

Special Edition On Antitrust Issues In Arbitration Following The AIA Conference on 19.05.14



CONTACT US:

146, Avenue Louise
B-1050 Brussels
Belgium

Fax: +32 2 646 24 31

Tel: +32 2 643 33 01

Email:

administration@arbitration-adr.org

AIA UPCOMING EVENTS SECTION (I)

A-Z training on Belgian commercial arbitration



ORGANIZER: AIA NVZW – *The AIA Brussels Arbitration School*

PURPOSE:

- Training and certification for new arbitrators.
- Continuous learning for existing arbitrators & other ADR practitioners.

TOPICS INCLUDE:

Ethical rules & conduct of the arbitrator, organization & formalities of the arbitrator profession, liability risks of the arbitrator and existing insurance tools, overview of the arbitration procedure & principles, overview of arbitration terms & definitions, types & styles, arbitration costs, the arbitration clause, the request for arbitration and notifications within an arbitral procedure, constitution of the arbitration panel, the arbitrability of disputes, the arbitrator's competence and challenging the arbitrator.

In addition, arbitration & third parties, in limine litis arguments & consequences, evidence in arbitration, hearings and interim measures, expert interventions, interrelation with public tribunals and mediation/conciliation, termination of proceedings, types of awards (incl. dissenting opinions), drafting & registration of awards, selected issues in relation to the arbitral award, interpretation and correction of awards, possibility for appeal, annulment proceedings, exequatur proceedings, selected challenges of arbitrators, suggestions to develop your arbitration practice and overview of Belgian arbitration centers will be examined.

TARGET GROUPS: Lawyers, in-house counsels, experts & other ADR practitioners

LOCATION: The Institute for European Studies (IES), Pleinlaan 5, 1050 Brussels, Belgium

DATE: 24 November 2014 – 28 November 2014 (5 days)

LANGUAGES: Dutch & French

FEE:

- Full (5 day) registration fee: 600 Euros (VAT excluded); or
- Daily registration fee: 200 Euros (VAT excluded)

*AIA Members receive a 50 % discount. The Full (5 day) registration fee for members: 300 Euros (VAT excluded). The Daily registration fee: 100 Euros (VAT excluded).

30 BAR POINTS: Will be allocated

Please the [link](#) to our website for details, program and registration form. Seats are allocated on a first come, first served basis so register now to reserve your place!

AIA UPCOMING EVENTS SECTION (II)

The European Mediation Training for Practitioners of Justice (EMTPJ) 2014: A Great Offer For Members

Thanks To Our Sponsor Billiet & Co!



Are you interested in cross border mediation in civil and commercial matters and want to learn more about it in theory and in practice?

If so, the European Mediation Training for Practitioners of Justice (EMTPJ) which will take place in August 2014, can offer you the following unique advantages:

1. It offers both theoretical and practical training within a European perspective.
2. It is recognised by 18 mediation centers in and beyond Europe.
3. Thanks to our Sponsor Billiet & Co, we can offer AIA members a 500 euro discount on the training.
4. It is open to professionals from various different fields whether they have a background in mediation or not.
5. It offers a truly international learning environment with students and teachers travelling from all over the world to participate.
6. It is based in Brussels, the heart of Europe.
7. It is flexible, for those who are interested in part of the program but not everything, we offer EMTPJ continuous hours which allows participants to pick and choose subjects.
8. It provides a solid basis for students to build their own mediation practice.

Don't miss this opportunity and register now via our [website](#).

We encourage mediators who can illustrate 200 hours mediation experience and 20 mediation cases, to apply for the AIA's Qualifying Assessment Program (QAP) which will take place at the end of the EMTPJ 2014 session on the 31st of August 2014. Please visit our [website](#) for details!



Calling All EMTPJ Alumni!

Are you an EMTPJ alumni and:

1. Want to provide feedback on the EMTPJ?
2. Would you like to share your mediation experience since the EMTPJ?
3. Would you like to have a profile visible on the EMTPJ website?

If so: visit and read our EMTPJ [Alumni page](#), then fill in our online feedback questionnaire and send it to emptj@arbitration-adr.org with a picture of yourself if desired.

