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Practical Aspects of Arbitrating EC Competition Law

Schulthess § 2007

Bibliographic information published by ‹Die Deutsche Bibliothek›
Die Deutsche Bibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at ‹http://dnb.ddb.de›.

ISBN 978-3-7255-■■■■-■

www.schulthess.com

Preface

In the not too distant past, it was often questioned whether or not EC competition law was at all arbitrable. This issue arose in numerous arbitrations within and outside of the EC in which defendants tried to fend off contractual obligations, arguing that such obligations violated EC competition law (the so called Euro-defense). While there may still be some issues pending final resolution, it is nowadays widely accepted that arbitral tribunals are in a position to decide upon EC competition law questions.

Very recently, the EC Commission has started, within the framework of the ongoing modernisation of enforcement, an initiative to facilitate and thereby encourage private enforcement of EC competition law. On 19 December 2005, the EC Commission adopted a green paper and a commission staff working document on damages actions for breach of the EC antitrust rules and started a public consultation on the issue. It is clear that the strengthening of private enforcement of EC competition law in general will also increase the importance of arbitration as alternative dispute resolution mechanism for such enforcement.

In addition, the EC Commision increasingly uses arbitration as means of private monitoring and enforcement of commitments given by parties in the framework of public antitrust or merger control proceedings.

The present publication is the product of the joint working session of the International Arbitration and the Antitrust Commissions of AIJA (Association International des Jeunes Avocats, www.aija.org) at its Annual Congress 2006 (22–27 August) in Geneva. The different contributions are aimed at focussing on a number of issues of arbitrating EC competition law which are, in our view, of most relevance in practice.

Zurich / Basel, January 2007

Tobias Zuberbühler & Christian Oetiker

Table of Contents

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List of Abbreviations

ArbInt	Arbitration International, London
Arbitration	The Journal of the Chartered Institute of Arbitration, London
ASA	Association suisse de l'arbitrage (Swiss Arbitration Association)
ASA Bull	ASA Bulletin, The Hague
DFT	Decisions of the Swiss Federal Tribunal (= Federal Supreme Court)
DRJ	Dispute Resolution Journal, London
EBLR	European Business Law Review
EC	EC Treaty
ECLA	European Competition Law Annual
ECLR	European Competition Law Review
ELR	European Law Review
IALR	International Arbitration Law Review
IAR	Mealey's International Arbitration Report, Wayne PA (US)
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Commercial Arbitrations, adopted by the IBA Council on 1 June 1999
IBL	International Business Lawyer, London
IBLJ	International Business Law Journal
ICC	International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration effective as from 1 January 1998
ICC Bull	The ICC International Court of Arbitration Bulletin, Paris
ICCA	International Council for Commercial Arbitration
ICCA Handbook	ICCA International Handbook on Commercial Arbitration, The Hague/London/Boston
ICCA Yearbook	ICCA Yearbook of Commercial Arbitration, Deventer (UK)
IntALR	International Arbitration Law Review, London
JIntArb	Journal of International Arbitration, Geneva
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules in force as from 1 January 1998
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention; New York, 10 June 1958)

List of Abbreviations

PILS	(Swiss Federal) Private International Law Statute of 18 December 1987 (SR 291)
RDAI	Revue de droit des affaires internationales
Rev.arb.	Revue de l'arbitrage, Paris
SchiedsVZ	Zeitschrift für Schiedsverfahren (German Arbitration Journal), Munich/Frankfurt/Basel/Geneva
Swiss Rules	Swiss Rules of International Arbitration in force as from 1 January 2004
TDM	Transnational Dispute Management
UNCITRAL Notes	UNCITRAL Notes on Organizing Arbitral Proceedings (1996)
UNCITRAL Rules	UNCITRAL Arbitration Rules effective as from 15 December 1976
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (1994/2004)
WIPO	World Intellectual Property Organization
WIPO Rules	WIPO Arbitration Rules effective as from 1 October 2002

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§ 7 Expert Determination of Competition Issues

Paul Peyrot

I. Introduction

According to the parties and the nature of the claim, competition law disputes can be categorized as follows:[1] 1

- Contractual disputes between partners of either a horizontal or vertical nature: these claims include disputes on pricing, exclusivity, territory or termination;
- Disputes between buyers and sellers that arise on a transaction-by-transaction basis: these claims include price discrimination, tie-ins, resale or use restrictions, refusals to deal or other monopoly abuses;
- Disputes arising when a party to a business relationship cooperates with third parties to inhibit competition and damage the first party: these claims include price-fixing, market division and boycotts; and
- Disputes between competitors involving claims that one competitor has been injured by the other through predatory pricing, refusal to deal, monopolistic abuse, price discrimination, exclusive dealings, unfair competition and anti-competitive takeovers.

