Arbitration and EU Competition Law

Assimakis P. Komninos

I. ARBITRATION AND EU COMPETITION LAW: CONTRADICTION AND COMPLEMENTARITY

Any discussion of application of EU competition rules by courts cannot ignore arbitration. Arbitration is long-recognised by states as a dispute resolution mechanism alternative to litigation. It is the creation of the private autonomy of the parties, who withdraw the regulation of their disputes from state justice through a contract, the arbitration agreement. The arbitrators are called upon to resolve a certain dispute that has been submitted to them by the parties and do so by applying the law that is applicable to the merits of the dispute.[1] To designate that law, they must, like state courts, have access to private international law methods. The agreement to arbitrate is an enforceable contract that binds the parties and excludes the courts' jurisdiction to deal with the dispute. The arbitrators' final decision, the arbitral award, produces the same fundamental effects like judgments: it enjoys *res judicata* and, subject to certain formalities, is enforceable. In most developed legal systems, courts may not review arbitral awards in their substance (*révision au fond*), except for very narrow grounds, and may set them aside or refuse their recognition or enforcement, if certain conditions are met, which are rather exceptional, especially in the case of foreign arbitral awards.

Nowadays, an ever growing number of business disputes is submitted to arbitration, which is considered to be a much more preferable forum than state justice in many respects, most notably due to its globally perceived independence, neutrality, impartiality, flexibility,

[1] This may be the law of a state, but also legal principles not connected to any particular state, of a transnational nature. Such can be the *lex mercatoria* or the international law merchant, or the *UNIDROIT Principles of Contract Law*. Arbitrators may also be bound to decide by reference to no law whatsoever, usually *ex aequo et bono* or as *amiables compositeurs*. For more details see K.P. Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague/London/Boston, 1999); Rubino-Sammartano, "*Amiable compositeur* (Joint Mandate to Settle) and *ex bono et aequo* (Discretional Authority to Mitigate Strict Law: Apparent Synonyms Revisited)", 9(1) JInt'lArb. 5 (1992); E. Gaillard and J. Savage (Eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague/Boston/London, 1999), p. 801 *et seq*.; Marrella, "Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts", 36 Vand.JTransnat'lL 1137 (2003), p. 1158 *et seq*.

confidentiality, technical expertise, time and cost efficiency.[2] In the international level, in particular, it is rare for a commercial contract of a certain economic significance not to contain an arbitration clause,[3] while the very successful United Nations New York Convention of 1958 on recognition and enforcement of foreign arbitral awards[4] makes it easier to enforce an arbitral award than a court judgment in another country.[5]

In the words of a commentator,

> "*Merchants will not conduct business across national boundaries if there is no guarantee of either basic contractual accountability or the provision of remedies for material breach of contract. Arbitration civilizes the international marketplace and thereby makes it accessible to commercial parties … [Arbitration] makes the risks of transborder commerce palatable*".[6]

Arbitration and competition law are quite a strange pair. They can be regarded as inherently contradictory and incompatible, but also as inherently complementary and compatible to each other.

They are inherently contradictory and incompatible, because arbitration is the creation of private autonomy. Its basis is the agreement of the parties to submit a future or current dispute to private individuals, the arbitrators, whom they themselves choose, thus voluntarily withdrawing the regulation of their rights and obligations from the ambit of public justice. Conversely, competition law is the state mechanism, whose function is to restrain inappropriate private conduct in the market, in order to maximise the benefits of the economic activity of firms for the public good. In that sense, private autonomy is subject to control for the public interest. That explains the *public policy* nature of such rules.

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[2] See e.g. *Fouchard, Gaillard, Goldman*, *supra* note 1, p. 1.

[3] Parties to international commercial agreements usually submit their disputes to institutional arbitration (as opposed to *ad hoc* arbitration). In institutional arbitration, arbitral proceedings are administered by an institution in accordance with its rules of arbitration. Such an institution is *par excellence* the International Chamber of Commerce (ICC), based in Paris.

[4] *United Nations New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards*; entry into force on 7 June 1959; published in: 330 UNTS 38 (1959), no. 4739; in force in more than 140 countries and territories.

[5] While EU Member States have concluded an international convention on recognition and enforcement of foreign judgments, the 1968 Brussels Convention, which has now been transformed to an EU Regulation (Reg. 44/2001), such an all-encompassing instrument does not yet exist in the global context. An initiative that was undertaken by the Hague Conference on Private International Law in the mid-1990s came to a standstill in 2001. Finally, the Hague Conference adopted in 2005 a less ambitious text applicable only to choice-of-forum agreements and to recognition/enforcement of foreign judgments rendered pursuant to such agreements.

[6] See Carbonneau, "The Exercise of Contract Freedom in the Making of Arbitration Agreements", 36 Vand.JTransnat'lL 1189 (2003), p. 1195.

However, arbitration and competition law are also complementary and compatible with each other. First of all, arbitration is an institution that necessarily flourishes in a free market economy system with freedom of commerce and competition.[7] The more the competitive commerce of goods and services, the stronger the presence of arbitration.

Arbitration and *EU* competition law, in particular, may have even more in common. The EU competition rules have long been considered in their functional single market perspective.[8] They were also intended to constitute the most prominent and necessary flanking measure, in order to attain a true internal market. Competition-restrictive agreements, according to the Court of Justice, would tend to restore the national divisions in trade between Member States, namely to reconstruct trade barriers already abolished by the original Treaty of Rome.

> "*The Treaty, whose preamble and content aim at abolishing the barriers between States ... could not allow undertakings to reconstruct such barriers*".[9]

What the Treaty prohibited among Member States, could not be made possible by agreements among private parties. Similarly, according to the Commission Article 101(3) TFEU Guidelines,

> "*The objective of Article [101] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the [Union] for the benefit of consumers.*"[10]

Interestingly enough, arbitration is also a means to attain the objective of a single market. If the possibility to conclude arbitration agreements and to enforce arbitral awards in the international context has always been considered a great incentive for the development of trade in goods and services and for the mobility of persons among different nations, *a fortiori*

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[7] See e.g. Libertini, "Autonomia privata e concorrenza nel diritto italiano", 100 Riv.Dir.Comm. 433 (2002), p. 433, who considers private autonomy and freedom of competition as two pillars of the market economy system. A recognition of a high degree of private autonomy is a *sine qua non* condition for the establishment of effective competition in the market. However, it is also possible that private autonomy might be exercised in an anti-competitive way.

[8] Outside the EU context, free trade and free competition are not, of course, dependent on each other. It is perfectly possible for a satisfactory degree of domestic competition to exist even in a country that is closed to the international flows of trade. At the same time, it is possible for a country nominally open to foreign trade or for a free trade area to be entirely cartelised, so that few competition remains in the market. Ideally, free trade and free competition should go together. While this is not always feasible in the global context, in the EU the two are correlated and constitute perennial objectives pursuant to Arts. 3(3) TEU, 119 TFEU and Art. 2 of Protocol No. 4 on the Statute of the European System of Central Banks and of the European Central Bank, as well as pursuant to Protocol No. 27 on the Internal Market and Competition.

[9] Cases 56/64 and 58/64, *Établissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v. Commission*, [1966] ECR 299, at 340.

[10] Commission Notice - Guidelines on the Application of Article 81(3) of the Treaty, OJ [2004] C 101/97, para. 13.

this should be the case of the European Union. Indeed, the Treaty of Rome had realised the importance of arbitration for an internal market by inducing the Member States in the old Article 293 EC *in fine* to enter into negotiations with each other and to conclude agreements simplifying formalities governing the reciprocal recognition and enforcement of arbitration awards.[11]

In the following chapters, we examine, first, the historical dimension of the position of arbitration in the context of competition law enforcement, second, the powers of arbitrators to apply EU competition law, third, the private international law questions pertaining to the main theme, fourth, the links between arbitration and competition authorities (notably the European Commission), and finally, the question of the review of arbitral awards on public policy grounds, which remains an appropriate *ultimum refugium* for ensuring a balanced relationship between arbitration and competition law enforcement.

II. MODERNISED EU COMPETITION LAW AND ARBITRATION

A. From Distrust to Embrace

The problem of the application of EU competition law by the arbitrators is not a new one. It has attracted attention both from the side of EU and competition lawyers and from the side of arbitration specialists. The initial approach of both has been rather conflictual.

In the early stages of EU competition law enforcement, arbitration was seen quite suspiciously by the antitrust enforcement milieu. This suspicion, not to say hostility, was due to the fear that arbitration could be used by companies as a dangerous platform to break the antitrust rules, without risking detection by the Commission, national competition authorities or state courts.[12] The specific characteristics of confidentiality, neutrality and finality of

[11] That provision referred also to recognition and enforcement of judgments. While the then EEC Member States proceeded to the conclusion of the 1968 Brussels Convention, no similar course was taken with regard to arbitral awards, because the 1958 New York Convention had come meanwhile into force. See in this context the Jenard Report of the 1968 Brussels Convention, OJ [1979] C59/1, p. 13. The New York Convention was signed by the majority of the then EEC Member States (Italy acceded in 1969) and addressed in a very satisfactory way the exigencies of the internal market. Currently, all EU Member States are party to that convention.

[12] See Werner, "Application of Competition Laws by Arbitrators: The Step Too Far", 12(1) JInt'lArb 21 (1995), p. 23, referring to a real case: Two EU companies had concluded an agreement infringing Art. 101 TFEU. The agreement was subject to Swiss law and arbitration took place in Switzerland. Only one copy of the agreement existed, and this was hidden in a Swiss bank. When the dispute started, the arbitrators were asked to examine the contract, but not to mention it in their decision.

arbitration were seen as particularly alarming.[13] Such a possibility was correlated with anecdotal evidence that international arbitrators sitting in non-EU jurisdictions, which were important arbitration centres, were not paying due deference to the EU competition rules.[14]

The arbitration milieu, on its part, initially saw EU competition law and the wide powers of enforcement of the European Commission with some suspicion, if not fear. The public policy nature of the competition rules and the fact that until comparatively recently these rules were not considered arbitrable, created a rather defensive attitude of arbitrators who were usually preferring to avoid dealing with such problematic questions, rather than risk their awards' non-enforcement or annulment on public policy or non-arbitrability grounds.[15] At the same time, arbitration specialists rejected what they saw as the Commission's interventionist and disrespectful approach vis-à-vis arbitration.[16]

This state of affairs has changed profoundly in the last fifteen years.[17] The Commission stopped obliging the parties to an exempted agreement to notify future arbitral awards, and current block exemption regulations do not contain provisions on the withdrawal of the block exemption's protection in the event of an offending arbitral award.

Indeed, of late, one may even speak of an embrace of arbitration by the Commission as an alternative dispute resolution mechanism that can be complementary and ancillary to competition law enforcement. Thus, there has been a whole series of recent merger decisions,[18] clearing concentrations subject to certain conditions or obligations, one of which is recourse to arbitration for certain disputes. In those cases, arbitration is used as a

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[13] See *idem*, pp. 23-24.

[14] See *idem*, p. 23; Baudenbacher, "Enforcement of EC and EEA Competition Rules by Arbitration Tribunals Inside and Outside the EU", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), pp. 341-343.

[15] See N. Shelkoplyas, *The Application of EC Law in Arbitration Proceedings* (Groningen, 2003), p. 160, fn. 49.

[16] Initially, the Commission had imposed duties on private parties, through some old individual and block exemptions, to notify to it arbitration proceedings and arbitral awards. The Commission had also intervened once in the past to enjoin parties from enforcing an arbitral award that was considered objectionable. See further Komninos, "Arbitration and the Modernisation of European Competition Law Enforcement", 24 *World Competition* 211 (2001).

[17] See Komninos, *supra* note 16, p. 216 *et seq*.

[18] See further Idot, "Une innovation surprenante : L'introduction de l'arbitrage dans le contrôle communautaire des concentrations", (2000) Rev.Arb. 591; M. Blessing, *Arbitrating Antitrust and Merger Control Issues* (Basle/Geneva/Munich, 2003); G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies, A Novel Supranational Paradigm in the Making?* (Groningen, 2006); F. Heukamp, *Schiedszusagen in der Europäischen Fusionskontrolle* (Cologne/Berlin/Munich, 2006); Blanke, "The Use of Arbitration in EC Merger Control: Latest Developments", 28 ECLR 673 (2007).

procedural remedy that ensures that parties comply by their - usually - behavioural commitments. The same has also happened in the antitrust area with some old exemption decisions pursuant to Article 101(3) TFEU [19] and some new commitment decisions pursuant to Article 9 of Regulation 1/2003.[20] This "delegation" of competition law enforcement to private justice constitutes a clear indicator of complementarity between arbitration and competition law.[21]

The same change of climate can be sensed in the arbitration side. Arbitrators currently feel much more at ease with competition rules and apply or refer to them as a matter of course, indeed, exceptionally they even raise them *ex officio*.[22] Arbitrators and arbitration specialists have also seen positively the recent embrace of arbitration by the Commission and the proposed use of arbitration in Commission decisions.[23] This has meant increased opportunities for arbitration in an area where its flexibility, informality and swiftness can be critical.

B. How Competition Law Issues Arise in Arbitration

Arbitrators usually come across competition law issues in an incidental way. In most cases there will be a contractual dispute and the competition law question will be raised as a defence by the defendant. The contract - typically a distribution, licensing or cooperation

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[19] See e.g. Commission Decision 89/467/EEC of 12 July 1989 (*UIP*), OJ [1989] L 226/25; Commission Decision 96/546/EC of 17 July 1996 (*Atlas*), OJ [1996] L 239/23; Commission Decision 99/781/EC of 15 September 1999 (*British Interactive Broadcasting/Open*), OJ [1999] L 312/1; Commission Decision 93/403/EEC of 11 June 1993 (*EBU/Eurovision System*), OJ [1993] L 179/23, renewed in Commission Decision 2000/400/EC of 10 May 2000 (*Eurovision*), OJ [2000] L 151/18. See Komninos, *supra* note 16, p. 217; Blanke, "The Use of International Arbitration under Article 81(3) of the EC Treaty and under Article 9 of Regulation 1/2003", 6 SchiedsVZ 234 (2008), p. 236 *et seq*.

[20] See e.g. Commission Decision 2005/396/EC of 19 January 2005 (*Joint selling of the media rights to the German Bundesliga*), OJ [2005] L 134/46; Commission Decisions of 14 September 2007 (*Opel, Toyota Motor Europe, Fiat and DaimlerChrysler - Access to technical information*).

[21] The term "delegation" is not used in the strictly legal sense, but rather in a political science one. Indeed, legally speaking, the public enforcement powers of the Commission cannot be delegated to private parties (trustees, arbitrators or other experts); compare case T-201/04, *Microsoft Corp v. Commission*, [2007] ECR II-3601, para. 1264 *et seq*.

[22] See generally Radicati di Brozolo, "Arbitrage commercial international et lois de police : Considérations sur les conflits de juridictions dans le commerce international", in: 315 Rec.Cours 265 (2005), p. 445 *et seq*.; Blanke and Nazzini, "Arbitration and ADR of Global Competition Disputes: Taking Stock (Part II)", 1 GCLR 78 (2008), p. 79 *et seq*.; Van Houtte, "The Application by Arbitrators of Articles 81 & 82 and their Relationship with the European Commission", 19 EBLR 63 (2008), p. 65.

[23] See e.g. Blessing, *supra* note 16, pp. 194-197 and generally Blanke and Nazzini, "Arbitration and ADR of Global Competition Disputes: Taking Stock (Part I), (Part II), (Part III) & (Part IV)", 1 GCLR 46 + 78 + 133 (2008) & 2 GCLR 1 (2009).

agreement - will contain an arbitration clause and the plaintiff will advance claims based on breach of contract, while the defendant will raise the nullity of the contract or of certain parts thereof.