We will provide the following starrng system:

- 1 Star = EMTPJ graduate
- 2 Star = 50 mediations+
- 3 Star = 100 mediations+

Become a Member of AIA 2014 Today To Benefit From Discounts to Our Events And Other Advantages!



Membership of AIA takes the form of yearly subscriptions. All members benefit from the following advantages:

- An online profile on our website.
- Possibility to publish articles on ADR in the AIA newsletter.
- Opportunity to publish events in our newsletter for a reduced rate.
- 50% discount for all AIA events from March 15, 2014.
- Free ticket to Future Mediation in Belgium sessions.
- 500 € reduction on the European Mediation training for Practitioners of Justice (EMTPJ).
- 20% Discount on books published by Kluwer and if members would like to subscribe to KluwerArbitration.com, Kluwer may offer a special price for subscription.
- Access to our arbitration library.
- Access Corporate Disputes Magazine.

The annual membership fee is 200 €, or 150 € for members under 40 years of age (VAT excluded). Fill in our online form at the bottom of our Membership page to [sign up](#) for 2014.

“Entrusting Antitrust Issues to Arbitration”

Location: Le Palais De Justice, Brussels
Date: 19/05/2014



In conjunction with Dr. Blessing’s information, Panelist Manuel Penadés discussed the issues at hand from a slightly different perspective. Mr. Penadés recently published an article on the subject, titled: *'Beyond the prima facie effectiveness of arbitration commitments in EU merger control'* *Common Market Law Review* (2012) that explains, in depth, the shortcomings of arbitration in EU merger control. According to Mr. Penadés, a considerable increase in recognition and support for the use of arbitration in merger control has occurred over the last decade from European institutions, legal scholars and practitioners. He spoke of how there is general consensus as to its benefits and efficiencies for the enforcement of behavioral remedies.

However, he was adamant to point out that in the vast majority of cases until 2010 this enthusiastic position had been based on vague allegations about the general advantages of arbitration, and lacked substantive analysis of the stated operability of the mechanism when it comes to its practical implementation.

Overview

The AIA Conference; “Entrusting Antitrust Issues to Arbitration” addressed the various issues involved with EU competition law and its relation to Arbitration. The participants carefully examined the underlying legal framework, and discussed possible future uses for arbitration in light of the present European Union competition law and its private enforcement system.

He argues that when one looks past the *prima facie* effectiveness, arbitration commitments in most pre – 2010 clearances - are considerably deficient and could result in a pathological procedural process if triggered by third parties. Regarding post- 2010 arbitration commitments, he addressed challenges posed by frequently used clauses on applicable law, the participation of the Commission and the relationship with subsequent investigations by competition authorities.

The aim of the conference was divided into three sessions: first, to highlight the interaction between arbitration and

He closed his discussion on a notion that was omnipresent amongst many of the speakers; that improvement of these weaknesses is

merger control; second, to examine present EU competition law before arbitrators, with a particular focus on the most problematic scenarios arising out of the application of EC competition rules by arbitrators; and lastly, discuss National Court reviews of arbitral awards dealing with EU competition law issues.

- Keynote Speaker: **Gordon Blanke**- Dr. Blanke has wide-ranging experience in all types of international commercial arbitration, having acted as advising counsel and arbitrator under most leading institutional arbitration rules (including the ICC, LCIA, DIFC-LCIA, DIAC, ADCCAC, GCC and JAMS Rules) in arbitrations seated in the US, Europe and the Middle East in relation to a wide variety of industry sectors.

Dr. Blanke is a member of leading international arbitration institutions, the Chartered Institute of Arbitrators in London and the ICC UAE Steering Committee. He is a regular contributor to a number of international arbitration and competition law journals and has published and co-edited several books on international arbitration and antitrust law. Major publications of relevance include *The Use and Utility of International Arbitration in EC Commission Merger Remedies*, Groningen, Europa Law Publishing, 2006; *Arbitrating Competition Law Issues: A European and a US Perspective* (ed.), EBLR special edition, Kluwer Law International, 2008; *EU and US Antitrust Arbitration* (ed. together with Dr. P. Landolt), Kluwer Law International, 2011; *Comparison of Gulf International Arbitration Rules*, Juris, 2010; and *Comparison of MENA International Arbitration Rules*, Juris, 2011.

