a licence to any interested third party;
  - Pendulum arbitration in respect of the terms
  - If the third party/licensee does not abide by the terms of the arbitral award, Dow may request the Commission to be relieved from its commitment,
  - Furthermore: pendulum arbitration for selling technology to its competitor Amoco;
  - Netherlands Arbitration Institute.
- **Shell/OEA:** (M.2359)
  - Commitment during 10 years
  - ICC arbitration, in London, but the tribunal to fix the deposits (Q)
  - Prima facie evidence rule;
  - Award within 1 month (Q)

→ Is this justified?
→ Feasible?
Salient/Striking Elements of Arb – Provisions VII

- NewsCorp/Telepiù: (M.2676)
  - Two-tier dispute mechanism: Italian Communications Authority and Arbitration
  - Negotiations to come first
  - Prima facie evidence rule
  - ICC arbitration in Milano
  - The EU Commission shall not be bound by the award

- General Electric/Instrumentarium: (M.3183)(2sep03)
  - 15 day mandatory consultation phase
  - Prima facie evidence rule
  - Q: Is this justified?
  - Award to specify action to be take for complying with the commitments
  - For interpretation of commitments: arbitrators must seek the interpretation from the Commission which shall be binding
  - Q: Is this justified?

- Alcan/Fáchraí Ét (M.3320)
  - ICC in London
  - Pedestrian arbitrators
  - Prima facie evidence rule
  - In case of non-compliance with the award: the third party (regarding the licence): Alcan may request the Comm for being relieved of its behavioural obligation

Salient/Striking Elements of Arb – Provisions VIII

- Lufthansa/Eurowings (M.3940)(22dec05)
  - Fast track arbitration, preceded by a 15 day consultation phase
  - President of the ICC as appointing authority
  - “Vorläufige Entscheidung” (preliminary decision/interim measure) within 1 month
  - Award within 6 months from the start
  - Far reaching investigative powers of the arbitrators
  - Prima facie evidence rule
  - Procedure: by applying the ICC Rules
  - Q: What does this mean?
  - Award within 6 months from the start
  - Far reaching investigative powers of the arbitrators
  - Prima facie evidence rule
  - Where a interpretation of the commitments is required: the arbitrators should (“können”) inform the Commission
  - Commission may at any time elect to file submissions to the arbitral tribunal

- Reuters/Telerate (M.3692)(23may05)
  - The Licence Agreement provides for ICC arbitration in New York
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  - Parties to nominate/appoint the arbitrators
  - Similar provisions as in the two Lufthansa cases: documentary requests; prima facie evidence rule;
  - Follow the LCIA Rules (but not an administered procedure!!)
  - Arbitrators may seek interpretation from the Commission, and Commission may file briefs
  - Arbitrators to decide on the fees and costs

Salient/Striking Elements of Arb – Provisions IX

- Honeywell/Novar (M.3840)(30mar05)
  - Divestiture trustee
  - If parties disagree with the Trustee: ad hoc arbitration

- Areva/Urenco/ETC JV (M.3099)(6oct04)
  - Shareholders’ Agreement provides for standard arbitration

- Johnson&Johnson/Guidant: (M.3687)(23aug05)
  - Fast-track procedure
  - Consultation 15 days; failing agreement: initiation of arbitral process within 7 days
  - Parties to nominate/appoint the arbitrators, but LCIA as appointing authority in case of default
  - Similar provisions as in the two Lufthansa cases: documentary requests; prima facie evidence rule
  - Follow the LCIA Rules (but not an administered procedure!!)
  - Arbitrators to decide on the fees and costs

- Lufthansa/Swiss (M.3770)(10jul05)
  - Exactly same features as in Lufthansa/Eurowings!
  - AGAIN: reference to ICC, but it is not an ICC administered procedure!
The Review Shows: Lots of Trial and Error! - Why a Model Text?