One cannot exclude, however, the possibility that EU competition law could also be pleaded as a sword before arbitrators. This could happen in case of a co-contractor's damages claim because of harm incurred through his counter-party's violation of the competition rules or in a similar case involving a member of an illegal cartel and his direct purchasers. In most of these rather rare cases, typically, there will be a pre-existing arbitration clause (*clause compromissoire*). On the other hand, it is rare to see a non-contractual liability case be decided by arbitrators, if there is not yet any arbitration clause, since it would be almost impossible for the litigants to conclude an arbitration agreement after the dispute has arisen (*compromis*).

In sum, the way a competition law-related dispute arises before the arbitrators bears no difference at all from the way it comes before the courts.

C. Arbitrability of EU Competition Law

An old question of theoretical and practical significance has been the "arbitrability" of competition law-related disputes, i.e. whether the parties to an arbitration clause can submit to arbitration such disputes and whether the arbitrators themselves have the power to decide them. It is basically the contractual nature of private arbitration that gives rise to this question. Arbitration is the creation of private autonomy and, for this reason, it has long been debated whether certain "public law" disputes that pertain to the public interest can be settled and submitted to arbitration.

In addition, private autonomy has a secondary role in competition law disputes. Indeed, competition law places limits upon it.[24] Thus, if we take Article 101 TFEU as our paradigm, the nullity of anti-competitive agreements is absolute and must be raised by courts *ex officio*, notwithstanding the will of the litigants. Then, during the civil proceedings, a competition authority may wish to intervene as *amicus curiae* and make submissions if the protection of the public interest so requires. At the same time, parties cannot settle their disputes through

[24] A recognition of a high degree of private autonomy is a *sine qua non* condition for the establishment of effective competition in the market. However, it is also possible that private autonomy might be exercised in an anti-competitive way. Indeed, competition law does nothing more than to impose limits on private autonomy in order to protect the public interest.

an in-court or out-of-court settlement that runs counter to competition law. In addition, private parties cannot dispose of the antitrust rules or exclude their applicability.

This has important consequences for the treatment of the competition rules in the course of a dispute both domestically and internationally.

First, domestically, the Treaty competition rules constitute mandatory public law provisions,[25] primarily aiming at safeguarding the public interest and thus restricting freedom of contract (*ius cogens*, *dispositions impératives*, *zwingende Bestimmungen*). The General Court has stressed that "*the public policy nature of competition law is specifically designed to render its provisions mandatory and to prohibit traders from circumventing them in their agreements*".[26] As a result, private parties cannot conclude a contract and explicitly or implicitly decide that their contract will not be subject to EU competition law. The application of the prohibition provisions of Articles 101 and 102 TFEU is obligatory, automatic, and independent of the parties' will (*ius cogens*).[27]

Second, internationally, they cannot be set aside by the parties' choice of a foreign law[28] since they are mandatory in the private international law sense (*lois d'application immédiate*). They are applicable notwithstanding the *lex causae* and irrespective of whether the parties have chosen a certain applicable law.

All these elements of competition law had led in the past to the exclusion of the arbitrability of antitrust-related disputes, because of their public policy (*ordre public*) nature. This attitude, however, was reversed in the 1980s and early 1990s and it can now be said with certainty that arbitrability of competition law disputes is generally accepted in all jurisdictions with developed antitrust regimes.[29] Indeed, it is not an overstatement to say that,

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[25] See e.g. Schröter, in: Schröter, Jakob & Mederer (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003), p. 98.

[26] Case T-128/98, *Aéroports de Paris v. Commission*, [2000] ECR II-3929, para. 241. See also case T-34/92, *Fiatagri and New Holland Ford v. Commission*, [1994] ECR II-905, para. 39, Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, [1999] ECR I-3055, para. 39; Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al.*, [2006] ECR I-6619, para. 31.

[27] Compare also Commission Decision 2002/759/EC of 5 December 2001 (*Luxembourg Brewers*), OJ [2002] L 253/21, para. 62, which refers to Art. 101 (1) TFEU as a "rule of public policy".

[28] In this case, foreign law means the law of a country that is not an EU Member State, since EU competition law is an integral part of all EU Member States' laws, therefore the choice of any national law within the EU would not lead to an application of "foreign" law with respect to the Treaty competition rules.

[29] In the United States, see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985); *Kotam Elecs., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724 (11th Cir. 1996); *Seacoast Motors of Salisbury, Inc. v. Daimler-Chrysler Motors Corp.*, 271 F.3d 6 (1st Cir. 2001); *JLM*

while arbitrability remains in principle a question governed by state (municipal) law, the increased internationalisation of arbitration law and practice and the emergence of transnational principles have led to a general transnational principle of arbitrability (*favor arbitrandi*).[30] Arbitrability of competition law-related disputes can now be considered such a transnational principle.

This is also supported by the arbitration practice itself, which is quite rich on the question of arbitrability. In particular, the plea that a certain dispute is not arbitrable because it pertains to public rules on the protection of free competition has been heard quite often by arbitrators and has been invariably rejected. In all of these cases, the usual approach taken by arbitrators is that competition law is arbitrable and therefore the arbitration clause itself is fully operative and gives the power to the arbitral tribunal to hear arguments and decide a dispute that also involves competition law. From this analysis, it is evident that the arbitrability of EU competition law is no longer questioned and should be taken for granted.

The 1999 *Eco Swiss*[31] ruling of the Court of Justice by implication also supports this proposition.[32] The Court, by deciding on the duties of national courts to safeguard the effectiveness of EU competition law and to refuse to recognise or to set aside arbitral awards that offend against the public policy (*ordre public*) of the forum, implicitly ruled on the arbitrability of those rules.

Industries, Inc. et al. v. Stolt-Nielsen SA et al., 2004 US App. LEXIS 22253 (2d Cir. 2004), XXX YCA 963 (2005). In France, see CA Paris, 19.5.1993, *Labinal SA v. Mors and Westland Aerospace Ltd.*, (1993) Rev.Arb. 645, with a comment by Idot, (1993-7) *Europe* 10, 11; CA Paris, 14.10.1993, *Sté Aplix v. Sté Velcro*, (1994) Rev.Arb. 164, with a comment by Idot, (1994-4) *Europe* 12. See also more recently CA Paris, 20.3.2008, *Jacquetin v. Intercaves* – RG nº 06/06860. In Italy, see Corte di Cassazione, 21.8.1996, n° 7733, *Telecolor SpA v. Technocolor SpA*, 47 Giust.Civ. I-1373 (1997), with a comment by Falvella, 47 Giust.Civ. I-1375 (1997); Corte d'Appello Bologna, 11.10.1990, *COVEME SpA v. CFI - Compagnie Française des Isolants SA*, 3 Riv.Arbitrato 77 (1993), with comments by Rosi, 3 Riv.Arbitrato 79 (1993); Caporale, 7 Dir.Comm.Int. 725 (1993). In England & Wales, see *ET Plus SA et al. v. Welter et al.* (Comm.), [2006] Lloyd's Rep. 251; [2005] EWHC 2115. See also, generally, Mourre, "Arbitrability of Antitrust Law from the European and US Perspectives", in: Blanke & Landolt (Eds.), *The Treatment of US Antitrust and EC Competition Law in International Arbitration* (forthcoming by Kluwer).

[30] Compare M. Lehmann, *Die Schiedsfähigkeit wirtschaftsrechtlicher Streitigkeiten als transnationales Rechtsprinzip* (Baden-Baden, 2003); *idem*, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice", 42 Columbia JTransnat'lL 753 (2004).

[31] *Supra* note 26.

[32] See, in this sense, Radicati di Brozolo, "Arbitrato, diritto della concorrenza, diritto comunitario e regole di procedura nazionali", 9 Riv.Arbitrato 665 (1999), p. 670 *et seq.*; P. Landolt, *Modernised EC Competition Law in International Arbitration* (The Hague, 2006), p. 101; J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (London, 2007), p. 298.

D. Competences of Arbitrators in the Decentralised System of Enforcement

Until 1 May 2004, arbitrators had been applying Articles 101 and 102 TFEU on numerous occasions, although, like national judges, they did not have jurisdiction to apply Article 101(3) TFEU,[33] which pursuant to Article 9(1) of Regulation 17 of 1962[34] was reserved to the sole power of the Commission to apply. There is no doubt that with the abolition of this enforcement monopoly of the Commission, like state judges, arbitrators are now able to apply the third paragraph of Article 101 TFEU, too.[35] In so doing, arbitrators would not be granting

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[33] In other words, Art. 101(3) TFEU was not arbitrable under the Reg. 17 enforcement system.

[34] Reg. No. 17 of 6 February 1962 - First Regulation Implementing Articles 85 and 86 of the Treaty, JO [1962] L 13/204.

[35] See Burrichter, "The Application of Article 81(3) by National Courts: Some Remarks from the Point of View of a Practitioner", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 543; Komninos, *supra* note 16, p. 219 *et seq*.; Idot, "Arbitration and the Reform of Regulation 17/62", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), pp. 316-317; Dolmans and Grierson, "Arbitration and the Modernization of EC Antitrust Law: New Opportunities and New Responsibilities", 14(2) ICC Bull. 37 (2003), p. 49; Nourissat, "L'arbitrage commercial international face à l'ordre juridique communautaire : Une ère nouvelle?", (2003) RDAI/IBLJ 761, pp. 768-769; Liebscher, "Arbitration and EC Competition Law - The New Competition Regulation: Back to Square One?", 6 Int.ALR 84 (2003), pp. 90-91; Radicati di Brozolo, "Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration: A Fresh Look at the 'Second Look'", 7 Int.ALR 23 (2004), p. 33; Nazzini, "International Arbitration and Public Enforcement of Competition Law", 25 ECLR 153 (2004), pp. 155-156; Bastianon, "Il decentramento del diritto comunitario della concorrenza e l'arbitrabilità delle controversie antitrust", 9 *Danno e Responsabilità* 353 (2004), pp. 359-361; Radicati di Brozolo, "Arbitrato e diritto della concorrenza: il problema risolto e le questioni aperte", 14 Riv.Arbitrato 9 (2004), pp. 20-21; Nourissat, "La place de l'arbitrage dans le nouveau paysage communautaire de la concurrence", in: Nourissat & Wtterwulghe (Eds.), *Le nouveau règlement d'application du droit communautaire de la concurrence : Un défi par les juridictions françaises* (Paris, 2004), p. 52; I. Van Bael and J.-F. Bellis, *Competition Law of the European Community* (The Hague/London/New York, 2004), pp. 1197-1198; Abdelgawad, "L'arbitrage international et le nouveau règlement d'application des articles 81 et 82 CE", (2004) Rev.Arb. 253, pp. 255-264; Bowsher, "Arbitration and Competition", in Ward & Smith (Eds.), *Competition Litigation in the UK* (London, 2005), pp. 428-429; Van Houtte, "Distribution Arbitration and European Competition Law", in: *Arbitration and Commercial Distribution, Reports of the Colloquium of CEPANI of November 17th 2005* (Brussels, 2005), pp. 95-96; Thalhammer, "Die Rolle der Schiedsgerichte bei der Durchsetzung von EG-Kartellrecht unter dem Regime der VO 1/2003: Zugleich ein Beitrag zu 1 Ob 270/03t und § 124 KartG", 19 WBl. 62 (2005), pp. 64-65; Eilmansberger, "Die Bedeutung der Art. 81 und 82 EG für Schiedsverfahren", 4 SchiedsVZ 5 (2006), p. 8; Landolt, *supra* note 32, pp. 101-104; K. Hilbig, *Das gemeinschaftsrechtliche Kartellverbot im internationalen Handelsschiedsverfahren, Anwendung und Gerichtliche Kontrolle* (Munich, 2006), pp. 99-107; Kurkela, Levin, Liebscher and Sommer, "Certain Procedural Issues in Arbitrating Competition Cases", 24 Jint'lArb. 189 (2007), p. 190; Idot, "La place de l'arbitrage dans la résolution des litiges en droit de la concurrence", D. 2007.2681, p. 2683; Howard, Rose and Roth, "The Enforcement of the Competition Rules in the Member States", in: Roth & Rose (Eds.), *Bellamy & Child European Community Law of Competition* (Oxford, 2008), p. 1478; M.-C. Boutard-Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem and J. Vialens, *L'application*

"exemptions" under Article 101(3) TFEU, since the giving of an "exemption" is no longer possible under the system of legal exception, but rather they would be applying Article 101 TFEU as a whole, exactly like courts.[36]

The fact that Regulation 1/2003 does not mention arbitration, should not come as a surprise, as state laws do not normally contain individual rules on the arbitrability of every single dispute but rather rely on general criteria. Under the old system, arbitrators applied the first two paragraphs of Article 101 TFEU, without having been authorised to do so under any provision of EU competition law. Their jurisdiction to do so is well established and it has been confirmed by national courts and by implication by the Court of Justice alike.[37] If there was an intension for some reason to bar arbitrators from applying Article 101(3) TFEU, an express provision would undoubtedly have been included to this end. By not having done so and by emphasising the fact that Article 101 TFEU will be applied as a whole, Regulation 1/2003 has fully accepted the arbitrators' competence to apply Article 101(3) TFEU.[38]

Any other solution would create serious problems of a procedural nature. Even if they could somehow separate paragraph (3) from Article 101 TFEU, which is no longer possible since Article 101 TFEU must now be applied as an integrated norm, the question would arise as to whom they would have to send the issue to be decided. Certainly not to the Commission,

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en France du droit des pratiques anticoncurrentielles (Paris, 2008), p. 774; Dempegiotis, "EC Competition Law and International Commercial Arbitration: A New Era in the Interplay of These Legal Orders and a New Challenge for the European Commission", 1 GAR 135 (2008), p. 140; Blanke and Nazzini, "Arbitration and ADR of Global Competition Disputes: Taking Stock (Part I)", 1 GCLR 46 (2008), pp. 52-55. To our knowledge, there has been no view published in any scholarly journal supporting the lack of arbitrators' jurisdiction to apply Art. 101(3) TFEU. The only notable exception is the comparative report of the 2004 study on the damages actions for violation of EU competition law that was commissioned by the Commission: see Waelbroeck, Slater and Even-Shoshan, "Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report", 31 August 2004, in: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html, p. 134. Compare also De Groot, "Arbitration and the Modernisation of EC Competition Law", 19 EBLR 175 (2008), p. 187, who refers to private correspondence with a senior Commission official who seems to suggest that arbitrators cannot apply Art. 101(3) TFEU. No great weight should be given, however, to such private statements. In any event, the Commission has no power to interpret Reg. 1/2003 or *a fortiori* to rule on the arbitrators' jurisdiction.

[36] Thus, it is better to avoid speaking of arbitrators "granting individual exemptions", as some authors do (see e.g. Poudret and Besson, *supra* note 32, p. 299), and instead speak of the arbitrators' jurisdiction to "apply" Art. 101(3) TFEU.

[37] See e.g. case C-393/92, *Gemeente Almelo et al. v. Energiebedrijf Ijsselmij NV*, [1994] ECR I-1477; *Eco Swiss*, *supra* note 26.

[38] See in this sense Edward, "The Modernisation of EC Antitrust Policy: Issues for Courts and Judges", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 569; Komninos, *supra* note 16, p. 221.

since the latter would no longer have jurisdiction to give an individual exemption, neither to the European Court of Justice, since the latter - ever since the ruling in *Nordsee*,[39] lately confirmed in *Eco Swiss*[40] and *Denuit*[41] - cannot accept preliminary references from arbitrators.[42] Thus, they would have no other option but to send this specific issue to national courts. However, it is no longer possible or meaningful for a court to issue a separate decision of exemption or a declaration of applicability of Article 101(3) TFEU, other than to apply Article 101 TFEU as a whole. If, however, the arbitrators were to refer the whole question of the applicability of Article 101 TFEU to courts, this would lead to retrogression and would strip arbitrators of their well-established competence to apply Article 101(1),(2) TFEU.

