Arbitration in competition disputes has swiftly become a commercial reality. **John Pheasant** warns that companies used to fending off competition watchdogs will need to learn new tricks

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Taking competition into a new arena

There has been much discussion of the European Commission's Green Paper on damages for infringement of EC antitrust law. The Green Paper launched a debate designed to encourage and even facilitate private actions in national courts. The Commission and the Office of Fair Trading (OFT) have indicated that, to prioritise the use of their own limited resources, complainants will be encouraged, in appropriate cases, to resolve their disputes privately, whether through action in national courts, arbitration or other forms of dispute resolution.

Appropriate cases will include those in which there is a contractual dispute giving rise to competition law arguments in respect of which the jurisprudence of the European Court of Justice (ECJ) and/or guidelines of the Commission and OFT provide enough guidance for judges and arbitrators.

The number of commercial disputes in which arbitrators in the UK are asked to adjudicate on competition disputes, whether raised by the claimant or the defendant, is growing and will continue to grow. This trend reflects developments in the US where, as recently as the mid-1980s, it was not fully clear whether US antitrust disputes could be resolved in arbitration. Several US courts had previously held that, because of the public nature of antitrust laws, the resolution of antitrust disputes by a private arbitration violated public policy.

However, in *Mitsubishi Motors Corporation v Soler Chrysler Plymouth* [1985], the Supreme Court issued a decision holding that a party could be compelled to arbitrate US antitrust claims relating to an international transaction. More recently, US courts have begun to interpret standard commercial arbitration provisions to encompass antitrust claims.

For example, in the well-publicised litigation in *Stolt-Nielsen*, involving a parcel tanker shipping cartel, an appellate court held that the standard arbitration clause in the industry — which stated that "any and all differences and disputes of whatsoever nature arising out of" the agreement must be arbitrated — required arbitration of antitrust claims asserted by customers.

In the US, a broadly-worded arbitration provision could mean the difference between a US jury or a sophisticated arbitral panel deciding key issues. Additionally, courts and arbitral panels have begun to permit arbitration procedures that would mimic the US class actions. The Supreme Court opened the door to such a result in *Green Tree Financial Corp v Bazzle* [2004], finding that an arbitration clause which did not explicitly reference class actions could be "ambiguous" on this issue, and that the arbitrators should decide whether to permit "class action" claims in arbitrations. The American Arbitration Association has even published rules governing how a class action arbitration might proceed.

The growth of antitrust arbitration in Europe might heighten concerns about the 'modernisation' in 2004 of antitrust procedures through greater decentralisation and the enhanced powers of national courts to apply article 81 EC in its entirety. In broad terms, article 81(1) prohibits agreements that restrict competition unless exempted under article 81(3) by reason of the compensating economic benefits. Pre-modernisation, only the Commission and, in limited circumstances, national competition authorities had jurisdiction to grant exemptions; this power is now conferred on national courts and, by implication, arbitrators.

The concern relates to the risk of uneven application of EC antitrust law across Europe, including by arbitral tribunals not least since such proceedings are confidential and the opportunities for review by the Commission or another competition authority are limited.

When a national court applies EC antitrust law, the modernisation regulation (Regulation 1/2003) provides that it may request an opinion of the EC (article 15(1)). It also provides, reflecting the authority of the ECJ, that national courts are obliged to avoid a conflict with an existing or contemplated decision of the EC (article 16(1)). As confirmed this year by the House of Lords in *Crehan*, for there to be an actual or potential conflict, the decision or contemplated decision of the Commission would have to be binding on the court; in essence it would need to be addressed to the same parties and deal with the same subject matter.

PARTIES SHOULD RECOGNISE THAT THE RELEVANT BURDEN OF PROVING OR DEFENDING THE ANTITRUST CLAIM WILL BE ON THEM

The modernisation regulation does not expressly address the position, or obligations, of arbitral tribunals. The ECJ has ruled, however, that where its national rules of procedure require a national court to grant an application for annulment of an arbitration award and where such an application is founded on failure to observe national public policy, it must also grant such application where it is founded in failure to comply with the provisions laid down in article 81(1) EC (*EcoSwiss v Benetton* [1999]). It is argued that arbitral tribunals should therefore have regard to, and as appropriate comply with, the obligations contained in articles 15 and 16 respectively of the modernisation regulation.

The number of cases in which an arbitral tribunal will be faced with an actual or potential conflict as defined in the jurisprudence of the ECJ will be limited compared with the number of commercial disputes submitted to arbitration in which competition arguments are raised. Equally, there will be practical limitations on the ability of the EC to provide an opinion in more than a small number of cases. Arbitrators will therefore in many cases simply proceed to apply competition law as they would apply any other relevant legal provisions.

Given the likelihood of an increase in the frequency with which arbitral tribunals will be faced with competition arguments, companies should give careful consideration to the scope and effect of their arbitration clauses. Should they, for example, cover both tortious and contractual claims so that an action for damages based on an alleged antitrust infringement and, under English law, breach of statutory duty would be submitted to arbitration?

Similarly, the parties may wish to consider the relevant expertise and experience of the arbitrator(s), particularly in circumstances in which a competition law argument is capable of deciding the case in favour of one of the parties. In addition, the parties should recognise that the relevant burden of proving or defending the antitrust claim will be on them: under the modernisation regulation, the onus of proving that the prohibition in article 81(1) applies falls on the party alleging the infringement, whereas the onus of proving that the conditions for exemption under article 81(3) are satisfied is on the party claiming the benefit of that provision. Each party will need to cite the requisite evidence, including, where appropriate, expert economic testimony. Unlike competition authorities, arbitral tribunals will not issue requests for information to seek clarification and support for insufficiently founded arguments. ■

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