

Modernised EC Competition Law in International Arbitration

By Phillip Landolt

KLUWER LAW

INTERNATIONAL

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Foreword

On 1 May 2004 the Modernisation of EC competition law came into force. Under Modernisation, the Commission's formerly centralised enforcement of EC competition law was shared out to competition authorities of the 25 Member States and to their courts. Indeed, under Modernisation, the private enforcement of EC competition law is assigned a significantly expanded role. Since no one doubts that EC competition law is arbitrable – both before Modernisation and after – it results that much of this private enforcement falls to arbitral tribunals.

Many have dwelt upon the antipathy that international arbitration is supposed to feel towards EC competition law. International arbitration is cast as Hamlet to EC competition law's Polonius. But tragedy is not a foregone conclusion. EC competition law and its principal exponent the European Commission need not be treated as officious intermeddlers, “full of high sentence”, into essentially private affairs.

Today, the EU legal order has shed much of its original suspicion of arbitration. Yet the Modernisation Regulation maintains an uncomfortable silence over arbitration. There is, however, no basis to suppose that, with the adopting of the Modernisation Regulation, the Commission's Article 85(1) EC duties to ensure the application of the principles laid down by EC competition law are exhausted. The Modernisation Regulation is not the end of history. There remains work to be done on private enforcement, by arbitral tribunals in particular. Over the next several years the Commission will doubtless take up this challenge (some may say “grasp this nettle”).

The present book is offered as a guide to those who wish to know how EC competition law applies in international arbitration, especially how it aspires to apply, and how practically to deal with this subject matter. One senses that the claims of EC competition law try certain of the basic postulates of international arbitration, in particular the reign of party will, or that concept's more sophisticated expression, parties' legitimate expectations. The singular aspect of competition law is that it reaches into the very heart of many of the most important commercial relations, for which the dispute resolution mechanism of preference is generally arbitration. Although the problem of its application is a variation on a common theme in arbitration, of applying mandatory norms, it raises this problem with particular frequency, and intensity. Indeed, applying EC competition law adequately can involve parties and arbitrators in complex demonstrations and determinations at the intersection of law and economics.

The plan to write this book was hatched in the summer of 2003, when the future shape of Modernisation had been amply debated and had come into clear focus. Since that time, a number of books and articles have appeared on the subject, and this will certainly not be the last. The initial works concentrated on laying the theoretical foundations supporting the relationship between arbitration and modernised EC competition law. By now, however, this relationship has crystallised sufficiently for concrete, descriptive guidance to be offered to practitioners on it.

I am grateful to Vincent Brophy, Pierre-Yves Gunter, Silke Obst, and David Roney for reviewing and commenting on portions of the manuscript.

The following accepted particular responsibility for commenting on individual aspects of the book. Dr David A. Lawson contributed the wisdom of his extensive experience in international arbitration. With his comments the book has gained in relevance and practical use. David Fruitman generously brought to bear his hands-on knowledge of and analytical skills in relation to competition law economics, the subject of Chapter 9, drawing especially from the US and Canadian experience. Dr Bernd Ehle expertly verified and commented on matters of German law. Paul Martinet lent his considerable insight to the sections on arbitration of competition questions in regulated industries. I am glad to have this opportunity to express my abiding gratitude for their assistance.

Yves Derains graciously reviewed Chapters 6 and 7. As much by his acknowledged expertise in the subject matter of these chapters as by the evident attention he devoted to this task, his comments were of inordinate value. They prompted much rewriting and, it is thought, a better calibrated treatment of the issues dealt with in those chapters.

I am dedicating this book to my wife Laura who unfailingly supported me in this project, and made it possible for me to bring it to fruition.

This area of law will play host to significant developments over the next several years in jurisdictions both within the EU and outside. I would be grateful to receive notice of these developments, as they occur, and for any comments on the book: landolt@tavernierschanz.com