Leaving aside any legal arguments,[43] a policy argument against the application of Article 101(3) TFEU by arbitral tribunals relies on the supposed inability of arbitrators to get involved in such questions, so utterly connected with economic public policy and so prone to complex economic deliberations. However, if courts have now been accepted as full enforcers of Articles 101 and 102 TFEU, it would be contradictory to treat arbitrators in a different way. Indeed, what can be held against courts, basically that they usually lack the expertise that would allow them to address the complex economic issues involved, may be one of the strengths of arbitration. Parties may - and usually do - select as arbitrators persons

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[39] Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, [1982] ECR 1095.

[40] *Eco Swiss*, *supra* note 26, paras. 32, 33.

[41] Case C-125/04, *Guy Denuit and Betty Cordenier v. Transorient – Mosaïque Voyages and Culture SA*, [2005] ECR I-923.

[42] On the non-availability of the preliminary reference mechanism to arbitrators and on possible indirect ways for arbitrators to seize the ECJ, see also Komninos, "Assistance to Arbitral Tribunals in the Application of EC Competition Law", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 367 *et seq*.

[43] Recently, a commentator has stressed that the arbitrators' jurisdiction to apply Art. 101(3) TFEU is derived from the direct effect of that provision, which is the result of Art. 1 Reg. 1/2003, therefore the above legal argumentation is unnecessary; see Nazzini, "A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as *amici curiae* and the Status of their Decisions in Arbitral Proceedings", 19 EBLR 89 (2008), p. 93. However, the reality is more complicated. It is not true that Reg. 1/2003 conferred direct effect on Art. 101(3) TFEU; Article 1 Reg. 1/2003 only changed the enforcement system and abolished the administrative authorisation system and the Commission's exclusive competence to apply Art. 101(3) TFEU. There is, in other words, a necessary distinction between direct effect as such, which Art. 101(3) TFEU was always capable of having, and competence, which under the previous system of enforcement was exclusively enjoyed by the Commission (as to this distinction, compare Idot, "La place de l'arbitrage dans la résolution des litiges en droit de la concurrence", D. 2007.2681, p. 2683). Therefore, it is the competence question that is critical here and it is because of this that it is necessary to analyse and interpret the relevant provisions of Reg. 1/2003.

with a high level of expertise, thus minimising any risks owed to the judge's possibly limited knowledge of a highly technical field.[44]

At the same time, the increased flexibility of the arbitral procedure, in comparison to that of state justice, suits well antitrust, whose substance might sometimes be at pains with the straitjacket of a national code of civil procedure. This is particularly true of national rules of evidence, which can be a considerable hurdle for an antitrust case in national courts, as opposed to arbitral tribunals, which may avail themselves of much more extensive powers of discovery.[45] Indeed, there is anecdotal evidence that arbitrators, even before the introduction of the legal exception system, have on some occasions felt quite at ease to hear arguments and base their awards on considerations pertaining to Article 101(3) TFEU, thus applying this provision "by the back door".[46] In sum, arbitrators, exactly as state courts, enjoy now the power to apply Articles 101 and 102 TFEU in full.

III. THE APPLICATION OF EU COMPETITION LAW BY INTERNATIONAL ARBITRATION TRIBUNALS

A. EU Competition Law as Applicable Law in Trans-border Disputes in General

Before addressing the specific question of the arbitrators' power or duty to apply EU competition law in an international arbitration, we proceed to some introductory observations on the relationship between EU competition law and private international in the context of trans-border private law disputes.

In such cases, there are two specific mechanisms in private international law which lead to the application of substantive EU competition law to certain conduct. Under the *first*

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[44] See also Liebscher, "L'arbitrage est-il une alternative viable?", in: Idot & Prieto (Eds.), *Les entreprises face au nouveau droit des pratiques anticoncurrentielles : Le Règlement 1/2003 modifie-t-il les stratégies contentieuses ?* (Brussels, 2006), pp. 165-167.

[45] See Temple Lang, "Panel Discussion: International Arbitration", in: Hawk (Ed.), *International Antitrust Law and Policy 1994*, *Annual Proceedings of the Fordham Corporate Law Institute* (New York/The Hague, 1995), p. 421 *et seq*. A certain weakness of arbitration exists as to third-party evidence. The latter can be usually obtained through the intervention of state courts.

[46] See Fox, "Panel Discussion: EC Competition System: Proposals for Reform", in: Hawk (Ed.), *International Antitrust Law and Policy 1998*, *Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1999), p. 228; Bowsher, *supra* note 35, p. 427. It is not clear whether in these cases the arbitral award was explicitly based on a *positive* application of Art. 101(3) TFEU. Were this the case, such awards would have been vulnerable to annulment or non-recognition/non-enforcement for having dealt with inarbitrable matters. See, however, Dolmans and Grierson, *supra* note 35, p. 42, according to whom, no problem would have arisen if Art. 101(3) TFEU had been applied correctly or even if an exemption had been denied incorrectly, since the Commission's monopoly to apply Art. 101(3) TFEU under the old system was not itself a rule of public policy. The authors may be right as to public policy but the problem of inarbitrability would have remained.

mechanism, and if the parties to the specific legal relationship have not chosen an applicable law, Articles 101 and 102 TFEU are considered to contain an *indirect unilateral conflicts rule* which defines the cases that fall within their scope.[47] The rule is *unilateral*, because EU law itself demands its application if there is a sufficiently close connection with the territory of the EU.[48] This is a characteristic not only of EU competition law, but also of a wide range of EU Directives.[49] It is also *indirect* because the relevant provisions do not spell this out expressly; rather, the conclusion is reached by interpreting those specific norms.[50] The criterion for the application of the EU competition rules is whether certain agreement, practice or behaviour prevents, restricts or distorts competition within the internal market in a causal, foreseeable and substantial way.[51] Such an effect constitutes a sufficiently "close link" with the EU Member States to justify the application of the EU competition rules.

Such a conflicts rule exists in most national competition laws, which also use as a connecting link (*facteur de rattachement*) the impact of the anti-competitive conduct on their markets.[52] German competition law offers an example in Section 130(2) GWB, which provides that the German competition law provisions apply if there are effects on German territory.[53]

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[47] See A.S. Metallinos, *The Prohibition of Collusion of Firms under the Law of the European Economic Community* (Athens, 1968) [in Greek], p. 93 *et seq*.; Schaub, "Grundlagen und Entwicklungstendenzen des europäischen Kollisionsrechts", 60 JZ 328 (2005), pp. 329-330.

[48] On these unilateral rules (*einseitige Kollisionsregel*) in the context of EU law, see Magnus and Mankowski, "The Green Paper on a Future Rome I Regulation – On the Road to a Renewed European Private International Law of Contracts", 103 ZVgl.RWiss. 131 (2004), p. 133.

[49] See e.g. *Council Directive 86/653/EEC of 18 December 1986 on the Co-ordination of the Laws of the Member States Relating to Self-employed Commercial Agents*, OJ [1986] L 382/17.

[50] See in that respect Magnus and Mankowski, *supra* note 48, pp. 139-142, who emphasise the difference between the indirect unilateral conflict of laws rules of pre-1993 Directives and the direct unilateral conflict of laws rules of post-1993 Directives. The judgment of the ECJ in case C-381/98, *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, [2000] ECR I-9305, should be seen in the former framework. See further C. von Bar and P. Mankowski, *Internationales Privatrecht*, Vol. I, *Allgemeine Lehren* (Munich, 2003), p. 271.

[51] In *Gencor*, the General Court gave a clear definition of the concept of "effect on competition within the Union" and identified three cumulative criteria to carry out the assessment. It stated that: "*Application of a [merger] regulation is justified under the public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the [Union …]. It is therefore necessary to verify whether the three criteria of immediate, substantial and foreseeable effect are satisfied in this case* (case T-102/96, *Gencor Ltd v. Commission*, [1999] ECR II-753, paras 90 and 92). See also joined cases 89/85, 104/85, 114/85, 116/85-117/85 and 125/85 to 129/85, *A. Ahlström Osakeyhtiö et al. v. Commission (Woodpulp I)*, [1988] ECR 5193.

[52] See, in the context of Greek competition law (Art. 32 L. 703/1977), Liakopoulos, "The Question of Private International Law in the Control of Concentrations", in: *The Control of Concentrations of Undertakings in Competition Law* (Athens, 1998) [in Greek], pp. 38-39.

[53] For a jurisprudential example, see LG Düsseldorf, 31.7.02, 12 O 415/98 – *Lüneburger Quick-Service*, 53 WuW 71 (2003).

In fact, such rules may exceptionally be universal or bilateral as well as unilateral. In such cases the national conflicts rule refers to the applicability not only of domestic competition law, but also of the competition laws of third countries. Swiss law follows this approach. Article 137 of the Swiss Act on Private International Law lays down that when anti-competitive conduct affects or refers to a specific foreign market, the competition rules of that jurisdiction should be applicable to that conduct with regard to related tortious claims.[54]

There is, however, a *second mechanism* whereby the Treaty competition rules will be applicable. As explained above, in the international context, antitrust norms pertain to the public policy of the forum and are considered to fall under the category of mandatory norms (*lois de police, lois d'application immédiate, Eingriffsnormen*),[55] in the sense that they are applicable notwithstanding the *lex causae* and irrespective of whether the parties have chosen a certain applicable law.[56] Mandatory rules usually aim to protect the general political, social, economic, or cultural interests of a specific country.[57] Rules protecting free competition are

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[54] See further M.-A. Renold, *Les conflits de lois en droit antitrust, Contribution à l'étude de l'application internationale du droit économique* (Zurich, 1991), p. 193 *et seq*.; Esseiva, "L'application du droit européen des cartels par le juge civil sur la base de l'article 137 LDIP", (1996) *Aktuelle Juristische Praxis/Pratique Juridique Actuelle* 694, p. 696 *et seq*. For a critique of the universal bilateral method, see Idot, "Les conflits de lois en droit de la concurrence", 122 JDI (*Clunet*) 321 (1995), pp. 325-327; Schwartz and Basedow, "Restrictions on Competition", in: Lipstein (Ed.), *International Encyclopedia of Comparative Law*, Vol. III, *Private International Law*, Ch. 35 (Tübingen/Dordrecht/Boston/Lancaster, 1995), p. 118 *et seq*.; Hellner, "Private International Enforcement of Competition Law: The Application of Foreign Competition Law", 4 YPIL 257 (2002), p. 293.

[55] See e.g. Schröter, *supra* note 25, p. 99; von Bar and Mankowski, *supra* note 48, p. 256. See also para. 50 of AG Darmon's Opinion in *Woodpulp I*, *supra* note 51.

[56] See Art. 9 of European Parliament and Council Regulation 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), [2008] OJ L 177/6, and Art. 16 of European Parliament and Council Regulation 864/2007 of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), OJ [1997] L 199/40, both referring to "*overriding mandatory provisions*". Note that the public policy exception in the context of conflict of laws, to be found in Arts. 21 and 26 of the Rome I and Rome II Conventions, respectively, is a methodologically different instrument of negative rather than positive function, than mandatory norms are, though the two concepts broadly refer to the same interests that are deemed fundamental. In other words, the public policy exception merely safeguards that a certain provision of the specified law does not lead to consequences contrary to the public policy (*ordre public*) of the forum. It does not, however, lead to the positive application of the forum's mandatory norms. This result is attained only through the compulsory application of these rules through their being considered as internationally mandatory norms (*lois d'application immédiate*).

[57] See von Bar and Mankowski, *supra* note 48, p. 262 *et seq*. Compare joined cases C-369/96 and C-376/96, *Criminal Proceedings against Jean-Claude Arblade et al.*, [1999] ECR I-8453, para. 30, where the ECJ refers to the notion of internationally mandatory norms in the following terms: "*Concerning the classification of the provisions at issue as public-order legislation under Belgian law, that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member*

generally accepted to constitute such mandatory norms, irrespective of their EU or national provenance.[58]

It is this second characteristic of the EU competition rules that becomes important in a transnational context, particularly for international arbitration.

B. The Specific Case of Arbitration

The application of EU competition law by arbitrators raises a number of very specific questions because of the distinct features of arbitration.

Arbitration is a dispute resolution mechanism and arbitrators themselves are private judges whose task is to resolve a dispute that the parties have placed before them. They are not state organs and are not entrusted with the safeguarding of any public interest or public policy as such. Indeed, unlike state courts, international commercial arbitration has no forum and no *lex fori*, since its seat cannot be properly considered a forum.[59] This means that arbitrators are not bound by any particular conflict of laws or private international law rules[60] and, at the same time, are not bound by any mandatory norms (*lois d'application immediate*) of any forum. For them, all such norms are essentially tantamount to mandatory norms of a third country.[61]

At the same time, arbitrators do not function in a vacuum. They cannot act as vehicles of illegality, since, in the eyes of EU competition law, they are undertakings themselves. This means that if they were to act as facilitators of cartels and if the arbitration process were a sham, essentially being an internal mechanism to a cartel, they would themselves be liable to

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State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State".

[58] See von Bar and Mankowski, *supra* note 48, p. 256; Idot, "Le droit de la concurrence", in: Fuchs, Muir Watt & Pataut (Eds.), *Les conflits de lois et le système juridique communautaire* (Paris, 2004), p. 278. See also the Giuliano/Lagarde Report on the Convention on the Law Applicable to Contractual Obligations, OJ [1980] C 282/1, p. 28.

[59] See *inter alia* Idot, "Arbitration and the Reform of Regulation 17/62", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 313.

[60] See Reymond, *supra* note 54, p. 102; P. Nygh, *Autonomy in International Contracts* (Oxford, 1999), pp. 42-44 and 226 *et seq*.; Karrer, "Article 187", in: Berti, Honsell *et al.* (Eds.), *International Arbitration in Switzerland, An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute* (Basle/The Hague/London/Boston, 2000), p. 501; F. Vismara, *Le norme applicabili al merito della controversia nell'arbitrato internazionale* (Milan, 2001), p. 173 *et seq*.

[61] This does not mean that an international arbitral tribunal will disregard these rules. See further below on the discussion of public policy and the duties of arbitrators.

fines for breach of Article 101 TFEU.[62] More importantly, their arbitral award would not be enforceable in the European Union, since it would be contrary to public policy in the EU Member States, and the national courts in the EU, further to the *Eco Swiss* ruling of the European Court of Justice, would be under a duty to set aside such awards or to refuse to recognise or enforce them. These are, of course, hypothetical scenarios. There is currently no evidence that international arbitration is used as a vehicle to breach the most fundamental notions of competition law. On the contrary, the few reported cases and anecdotal evidence show that arbitrators are conscious of competition law and that they deal with such issues appropriately, certainly in no less satisfactory ways than state courts. In any event, the above hypothetical scenarios and risks are an adequate safeguard and arbitrators act in a prudent and practical manner, when an EU competition law question arises.

We will come back to this question below, at the section on the public policy control, but, for the time being, it suffices make the following distinctions, when speaking about the application of EU competition by an international arbitral tribunal:

(a) In a situation where the arbitrators consider that the law applicable (*lex causae*) to the specific legal relationship in question and thus to the merits of the dispute is the national law of an EU Member State, there is no issue as to the applicability of EU competition law by the arbitrators,[63] since these provisions are an integral part of the Member States' laws.