- There had been quite a few pathological provisions, or provisions that will not easily work in practice and will need to be rescued.
- There has been no systematic/considered approach of the Commission, and no "model for drafting". It is rather a "trial and error" - approach - until very recently!
- However, there is a *body of particular requirements* on which the Commission insists.
- This "body" sets the stage for drafting a better organized and improved Model Arbitration Commitment.
- There is a strong need to have a carefully considered Model available; why?
  - Commitments are typically bargained for up to the last minute.
  - Arbitration provisions are then drafted at the 11th hour and 59 Minutes, and a Model would be extremely helpful.
- The Commission itself does not seem to have a clear view as to what it requires in terms of monitoring and supervising the process as a matter of good practice and policy (which makes it even more difficult for the parties to propose the terms of an arbitration commitment).

Part VIII: An Arbitration sui generis

Specificity: an Arbitration sui generis

- The arbitration-commitment is *an open offer* by the merging enterprises to accept arbitration as the dispute resolution mechanism:
  - hence similar to the arbitration provisions in some 2'000 BITs (Bilateral Investment Treaties)
  - the claiming third party can avail itself of that offer, by initiating the arbitration
  - thereby, arbitral jurisdiction is clearly established, even without an arbitration clause (but of course only within the boundaries of the commitment).
- The EU Commission is and remains responsible, and can not and - according to the EC Treaty - *must not delegate* its ultimate powers.
  - This inevitably has consequences for the arbitral process
- The Commission sets the standards, the yardsticks and the goal-posts in its Merger Decision.
- Hence, the Arbitrators can not function in a vacuum, or at liberty.
- Nevertheless, a sufficient degree of judicial independence must be maintained, and this is certainly recognized by the Commission.
What are the Special Features?

- The *weaker* party should not be required to struggle against the "giant" (holding a dominant position) starting its case in the local home-court of that "giant".
- The claiming party should not be trapped in the machinery of local procedures over two or three court instances.
  - *Arbitration at a neutral place solves this ideally.*
  - *No home court advantage.*
  - *Unbiased access to justice.*
- Time constraints imposed by the Commission: 1 to 6 months.
  - *Fast constitution of the Tribunal required.*
  - *Fast track procedure (almost supersonic!)*
  - However, the imposed speed must not jeopardize the integrity of a sound and careful arbitral process (flexibility will be important); due process to be observed.
- Importance of *provisional measures* (interim relief): they will allow to relax the time-frame.
- Some monitoring of the procedure by the Comm:
  - *But Q* to what extent?

Special Features cont.: Narrow Focus

- The "*Prima Facie Evidence Rule*" will more often than not apply.
  - This reversal of the burden of proof makes the arbitration avenue particularly attractive for the third party.
  - It would be almost foolish for the third party not to accept arbitration on such a comfortable basis.
  - The shifting of the burden of proof is indeed *quite justified*, as all the documentary evidence will normally be in the hands of the dominant enterprise,
  - Hence, the third party would otherwise have little or no means to prove its case.
- The arbitration commitment arises within a *very particular circle of concern* of the Commission:
  - For instance the concern that a telecom network must be and remain accessible to third party-competitors on a non-discriminatory basis.
  - This also provides the jurisdictional ground for the Arbitrator (and he may have no authority beyond that specific scope!), unless otherwise agreed.

Special Features cont.

- The careful analysis of the Commission’s Decision provides the yardsticks for the Arbitrator’s substantive determination; hence, the provision on the substantive law will express this accordingly.
- Filing of an *amicus curiae* brief should be possible.
- *Q:* To what extent are the arbitrators bound by the „yardsticks“ set by the Commission in its Decision?
  - *Quid*, if the arbitrators disagree?
  - *Quid*, if over the time the factual parameters changed?
  - *May* the arbitrator step beyond and enlarge the scope of review?
  - *These are delicate and difficult questions for further reflection/discussion.*
- The arbitrator will determine the civil law side but his determination and „verdict“ may have repercussions.
- The Commission may then draw its own conclusion, impose further remedies, possibly imposition of a divestiture, and of fines!
Part IX: a Model Arbitration Commitment

What May a Model Arbitration Clause Contain?