Dr. Blanke is on the editorial board of *Arbitration*, the Journal of the Chartered Institute of Arbitrators, and of the *International Commercial Arbitration Review*, published in association with the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (CCI), Moscow. He is co-editor of the Arbitration and ADR section of *Global Competition Litigation Review*, and book review editor of the *European Competition Law Review*. Dr. Blanke is fluent in English, German (native), French and Spanish.

Dr. Blanke delivered the keynote address for the AIA Conference. He came across the intersection of arbitration and competition law as a young legal professional training in the dispute resolution department of a London based international law firm. At that time, a principal of his asked for a comment on a case that was developing in Sweden and happened to involve both arbitration and EC competition law. This experience sparked a passion for the subject-matter of competition arbitration, which Dr. Blanke has actively contributed to ever since.

Dr. Blanke began his keynote address by providing a comprehensive overview and background of how arbitration of competition law has become increasingly important over the past decades. He mentions the Private Enforcement Initiative, ("the modernization exercise") by the EU Commission at the dawn of the new millennium as a key event for this area of practice. Essentially, this initiative has "set in motion" the direct application of Article 81 (3) EC (now Article 101 TFEU) in its entirety by arbitral tribunals, thus driving private enforcement of EU competition law through arbitration.

According to the speaker, arbitration has evolved into a credible and desirable alternative to litigation before the courts or a credible complement to investigatory actions by the state competition authorities. These developments of private enforcement of antitrust laws in both the United States and the European Union are a clear indicator of the potential of arbitration as an alternative dispute resolution mechanism in the resolution of antitrust-related issues in years to come.

He enthusiastically states the positive outlook he has for this area of

necessary to guarantee the real enforceability of behavioral remedies and the effectiveness of arbitration in EU merger control.

Panel 2: EU Competition Law before arbitrators and the future of private antitrust enforcement in Europe



- **Assimakis Komninos**- advises on questions of EU and Greek competition law, EU law, international arbitration and litigation and private international law. His practice focuses on complex cases of abuse of dominance, restrictive agreements and merger notifications, arising before the European Commission, national competition authorities and national administrative and civil courts and arbitration tribunals.

He has also represented or advised clients in proceedings before the Albanian, Cypriot, French, Greek, Kosovo and Romanian competition authorities and Belgian, Bulgarian, Cypriot, French, Greek, Latvian and Spanish appellate courts. He has particular expertise in arbitration cases involving EU and national competition issues and in private antitrust litigation cases in national courts.

Dr. Komninos is currently a visiting fellow of the Centre for Law and Governance in Europe at University College London (UCL), where he teaches EU competition law, and a senior associate fellow of the Institute for European Studies (IES) at the Vrije Universiteit Brussels (VUB). He often gives speeches and seminars on EU competition law, arbitration and Greek law and is a non-governmental advisor to the International Competition Network (ICN).

- **Gordon Blanke** (see description earlier)
- **Marc Blessing**- Dr. Blessing has more than thirty years of experience in international arbitration. He mostly serves as Chairman (or party-nominated arbitrator) of international arbitral tribunals, either in ad hoc arbitrations, or in arbitrations under the major Institutional Arbitration Rules (such as ICC, LCIA, AAA-ICDR, Swiss Rules, WIPO Rules, DIS Rules, Singapore (SIAC), Beijing (CIETAC), Vienna Centre, Stockholm Arbitration Institute etc.); he is also an accredited Arbitrator of numerous other Institutions. Marc Blessing also advises the parties as counsel or co-counsel in matters of international arbitration, and serves as legal expert on Swiss law and on the practice of international arbitration. Dr. Marc Blessing has authored some 70 books, articles and published Conference Reports.



Panel Overview:

Panel 2 opened with the esteemed Dr. Assimakis Komninos discussing

practice and firmly believes that the growth and development of this area of arbitration is picking up momentum; in the words of Dr. Blanke:

"I sense it is now the younger generation that has started to take a keen interest in the development of the subject matter as field of study in its own right. Over the course of the past years I have seen at least 4 to 5 postdoctoral studies undertaken on the interaction between EU competition law and arbitration across the European Union".

