Preface

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The following collection of articles and speeches has been inspired by the conference on *"Arbitrating Competition Law Issues: A European and a US Perspective"* organised by SJ Berwin LLP in co-operation with the British Institute for International and Comparative Law (BIICL) at Gray's Inn Chambers in London on 12 June 2006. Apart from conference contributions, the collection benefits from two further articles and one case commentary contributed by invitation and reproduces in full the original *ICC Draft Best Practice Note on the European Commission Acting as* Amicus Curiae *in International Arbitration Proceedings*, which was submitted to the late International Chamber of Commerce Task Force for Arbitrating Competition Law Issues for discussion by the Task Force in September 2005. Essentially, the various contributions aim to give a *tour d'horizon* of the development of antitrust arbitrations this side of and across the Atlantic.

Over recent years, the arbitration of competition law issues has moved into the limelight of the international arbitral profession and has awakened increasing academic interest. With globalisation setting the pace in an international business world, arbitration clauses have become more and more prominent in international commercial contracts. In addition, due to the regulatory force of antitrust and competition laws and their permeation throughout the world's legal systems at the dawn of the 21st century, antitrust law issues are likely to become a more standard feature in future international commercial arbitrations.

Both the European Union and the United States dominated the regulatory antitrust landscape world-wide and led a true revolution in the thinking on antitrust laws over the course of the 20th century. With the beginning of the twenty-first, in an attempt to emulate the US litigious culture in the field, the European Union set in motion a further revolution which has gained currency under the term "Modernisation" and which essentially aims at the privatisation of antitrust supervision within the internal market.[1] The resulting decentralisation of the Community antitrust machinery has provided an impetus for antitrust litigation before the Member

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[1] See the various contributions to this volume.

State courts as well as the national competition authorities. In this more litigious environment for the settlement of antitrust controversies, arbitration has become a credible and desirable alternative to litigation before the courts or to investigatory actions by the national competition authorities. These developments of private enforcement of antitrust laws in both the United States and the European Union are a timely indicator of the potential for arbitration as an alternative dispute resolution mechanism in the resolution of antitrust-related issues in years to come.

The attraction of private enforcement in the European context has been well captured by one leading practitioner in the following terms:

> In the first place, national courts may award compensation for loss suffered as a result of a restrictive practice or agreement, a possibility not open to the Commission. Secondly, national courts may adopt interim or protective measures more rapidly than the [European] Commission. Thirdly, a national court may be seized simultaneously of actions under national law and actions under Community law; the same cannot be said of the Commission. Fourthly, national courts may award costs against the unsuccessful party, including lawyers' fees, a course of action not available in an administrative procedure. Besides, it would seem that national courts constitute that logical forum for commercial litigation and are in a better position than the Commission to resolve conflicts between private interests. The parties and their lawyers are also more familiar with the procedure to be followed before national courts and benefit from the fact that the latter are near at hand. Finally, administrative authorities – the [European] Community authorities at least – are not in general obliged to deal with specific cases or to process every request made to them. They can choose those which they consider most important, whereas national courts are obliged to deal with all matters brought before them.[2]

Without the need to undertake a comparative analysis highlighting the pros and cons of international arbitration in contradistinction to litigation, any seasoned practitioner of international arbitration would readily support the view that the essence of the advantages of court proceedings recounted in the excerpt above is also embodied in international arbitral proceedings. On a less optimistic note, as regards private enforcement before the national courts,

> [i]t must be recognized, however, that not every aspect of proceedings before national courts is advantageous. In practice, proceedings before national courts may be as slow, complicated, and expensive (even where the unsuccessful party is ordered to pay the successful party's costs) as those before the [European] Commission. Furthermore, many national courts may experience difficul-

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[2] Quoted from L O Blanco (ed), *EC Competition Procedure* (Oxford University Press 2006 2nd edition), at para 2.04. Original footnotes omitted.

