Foreword

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It is 50 years since the Restrictive Trade Practices Act 1956 introduced concepts of competition law into UK law, albeit in rudimentary form. A year later the Treaty of Rome incorporated Articles 85 and 86 (already foreshadowed in the Coal and Steel Treaty) into the domestic law of the Member States of the EEC. Over the past half century competition law has become an indispensable feature of the economies of Europe, as antitrust law has been for more than a century in the United States.

It is important that competition law should be enforced uniformly and effectively since the ultimate victims of anticompetitive practices are the consumers. But how and by whom should it be enforced? Since Regulation 1/2003 enforcement in Europe has largely been devolved to the national courts and competition authorities, reserving some powers to the European Commission itself. The Commission sees arbitration as a valuable way of resolving competition and merger control issues with the Commission and/or national authorities intervening, where appropriate, as *amici curiae*. (The US authorities are less enthusiastic.)

In spite of the all-pervading influence of competition law on commercial relations, there is still a sense amongst many businessmen, and even some lawyers, that competition law is an unwarrantable intrusion into the domain of private enterprise, private contractual relations and the classical concepts of private law.

Arbitration is intended to be a means of *private and confidential* dispute resolution. The parties choose their arbitrator and define what it is that they want him or her to decide. For a variety of reasons they may prefer that competition law issues should be kept out of account.

To what extent and in what circumstances should arbitrators feel compelled to ignore the wishes of the parties and effectively become private enforcers of public policy? Leaving aside cases where the parties want to conceal anticompetitive practices from public scrutiny, the purpose of a submission to arbitration may well be to secure a quick decision on a short point or to resolve a dispute without the risk of disclosing business secrets.

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Investigation of competition issues can be costly in terms both of time and money. Why should the parties be forced to 'litigate' such issues against their will? And if they must do so, how should they go about choosing their arbitrator? An arbitrator with skills appropriate to the point at issue between the parties may feel lost if the complexities of competition law are added to the mix.

Why, in particular, should a private dispute be open to the intervention of public authorities who may have their own agenda to pursue? Even if the parties consent to the intervention of the Commission or national authorities as *amici curiae*, is it the responsibility of the parties or the arbitrator to decide what is the issue on which their intervention should be sought? Before inviting them to intervene, should the arbitrator make preliminary findings of fact on which their opinion will be based?

What will be the evidential value of the intervention, especially if closer enquiry shows that the preliminary findings of fact are unsound or incomplete? Indeed, are the views of the *amicus curiae* "evidence" at all? Will the authorities provide a witness who will be open to cross-examination, or must the *amicus* brief be taken at face value? Since it represents the view of a public authority, is it binding on the arbitrator and the parties? What, in particular, will be the status of an opinion of the Commission, given that an arbitrator cannot invoke Article 234 EC to seek a ruling from the Court of Justice, whereas a "decision" of the Commission is always open to judicial review?

These are only some of the fascinating issues raised at the conference of which this book is the product. There is no doubt that arbitration of competition law issues is increasingly a feature of the world of international arbitration. But the tension between the private and party-driven nature of arbitration, on the one hand, and the enforcement of competition law as a matter of public policy, on the other, is not the less acute.

International arbitrators are faced with the further complication that, although the economic goals of competition (or antitrust) law are broadly the same, the law differs in content and application from one jurisdiction to another – not to speak of the often fierce disagreements between experts as to the underlying economic theory. In an international dispute, even if the parties are agreed as to the national law that is to be applied, is national competition policy enforceable as part of national law?

The potential problems are professional as well as legal. Does an arbitrator or mediator who knowingly "blesses" an anticompetitive deal between private parties thereby become a party to their violation of competition law? Conversely, does he or she have a responsibility to bring the violation to an end, if necessary by bringing it to the attention of the public authorities – as may be the result if they are invited to intervene as *amici curiae*?

The papers and the report of the discussion that followed show a considerable diversity of views. One afternoon was sufficient only to scratch the surface of the issues. They deserve to be explored and discussed in much greater detail, not least in the interest of those who practice as arbitrators.