Furthermore, his address placed heavy emphasis on the role that institutions, such as the International Chamber of Commerce (ICC) in Paris, together with its International Court of Arbitration in Paris, have played in establishing a reliable framework for the implementation of competition arbitration. He believes that the institutional role of the ICC was responsible for "sowing the seeds for arbitration long before the adoption of the Modernization Regulation [by the European Commission]."

Dr. Blanke elaborated on this aforementioned point by explaining how the ICC has done much to push commercial arbitration through ad hoc task forces. In particular, he credited the ICC Task Force for Arbitrating Competition Law Issues led by Marc Blessing in the 2000's.

The Task Force was successful in establishing a constructive dialogue with the European Commission. Furthermore, an ICC framework for best practices on arbitration proceedings was developed, -but unfortunately only remained a draft due to prevailing disconsent within the Task Force on its precise wording.

Dr. Blanke also mentioned how the ICC has promoted arbitration as the "preferred mechanism for behavioural commitments in both EU merger control and within the context of Article 9 commitment decisions."

In the latter part of the address, Dr. Blanke focused on the concept of trust with respect to the arbitral process as a whole. He noted the issues that are present in the private enforcement discussion and how trust is essential for the success of the arbitral process; which is why he suspected- the AIA chose to include the word "trust" in the title name of the conference. He spoke of how there must be trust from the European Union and the Commission, trust from the member states, trust on behalf of the arbitrating parties, and trust on the part of the arbitrators.

He closed by pointing out that, "there is all reason to believe that we are witnessing an era that will ultimately result in the transformation from international commercial to 'supranational' arbitration in which the consideration of EU competition law issues will be taken for granted in any arbitral mandate exercised within the EU." Lastly, he ended the address by relaying the point that conferences such as this one will help to further the development of this field.

- **Panel 1: Arbitration in Merger Control**

- **Janice Feigher** - Dually qualified as a French *avocat* and as Solicitor of the Senior Courts of England and Wales. She holds a double Degree in English and French Law from the Universities of Paris I and King's College London. She specializes in international arbitration, commercial litigation and M&A, mainly for international groups. She is Counsel in the firm's arbitration team. She works in French, English and Italian.

- **Manuel Penadés** – Member of the Private International Law Department of the University of Valencia (Spain) and guest teacher for International Commercial Arbitration at the LLM programme of the London School of Economics (LSE). He obtained an LLM in International Business Law from the LSE in 2009 and holds two degrees in Law and Business Studies (Hons) from the University of Valencia. He is a

material from a paper he co-authored titled: *Arbitration and Damages Actions Post-White Paper: four common misconceptions* (Dr Assimakis P. Komninos* and Dr Markus Burianski** 2009). He opened the panel with a brief discussion on the basics of European Union competition law so as to provide a foundation on which, the more in-depth discussion pertaining to the future of private antitrust enforcement would be explored.

The panelists spoke about the rise of private enforcement of competition law in Europe, especially in the context of the previously mentioned modernization initiative of EC competition law enforcement. The panelist described the current post-decentralization state of affairs but also spoke in detail about the new package on Private Damages Actions of 11 June 2013 and the latest proposals to enhance private antitrust enforcement in the European Union.

Dr. Komninos mentions how this new Directive has changed evidence procedures from "A system of fact pleading to a system of notice pleading". However he alluded to the importance of establishing a system that avoided the excesses of the United States system. Moving forward he addressed three specific issues arising out of this new directive and offered knowledgeable answers to mitigate them.

As the panel moved forward Dr. Gordon Blanke, the keynote speaker, addressed the means of co-ordination and co-operation between the EU commission, national competition authorities and arbitrators. He broke the discussion down into separate areas which included: The Ontological Framework, The Institutional Framework, The Contractual Framework, and Potential Forms of Co-ordination and Co-operation.

Dr. Blessing also provided an extensive presentation, taking the audience to the issues which lawyers have to argue in an antitrust arbitration, identifying some 60 issues to be argued by a claimant's counsel, and a similar number of issues (with different emphasis) by a respondent's lawyer. Specifically, Dr. Blessing examined practical issues which counsels face providing his 40 years of experience in antitrust cases on the matter. He advised that the first homework which ought to be conducted is market studies and analysis.

He mentioned that this is an extensive and potentially frustrating job which requires key consultation with economists. He emphasized the increasing importance of economists in the antitrust field in comparison to the role of lawyers.