(b) The issue arises only when the *lex causae* is the law of a third country, for example Swiss law, or when the arbitrators are deciding on the basis of *lex mercatoria* or of the UNIDROIT or PECL Principles or without any reference to legal principles, as *amiables compositeurs* or *ex aequo et bono*. In such a case, the arbitral tribunal is not under a legal duty to apply EU competition law. However, this does not mean that the arbitrators cannot apply EU competition law, if they wish. They may do so, on a number of premises:

    a. First, the arbitrators, in defining the applicable law to the merits of the dispute, may rely on a system of conflict of laws that exceptionally possesses a universal bilateral conflicts rule applicable to competition law, such as Article

[62] See further below note 122 and the accompanying text.

[63] See above. For an example from the arbitral practice, see the judgment of 28-4-92 of the Swiss Federal Tribunal in *G SA v. V SpA*, 118 II ATF 193; [1996] ECC 1, where it was stressed that an arbitral tribunal based in Geneva applying Belgian law had to apply Art. 101 TFEU.

137 of the Swiss Act on Private International Law, which has introduced a general and universal connecting link for competition law-related torts.

b. Second, the arbitrators may rely on a system of conflict of laws that allows for foreign mandatory norms to be taken into account under certain conditions. Thus, for example, Article 19 of the Swiss Act on Private International Law allows Swiss courts to "take into account" foreign mandatory norms if the interests of one party advocate this, and if there is a close connection between the facts of the case and the specific legal system to which the mandatory norms belong. Similarly, Article 9(3) of the Rome I Regulation provides that effect may be given to mandatory norms of third countries where the obligations arising out of the contract have to be or have been performed, in so far as those provisions render the performance of the contract unlawful.

c. Finally and more importantly, the arbitrators may decide to apply EU competition law, without necessarily relying on a specific conflicts rule, because they consider this appropriate, taking into account the enforceability of their award. In other words, when the arbitrators see that ignoring EU competition law would prejudice the award's chances of recognition and enforcement in the EU Member States, they take a practical approach and decide to apply the Treaty competition provisions, sometimes even *ex officio*, notwithstanding the parties' selection of law or seat of arbitration.

We will return to this question below, when we analyse the control of arbitral awards by courts on public policy grounds.

IV. THE INSTITUTIONAL POSITION OF ARBITRATION IN ITS RELATIONSHIP WITH THE EUROPEAN COMMISSION

A. Arbitration Is not Covered by the Cooperation Duties of Regulation 1/2003

The basic premises of the system of EU competition law enforcement are to be found in Council Regulation 1/2003.[64] That Regulation lays down not only the mechanisms for public enforcement by the Commission but also deals with the decentralised application of the Treaty competition rules by national (competition) authorities and courts. With regard to national courts, the Regulation does not stop at confirming their full competence to apply EU

[64] Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

competition law, but also creates an institutional framework, which provides for specific powers and duties for the national courts, aiming at ensuring consistency in the decentralised enforcement of EU competition law.

Such powers and duties also echo - and are in a sense *leges speciales* of - Article 4(3) TEU, which remains the *lex generalis*.[65] Arbitration, on the other hand, is not subject to Article 4(3) TEU.[66] Indeed, the duty of cooperation in Article 4(3) TEU is limited only to EU institutions and to official authorities and organs of the Member States. Arbitrators do not fall under this provision, since, although enjoying jurisdictional and quasi-judicial powers, they still remain a creation of private autonomy. This means that most of the cooperation and co-ordination mechanisms between national courts and the Commission provided for in Regulation 1/2003 are not transposable to arbitration.[67]

Thus, neither Article 4(3) TEU nor Article 15(1) of Regulation 1/2003 can provide for a legal basis for formalised cooperation between the Commission and arbitrators in the sense of the former being bound to offer assistance on a specific competition-related issue to the latter. This question will be further discussed below, when referring to the applicability of the Commission's Cooperation Notice to arbitration.

Similarly, Article 15(2) of Regulation 1/2003, which provides that Member States are under a duty to forward to the Commission copies of "*written judgments*" of "*national courts*", does not certainly apply directly to arbitral awards and tribunals. It might have been tempting to argue that the imposition of this administrative duty to Member States, rather than to courts, might mean that the former have to forward to the Commission also copies of arbitral awards applying Articles 101 and 102 TFEU. Such an argument, however, fails in view of the letter

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[65] See Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ('Regulation Implementing Articles 81 and 82 of the Treaty'), COM(2000) 582 final, OJ [2000] C 365E/284, Explanatory Memorandum, which notes that Art. 15 codifies "*the existing obligation of the Commission, based on Article [4(3)] of the [EU] Treaty, to cooperate with national courts*". See also Case C-429/07, *Inspecteur van de Belastingdienst v. X BV*, Judgment of 11 June 2009, para. 21.

[66] That arbitration is not formally speaking subject to Art. 4(3) TEU is a generally accepted proposition. See e.g. Van Gerven, "L'arbitrage dans le droit européen", 72 RDIDC 67 (1995), p. 73; Komninos, *supra* note 16, p. 228; Idot, *supra* note 59, p. 318; Shelkoplyas, *supra* note 15, p. 423.

[67] See in this sense Liebscher, *supra* note 35, p. 92; Radicati di Brozolo, "Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration: A Fresh Look at the 'Second Look'", 7 Int.ALR 23 (2004), pp. 33-34; Idot, "Les entreprises face à la suppression de l'autorisation préalable", in: Mourre (Ed.), *Le nouveau droit communautaire de la concurrence, Les droits de la defense face aux pouvoirs de la Commission européenne* (Paris, 2004), p. 145; Hilbig, *supra* note 35, p. 166; Thalhammer, *supra* note 35, p. 69; Boutard-Labarde, Canivet, Claudel, Michel-Amsellem and Vialens, *supra* note 35, p. 771; *contra* Abdelgawad, *supra* note 35, p. 266.

of the text, but also in view of its rationale, which is to make the Commission aware of possible cases of national litigation, where the former can intervene at a later stage as *amicus curiae*. Besides, states do not – indeed should not – have mechanisms in place to notify arbitral awards, since it is impossible for a state to know at a given time the number of arbitrations and arbitral awards. In an open and democratic society, this would be unthinkable and would certainly run counter the most fundamental principles of arbitration: privity, independence and confidentiality.[68]

Naturally, arbitration may be indirectly affected by Article 15(2) of Regulation 1/2003, in case a Member State court has reviewed an arbitral award, or has given judgment concerning its recognition or enforcement, or has even intervened in support of the arbitration proceedings, for example by ordering a provisional measure.[69] All these court judgments will have to be forwarded to the Commission by the Member State in question, if EU competition law has been applied by the court.

It should be stressed that it is neither sufficient nor necessary for such an EU law duty to exist, if *the arbitrators* have applied Articles 101 and 102 TFEU. The national court *itself* must have applied these provisions, which is more likely to have happened when the court extensively reviewed the arbitral award.[70] Indeed, in the recent *MDI* case, which represents the first case where a national court in the European Union refused to enforce a foreign arbitral award on public policy grounds, because of an EU competition law violation, the judgment of the Court of Appeal of The Hague was transmitted to the Commission under Article 15(2).[71]

As for the power of the Commission (or of national competition authorities) to submit written or oral observations *ex officio* to national courts pursuant to Article 15(3) of Regulation 1/2003, again such an *amicus curiae* mechanism is neither applicable nor transposable to

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[68] Compare van Houtte, *supra* note 35, p. 106.

[69] This is so, if the wider meaning of "judgment" is followed, which also covers courts' decisions that are final in nature, yet they may be interim or partial. See, in this regard, A.P. Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (Oxford/Portland, 2008), p. 104.

[70] Article 15(2) Reg. 1/2003 would cover also court decisions that have applied the Treaty competition provisions, even if the arbitral tribunal may have not touched upon this issue.

[71] Court of Appeal of The Hague, 24-3-2005, *Marketing Displays International Inc. v. VR Van Raalte Reclame BV*, Cases 04/694 and 04/695, 8(2) SIAR 207 (2006), reported in the Commission's website that brings together the national judgments transmitted to it under Art. 15(2) Reg. 1/2003: http://ec.europa.eu/competition/antitrust/national_courts/court_2005_046_nl.pdf.

arbitration.[72] Any attempt to extend such measures to arbitration proceedings should be avoided not only as being unnecessary and disproportionately restrictive, but also because it would be detrimental to the nature of arbitration and to the most fundamental principles of the arbitration process, namely privity, independence and confidentiality.[73] If competition authorities were to demand to become privy to arbitration involving competition issues, many parties might opt to transfer their arbitrations to venues outside the EU, especially if one of the parties is not an EU national.[74]

The question remains whether the intervention of a competition authority would be possible, if the arbitration agreement itself provided for such a possibility or if the arbitrators were to give permission to this and both parties gave their consent.[75] In such an exceptional case, the flexibility of arbitration would advocate in favour of a positive answer. However, there are good policy reasons that plead against placing too much emphasis on the consent of the parties. In practice, it will be quite difficult for a party to the arbitration proceedings to resist the Commission's or another competition authority's intervention without raising its suspicions and thus without attracting its "attention". A party may in some cases *volens nolens* acquiesce in such an intervention. To condition such a mechanism solely on the parties' consent would not be appropriate.

Therefore, arbitrators should seek or allow such intervention only in those cases where either the arbitration agreement explicitly refers to this possibility or the two parties genuinely agree and urge the arbitrators to ask the Commission to intervene in order to shed light on to some important competition law question.[76]

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[72] See Idot, *supra* note 67, p. 145; *idem*, *supra* note 43, p. 2683; Boutard-Labarde, Canivet, Claudel, Michel-Amsellem and Vialens, *supra* note 35, p. 773.

[73] On the principle of confidentiality and its limits from a comparative law perspective, see Misra and Jordans, "Confidentiality in International Arbitration: An Introspection of the Public Interest Exception", 23 JInt'lArb. 39 (2006). The principle of confidentiality may recede and, thus, allow for *amicus curiae* briefs by third parties only in cases of public-private, i.e. investment, arbitration. See further Mistelis, "Confidentiality and Third Party Participation: *UPS v. Canada* and *Methanex Corporation v. United States*", 21 Arb.Int 211 (2005), p. 221 *et seq*.

[74] See Lew, "EEC Law Restriction on Arbitration", 47 Arb. 117 (1981-82), p. 119.

[75] In such a case, there would be no violation of the fundamental principle of confidentiality. See Müller, "La confidentialité en arbitrage commercial international : Un trompe-l'œil ?", 23 Bull. ASA 216 (2005), p. 223.

[76] See Nisser and Blanke, "Reflections on the Role of the European Commission as *amicus curiae* in International Arbitration Proceedings", 27 ECLR 174 (2006), pp. 179, 181; *contra* Abdelgawad, *supra* note 35, p. 269, who thinks that the arbitral tribunal should be entitled to decide itself to permit the Commission's intervention without the parties' consent, because of the public policy nature of EU competition law, which trumps private autonomy. However, this extreme position runs counter to the most fundamental notions of arbitration.

If the above rather exceptional conditions are met, in most cases, it will be preferable to allow the European Commission to interfere only through the submission of arguments in writing, without however giving it the power to participate in the arbitration hearings or to have access to the file of the case and to documents produced during the proceedings. This solution has been followed in the context of NAFTA arbitration, which is certainly very different from a purely private commercial arbitration, but could be considered by analogy.

B. General Exclusion of Arbitration from the Cooperation Notice

The absence of any reference to arbitration in Regulation 1/2003 may not be surprising. However, one would have welcomed at least a reference to arbitration in the accompanying soft law measures of modernisation, in particular in the Notice on cooperation between the Commission and national courts.[77] Regrettably,[78] not only is the Notice silent, but actually excludes by implication arbitration tribunals, by adopting, in our view entirely unreasonably and unnecessarily, a definition of "court" that follows the "court or tribunal" criterion of Article 267 TFEU, as interpreted by the Court of Justice.[79] As a result of a consistent line of case law, arbitrators do not fall under this criterion and cannot therefore make preliminary references to Luxembourg.[80]

Thus, paragraph 1 states that

> "*for the purpose of this notice, the 'courts of the EU Member States' (hereinafter 'national courts') are those courts and tribunals within an EU Member State that can apply Articles [101 and 102 TFEU] and that are authorised to ask for a preliminary question to the Court of Justice of the European [Union] pursuant to Article [267 TFEU]*".

It is not clear whether this language intended implicitly to exclude arbitration, though there is some evidence that this may well have been the intention.[81] Irrespective of the exclusion of

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[77] Commission Notice on the Cooperation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, OJ [2004] C 101/54.

[78] See L. Idot, *Droit communautaire de la concurrence, Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE* (Paris/Brussels, 2004), p. 81.

[79] Cooperation Notice, *supra* note 78, para. 1.

[80] Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, [1982] ECR 1095, para. 13; *Eco Swiss*, *supra* note 26, para. 34; *Denuit* , *supra* note 41, para. 13. For indirect possibilities to seize the ECJ through the intervention of national courts, see Komninos, *supra* note 42, p. 363 *et seq*.

[81] See Paulis, "Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions", in: Hawk (Ed.), *International Antitrust Law and Policy 2002, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2003), p. 459, who explains that, indeed, the Commission was probably "frightened" to grant full access to arbitrators for the same

arbitration, this wording is also unfortunate, because it is Article 4(3) TEU and not 267 TFEU that should guide the Commission in its cooperation with national courts. Indeed, as explained above, Article 15 of Regulation 1/2003 and, in a certain sense, also the cooperation Notice, are *leges speciales* of the *lex generalis* of Article 4(3) TEU. Thus, an entity considered as a "court" in the national legal order should be able to cooperate with the Commission on the basis of Article 4(3) TEU and of the principles of cooperation established in *Delimitis*[82] and *Automec II*.[83] In other words, the term "court or tribunal" in Article 267 TFEU may be narrower than what may nationally be considered a "court". In this author's view, it would be inappropriate for the Commission to shut its doors to such a "court", since the latter, being an organ of the Member State in question, should be able to seize the Commission according to Article 4(3) TEU, notwithstanding paragraph 1 of the cooperation Notice.

In any event, however, it is reasonable to believe that the Commission intended to exclude arbitration only from the specific procedural framework of the new cooperation Notice, which contains self-imposed deadlines for the Commission's assistance. The Commission probably wanted to entertain requests from arbitrators on an *ad hoc* and fully discretionary basis, rather than being bound to engage in a dialogue with arbitrators as it is bound to do so with courts.[84] In any event, the soft law nature of the cooperation Notice means that its mechanisms can be used by analogy also by arbitrators.[85]

Thus, on an informal basis, arbitrators should be able to seek cooperation, whenever a legal or factual problem arises in regard to a question of enforcement of EU competition law. This is for the following reasons:

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reasons as maybe the ECJ was. The exclusion of arbitration from the mechanisms of the cooperation Notice has been criticised by many stakeholders in their comments on the Commission's modernisation package. See e.g. the comments by professor Laurence Idot, the Joint Working Party of the Bars and Law Societies of the UK on Competition Law, and the law firm Clifford Chance (comments available at http://ec.europa.eu/comm/competition/antitrust/legislation/procedural_rules/comments).

[82] Case C-234/89, *Stergios Delimitis v. Henninger Bräu AG*, [1991] ECR I-935, para. 53.

[83] Case T-24/90, *Automec Srl v. Commission (II)*, [1992] ECR II-2223, para. 90.

[84] See Paulis, *supra* note 82, pp. 459-460.