Obviously, arbitration of EC competition law matters can involve highly technical questions regarding economics, accounting and technology. Additionally, competition law is very close to public policy issues. An arbitrator dealing with these issues needs not only a deep understanding of the relevant markets and their practices, but also special training for example in econometrics. As arbitral tribunals are almost exclusively composed of lawyers who might lack the necessary expertise to deal with these matters, obviously the tribunal or the parties might want to call on an expert in the field. 2

[1] Baker / Stabile, 395.

1. Different Forms of Experts

3 In arbitral proceedings, experts can be used for two distinct functions. In order to avoid confusion, the following two meanings of the term are distinguished:

a) Where an expert is appointed by the arbitral tribunal or the parties and his report or testimony is used by the tribunal as *evidence*. For example, Article 47 of the Swiss Cartel Law expressly provides that the cartel commission can render expert opinions for government authorities including courts. Issues connected with this topic are not dealt with.

b) Where an expert may give a decision which the parties accept as *binding*. In this case, the expert becomes an adjudicator and the process of expertise comes close to being one of arbitration.[2] In the following, we will focus on expert determination in this sense.

2. A brief outline of the process of expert determination

(a) Expert Determination Compared with Arbitration

4 Expert determination as mentioned sub 1.b) above usually fulfils a quasi-arbitral function, in that the expert determines only a limited number of questions related to a dispute. Arbitral tribunals in the contrary decide on the whole of a dispute. Arbitration is a formal adjudication process that fulfils the requirements of due process and results in an award that is enforceable.

5 Expert determination usually falls outside the scope of the national laws governing arbitration and is purely a matter of the contractual provisions made by the parties. Contrary to arbitration, the decision reached in expert determination is not directly enforceable. Enforcement against the defaulting party thus requires an additional order by an arbitral tribunal or state court. Additionally, and this is important to note, there might be only very limited rights to formally challenge the opinion rendered by the expert.[3] The procedures to challenge and set aside an arbitral decision do not apply in the case of expert determination.

6 The subject matter to be decided in expert determination can be questions of fact and, under certain circumstances, even questions of law. Expert determi-

[2] REDFERN / HUNTER, 49.

[3] BLESSING, Introduction, 310; SACHS, Interaction, 239.

nation is used frequently in connection with construction contracts, merger & acquisition transactions (e.g. for valuation issues) or sales of goods (e.g. for quality monitoring). Expert determination can also be used for adapting a contract to changed circumstances (e.g. adjustment of the contract price according to the conditions of the markets). In general, the parties will opt for a binding expert opinion if they wish that the expert's findings, solutions or conclusions should not be subject to challenge before a court called upon to make a final legal disposition of the case.[4] This would mean that the expert's opinion stops short of resolving legal issues or fashioning remedies to the dispute, but rather leaves this to the court that has the authority to decide on the merits of a dispute. Expert determination in this sense is the binding determination of a legally material fact. It usually is a pre-arbitral solution. However, it potentially has great impact on the decision of the arbitral tribunal and maybe could even make it unnecessary for such tribunal to deal with the matter. It should, however, be noted that, if an arbitral tribunal is called to decide a dispute, it must not delegate this competence to experts.

7 The parties are free to go beyond these limitations and entrust the expert with more powers to make binding decisions. Sometimes it becomes, therefore quite difficult to distinguish which role the expert has in a given case.[5] However, the distinction is necessary, as more procedural rules will likely apply to binding expert determination. If an expert opinion serves as evidence to an arbitral tribunal, the application of extended procedural rules to the expert procedure would make them overly legalistic, inflexible and inefficient. On the other hand, if the expert's determination should be binding on the parties, it is necessary to observe minimal procedural standards in order not to jeopardize the binding effect of the expert's finding. Thus, when referring to an expert in an arbitration clause, the parties should make clear what kind of expert determination they have in mind and provide for adequate procedural rules.