Phillip Landolt
Geneva, 28 November 2005

Table of Abbreviations

Arbitration Act, 1996	English <i>Arbitration</i> Act, 1996
Article 81(3) EC Guidelines	Commission Notice: Guidelines on the application of Article 81(3) of the Treaty; OJ 2004 C 101/8 of 27 April 2004
Authorities Cooperation Notice	Commission Notice on cooperation within the Network of Competition Authorities; OJ 2004 C 101/3 of 27 April 2004
BGB	German Civil Code (<i>Bürgerliches Gesetzbuch</i>)
Brussels Regulation	Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; OJ 2001 L 12/1 of 16 January 2001
CFI	Court of First Instance in Luxembourg
CO	Swiss Code of Obligations
Commission	The European Commission
Complaints Notice	Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty; OJ 2004 C 101/5 of 27 April 2004
Courts Cooperation Notice	Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC; OJ 2004 C 101/4 of 27 April 2004
Dutch Civil Code	<i>Burgerlijk Wetboek</i> (Nederland)
Dutch Code of Civil Procedure	<i>Wetboek van Burgerlijke Rechtsvordering</i> (Nederland) of which the fourth book is devoted to arbitration
ECJ	European Court of Justice in Luxembourg

Electricity Directive	Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC; OJ 2003 L 176/37 of 15 July 2003.
EMCR	Council Regulation (EC) No. 139/2004 of 20 January 2004
1989 ECMR (or original ECMR)	Council Regulation (EEC) No. 4064/89 of 21 December 1989
Effect on Trade Notice	Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty; OJ 2004 C 101/7 of 27 April 2004
Effect on trade test	The test for the application of EC competition law for both Articles 81 and 82 EC
European Convention on Human Rights (or ECHR)	Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, made in Rome on 4 November 1950
1998 Fines Notice	Commission Notice: Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation 17 and Article 65(5) of the ECSC Treaty; OJ 1998 C 9/3 of 14 January 1998
French NCPC	French New Civil Procedure Code (<i>Nouveau code de procédure civile</i>)
FTAIA	US Federal Foreign Trade Antitrust Improvements Act of 1982
Gas Directive	Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC; OJ 2003 L 176/57 of 15 July 2003
German Civil Procedure Code	German <i>Zivilprozessordnung</i>
Giuliano-Lagarde Report	Report on the Rome Convention by Mario Giuliano Professor, University of Milan (who contributed the introduction and the comments on Articles 1, 3 to 8, 10, 12, and 13) and Paul Lagarde Professor, University of Paris I (who contributed the comments on Articles 2, 9, 11, and 14 to 33)
GWB	German Statute on Restrictions to Competition (<i>Gesetz gegen Wettbewerbsbeschränkungen</i>)

Horizontal Cooperation Guidelines	Commission Notice: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements; OJ 2001 C 3/02 of 6 January 2001
2004 Horizontal Mergers Guidelines	Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings; OJ 2004 C 31/03 of 5 February 2004
LCart	Swiss Federal Act on Cartels and other Restrictions to Competition of 6 October 1995
Lugano Convention	Convention on jurisdiction and the enforcement of judgments on civil and commercial matters, made at Lugano on 16 September 1998
Modernisation	An extensive programme of reorganising the enforcement of Articles 81 and 82 EC under the Modernisation Regulation which entered into force on 1 May 2004
Modernisation Implementing Regulation	Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty; OJ 2004 L 123/18
Modernisation Regulation	Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; OJ 2003 L 1/1 of 4 January 2003
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958
R&D Block Exemption	Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements; OJ 2000 L 304 12/7 of 5 December 2000
Regulation 17	EEC Council Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty; OJ 1962 13/204 of 21 February 1962
Relevant Markets Notice	Commission Notice on the definition of relevant market for the purposes of Community competition law; OJ 1997 C 372/5 of 9 December 1997
Rome Convention	EC Convention on the law applicable to contractual obligations, made in Rome on 19 June 1980; OJ 1980 L 266/1 of 9 October 1980
Rome Convention II	Draft Convention to extend the Rome Convention to include non-contractual obligations

Rome Convention II Proposal	Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, COM(2003) 427 final of 27 July 2003
Specialisation Block Exemption	Commission Regulation (EC) No. 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements; OJ 2000 L 304/3 of 5 December 2000
Surveillance and Court Agreement	Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice
Swiss PIL Act	Swiss Private International Law Act (<i>Loi sur le droit privé international</i>)
Technology Transfer Block Exemption (or TTBE)	Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements; OJ 2004 L 123/11 of 27 April 2004
Technology Transfer Guidelines	Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements; OJ 2004 C 101/2 of 27 April 2004
Telecommunications Access Notice	Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ 1998 C 265/2 of 22 August 1998
Verticals Guidelines	Commission Notice: Guidelines on vertical restraints; OJ 2000 C 291/01 of 13 October 2000
Vertical Restraints Block Exemption (or VRBE)	Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted Practices; OJ L 336/21 of 29 December 1999

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