[85] See Komninos, *supra* note 16, p. 228; Wils, "Community Report", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union*, *FIDE 2004 National Reports* (Cambridge, 2004), p. 698; Heitzmann and Grierson, 'The French Approach to Arbitrating EC Competition Law in the Light of the Paris Court of Appeal's Decision in *SNF vs Cytec Industries*", in: Zuberbühler & Oetiker (Eds.), *Practical Aspects of Arbitrating EC Competition Law* (Zurich/Basle/Geneva, 2007), p. 200, fn. 37.

- Any disrespectful attitude of the Commission towards arbitration in this regard would run counter the long-established recognition of arbitration in all Member States as an alternative judicial forum.
- At the same time, it would not serve the Commission's purpose to further the decentralised civil enforcement of EU competition law, and it might alienate arbitrators, with the possible repercussion that the latter would rather suppress a difficult competition law issue, instead of running the risk to decide it wrongly themselves and consequently to expose their award to annulment.
- Finally, a negative approach towards such requests of assistance by arbitrators would not be in conformity with the Commission's central role in the enforcement of the competition law regime of the Treaty.[86]

Indeed, in the past, the Commission has been quite open in providing assistance to arbitrators applying EU competition law. It has on occasions treated arbitral tribunals in the same way as national courts under the old Notice on cooperation.[87] In one reported case, it received and responded to an application for legal information by a body defined as "Tribunal Arbitral de Barcelona", an *ad hoc* arbitration tribunal.[88] The information sought referred to an alleged dominant position of a public undertaking that controlled the bidding and executing of certain infrastructure projects in a Spanish region. It is interesting that the arbitration tribunal wanted to know whether the undertaking in question occupied a dominant position "*in the sense of the Court of Justice's case law*".[89] One can only suppose that this is a question that normally would have been addressed to the Court of Justice itself, had the referring body been a court. The case, thus, demonstrates how the Commission can remedy in some instances the inability of arbitrators to seize the Court of Justice with a preliminary reference.

Due to the arbitrators' increasing application of Article 101(3) TFEU, which admittedly entails more elaborate competition-related economic and legal questions, and to the

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[86] According to Art. 105(1) TFEU, "*the Commission shall ensure the application of the principles laid down in Articles 101 and 102*".

[87] See Temple Lang, "Panel Discussion: International Arbitration", in: Hawk (Ed.), *International Antitrust Law and Policy 1994, Annual Proceedings of the Fordham Corporate Law Institute* (New York/The Hague, 1995), p. 418; De Gryse, "Quelques propos sur l'arbitrage en matière des brevets d'invention", in: *Jura vigilantibus, Antoine Braun, les droits intellectuels, le barreau* (Brussels, 1994), p. 114; Simont, "Arbitrage et droit de la concurrence - Quelques réflexions d'un arbiter", (1998) RDAI/IBLJ 547, p. 550; Eilmansberger, *supra* note 35, p. 12.

[88] See Joris, "Communication relative à la coopération entre la Commission et les juridictions nationales pour l'application des articles 85 et 86 : Cas d'application jusqu'à présent", (1998-4) *EC Competition Policy Newsletter* 47, p. 48.

[89] *Ibid*.

competition authorities' more favourable approach towards arbitration, the Commission is expected to cooperate more often with arbitral tribunals in appropriate cases. As for the kind of assistance that arbitrators could request, this would not be substantially different from that, which the courts may request.[90] It covers:

- factual information, for example questions on the identity of the undertakings concerned; or
- information on whether a certain case is pending before the Commission; or
- whether the latter has reached a decision or a reasoned opinion in this matter.

It may also refer to:

- a legal issue of EU competition law, as well as to
- economic data, such as statistics, market characteristics, and economic analyses.[91]

Whether the request of such information or assistance by the Commission is desirable, is, of course, only for the arbitrators to decide. It is a question of the law governing the arbitration procedure (*lex arbitri*) and of the arbitration clause itself, whether an arbitrator may use such a facility *sua sponte*. This is a sensitive issue, because the privity of the arbitral process recedes, and arbitrators will have to show extreme diligence. Indeed, according to one view, arbitral tribunals should abstain from seizing the Commission, since the parties have submitted their dispute only to them and the applicability of Article 101 TFEU is still a question of law, which only they should deal with.[92]

Most likely, they could take such an initiative, if one of the parties has filed a complaint with the Commission, thus having brought the matter already to its attention, provided both parties consent; or if the terms of reference of the arbitration allow it.[93] In any case, specific consultations with and hearing of all parties seem to be necessary.[94] Indirectly, an arbitrator

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[90] See e.g. para. 21 *et seq*. of the cooperation Notice, *supra* note 78.

[91] See also Peyrot, "Expert Determination of Competition Issues", in: Zuberbühler & Oetiker (Eds.), *Practical Aspects of Arbitrating EC Competition Law* (Zurich/Basle/Geneva, 2007), p. 109.

[92] See Goffin, "L'arbitrage et le droit européen", 67 RDIDC 315 (1990), p. 333.

[93] See Simont, *supra* note 88, p. 550 *et seq*., according to whom the arbitrators, who are contractually bound with the parties, could be personally liable, if they exposed them to proceedings (before the Commission) that could lead to fines. Compare also Lesguillons, "La solitude pondérée de l'arbitre face au droit de la concurrence", 123 GP n° 148-149 17 (2003), p. 20; Van Houtte, *supra* note 35, p. 106, who stresses the arbitrators' duty of confidentiality vis-à-vis the parties.

[94] See Blessing, "Introduction to Arbitration - Swiss and International Perspectives", in: Berti, Honsell *et al.* (Eds.), *International Arbitration in Switzerland, An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute* (Basle/The Hague/London/Boston, 2000), p. 235; Blanke and Nazzini, "Arbitration and ADR of Global Competition Disputes: Taking Stock (Part III)", 1 GCLR 133 (2008), p. 137.

could enjoin the parties to supply him with certain legal or economic information or data, while stressing to them that this information could be easily requested from the Commission, if they consented to that.[95]

C. A Notice on Cooperation with Arbitrators?

Though not necessary, it might still be desirable for the Commission to publish a Notice or perhaps make a public announcement on cooperation with arbitration tribunals.[96] Such a Notice could provide for a more structured dialogue between the Commission and arbitrators, while increasing the transparency of the whole system of cooperation. It would also raise the competition law awareness of arbitrators and of the parties to an arbitration, without encroaching on the flexibility and privity of the arbitral process.

In any case, the Commission would not be legally bound to provide ssistance to arbitral tribunals, although it is evident that it is to its interest to do so.[97] This is a direct consequence of the non-applicability of Article 4(3) TEU to arbitrators. Since the latter are not under any EU law duty, as against the EU institutions, similarly the Commission should not be so bound. A Notice would essentially be a list of best practices and procedures available to arbitrators for seizing the Commission. It should be based more on discretion than on obligation and the Commission should be ready to give rather than take, precisely because offering assistance to arbitrators willing the competition rules, would enhance the overall effectiveness of such rules.

It should finally be noted that any informal cooperation between arbitrators and the Commission should not be reserved to arbitration tribunals sitting within the EU, but should be available for all international arbitration tribunals irrespective of the seat of the arbitration. In the first place, it would nowadays be futile to distinguish between EU and non-EU arbitral tribunals, since it is often difficult to identify the "nationality" of an arbitral tribunal. Second, if the main duty and concern of the European Commission is to ensure that the principles of Articles 101 and 102 TFEU are effectively applied and that the conditions of free and undistorted competition are safeguarded in the European Union, it should not be important

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[95] See Simont, *supra* note 88, p. 550.

[96] See Komninos, *supra* note 16, p. 229.

[97] See Lenaerts and Pittie, "Conclusions générales", in: Briner, Derains *et al.* (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Brussels, 1997), p. 218.

where an arbitration tribunal sits but rather whether some potentially anti-competitive agreements or practices might affect the internal market.[98]

EU competition law may be enforced extraterritorially against anti-competitive acts, as long as the latter are implemented or produce substantial effects inside the EU territory, no matter if they were concluded in or directed from a third country. By the same token, if there is an on-going arbitration outside the European Union, and if an issue arises pertaining to EU antitrust law, it would be rather contradictory for the Commission to deny access to its resources to such an arbitral tribunal. The Commission should entertain such a request without examining the nationality of the arbitrators and parties involved or the applicable law of the dispute (*lex causae*). The only concern must be whether there is a genuine dispute, which *prima facie* relates to conduct potentially caught by the EU competition rules.

V. CONFLICTS OF RESOLUTION BETWEEN ARBITRATION AND COMPETITION AUTHORITIES

A. Arbitration and Article 16 of Regulation 1/2003

Since arbitration tribunals, just as national courts, enjoy parallel competences in the application of the Treaty competition rules with the Commission (and other national competition authorities), conflicts of resolution are not excluded. However, the existence of such conflicts between arbitration and the Commission do not give rise to the same concerns and issues as those arising with national courts.

In the case of national courts, the main concern is related to the more fundamental features of the supranational structure of the European Union and the principle of supremacy of EU law. It is in this context of supranationalism that we must see the specific principles on the resolution of conflicts set out in the *Masterfoods* ruling of the ECJ[99] and Article 16 of Regulation 1/2003. The fundamental principle is that national organs must pay due respect to EU organs, national law must always give way to EU law, national interests should be superseded by the EU interest. Thus, Article 16 of Regulation 1/2003, a verbatim transposition of *Masterfoods*, provides that when national courts apply Articles 101 and 102 TFEU and the Commission has already taken a decision on the same conduct in question,

[98] See Rigozzi, "L'art. 85 du Traité CE devant le juge civil Suisse : Les contrats de distribution à l'égard de l'art. 19 LDIP et la nouvelle loi fédérale sur les cartels", Swiss Papers on European Integration, No. 2/96 (Berne/Zurich, 1996), p. 57, who goes even further in suggesting that the Commission, in order to ensure the effectiveness of EU competition enforcement, should also entertain requests of assistance by Swiss courts.

[99] Case C-344/98, *Masterfoods Ltd. v. HB Ice Cream Ltd.*, [2000] ECR I-11369.

they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated and may therefore have to suspend proceedings awaiting the Commission's decision.

On the other hand, arbitration tribunals, as already explained, are not organs of the EU Member States and are not bound by Article 4(3) TEU. They are a creation of private autonomy and their aim is not to safeguard any particular public interest of national or supranational nature but rather to resolve a private dispute.[100] These considerations have to be seriously kept in mind while speaking about conflicts and their resolution in the present context. The position of arbitration tribunals is fundamentally different from that of courts and the court-related conflict resolution mechanisms cannot be automatically transposed to arbitration.

Thus, by no means should the initiation of proceedings by the Commission entail the suspension of the arbitral proceedings.[101] The primary duty of the arbitrators vis-à-vis the parties is to resolve their dispute and render swiftly an award.[102] A stay of proceedings is something that arbitrators should have recourse to only rarely, when there is a very serious and novel competition law issue in the hands of the Commission or of a national competition authority, the resolution of which is forthcoming and is expected to have an impact on the arbitration proceedings. In all such cases, the arbitrators should first hear the parties and aim at ensuring there is consent.[103]

Then, when the Commission proceeds and finds that a particular arrangement is contrary to the Treaty competition provisions, arbitrators cannot be formally bound by Article 16 of Regulation 1/2003 to avoid a conflicting decision with the Commission.[104] This rule is again

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[100] See also Shelkoplyas, *supra* note 15, pp. 71-73; Derains, "L'arbitre, la Commission et la Cour : questions de rocédure", 123 GP n° 148-149 45 (2003); Van Houtte, *supra* note 35, p. 98; *contra* Abdelgawad, *supra* note 35, pp. 272-273.

[101] Opinion by Marc Blessing, expressed during the discussions at the IAI conference on "Les réformes du droit communautaire de la concurrence et l'arbitrage international : un nouveau rôle pour les arbitres ?" on 4 October 2002 in Paris.

[102] See, in a similar sense, J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration* (The Hague/London/New York, 2003), p. 487; Nazzini, *supra* note 35, p. 158.

[103] Arbitrators have been hesitant in the past to stay proceedings. See e.g. ICC 7146/1992, cited by C.C.Q. Truong, *Les différends liés à la rupture des contrats internationaux de distribution dans les sentences arbitrales* CCI (Paris, 2002), pp. 109-112.

[104] See also Dolmans and Grierson, *supra* note 35, p. 51; Nazzini, *supra* note 35, p. 161, leaving open the possibility that arbitration tribunals may have to consider an infringement decision by a public authority as "conclusive" on the basis of the doctrine of "abuse of process"; Thalhammer,

a *lex specialis* of the more general provision of Article 4(3) TEU and arbitrators are immune from any duties emanating from that provision.

However, notwithstanding the absence of a formal duty to that extent, the arbitral tribunal will have to be cautious, particularly when the case entails some kind of hard core behaviour. It is certainly best-advised to give proper attention to the Commission's decision and in appropriate circumstances to consider it as persuasive.[105]

Thus, if the Commission has taken a decision finding an infringement of Article 101 TFEU in the case of a hard core anti-competitive behaviour (e.g. a cartel), in reality that Commission decision imposes *de facto* a duty of vigilance upon the arbitral tribunal. The latter remains theoretically empowered to depart from the findings of the Commission and find that there has been no cartel infringement based on the same facts. The arbitral award would still enjoy *res judicata* as between the parties,[106] but, at the same time, it would be highly vulnerable to an annulment action, which the losing party would not certainly miss to exploit. Such an award would essentially amount to a truncated award. It is clear that the arbitrators cannot and, indeed, should not proceed in such controversial manner, thus compromising the effectiveness of their award and their credibility as arbitrators as well as the credibility of arbitration as a respectable dispute resolution method.

Of course, even in the case of a Commission or an antitrust authority decision finding a cartel infringement, the above does not mean that the arbitrators should be totally bound by all findings in the Commission's decision. Indeed, there is no reason to deny them the possibility to depart from certain findings, if they evaluate the evidence differently or if they have additional evidence in their hands. Thus, even in such extreme cases, an arbitrator could find a different duration of the cartel or a different degree of participation in the cartel by a specific company. Such an award will not in reality contradict the Commission in its most

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supra note 35, p. 69; Hilbig, *supra* note 35, p. 169; Idot, *supra* note 43, p. 2686, speaking of a "moral" though not a legal authority; Boutard-Labarde, Canivet, Claudel, Michel-Amsellem and Vialens, *supra* note 35, p. 770.

[105] Indeed, in practice, arbitrators normally pay deference to Commission decisions. See e.g. ICC 8626/1996, 126 JDI (*Clunet*) 1073 (1999); Van Houtte, *supra* note 35, pp. 101-102; *idem*, *supra* note 22, p. 73; Boutard-Labarde, Canivet, Claudel, Michel-Amsellem and Vialens, *supra* note 35, p. 770, fn. 27, with references to an *ad hoc* arbitral award rendered in Geneva on 30 June 1994 (also cited by W. Abdelgawad, *Arbitrage et droit de la concurrence, Contribution à l'étude des rapports entre ordre spontané et ordre organisé*, (Paris, 2001), p. 307; *idem*, *supra* note 35, p. 272, fn. 43). See also Derains, *supra* note 100, p. 47. Reference is made also to ICC 7146/1992, supra note 104, pp. 109-112: "*le Tribunal Arbitral tiendra naturellement compte de la manière dont les règles communautaires sont interprétées et appliquées par les institutions communautaires, notamment par la Commission et la Cour de Justice*..." (emphasis added).