> ties in making extremely complicated economic evaluations. Since proceedings before national courts are adversarial, the parties must produce evidence to support their claims. They cannot rely on evidence being obtained by the judicial authorities, as in the case of inquisitorial proceedings. Therefore, it remains to be seen how soon private enforcement becomes decoupled from parallel investigation by the [European] Commission and/or the newly empowered NCAs, especially in those Member States where claimants have substantial difficulties in proving an infringement in certain cases. These considerations continue to carry considerable weight and may prompt parties to turn to administrative authorities rather than to courts, at either Community or national level.[3]

Against this background, it would appear that arbitration is an ideal mechanism to address antitrust-related disputes in international commercial relationships: Neither does arbitration suffer from the procedural shortcomings of actions before the national courts, nor does it replicate any of the less attractive features of investigative proceedings before the relevant competition authorities. Arbitration proceedings can be entirely tailor-made to meet the procedural and substantive prerequisites for the efficient and effective resolution of antitrust disputes. As Lord Justice Mummery most recently illustrated in the English Court of Appeal in a statement on the desirability of using private dispute resolution mechanisms in preference to recourse to the public courts in complex competition law cases, such as arise from the abuse of an essential facility:

> The nature of […] difficult [pricing and access] questions [in relation to essential facilities] suggests that the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers. The adversarial procedures of an ordinary private law action, the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interests and the public interest. These are not, however, matters for decision by the court, which must do the best that it can with a complex piece of private law litigation.[4]

The Lord Justice's words in this recent judgment of the English Court of Appeal cannot be but understood as a strong encouragement to private parties to resort to arbitration of their competition law disputes in preference to proceedings before

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[3] Quoted from L O Blanco (ed), op cit, at para 2.07. Original footnotes omitted.

[4] Judgment of the English Court of Appeal of 2 February 2007 in *Attheraces Ltd et al v British Horseracing Board et al*, [2007] EWCA Civ 38., at para 7.

the national judiciaries. As will be seen below,[5] for the better part of two decades, the European Commission has made the Lord Justice's wisdom its own by actively promoting arbitration of disputes arising from the incorrect or non- implementation of remedies in EC merger control and behavioural EC antitrust scenarios. Most recently, the Commission has made express referral to the use of international arbitration in EC merger control in its new draft Notice on Remedies.[6]

One of the currently most hotly debated issues within the context of arbitrating competition law issues is the relationship between the relevant competition authorities in their role as public prosecutors (and especially the European Commission as the Community public prosecutor) on the one hand and the arbitrators in their role as private judges with a contractual mandate granted by the arbitrating parties on the other. This relationship will be further explored by the *ICC Draft Best Practice Note on the European Commission Acting as* Amicus Curiae *in International Arbitration Proceedings* appended at the end of this volume. The controversies that arise from the attempt to define adequate guidelines for the mutual dealings between the Commission or competition authorities more generally in international arbitration proceedings will become apparent from the critical comments provided on the Draft Best Practice Note by Alexis Mourre.

My particular thanks go to Sir David Edward KCMG for kindly having contributed the foreword, all speakers and discussants of the conference who, through their unflinching efforts, have made this publication possible and to Prof. Mads Andenas, the chief editor of the European Business Law Review, who has shown an inordinate measure of patience in waiting for the completion of the final script of the present volume. Last but not least, I wish to thank Tim Taylor, without whose vision and faith the conference of which the present volume is the fruit would not have seen the light of day.

Remains to be hoped that the contributions reproduced in the present volume will keep the debate on arbitrating competition laws in the European Union and the United States stimulated and will provide further inspiration for the future development of the currrent discourse and practice of antitrust arbitration for decades to come.

I would be grateful for comments and ideas on this publication at gordon.blanke@sjberwin.com.

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[5] See in particular the contributions made by Prof. Luca Radicati di Brozolo and Dr. Johannes Lübking.

[6] See in particular paras 66 and 127 of the new draft Notice on Remedies. The new draft Notice is available at http://ec.europa.eu/comm/competition/mergers/legislation/draft_remedies_notice.pdf. For a further discussion, see my comments made on the draft Notice, which are available on the Commission website at http://ec.europa.eu/comm/competition/mergers/legislation/files_remedies.berwin.pdf.