

European Commission and Arbitration Tribunals – Co-operation or Conflict ?

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Competition Law

Public law that limits private autonomy → public interest in protecting free competition in the market

- Public Enforcement (administrative authorities)
- Private Enforcement (civil courts)

Arbitration

Dispute resolution method – creation of private autonomy

The fundamental premises

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- Arbitral Tribunals are not organs of the Member States (Art. 10 EC → not applicable)
- Arbitrators resolve disputes like courts (exclusion of state courts, *lis pendens*, *res judicata*, enforceability)
- Basic Arbitration Principles:
 1. Privity
 2. Confidentiality
 3. Informality
 4. Flexibility

"Two EC companies enter a market-sharing agreement infringing Article 81 EC; Swiss law; arbitration in Switzerland; only one copy of the written agreement exists, deposited in a Swiss bank; arbitrators are asked to examine the agreement but not to mention it in their award" Jacques Werner (1995)

Arbitration mechanism in a hard-core agreement

- Arbitrators → “undertakings” (NB *Treuhand*)
- Arbitration clause itself may increase the anti-competitive function of the unlawful practice (illegality of the clause) (*Stoves & Heaters*)
- Commission may enjoin parties from enforcing the award (*Preflex*)

Complementarity – The current state of affairs

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- Arbitration furthers free trade (and competition) - EC Treaty – Art. 293 – free movement of arbitral awards
- Arbitration → the natural forum for most significant commercial disputes
- Arbitrators in practice show respect for the competition rules and are usually very competent to deal with them
- Use of arbitration as a procedural mechanism in Art. 9 Decisions and in merger cases (offered by way of commitments by the parties)

Reg. 1/2003 co-operation and co-ordination mechanisms between national courts and the Commission are not transposable to arbitration

Art. 15 → *lex specialis* of Art. 10 EC → not applicable to arbitration

Art. 16 → not technically applicable to arbitration → arbitrators are not organs of the Member States

- Art. 15(1) → not formally applicable to arbitration
- Art. 15(2) → Member States' duty to forward to the Commission copies of arbitral awards?
 - NO → Ratio is the possibility of the Commission to file *amicus curiae* briefs
 - YES if national courts' judgments in the context of control

■ Art. 15(3) → power of the Commission (or of NCAs) to submit written or oral observations *ex officio (amicus curiae)* cannot be transposed to arbitration

- ◆ Reg. 1/2003 not applicable to arbitration
- ◆ unnecessary and disproportionately restrictive
- ◆ detrimental to the nature of arbitration and to the most fundamental principles of the arbitration process
- ◆ ≠ privity, confidentiality and independence

Exception: if the arbitrators give permission and both parties give their consent

OK for flexibility of the arbitral process, bad for policy reasons

Para. 1: "*for the purpose of this notice, the 'courts of the EU Member States' (hereinafter 'national courts') are those courts and tribunals within an EU Member State that can apply Articles 81 and 82 EC and that are authorised to ask for a preliminary question to the Court of Justice of the European Communities pursuant to Article 234 EC*".

- Intention was to exclude arbitrators

BUT

- the Commission probably intended to exclude arbitration only from the specific procedural framework of the new co-operation Notice
- The Commission can and does co-operate with arbitration tribunals informally on an *ad hoc* and fully discretionary basis

Co-operation under which circumstances?

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Only the arbitrators should decide if contacts with the Commission are desirable

Can arbitrators do this *ex officio*? → Question of the law governing the arbitration proceeding and of the arbitration clause itself

Problem with privity and confidentiality of the arbitration proceedings

Arbitrators should show extreme diligence

Possible

- if one of the parties has filed a complaint with the Commission, thus having brought the matter already to its attention
- If there is a proceeding open before the Commission
- if both parties consent or
- if the terms of reference of the arbitration allow so

Specific consultations with and hearing of all parties → necessary

Indirect contacts through the parties

Arbitrators may encourage or enjoin the parties to supply certain legal or economic information or data → parties use Reg. 1049/2001 → parties request a guidance letter under the Notice on guidance letters BUT difficult (stringent conditions)

Non-EU based arbitration tribunals?

- futile to distinguish between EU and non-EU arbitral tribunals
- EC competition law may be enforced extraterritorially – so why not?

Arbitrators not bound by Art. 10 EC (*Masterfoods*)

Arbitrators merely resolve disputes *inter partes* and do not apply the substantive EC competition rules *à titre principal*

International arbitration has no forum

BUT

de facto the tribunal will have to be extremely cautious

Distinction between hard-core and rule of reason type of decisions

- If Decision condemns hard-core behaviour → possible *ordre public* violation
- If Decision finds an infringement as a result of a rule of reason analysis → departure from Commission in itself not an *ordre public* violation