[106] See Dalhuisen, "The Arbitrability of Competition Issues", 11 Arb.Int'l 151 (1995), p. 161.

fundamental findings, but would rather depart from them in certain aspects. It is difficult to see how such an award, especially if adequately reasoned, would be contrary to public policy, if it found that there has been in principle a cartel infringement, but arrived at some findings that may contradict some secondary findings of the Commission decision. At most, the award will have committed an error, but review of arbitral awards' errors would amount to *révision au fond* and should therefore be excluded.[107]

If the case involves some behaviour that does not amount to a hard core violation of competition law, the arbitrators may have more liberty to depart from the Commission's findings,[108] since an arbitral award that contradicts such a Commission decision would run less of a risk at the enforcement stage. This does not mean that such an award should be seen as perfectly secure. The arbitrators would still have to exercise a certain degree of caution. For example, a blatant refusal to follow the Commission in finding illegal a 20-year non-competition clause in a contract that has no particular elements that could justify such duration, should not be a step easy to take for the arbitrators, who should know that again their award would be vulnerable.

If, on the other hand, there is different approach between the Commission and an arbitration tribunal as to the interpretation of one of the criteria of Article 101(3) TFEU or as to the economic analysis of certain conduct under Articles 101 and 102 TFEU, this would most likely make the arbitral award in this case immune from annulment, since if the more correct approach is followed, such an award cannot be said to violate public policy.

In other words, public policy comes into play only with regard to a serious violation of substantive competition law and not with regard to the existence of a conflicting award, which is more a "procedural" question.[109] The public policy nature of a rule is a different matter from the binding effect of a decision of an authority or court over the arbitration tribunal. Indeed, the Court of Justice's *Eco Swiss* ruling, which declared the public policy nature of the Treaty competition rules, was based on the concern to ensure that no anti-competitive effects occur on the market. It was not the Court's concern whether a decision by the Commission binds an arbitration tribunal. The fact that an arbitration tribunal has the

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[107] See in the same direction, Radicati di Brozolo, *supra* note 67, p. 29. See, more generally on the question of review of arbitral awards on public policy grounds, Radicati di Brozolo, "Arbitrage commercial international et lois de police : Considérations sur les conflits de juridictions dans le commerce international", in: 315 Rec.Cours 265 (2005), pp. 345 *et seq*., 409-437.

[108] Compare Van Houtte, *supra* note 35, p. 107.

[109] See Komninos, *supra* note 69, pp. 134-135; *contra* R. Nazzini, *Concurrent Proceedings in Competition Law, Procedure, Evidence and Remedies* (Oxford, 2004), p. 353.

power, if it wishes, to depart from the findings of a Commission decision does not mean that the tribunal will surely violate the competition rules or that its award will surely violate public policy. In other words, it is the arbitral award that changes the legal reality and must thus be examined whether it violates public policy, and not the decision of the arbitrators to depart from or to follow a Commission decision.

There has been a view that an arbitration tribunal should never depart from a decision of the Commission because a national court in a setting aside or in a recognition/enforcement action would be bound by Article 16 of Regulation 1/2003 to set aside or refuse to recognise/enforce that award.[110] If this view implies that Article 16 can be an autonomous legal basis for review of arbitral awards independently of the review on public policy grounds, then it goes too far. There are compelling reasons to resist such over-expansive reading of Article 16(1) of Regulation 1/2003. First, that would lead to an unacceptable sacrifice of the principles of legal certainty and finality of arbitral awards.[111] Second, it would not be in accordance with the principle of free movement of arbitral awards in the Union and with more general long-standing principles of international law that allow only exceptionally for the non-enforcement or non-recognition of a foreign arbitral award. Certainly, such an approach would be in direct conflict with the 1958 New York Convention and other international conventions.

It is, therefore, preferable to refrain from such disproportionately intolerable intrusions into national procedural autonomy and into the spirit and text of international instruments that deal with the recognition and enforcement of arbitral awards. As noted also by the Court of Justice in *Eco Swiss*, the exception of public policy remains a sufficient tool of review in those exceptional cases[112] of violation of EU competition law by arbitration tribunals, irrespective of the existence of a contradictory Commission decision. This approach is also in line with another recent ruling of the Court of Justice that rejected an over-expansive reading of Article 4(3) TEU, which, not to forget, is the *lex generalis* of Article 16 of Regulation 1/2003, and, citing *Eco Swiss*, held that "*[Union] law does not require a national court to*

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[110] See Nazzini, *supra* note 35, p. 162; *idem*, *supra* note 109, pp. 352-353. Compare also Blanke, "The Case for Supranational Arbitration – Ideas and Prospects", 19 EBLR 17 (2008), p. 33.

[111] It is noteworthy that the ECJ in *Eco Swiss* (*supra* note 26) placed particular emphasis on those principles (see para. 35 on finality and para. 46 on legal certainty).

[112] Compare *Eco Swiss*, *supra* note 26, para. 35, recognising the principle that "*review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances*" (emphasis added).

disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of [Union] law by the decision at issue".[113]

Finally, it must be noted that there are divergent approaches as to the real meaning of "conflict", to which Article 16 of Regulation 1/2003 refers. Thus, according to one view, a real conflict between a Commission decision and a national court judgment would happen only if the national court were to prevent compliance by the addressee of a Commission decision with the operative part of that decision. The 2008 FIDE Community report expresses this rationale in the following terms:

> "*The Commission's reasoning leading it to a particular decision, including its interpretation of Article [101] or Article [102] and its findings of fact, are clearly not 'binding' as such. The addition to the [Union] legal order that Commission decisions represent is not a particular interpretation of Article [101] or Article [102], or its findings of fact. It is in the operative part of the decision that specific provisions are found, creating legal effects: the obligation to pay a fine, the duty to conform to an order to cease certain behaviour or to take certain positive action. This is the part of the* decision *that becomes part of [Union] law and is vested with supremacy as long as the decision stands*."[114]

It is therefore unclear, under the above reading, why a national judgment rejecting a setting aside action or recognising and enforcing an arbitral award would give rise to a conflict with the operative part of a Commission's decision which imposes a fine and includes an injunction.

B. Arbitration and National Laws Conferring a Binding Effect on NCAs' decisions

A word should be said about those national laws that have specific provisions on the effect on civil proceedings of infringement decisions taken by antitrust authorities. A comparative analysis of national laws confirms that, in most legal systems, private enforcement remains independent of public enforcement.[115] Although a pre-existing decision by an administrative authority may be used by the courts and the litigants to establish and prove certain facts, in particular in case of follow-on civil actions, such a decision does not normally acquire the status of binding authority, though it can certainly be persuasive authority. The principle of

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[113] Case C-234/04, *Rosmarie Kapferer v. Schlank & Schick GmbH*, [2006] ECR I-2585, para. 21.

[114] See Gippini-Fournier, "Institutional Report: The Modernisation of European Competition Law: First Experiences with Regulation 1/2003", in: Koeck & Karollus (Eds.), *The Modernisation of European Competition Law, Initial Experiences with Regulation 1/2003* (Vienna, 2008), p. 471. Compare also Komninos, "Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight", 44 CMLRev. 1387 (2007), p. 1397 *et seq.*

[115] See Komninos, *supra* note 69, p. 15 *et seq.*

independence is also not affected by the possible deference paid on occasion by civil courts to competition authorities' decisions. Such an attitude simply reflects the principle of economy in legal proceedings, which may make it inappropriate to repeat parts of the procedure before a civil generalist court, if a specialist authority or court has already dealt with the same facts.

There are, however, some exceptions: some recently-amended national competition laws aim at facilitating follow-on civil actions for damages by conferring a binding effect on final infringement decisions of public antitrust authorities. Thus, section 58A of the UK Competition Act 1998, as subsequently amended, confers a binding effect on decisions of the Office of Fair Trading (OFT) and the Competition Appeal Tribunal (CAT) on appeal from the OFT. This provision clearly specifies that it "*applies to proceedings before the court in which damages or any other sum of money is claimed in respect of an infringement*".[116] Section 47A extends the binding effect of infringement findings to decisions of the European Commission but is applicable to follow-on claims for damages only brought before the CAT. Similarly, section 33(4) of the German Competition Act goes even further in conferring binding effect on all Commission, *Bundeskartellamt* and even other Member States' national competition authorities' decisions.[117]

Whether such provisions are applicable to arbitration is open to discussion. International arbitration tribunals will be bound by such provisions only if the latter make part of the applicable law, the *lex causae*. To the extent the applicable law contains such specific provisions on the binding effect of administrative decisions, the arbitrators should consider themselves bound.[118] However, even in that case, it will be a matter of true construction of the specific statute. Thus, if it appears that the national provision in question is intended to apply to follow-on civil proceedings brought only before specific specialist courts, this being the case of section 47A of the UK Competition Act 1998, as subsequently amended, then arbitration proceedings will fall outside the scope of the provision. If, on the other hand, the national provision appears general enough to cover any civil proceeding brought before the

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[116] This is clearer if one reads para. 87 of the Explanatory Notes to the Enterprise Act 2002, available at www.legislation.hmso.gov.uk/acts/en2002/2002en40.htm: "*Section 20: Findings of infringements. Subsection (1) inserts a new section 58A in CA 1998. The new section provides that certain decisions of the OFT or the CAT regarding an infringement of competition law are to bind the courts for the purpose of a subsequent claim for damages*" (emphasis added).

[117] Similar provisions exist in Czech and Hungarian law.

[118] Compare Kurkela, Levin, Liebscher and Sommer, *supra* note 35, p. 194; Nazzini, *supra* note 43, p. 109.

ordinary courts, this will be a good indication that its scope includes arbitration.[119] In any event, the question of binding effect is not of great practical significance because the above national provisions refer only to follow-on civil claims for damages, which are very rarely submitted to arbitration.[120]

C. Direct Intervention by the Commission as an Exceptional Corrective Mechanism

There are exceptional cases where a public antitrust authority can directly intervene in an arbitration and where the arbitrators themselves are directly subject to the authority's powers. A relevant precedent is the *Organic Peroxides* case,[121] where the European Commission did not shy away from fining a cartel facilitator which had acted as a secretary to the parties and facilitated the implementation of the agreement. In the extreme case where an arbitration tribunal is internal to the cartel and has the function to ensure compliance and to discipline cartel members that "cheat" on the cartel's decisions, there is no valid reason why these "arbitrators" should not be subject to the full powers of the Commission, as well as to penalties. Arbitrators, like other professionals such as lawyers,[122] are undertakings and would act here as an ancillary vehicle that supports, reinforces and facilitates the anti-competitive conduct.

The Commission also has many indirect ways to interfere with arbitration proceedings or awards which it considers to be detrimental to EU competition law. It has retorted to such indirect routes on one occasion in the past, in the *Preflex/Lipski* case.[123] The facts were that an arbitral award had required that the defendant continue to pay license fees pursuant to a patent licensing agreement after the expiry of the patents. The Commission held that this agreement as interpreted by the arbitral award, which in fact had even been subsequently

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[119] This is the case of s. 33(4) of the German Competition Act and probably of s. 58A of the UK Competition Act 1998, as subsequently amended.

[120] Needless to repeat that an arbitration tribunal's failure to be bound by an infringement decision of a public authority, will only amount to a misapplication of the specific applicable law, and, as such, will not suffice to qualify as a violation of public policy (see *mutatis mutandis* above).

[121] Commission Decision 2005/349/EC of 10 December 2003 (*Organic peroxides*), OJ [2005] L 110/44, para. 84. See, on appeal, case T-99/04, *AC-Treuhand AG v. Commission*, [2008] ECR II-1501. Recently, the Commission imposed once more a fine against AC-Treuhand in another cartel facilitation case (see Commission Press Release IP/09/1695 of 11 November 2009).

[122] Case C-35/99, *Criminal Proceedings against Manuele Arduino*, [2002] ECR I-1529, paras. 37-38 (by implication); case C-309/99, *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, paras. 48-49.

[123] See Commission Xth Report on Competition Policy - 1980 (Brussels/Luxembourg, 1981), para. 126, pp. 87-88.

approved by a national court,[124] was incompatible with the Treaty competition rules. It did not, of course, set aside the arbitral award or - obviously - the national court's judgment, since this is not possible under EU law. It did, however, communicate its objections to the parties and in essence rejected the construction given by the arbitral tribunal to the problematic contractual clause.[125] As a result, the parties complied with the Commission's views and reached a settlement, thus putting an end to the dispute.

Such a Commission practice can have far-reaching consequences in like situations. Essentially, it could mean that each party to an agreement can, at least indirectly, bring an arbitral award before the Commission, by filing a complaint with it, hoping that the Commission will in effect enjoin the parties from enforcing the agreement, if the latter, as construed by the award, is found to be incompatible with EU antitrust rules. The result is that the *res judicata* effect of the arbitral award in question will only be nominal.

Such an - indeed remote - possibility can be a powerful deterrent and corrective mechanism in appropriate cases. This may be so, where the arbitral award manifestly disregards EU competition law, for example by upholding a *per se* anti-competitive conduct, such as a blunt market sharing or price fixing agreement, and when it is apparent that the parties had submitted their dispute to arbitration in order to evade the application of EU competition law. Of course, it is likely that the Commission will intervene only in those cases where the enforcement of the arbitral award by the parties can be expected to have serious anti-competitive effects on the market.

A Commission intervention to enjoin the parties from enforcing a final arbitral award, especially after a national court has sanctioned an arbitral award, should be a rare course, to be taken only if there is at stake a strong EU public interest necessitating intervention, and not just the individual interest of the loosing party of the arbitration.[126] The Commission should not, therefore, allow itself to be considered as an "appeal tribunal" in such arbitrations

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[124] Civ. Bruxelles, 15-10-75, *Preflex SA v. Lipski*, 91 JdT 493 (1976). The Brussels court of first instance rejected an action to have the award set aside, because, after dealing with the EU competition issue, it concluded that no infringement had taken place.

[125] See further on that case De Mello, "Arbitrage et droit communautaire", (1982) Rev.Arb. 349, pp. 373-374; Idot, "Judicial Control and Enforcement of the Arbitral Award: Rapport introductif", in: *Competition and Arbitration Law*, Institute of International Business Law and Practice, ICC (Paris, 1993), pp. 280-281; Bos, "Panel Discussion: International Arbitration", in: Hawk (Ed.), *International Antitrust Law and Policy 1994, Annual Proceedings of the Fordham Corporate Law Institute* (New York/The Hague, 1995), p. 425.

[126] See Temple Lang, "Panel Discussion: International Arbitration", in: Hawk (Ed.), *International Antitrust Law and Policy 1994, Annual Proceedings of the Fordham Corporate Law Institute* (New York/The Hague, 1995), p. 426.

but should leave this to the initiative of the losing party and to the courts to remedy pursuant to the applicable civil procedures.

VI. THE ULTIMATE SAFEGUARD: THE PUBLIC POLICY CONTROL OF ARBITRAL AWARDS

A. *Eco Swiss*

Quite apart from any other preventive or corrective mechanism for the effective application of the Treaty competition provisions by arbitrators, review by state courts constitutes the ultimate and most efficient safeguard. The EU competition rules make up the fundamental economic system of the Union and of its Member States and enjoy, therefore, a public policy (*ordre public*) character. The *ordre public* nature of the EU competition provisions and the duty of EU Member State courts to review and set aside arbitral awards that violate those fundamental provisions were forcefully pronounced in *Eco Swiss*.[127]

The Court of Justice recognised the legitimate interest of Member States that the judicial review of arbitral awards be limited. However, in view of the fundamental importance of Article 101 TFEU and having regard to the necessity of a uniform and effective application of EU competition law, something which under Article 4(3) TEU only national courts can safeguard, it went on to stress that such national courts were under a duty to set aside awards that violate the competition rules.[128] Of particular importance was under the Court's reasoning the inability of arbitrators to address Article 267 TFEU preliminary references on matters of EU law to the Court of Justice as a result of *Nordsee*.[129] It was up to national courts to send such references to Luxembourg, while exercising their review powers over arbitral awards. Obstructive national procedural rules, such as the rule that a party may not raise for the first time issues at a setting aside proceeding, should not, therefore, be followed.