(b) Contractual Character

8 In several jurisdictions, expert determination with binding effects on the parties is expressly recognized by law, such as the German *Schiedsgutachten*, the

[4] Craig / Park / Paulsson, 702.

[5] As Blessing, Merger Control, 208, points out, the Commission itself seems not to be totally aware of the differences between arbitration and expert determination, as it has used clauses like "arbitration by mutually agreed independent experts" on several occasions.

Italian *arbitraggio*, the Dutch *bindend advies* or the English *valuation* or *expert determination*.[6]

9 In general, as expert determination is a contractual concept. All issues regarding the expert determination itself are matters of the law applicable to the contract. It has been noted that although the treatment of expert determination under the various national laws is similar, considerable differences in the dogmatic approach and in practical terms exist.[7] Accordingly, the drafting of a clause that provides for expert determination requires much care. Of special importance are the clear demarcation between the expert determination proceedure and the arbitration proceedings, the definition of the interaction between the two proceedings and a clear definition of the precise task and powers of the expert, the standards to be applied and the applicable rules of due process.

10 Nevertheless, as the parties contractually agree the expert determination to be binding, it is generally assumed that the arbitral tribunal or state courts lack jurisdiction to the extent that the matter has been referred to expert determination.[8]

(c) Procedural Aspects of Expert Determination

11 As expert determination is distinct from arbitration, its adoption requires different contractual provisions.[9] In order to avoid confusion with arbitration, such a clause could expressly state: "The expert shall act as an expert (e.g. as Schiedsgutachter within the meaning of § 317 of the German Civil Code) and not as an arbitrator."[10]

12 In order to give more certainty to expert proceedings, the ICC has established the International Centre for Technical Expertise in 1976 and the ICC Rules for Expertise in 1993. It is up to the parties to define the role of the expert, meaning that they can ask for him to give an opinion either as evidence for the court or as a binding decision. The rules can be applied in both cases. Art. 12 (3) of the rules states that, unless otherwise agreed by the parties, the findings of the ex-

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6 CRAIG / PARK / PAULSSON, 705.

7 SACHS, Interaction, 239.

8 This is the case not only in civil law jurisdictions, but also in common law; see SACHS, Interaction, 236.

9 See BLESSING, Introduction, 309, for a list of the points to be considered for an expert's mission.

10 SACHS, Interaction, 237.

pert shall not be binding upon them. Given the fact that the ICC has established procedural rules that can be applied in expert determination, one would assume that the centre should have been used frequently in EC competition law matters. However, this seems not to have been the case until now.

II. Why expert determination instead of arbitration?

Given the fact that expert determination has some shortcomings compared to arbitration, why should competition matters be dealt with by expert determination? 13

Expert determination is considered to be very suited for cases where the issue is limited to specific questions that are of such a nature that an arbitral tribunal would also need the help of an expert to resolve the issue. This is even more so if the expert would be in a position to render an opinion which could resolve the dispute. In such cases, parties might want to rely on very specific know-how of an expert and avoid arbitration proceedings that are more time-consuming and costly. In arbitration, the parties need decisions that are enforceable. Therefore, the proceedings and the expert procedure itself must fulfil minimal requirements of due process, which makes the proceedings slower and less flexible. Therefore, if the factual prerequisites are given, a swift and flexible expert determination will often be more adequate. 14

The hesitance of many parties to opt for binding expert determination, instead of arbitration, may be explained with the fear that they might be left with open legal issues after the rendering of the expert's decision. This will it make necessary to start an arbitration, so that the advantages of expert opinion disappear. 15

III. A case for experts: Monitoring the commitments of parties

1. General

As far as EC competition law is concerned, the Commission has opted for the use of arbitration in quite a large number of decisions.[11] These decisions concern merger cases, where the merging parties make commitments to the Commission regarding their market behaviour. 16

[11] Blessing, Merger Control, 154.