- The Commission is likely to establish a Model Arbitration Clause acceptable to it in future merger cases.
- The Commission does not seem to have a particular sympathy towards providing for institutional arbitration; it may go for ICC, sometimes for LCIA. BUT see the most recent Decisions!
- In contrast, my Model Arbitration Commitment, which I had proposed to the Comm in March 2004 (in my private capacity), did basically provide for an institutional arbitration;
- The Model I had proposed contains these elements:
  - A consultation phase of 15 business days
  - Determination of the place of arbitration and language
  - Notice/Answer
  - Nomination, and confirmation of Arbitrator(s) by the institution (reliable appointing mechanism is essential)
  - Provision on the procedure
  - Organizational conference and Terms of Reference plus Timetable
  - Ruling on conservatory measures within a very short timeframe (basically 1 month)
  - Explicit power for the Tribunal to appoint experts
  - Power of the Tribunal to request further documents from the Parties
  - Confidentiality, confidentiality adviser
  - Allocation of the burden of proof, with the prima facie evidence rule being used (as in previous cases)
  - Commission may possibly have to be kept informed on the procedure
  - Tribunal may ask the Comm’s opinion
  - Comm may at any time submit an amicus curiae brief
  - Comm reserves the right to approve time extensions
  - Comm reserves the right to review the Commitments, and may ask the Tribunal for making a recommendation
  - Award non-binding for the Commission.
Significantly, the Draft Does Not Contain...

- Not contained are some of the more critical requirements the Commission had sometimes imposed in past decisions, e.g.:
  - No requirement that arbitrators need to be approved by the Commission (BA/TT, Sánchez/Optica, Allied Signal/Honeywell)
  - Designation of an arbitrator (avoiding the confusion with an expert)
  - No provision that the weaker party's law (procedural and substantive be applied, and its language (EPP))
  - No requirement that the arbitral process as such should be approved by the Commission (BU, BSkyB/Kirch); information only
  - No requirement that the parties submissions (memorials) be copied to the Commission (Allied Signal/Honeywell)
  - No requirement that the arbitral award must be reviewed by the Commission (Campari/Milan)
  - No provision that compliance with the award be monitored by an expert reporting to the Commission (Allied Signal/Honeywell)
  - No provision that appeals should not be possible; waiver of appeal (Allied Signal, SEB/Moulinex)

Best Practice Note and Public Consultation by the Commission

- The Commission intends to come out with a revised Notice on Remedies, which may come along with a Best Practice Notice, and explanations in respect of the Arbitration Commitment, and possibly the Arbitrator's Mandate
- Moreover, there shall be a public consultation process in respect of the drafts.
- What is the present status of the Commission's practice?
- This is best exemplified when studying the arbitration commitment in e.g. Lufthansa/Eurowings (Comp/PH.3940, of 22 December 2005)
  - Discussion!

Particular Areas for Reflection and Discussion

- The need: a considered framework as a model would seem to be critically important and necessary
- The benefit: a reliable arbitration format will make it easier for the Comm to be content with the softer and more flexible remedy of behavioural commitments (instead of imposing painful divestitures)
- Qualified arbitrators and appointing mechanism: would an institution be the best solution for default appointments? And: what would the institution do to be fit for the purpose?
- Procedure:
  - Should it be a procedure under some institutional rules, or ad hoc?
  - Should the Comm be allowed to supervise the process, and if so: to what extent?
- Is arbitral Independence from the Commission sufficiently maintained?
- Fast track, or even supersonic track? Realistic? Dangerous?
- Prima Facie Evidence Rule: Justified? Experience?
- Are the yardsticks of the Comm. binding? Can they be changed, can they be ignored by the Tribunal?
- What would be the recommended Best Practices?
Some recent publications and books on the topic:

- Phillip Landolt: Modernised EC Competition Law in International Arbitration, Klwer 2006, 365 pages

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