For the Court of Justice, the review of arbitral awards for violation of EU competition law goes through public policy. The EU competition rules express an EU public policy, which is

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[127] Cited *supra* note 26. For commentaries of that case see *inter alia* Idot, (1999) Rev.Arb. 639; Radicati di Brozolo, *supra* note 32, p. 665 *et seq.*; Komninos, 37 CMLRev. 459 (2000); Weyer, "Gemeinschaftsrechtliche Vorgaben für das nationale Zivilverfahren: Verpflichtung der nationalen Zivilgerichte zur Anwendung der Art. 81, 82 EGV", 35 EuR 145 (2000); Poillot-Peruzzetto, "L'ordre public international en droit communautaire : À propos de l'arrêt de la Cour de justice des Communautés du 1er juin 1999 (*affaire Eco Swiss China Time Ltd.*)", 127 JDI (*Clunet*) 299 (2000); Liebscher, "European Public Policy: *A Black Box*?", 17(3) JInt'lArb 73 (2000).

[128] *Eco Swiss*, *supra* note 26, paras. 35-37.

[129] *Eco Swiss*, *supra* note 26, para. 40.

integrated in each national notion of *ordre public*. To reach that conclusion the Court relied on the old Article 3(1)(g) EC and stressed the competition provisions' primacy in the Treaty, since "*Article [101] constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [Union] and, in particular, for the functioning of the internal market*".[130]

The requirement that arbitral awards be submitted to a "communitarised" notion of public policy deserves approval. Any different solution would give rise to an unprecedented forum shopping inside the Union, where parties would opt for the jurisdiction that would be less interposing on arbitral proceedings and awards.[131]

B. The Extent of the Public Policy Control

While *Eco Swiss* clearly stated that the Treaty competition rules pertain to public policy, thus disagreeing with the referring national court, the *Hoge Raad*, which had essentially held that, in its view, competition rules should not be considered a public policy matter in the context of review of arbitral awards, it left open the question as to the scope of the public policy exception. In other words, the Court did not give a measure as to what exactly constitutes a violation of public policy. It is not clear whether for the Court of Justice *any* violation or misapplication or ignorance of EU competition law would amount to a public policy violation.

In any event, apart from what the Court of Justice thought about this matter, which is at the end of the day only an *ad hoc* issue that national courts are better equipped to deal with, a reply as to what constitutes a public policy violation must take into account various exigencies. Effectiveness of EU law is one, efficiency of competition law enforcement and deterrence is another, but there are also other conflicting interests and principles. Thus, the principle of finality of arbitral awards, the importance of arbitration for commerce within the EU, but also the broader importance of arbitration for the international trade with developing countries, which would use Europe's own respect for arbitration as an example for their own attitudes, and other cultural factors must all be taken into account. There is in fact a split in

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[130] *Eco Swiss*, *supra* note 26, para. 36. Reference was also made to the automatic nullity of all anti-competitive agreements in Article 101(2) TFEU.

[131] In *Eco Swiss*, the Dutch Supreme Court noted that competition law in general would not fall under the Dutch notion of public policy.

post-*Eco Swiss* theory and national jurisprudence between a minimalist and a maximalist approach.[132]

According to the *minimalist approach*, while the EU competition rules pertain to public policy, in practice it will be in extreme cases that an arbitral award will have to be annulled or refused recognition or enforcement. This would be when the arbitrators have put in effect hard core horizontal restrictions of competition that are repugnantly anti-competitive or when the arbitrators have completely ignored EU competition law although it was argued sufficiently clearly by the parties, thus rendering an award that refers to a practice manifestly anti-competitive. In all other cases there should be no public policy violation, especially if the arbitrators took into account the competition law question yet decided it erroneously. Reviewing arbitral awards for errors, according to this line of argument, would amount to *révision au fond*.

A review of the jurisprudence shows that the minimalist approach finds favour with the national courts in the EU. In the celebrated *Thalès* case, the Paris Court of Appeal, a court particularly experienced both in competition law and arbitration,[133] accepted that, while EU competition law is a matter of public policy, the violation of public policy in an international arbitration case must be "*flagrant, effective and concrete*", in order to lead to the setting aside of an arbitral award.[134] In this case, an arbitral award awarded damages to Euromissile on the basis of a licensing agreement, which stipulated that Euromissile would hold for twenty years the exclusive right to produce and sell a missile in Europe. A dispute arose when Thalès decided to proceed itself to the production of the missile, through a subsidiary. Euromissile brought the dispute before an ICC arbitration tribunal, which rendered a partial award in 2000 and a final one in 2002. The arbitrators awarded € 108 million to Euromissile and Thalès applied to the Paris Court of Appeal to set the award aside, because the licensing agreement was allegedly incompatible with the EU competition rules and thus null and void. In particular, Thalès's competition argument was based on the allegedly excessive duration of the exclusivity arrangement and on the market-sharing elements therein.

The competition law question had not been raised by any of the parties (or the arbitrators themselves) during the arbitration proceedings, and it was only at the review stage that Thalès

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[132] The minimalist and maximalist approaches are excellently presented by Radicati di Brozolo, *supra* note 67, p. 23 *et seq*.

[133] The Paris Court of Appeal is the competent court to hear appeals against the *Autorité de la concurrence* and at the same time it hears numerous setting aside actions against arbitral awards rendered in Paris, seat of the ICC and international arbitration site.

[134] CA Paris, 18-11-04, *Thalès v. Euromissile*, (2005) Rev.Arb. 750.

relied upon it to make the public policy argument. The parties had expert legal advice throughout the arbitration proceedings and the arbitrators were experienced, yet the competition issue never arose. The Court of Appeal noted this rather inconsistent behaviour of the plaintiff (*venire contra factum proprium*) and was not impressed by the EU competition law point. Although it did accept that the competition law arguments were not totally frivolous, it held that they required a detailed examination of the substance, for which the court and the setting aside procedure were ill-suited, otherwise this would mean reviewing the merits of the case (*révision au fond*), which French law, like most modern arbitration laws, do not allow for. It is evident from the judgment that the court considered the competition law argument not totally frivolous but, at the same time, not "eye-catching" enough to substantiate a violation of public policy. The infringement of the competition rules had to be "manifest" for the setting aside action to be successful.

This approach was followed by the Paris Court of Appeal also in *Cytec*.[135] In that case, the arbitral tribunal had rendered two awards. In the first final award, the tribunal found that the main contract was in breach of Article 101(1) TFEU and declared it null and void. However, in the second award, the tribunal awarded damages based on the situation in which the parties would have found themselves had the illegal agreement not been signed. The French court declared the second award, which was rendered in Belgium, as enforceable and refused to re-examine the merits of the dispute. The appellate judgment was then confirmed by the French Supreme Court, which repeated the *Thalès* standard of review.[136]

The same approach was also recently followed by the Higher Regional Court of Thüringen in Germany.[137] The case concerned a joint venture R&D-project regarding the development of a new technology. When a dispute arose and resulted in an arbitral award, one of the parties argued that the tribunal had erroneously considered the relevant contracts to be in compliance with Article 101 TFEU. A licensing contract between the parties contained a territorial restriction as well as a field-of-use restriction. The respective party was not allowed to use the licensed technology in Asia. In addition, the use of the licensed technology was restricted with respect to products distributed even within the EU. On those grounds the party argued

[135] CA Paris, 23-3-2006, *SNF SAS v. Cytec Industrie BV*, XXXII YCA 282 (2007).

[136] Cass.Civ., 4-6-2008, *SNF SAS v. Cytec Industries BV*, 135 JDI (*Clunet*) 1107 (2008) with a comment by Mourre, 135 JDI (*Clunet*) 1109 (2008). See also CA Paris, 15-3-2007, *Tamkar v. RC Group*, 127 GP n˚ 194-198 42 (2007).

[137] OLG Thüringer, 8.8.2007, 4 Sch 3/06 – *Schott*, 58 WuW 353 (2008).

that these clauses amounted to a restriction of competition and the award should not be enforceable in Germany.

The German court, however, rejected this argument. The court did acknowledge that EU competition law should be deemed to form part of public policy in Germany and referred to *Eco Swiss* but did not find the arbitral award to be inconsistent with Article 101 TFEU. However, the court argued that the territorial restriction only affected the trade outside the EU and therefore did not fall within the scope of Article 101 TFEU. With respect to the field-of-use restriction, the Court held that for the product affected by the field-of-use restriction, no market in the EU existed to date. Secondly, the Court was of the view that the field-of-use restriction only prevented the affected party from selling products in the EU as far as they were produced on the basis of the licensed technology. The party therefore was considered to be free to distribute in the EU products based on technologies. The court also pointed out that restrictions of this kind could be exempt under Article 101(3) TFEU. In any event, the court held that the public policy control exercised by German courts over arbitral awards could not go as far as revisiting the merits of the case (*révision au fond*).

In Italy, too, while courts accept that Articles 101 and 102 TFEU pertain to public policy, in two recent judgments, they granted enforcement to awards which had decided a competition law dispute and which were alleged to have reached an incorrect decision on this issue, purportedly in breach of public policy. In both cases the courts were satisfied that the arbitrators had sufficiently taken into account the principles of competition law in their reasoning, without needing to proceed to an in-depth review.[138] Finally, in Sweden, an appellate court refused to set aside an award for violation of the EU state aid rules, holding that an infringement of competition law can be considered a violation of public policy "*only in obvious cases*".[139]

The *maximalist approach*, on the other hand, relies on the rather general language of *Eco Swiss* and places more emphasis on the EU principle of effectiveness. According to this line

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[138] Florence Court of Appeal, 21-3-2006, *Soc. Nuovo Pignone v. Schlumberger SA*, with a comment by Treccani, 54 Riv.Dir.Civ. 71 (2008); Milan Court of Appeal, 5-7-2006, *Terra Armata Srl v. Tensacciai SpA*, 25 Bull.ASA 618 (2007). In the latter case, the losing party tried also to have the award set aside in Switzerland but failed. The Swiss Supreme Court refused to consider that EU competition law forms part of its notion of public policy, which it views very narrowly. See Tribunal Fédéral, 8-3-2006, *Tensacciai v. Terra Armata*, (2006) Rev.Arb. 763. See further Volders and Rétornaz, "Challenging an Arbitral Award for Infringement of Competition Law: The *Terra Armata* Decision of the Swiss Federal Tribunal of 8 March 2006", 8 YPIL 307 (2006). Similarly, a complaint filed with the Italian Competition Authority was not successful.

[139] Svea Court of Appeal, 4-5-2005, *Republic of Latvia v. Latvijas Gaze*, Case No. T 6730-03.

of argument, most violations of EU competition law, whose goal is always the protection of the public interest, should qualify as a public policy violation. Only very slight errors should be excusable and the arbitrators should be cautious when EU law is at stake, perhaps more so than in other comparable situations of national mandatory rules.

The maximalist approach has not been very successful with national courts in the EU. There are at least two national judgments representing this current, one of which has been recently reversed. *MDI* represents the first judgment rendered by an EU Member State court, in the Netherlands, whereby an arbitral award was not recognised and enforced on public policy grounds because of the award's violation of EU competition law. The case concerned an exclusive licensing agreement providing for a grant-back clause with respect to improvements made on technologies licensed. The contract also contained an American Arbitration Association clause and a choice of the law of the State of Michigan and of the United States.

Further to a dispute as to the licensee's obligations to pay royalties to the licensor, arbitration proceedings were initiated in the US. The winning party (the licensor) petitioned a Dutch lower court to enforce the relevant US arbitral awards pursuant to Article 1075 of the Dutch Code of Civil Procedure and to the New York Convention but the Dutch court refused to order the enforcement of the awards *inter alia* on public policy grounds, because in its view the exclusive agreement upheld by the awards was contrary to Article 101(1) TFEU due to its market-sharing elements.[140] The main contract was further found ineligible to fall under the then applicable block exemption Regulation 240/1996 on technology transfers,[141] because of the grant-back clause which the Regulation did not allow. There was also no possibility of individual exemption because the agreement was never notified to the Commission.

On appeal, the Court of Appeal of The Hague referred to *Eco Swiss* and considered that the main contract was *prima facie* anti-competitive, because it awarded an exclusive licence to manufacture and sell products in the countries of the Benelux. It also noted that the awards found the licensee in breach of contract because the latter was offering products protected by the licensor's patents outside its exclusivity territory. The Court then referred to the block exemption Regulations applicable at the relevant time and noted that they all disapproved of grant-back clauses. These were, in the Court's words, "*intolerable restrictions*". In these

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[140] Pres. Rechtbank The Hague, *Marketing Displays International Inc. v. VR Van Raalte Reclame BV*, 27-5-04, KG/RK 2002-979 and 2002-1617, 8(2) SIAR 201 (2006).

[141] Commission Regulation 240/96 of 31 January 1996 on the Application of Article 85(3) of the Treaty to Certain Categories of Technology Transfer Agreements, OJ [1996] L 31/2.

circumstances, the Dutch court considered that the enforcement of the three US arbitral awards should be denied pursuant to Article V(2)(b) of the New York Convention.[142]

A similar approach was taken in Belgium in *Cytec*, where a first instance court set aside an award rendered in Brussels for violation of EU competition law. In that case, the arbitral tribunal had rendered two awards. In the first final award, the tribunal found that the main contract was in breach of Article 101(1) TFEU and declared it null and void. However, in the second award, the tribunal awarded damages based on the situation in which the parties would have found themselves had the illegal agreement not been signed. The Belgian first instance court, although only dealing with the second award which had established liability in damages, clearly disagreed with the approach taken by the Paris Court of Appeal in *Thalès* and held that the violation of EU competition law does not have to be flagrant for there to be a public policy violation.[143]

On appeal,[144] however, the Brussels Court of Appeal stressed that it did not have the power to revisit the merits of the dispute and substitute the arbitral tribunal's opinion with its own or examine legal errors possibly made by the arbitral tribunal. The court did not dispute that Articles 101 and 102 TFEU pertained to public policy but, at the same time, acknowledged that the arbitral tribunal had, in its first award, declared the illegality of the agreement while merely settling the question of damages in the second award. Because of the prohibition of révision au fond, Belgian courts could not revisit other aspects of the case, including the award of damages. It is interesting to note here that, notwithstanding the Belgian annulment judgment at first instance, the same award was, as explained above, declared enforceable in France.[145]

C. A Proposed Balanced Approach for Review of Arbitral Awards

In our view, the minimalist approach or a variant thereof would be preferable for both legal and policy reasons.

From a legal point of view, it is noteworthy that the Court of Justice proceeded to the pronouncement as to the public policy nature of the Treaty competition rules by choosing to refer to the 1958 United Nations New York Convention on the recognition and enforcement

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[142] Cited *supra* note 71.

[143] Trib. prem. inst. Bruxelles, 8-3-2007, *SNF SAS v. Cytec Industrie BV*, 127 GP n° 112-114 53 (2007).

[144] Cour d'appel de Bruxelles, 22-6-2009, *SNF SAS v. Cytec Industrie BV*.

[145] A complaint to the European Commission was similarly unsuccessful.

of foreign arbitral awards, which in Article V(2)(b) includes a public policy for non-recognition and non-enforcement of foreign awards.[146] The Court did not have to this, since it was not requested about this question by the referring court and indeed the New York Convention was not applicable to the case at issue, because the award had been rendered domestically and was subject to a setting aside and not to an *exequatur* procedure in a foreign country. This means that the Court did not intend to add a self-standing ground for review of arbitral awards in the international context but rather preferred to integrate the notion of EU public policy in the respective national notions. The Court thought that this was a sufficient safeguard for the effectiveness of EU law.