Dr. Blessing placed the emphasis on a logical sequence in which these issues must be addressed, dealing with issues relating to the relevant markets, effects on trade, de minimis, pleading the constitutive elements under TFEU 101.1 (including so-called "but-for" arguments), arguments under any applicable BER, followed by arguments under TFEU 101.2. He explained that in many cases TFEU 102 issues will arise at the same time, describing the critical elements of dominance, particularly relating to so-called access cases for essential facilities/infrastructures, networks and patent portfolios.

Specifically, Dr. Blessing highlighted that the first step is to establish Jurisdiction under Article 101.1. He clarified that it must be shown that restriction has an appreciable effect on trade, an easy low threshold theoretical test. Thus, to foresee the effect is deemed sufficient.

Conversely, the second test requires one to show that the restriction is not de minimis in nature which again requires market information.

In addition, Dr. Blessing touched on the efficiency and indispensability tests and elements of dominance. He mentioned that abuse is a particularly difficult issue. Numerous procedural issues which have arisen in practice (eg interim relief) were highlighted, alongside a dozen important legal issues.

qualified *abogado* (Spain) and solicitor (England & Wales). Manuel has worked in a major arbitration firm in London; in projects for DG Internal Market (EU Commission) as an external legal expert; and in the Commercial Court of Valencia as a clerk. He is the author of the book '[Elección tácita de ley aplicable en los contratos internacionales](#)' (Implied Choice of Law in International Contracts, 2012), coordinator of '[Liber Amicorum Prof. Iglesias Buhiques](#)' (2012) and author of various articles in the field of international commercial law.



Panel Overview:

According to the laws of the European Union, a merger is the basic method to which firms resort in order to maintain their profitability. The European Commission plays a powerful role in the procedural aspect of approving merger related activities and commitments. Within the EU Competition Law system, the EC Merger Regulation creates the framework that regulates these kinds of transactions and emphasizes the need for maintaining or increasing competition in the internal market. In light of these facts, the first panel was focused on the ability of arbitration to act as a monitoring mechanism of the commitments offered by merging entities in concentrations taking place in the European Union market.

As the discussions continued panelists provided insights on how arbitration can be successful as a private enforcement remedy in EU merger control, particularly in relation to enforcing the commitments and obligations entities have undertaken in order to gain approval from the authorities for said merger action.

The panelists thoroughly discussed the applicable legal framework for arbitration and the specific role of the arbitrator in the context of EU merger control. Furthermore, the panelists pointed out the recent **interactions between arbitration and the Commission**.

The notion of Commission intervention can significantly influence commercial arbitration proceedings and considerably impact on its results. All of the panelists touched upon The Commission's attempt to incorporate arbitration in the "Brussels I" regulation which deals with the rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in European Union (EU) countries.

As mentioned earlier in the keynote address, Dr. Blessing (Moderator for this Panel), worked directly on this issue of merger control and commitment enforcement while chairing an ICC taskforce. The taskforce worked with and kept an active dialogue with the European Commission over the timeframe when Dr. Blessing was Chair of the ICC taskforce; however, according to Dr. Blessing, "...The Commission so far has not gained real experience in overseeing how arbitral tribunals could fulfill an indeed important task."

Dr. Marc Blessing provided an extensive presentation of the numerous

Panel 3: The Court review of arbitral awards dealing with EU Competition Law issues

- **Luca Radicati di Brozolo**- Luca G. Radicati di Brozolo is professor of Private International Law at the Catholic University of Milan, where he also teaches Law of International Arbitration and Transnational Commercial Law. His practice focuses on international arbitration, as counsel and arbitrator (including investment arbitration as counsel), and litigation, as well as private international law and European Union law and competition law, with particular emphasis on private damages litigation. He is the author of five books and over one hundred articles on different topics on arbitration, public and private international law, European Union law, antitrust law, telecommunications law, and the co-editor of the leading Italian commentary of the law of arbitration. He is a member of the International Court of Arbitration of the ICC; member of the European Commission's Expert Group on the Interface between Arbitration and the Brussels I Regulation; and Chair of the IBA Sub-Committee on the Recognition of Foreign Judgments.
- **Christoph Liebscher** - an internationally recognized expert in the field of arbitration. He has been involved in arbitrations as counsel and arbitrator in many jurisdictions, including the Czech and Slovak Republics, Hungary, France, Poland, Russia, Serbia and Montenegro, Bulgaria, Romania, Uzbekistan, Germany, England, Switzerland and Liechtenstein. He has more than 35 years of experience in domestic/international commercial arbitration and litigation in the English, German and French languages.
- **Renato Nazzini**- a Professor of Law at King's College, London, where he teaches competition law and commercial arbitration. He published more than 50 articles and book chapters on competition law and international commercial arbitration as well as a number of books including *Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies* (Oxford, OUP 2004), *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford, OUP 2011).