17 The main reason seems to be that the Commission often expects a very swift fast-track procedure, in which the award can be rendered within a few months only. Additional reasons for entrusting an arbitrator instead of state courts with monitoring the commitments are: concerns about judicial independence of the national courts, the necessity to translate all documents into the national language and concerns about the availability of effective interim relief.[12]

18 The need for dispute resolution typically arises when a third party wants to make use of the commitment by a merging party. Such a commitment is mostly incorporated into the decision of the Commission and offers any third party wishing to make a claim against the merged party, to enter into negotiations about the terms of the cooperation the merging party has committed to. Should the merging party not be willing to fulfil the third party's demands, a dispute resolution procedure can be started.

19 A good example for such a commitment containing a clause providing for arbitration proceedings is the Commission Decision re *Vodafone Airtouch/Mannesmann*.[13] The decision describes the commitments of Vodafone made in connection with the merger:

> "In order to respond to the Commission's serious doubts regarding the market for the provision of advanced mobile telecommunications services to internationally mobile customers, Vodafone Airtouch has submitted undertakings aiming at enabling third party non-discriminatory access to the merged entity's integrated network so as to provide advanced mobile services to their customers. These undertakings cover exclusive roaming agreements, third parties' access to wholesale arrangements, standards and SIM-cards and a set of implementing measures aimed at insuring their effectiveness. In particular, Vodafone Airtouch has proposed to set up a fast-track dispute resolution procedure in order to solve disagreements between the merged entity's group and third parties on third parties' access to roaming arrangements, third parties' access to wholesale arrangements, standards and SIM-cards."

20 According to these commitments, a third party could demand the appointment of an arbitral tribunal deciding in a fast-track procedure, if e.g. Vodafone rejects its request to make available wholesale services or if the terms offered

[12] BLESSING, Merger Control, 204.

[13] Decision of 12 April 2000, Case Comp./M. 1795; see BLESSING, Merger Control, 164.

seem discriminatory or if a dispute arises over technical standards and requirements.

2. Arbitration or Expert Determination?

In the *Vodafone Airtouch/Mannesmann* case, the Commission's decision only mentions a fast-track dispute resolution procedure. This could be either arbitration or expert determination. Only in the annexes to the opinion it becomes clear that an arbitration procedure is meant. However, this need not necessarily be the case. Expert determination could be a viable alternative to an arbitral tribunal. Given the fact that procedures of expert determination can be faster, more flexible and cheaper than arbitral proceedings, they might be better suited. In fact, time is of the essence in such cases and the Commission has on several occasions required that the arbitral process be accomplished within one month.[14] If the arbitral tribunal needs to rely on the services of an expert because of the factual issues or the special knowledge needed, it makes even more sense to adopt expert determination whenever this is feasible. 21

Appointing an expert in cases where the issue is the compliance of the merging party with the commitments it made to the Commission and to decide under which commercial and technical terms the merging party has to cooperate with a third party, also seems quite appropriate. Expert determination is not a judicial function - in these cases the necessary decisions on the law should already have been made by the Commission and resulted in a detailed opinion of the Commission. The merging party has submitted a letter of commitment. The determinations to be made are mainly factual. The legal questions arising out of the interpretation of the Commission's decision and of the merging party's commitment letter should play only a minor role. If any legal questions arise, they are most likely to be concerned with the correct implementation of the commitment. The expert does not have to render an opinion on a fully blown competition law case. He simply has to apply the letter of commitment and the Commission's decision to the facts of a given case. If the Commission's opinion and the merging party's commitment are well drafted, this should not give rise to legal problems that an expert could not handle. 22

The main argument against expert determination is that the decision might not be enforceable due to the lack of due process in the procedure. But as mentioned above, in these cases it might not be necessary at all to have an enforceable decision. Accordingly, the procedure does not need to adhere to strict 23

[14] Blessing, Merger Control, 212.

procedural rules. Should a party to the procedure feel aggrieved by the expert's determination, it can call upon the Commission for redress. As the Commission is in charge of enforcement of EC competition law in the first place, it would have to take on the enforcement if the merging party does not adhere to its commitments.

IV. The commission as expert to an arbitral tribunal?

24 Given the fact that the European Commission has often the best knowledge of a case and of the relevant markets, the question can be raised whether an arbitral tribunal could seek assistance from the Commission in order to establish the facts or the law in a specific case.

