EDITORIAL

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Resolution of competition law disputes: through arbitration?

For a long time vigorous enforcement of competition laws through private actions was mostly confined to the United States, where private actions account for a high percentage of antitrust enforcement cases, and where they are largely credited with being a deterrent to unlawful restrictive business practices as effective as the threat of actions by the governmental authorities. Now the trend has gained Europe, where in particular EEC officials are encouraging plaintiffs to bring their grievances before national courts rather than to follow the Brussels road.

This trend is to be welcomed, as being able to ensure a better enforcement of competition rules without building up huge bureaucracies. However the difficulties existing presently to such private actions in Europe must not be overlooked. One of them is the reluctance of national courts to move into that direction. In this connection the article of Katherine Humphrey in the present issue, as well as the attached decision of the English High Court, are of the highest interest.

Another difficulty resides in the fact that many of the restrictive business practices which would form the basis of private actions arise under international business contracts which provide for settlement of disputes not by national courts, but by international arbitration. And that European laws, as well as American, are, by and large, hostile to competition law claims being solved through arbitration, on the grounds that such claims involve questions of public policy which cannot be left to private persons who derive their powers exclusively from the will of the parties, but must be kept within the exclusive province of the courts.

This hostility originates in a serious misunderstanding of the nature of the arbitral process:

All arbitrators performing their functions in earnest want their awards to be effective, namely to be enforceable as if they were court judgements. In order to attain

that goal arbitrators have to ensure that their awards will comply with the applicable rules of public policy, as otherwise their enforcement might, at the request of the losing party, be denied by the competent national courts. Consequently control of the correct application by the arbitrators of the public policy rules contained in competition laws lies, ultimately, with the national courts.

As a lawyer active in competition law matters as well as a frequent international arbitrator I am convinced that, sooner or later, public authorities will recognize that the road to effective private enforcement of competition laws goes through arbitration.