Panel Overview:

The Panel opened with Christoph Liebscher who introduced the public policy notion of the European court of justice jurisprudence in the context of competition law and consumer protection.

Next, the panel, led by Luca Radicati di Brozolo, addressed the standard view of awards after setting aside enforcement proceedings and the principles that might guide arbitrators in their decisions regarding the application of competition. Luca Radicati di Brozolo assessed the current state of the debate on the relations between competition law and arbitration. Furthermore he examined the two central issues of the nature of the review by courts of awards involving competition law and of the duties and powers of arbitrators with regard to the application of competition law. Lastly, he analyzed the standard of review of awards involving competition law. (Luca G. Radicati Di Brozolo, 'Arbitration and Competition Law: The Position of the Courts

pathological arbitration commitments reflected in past merger control commitment decisions and the debates of the ICC Task Force regarding merger control arbitrations.

He mentions that in papers submitted to the ICC taskforce, the European Commission stated: "Exclusive competence for assessing concentrations and for monitoring the implementation of commitments." Hence, this implies that the mandate given to the arbitral tribunal does not amount to a delegation of the powers, or to an out sourcing. This type of arbitration is not based on a contract between private parties, but originates from the commitments that had to be conceded for obtaining clearance of the concentration.

Thus, the arbitration is not such much of a private arbitration, but a regulatory arbitration. Essentially, the bottom line regarding this issue is that, **"an involvement of the European Commission in the arbitral procedure is necessary."** Dr. Blessing alludes to the inefficiency created by the mandatory oversight by stating that, "The Commission itself does not seem to have a clear view as to what it requires in terms of monitoring and supervising the procedural aspect of this type of arbitration which results in further difficulty for involved parties to propose terms for an arbitration commitment and withdraws the arbitrators to function in a vacuum or at liberty."

Going forward, the panelists discussed possible options that could provide sustainable solutions to the various issues revolving around merger arbitration and the critical, often unnecessary oversight by the European Commission.

and of Arbitrators' 2011).

And last, but certainly not least, the discussions, led by Renato Nazzini, addressed the role of national courts in arbitration related proceedings and examined EC regulation 1/2003 and the new EU directive. Specifically, the speaker examined the relevance of substantive and procedural rules before national courts in arbitration-related proceedings; the indirect impact in arbitration of the relevance of substantive and procedural rules before national courts. Also, the speaker addressed the interpretation and textual difficulties revolving around provisions of Regulation 1/2003 and the Directive on Damages Actions while also discussing options to help combat the various issues.

In general, the material covered at the conference heavily revolved around the EC Regulation 1/2003, the Modernization Regulation, and Directive on Damages actions (among others); all of which have significantly changed the European Commission competition law enforcement system and as a result, facilitated the noteworthy rise of arbitration as a sustainable mechanism for the private enforcement of European Union competition rules.

Overall, the conference was an insightful yet cutting edge contribution to the Arbitration and Business Community alike. The Panels took into account the particulars of each issue without ever losing touch of both current legal practice and business reality.

In closing, The AIA Team would like to thank all of the speakers, panellists, and participants for truly making this a wonderful event.

Click on the icons and follow AIA on Twitter and Facebook



Click on the icons and follow us on Linked in



and the Young Arbitrators in Belgium Blog!



****All writings, data, materials and information were taken from various sources provided by the Conference panellists. For further information on particular research presentations, articles and books please contact The AIA.****

Edited by: Stephen M. Marcellino Jr. (Legal Researcher at the AIA)
Contributing Editor: Daria Levina (Legal Researcher at the AIA)

[Unsubscribe from this newsletter](#)