25 However, up to now, the Commission has been reluctant to commit itself formally to official cooperation with arbitral tribunals. So far, for example, arbitrators have not been given the right to refer questions to the Commission like the state courts can in application of Article 234 EC. On the other hand, the Commissions does informally answer requests for information from arbitral tribunals.[15]

26 Thus it appears that it is possible for an arbitral tribunal to obtain the assistance of the Commission in the application of EC competition law. As arbitration has established itself as an alternative judicial forum and the Commission itself has opted for arbitral tribunals to monitor commitments made by market players, it is self-evident that it is in the best interest of the Commission to cooperate with such tribunals. It would also serve the Commission's purpose to further the private enforcement of EC antitrust law. In cooperating with arbitral tribunals, the Commission could draw analogies to the cooperation with national state courts and use the mechanisms provided for in the *Notice on Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty*.[16] It has been noted, that the Commission already has treated arbitral tribunals in the same way as national state courts under the Notice on Cooperation.[17]

27 It seems viable that an arbitral tribunal could make use of the Commission's expertise and access to information in a specific case. However it is not obvious that it could do so without specific instructions from the parties to the arbitration. The parties might have appointed the arbitral tribunal with the exact pur-

[15] BAUDENBACHER, in: Atanasiu/Ehlermann, 355; KOMNINOS, in: Atanasiu / Ehlermann, xxxviii.
[16] OJ C39/5 [1993]; KOMNINOS, in: Athanasiu / Ehlermann, 381.
[17] KOMNINOS, in: Atanasiu / Ehlermann, 381.

pose of not having the EC authorities decide on their case. Additionally they might fear that additional confidential information, submitted to the tribunal, could be disclosed to the Commission. In this case they would be strongly opposed to any consultations with the Commission taking place. The question whether the arbitral tribunal is competent to call upon the Commission is a question of the arbitration agreement and the law governing the arbitral process.[18] This would not be an issue in the merger control cases mentioned above. Because, the Commission has to approve the wording of the arbitration clause as part of the merging party's commitment, it can easily make sure itself that it plays a role in the arbitral process.

Which exact role could the Commission have in the arbitral proceedings? Even if it is not per se impossible, it is not very practical to appoint the Commission as an expert in an expert determination procedure. The exact reason for devolving the application of the EC competition law is that the Commission would be too slow to decide on the case and that it would be procedurally easier and much faster to have an arbitral tribunal decide on the matter instead. Additionally the parties preferred arbitration over state court proceedings because of the flexibility and the privacy of the arbitral process. If the case is made for private enforcement of EC competition law by arbitral tribunals, it is nonsensical to involve Commission in the decision making process as an expert. Thus having the Commission's assistance by way of expert determination only appears feasible in very specific cases, where the arbitral tribunal does the bulk of the work (e.g. monitoring the parties'behaviour over a long period; deciding on most issues), but leaves only some pivotal questions for decision by the Commission. 28

It thus seems more likely that the Commission could assist the arbitral tribunal by providing non-binding assistance,[19] e.g. by supplying information on the markets or certain documents the arbitral tribunal cannot make available itself. This assistance by the Commission would not be substantially different from what the state courts could request: it could provide factual information as statistics, market characteristics and economic analyses. Additionally it might offer its (non-binding) opinion on legal issues of EC competition law. If the Commission provides a reasoned opinion on a legal issue it could – although formally not binding for the arbitral tribunal – be of such weight and persuasiveness that the arbitral tribunal could find it difficult exercise its own discretion and judgment. 29

[18] Komninos, in: Atanasiu / Ehlermann, 381.

[19] Then again the result is not "expert determination" in the meaning discussed here (binding decision), but only evidence to the court. See I.2.(a) above.

Arbitral tribunals should in their dealings with the Commission always be very careful to make them fully transparent to the parties. Informal communications with the Commission could lead to a serious lack of transparency and jeopardize procedural fairness.

V. Conclusion

30 Expert determination is a valuable alternative to arbitration in competition law disputes. One can expect a market for experts to develop. It seems unlikely, however, that parties will appoint the EU Commission as an expert or that they will approve of involving the Commission as a witness in arbitral proceedings.