At the same time, the Court must certainly have been conscious of the very restrictive reading of public policy (*ordre public international*), when reviewing international arbitral awards. If the Court did not accept such national judicial attitudes of self-restraint, it could have easily made this evident.

The fact that municipal courts have recently and invariably adopted a liberal approach towards arbitrability of competition law disputes, does not and should not make the review of arbitral awards easier, on public policy grounds. That would in effect undermine arbitrability through the back door. Indeed, while the US Supreme Court, in the landmark *Mitsubishi* case, did say that "in the event the choice-of-forum and choice-of-law clauses operate ... in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [it] would have little hesitation in condemning the agreement as against public policy",[147] the US courts, however, have not relied on this *dictum* to show hostility to arbitration.[148]

Besides, the Court of Justice has on many occasions interpreted the concept of public policy in the context of the old 1968 Brussels Convention on jurisdiction and enforcement of judgments.[149] It has invariably followed a very restrictive interpretation because it has considered free movement of judgments as an important principle for the European integration. The Court of Justice has held, in particular that the purpose of 293(d) EC, on the basis of which the Member States concluded the Brussels Convention, is

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[146] *Eco Swiss*, *supra* note 26, paras. 38-39.

[147] *Mitsubishi*, supra note 29, at 637, fn. 19.

[148] See e.g. *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir.) (en banc), cert. denied, 119 S.Ct. 365, 142 L.Ed.2d 301 (1998): "*we do not believe dictum in a footnote regarding antitrust law outweighs the extended discussion and holding in Scherk on the validity of clauses specifying the forum and applicable law*" (at 1295). See also *Simula v. Autoliv*, 175 F.3d 716 (9th Cir. 1999).

[149] 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Consolidated Version, OJ [1998] C 27/1.

> "*to facilitate the working of the [internal] market through the adoption of rules of jurisdiction for disputes relating thereto and through the elimination, as far as is possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the Contracting States … In fact it is not disputed that the Brussels Convention helps to ensure the smooth working of the internal market*".[150]

With regard to the specific question of the public policy exception,[151] the Court of Justice has consistently stressed in a series of cases that the public policy exception is meant to operate only in "*exceptional cases*".[152] In a judgment rendered after *Eco Swiss*, the Court of Justice had to examine whether a French judgment that had allegedly violated the free movement provisions of the Treaty and Article 102 TFEU could be resisted in Italy and thus be refused recognition on public policy grounds.[153] That the free movement provisions of the Treaty and Article 102 TFEU pertain to the public policy notion of Article 27(1) of the Brussels Convention was explicitly stressed by Advocate General Alber in his Opinion[154] and implicitly accepted by the Court.[155] The Court, however, made it clear that a public policy violation was to operate in very exceptional circumstances and that an alleged violation of fundamental provisions of EU law did not suffice as such.[156]

The "communitarisation" of the Brussels Convention through the adoption of Regulation 44/2001 has further reduced the scope of the public policy exception by adding an important qualification to the text of the current Article 34(1) of that Regulation: the recognition of the foreign judgment must be "manifestly" contrary to the public policy of the forum. This is indicative of the exceptional character of this provision, which has apparently led to the non-recognition/non-enforcement of judgments only in a handful of occasions in the past.[157]

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[150] Case C-281/02, *Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" et al.*, [2005] ECR I-1383, para. 33.

[151] Art. 27(1) of the Brussels Convention provides that "*a judgment shall not be recognised if such recognition is contrary to public policy in the State in which recognition is sought*". See now Art. 34(1) of Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ [2001] L 12/1.

[152] Case 145/86, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, [1988] ECR 645, para. 21; case C-78/95, *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, [1996] ECR I-4943, para. 23; case C-7/98, *Dieter Krombach v. André Bamberski*, [2000] ECR I-1935, para. 21; case C-394/09, *Marco Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, Judgment of 2 April 2009, para. 27.

[153] Case C-38/98, *SA Régie Nationale des Usines Renault v. Maxicar SpA and Orazio Formento*, [2000] ECR I-2973.

[154] See paras. 66-67 and 86 of AG Alber's Opinion.

[155] *Renault*, *supra* note 153, paras. 31-32.

[156] *Ibid*, paras. 26 to 32.

[157] For a German example, see BGH, 16.9.93, 46 NJW 3269 (1993); for a French one, see Cass.civ., 16-3-99, *Pordea v. Sté Times Newspapers Ltd.*, 126 JDI (*Clunet*) 773 (1999); for an English one, see *W. Maronier v. B. Larmer* (CA), [2002] ILPr. 39.

On the basis of the above an important argument can be made that surely the function of the public policy exception in the context of arbitration must not be different from its function in the context of the enforcement of judgments. Indeed, the necessity of recognition and enforcement of arbitral awards was mentioned side-by-side in the old Article 293 EC with the necessity of recognition and enforcement of judgments. Exactly like free movement of judgments, free movement of arbitral awards within the EU furthers European integration and is extremely beneficial to the four freedoms. It should therefore be accorded the same degree of deference.

Aside from these legal arguments, there are also important policy reasons advocating a more favourable view of the so-called minimalist approach:

(a) Arbitration is not just a creation of private autonomy that merely constitutes an irritant for EU competition law, but is rather a very important trans-border mechanism bringing commerce and persons together; especially in the context of EU law, arbitration is an important complement of the four freedoms and indeed it is not neglected by the Treaty of Rome.[158] If we can speak of a principle of free movement of judgments, we can also definitely speak of a free movement of arbitral awards.

(b) While the exigencies of EU law must be served, we must not lose sight of the broader picture. In the global context, arbitration is one of the most efficient mechanisms of trade but remains always vulnerable because it is entirely dependent on all parties' good will. It is to the interest of industrialised countries to ensure its effectiveness and to "preach" its qualities to developing countries. Arbitration has on occasions come under fire by some countries as a "Western imposition" and there have been many incidents where courts were particularly hostile to it. It would be regrettable if the courts of more developed countries were to introduce exceptional rules of review of arbitral awards for specific fields. A spill-over to other fields is not difficult, besides, competition law is not more special than or different from other areas of law with increased public interest elements in a specific country's domestic context.

(c) Finally, aside from the issue of the violation or ignorance of the competition rules by an arbitration tribunal, competition law should bother more about actual or potential anti-competitive effects on a specified market. It should only be in those cases where serious anti-competitive effects might be felt in a given territory, that an arbitral award should be reviewed in its substance and possibly annulled or denied

[158] See above.

enforcement. A technical infringement of the rules only on paper, in the text of the arbitral award, should not attract attention.

On the basis of the above, a public policy violation and a corresponding duty of national courts to set aside or refuse to enforce an arbitral award should only when the competition law issue has been totally neglected by the arbitrators with the manifest aim to evade the competition rules or in case of a *prima facie* illegality or conflict with such rules.

Thus, complete disregard of EU competition law and failure to address the competition law point on the part of the arbitrators, especially when the competition law infringement is rather obvious and serious, may offend against public policy.[159] It may also constitute a presumption of the parties' (and the arbitrators') intention to evade the law. However, in such cases, one must be careful not to reward conduct by parties who choose not to raise the competition law issue during the arbitration proceedings and prefer to wait and see whether they lose or win, in order to challenge the award.

Then, not every incompatibility between the arbitral award and the competition rules should qualify as a public policy violation. The competition law violation must be very serious, in order for an arbitral award to be refused recognition or enforcement on public policy grounds.[160] A restriction of competition in a horizontal agreement is likely to be more detrimental for competition than a restriction in a vertical agreement.[161] A cartel would certainly qualify as a repugnant infringement of the competition rules.[162] Another similar distinction can be made between *per se* rules of prohibition and rule of reason competition law violations. It should be only *per se* violations that should attract attention by state courts when reviewing an arbitral award.[163]

The simply erroneous application of EU competition law by arbitrators would not qualify as a violation of *ordre public*,[164] otherwise the most fundamental principle of the finality of arbitral awards (prohibition of the review on the merits - *révision au fond*) would be put at

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[159] See Radicati di Brozolo, *supra* note 32, p. 690.

[160] See *idem*, pp. 688-691.

[161] See C. Liebscher, *The Healthy Award, Challenge in International Commercial Arbitration* (The Hague/London/New York, 2003), p. 44.

[162] See further *idem*, pp. 44-47.

[163] See *idem*, p. 47.

[164] See Derains, "Specific Issues Arising in the Enforcement of EC Antitrust Rules by Arbitration Courts", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 338.

stake.[165] Errors of law or fact are not considered a setting-aside ground, at least in the international arbitration context,[166] and are not a privilege of the arbitrators. State courts also make errors and there is no reason to treat arbitral tribunals different than state courts. Only in very exceptional cases of gross errors made by the arbitrators, should such review of the merits of the award result in non-recognition.[167]

In sum, it seems that in all cases where the arbitrators *did genuinely apply* the EU competition rules, having fully considered the arguments of the parties and having provided a substantial reasoning in their award, review of the award should not be possible, even if the award erred in that application.[168] Finally, it must always be realised that in the context of enforcement of foreign arbitral awards, where the scope of the public policy exception is quite narrow, it is only the *effects* of the recognition of an award in the territory of the forum of enforcement that matter and not the offending award's mere *existence*. Only if those effects are intolerable and would run counter to the most fundamental principles of law and morality in that jurisdiction, should there be a public policy violation.[169]

Thus, using as example the national precedents referred to above, in our view, the Dutch judgment in *MDI* constitutes a dangerous precedent in Europe because it creates an exception to the cardinal rule of finality of arbitral awards and prejudices the effectiveness of the New York Convention. It shows also the excesses of the maximalist approach, which must be rejected particularly in cases such as the one at issue where the agreement merely contained a clause disapproved by a block exemption Regulation. Such a failure cannot suffice to qualify as a violation of Article 101(1) TFEU[170] and certainly as a public policy violation. It should

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[165] See Hanotiau, "L'arbitrage et le droit européen de la concurrence", in: Briner, Derains *et al.* (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Bruxelles, 1997), pp. 57-58; Idot, "France", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004), p. 182.

[166] See Gaitis, "International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards", 15 Am.Rev.Int'lArb. 9 (2004), pp. 65-66.

[167] See Komninos, *supra* note 42, p. 371; Radicati di Brozolo, *supra* note 67, pp. 28-32, in particular, p. 29.

[168] See Radicati di Brozolo, *supra* note 67, pp. 28-29; Idot, *supra* note 165, p. 182, who goes as far as accepting that even an arbitral award that is manifestly contrary to EU competition law would probably not constitute a violation of public policy, as long as the EU competition issue has been raised and debated during the arbitration.

[169] See Liebscher, *supra* note 127, pp. 83-84.

[170] Under the system of enforcement established by Reg. 1/2003, an agreement that cannot fall under a block exemption regulation is not automatically anti-competitive but must be analysed under Art. 101(3) TFEU. It appears that the Dutch court did not consider this, perhaps because it thought

take much more than a mere failure to fall into the ambit of a block exemption and to notify an agreement to an antitrust authority to lead a court to the dramatic option to refuse to recognise a foreign arbitral award.

D. Conclusions

The possibility of an arbitral award's being set aside or being refused recognition and enforcement in case of violation of *ordre public* is by far the best corrective mechanism in the application of EU competition norms by arbitrators. The mere deterrent effect of this possibility is such that it ensures in the best way that due respect will be paid to those norms. It also fits well with the nature of arbitration and it does not endanger its flexibility and informality. Arbitrators are still the "masters of the arbitral proceedings". The difference is that they have the responsibility or the burden to exercise this discretion in an appropriate way, so as to render an enforceable award.

Indeed, a fundamental concern of the arbitrators is to render an award that will be enforceable.[171] In international commercial arbitration regard should also be given to Article 35 of the 1998 ICC Rules of Arbitration,[172] according to which "*the Arbitral Tribunal … shall make every effort to make sure that the Award is enforceable at law*".[173] The efficiency of arbitration as an institution would be compromised, if arbitrators were to render awards that would be liable to non-enforcement or annulment, because of their incompatibility with mandatory legal provisions, whose infringement surely constitutes a public policy violation. As a former Secretary-General of the ICC Court of Arbitration stresses, referring to that problem in international commercial arbitration,

> "*an international arbitrator is bound as regards the 'Societas Mercatorum' to ensure that arbitration does not become an instrument for fraud upon the legitimate interests of the State. If he neglects that duty, international arbitration will disappear, at the expense of the development of international trade*".[174]

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that the agreement was not temporally covered by the legal exception system and probably had not been notified to the European Commission. In any event such formalism must be rejected.

[171] See Idot, "Arbitrage et droit communautaire", (1996) RDAI/IBLJ 561, p. 570.

[172] See http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

[173] See the opinion of an former Secretary-General of the ICC International Court of Arbitration: Schwartz, "The Domain of Arbitration and Issues of Arbitrability: The View from the ICC", 9 ICSID Rev. 17 (1994), p. 23, according to whom this Article entails that arbitrators may, if necessary, invoke of their own motion mandatory rules of law that may have an impact on the validity of the transaction that is the subject of arbitration.

[174] See Derains, "Report", in: *Competition and Arbitration Law*, Institute of International Business Law and Practice, ICC (Paris, 1993), p. 267. See also the *Report Adopted by the Working Party on Arbitration and Competition and Approved by the Executive Board of the ICC on 4-4-84*, in: (1984)

Therefore, it is recognised that "*in reality, the attitude and action of an arbitrator faced with an [EU] antitrust issue should be influenced by pragmatism rather than principle*".[175] Particularly in cases where an infringement of EU competition law appears gross and certain and where an EU Member State is a likely forum for the enforcement of the award, the arbitrators are expected to apply the competition provisions of the Treaty, even if the parties have not raised such issues, and, as judges of the contract, they can draw the relevant consequences as a result of this illegality and nullity of the anti-competitive arrangement.[176] The same holds true even if the parties have opted for a non-EU Member State law as *lex causae* and regardless of the arbitral tribunal's EU or extra-EU seat.[177]

Rev.Suisse Dr.Int.Conc., n° 21, 37, which stresses that "*the arbitrators must avoid any decision incompatible with public policy if they wish to ensure the effectiveness of the arbitration. If they consider that they have jurisdiction, they should apply the rules of public policy. And it must be stressed that even when they are 'amiable compositeurs' they have to respect the rules of public policy*" (p. 38).

[175] See Lew, "Determination of Arbitrators' Jurisdiction and the Public Policy Limitations on that Jurisdiction", in: Lew (Ed.), *Contemporary Problems in International Arbitration* (London, 1986), p. 80.

[176] See Grossen, "Arbitrage et droit de la concurrence", in: Reymond & Bucher (Eds.), *Recueil de travaux suisses sur l'arbitrage international* (Zurich, 1984), p. 42.

[177] See e.g. the ICC arbitral award in case nº 8626/1996, *supra* note 105, which was decided pre-*Eco Swiss*. An arbitral tribunal sitting in Switzerland, notwithstanding the parties' selection of New York law, proceeded to apply Art. 101 TFEU and the then block exemption Regulation on know-how licensing agreements (Reg. 556/89) and considered illegal a non-competition clause in the main contract. The tribunal recognised that this might not have been the case under New York law, but nevertheless opted to apply the EU competition provisions to that specific issue in view of the effect that the anti-competitive clause had on EU Member States. The tribunal made particular reference to the then Art. 26 of the *ICC Rules of Conciliation and Arbitration of 1988*, (now Art. 35 of the *ICC Rules of Arbitration of 1998*).