ACTIONS UNDER ARTICLES 101 AND 102 TFEU IN INTERNATIONAL ARBITRATION

Some Initial Guidance*

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This article discusses the enforcement of EU competition law claims before arbitration fora as an alternative to litigation. Arbitration as an alternative means of enforcement is often underrated in this context, but should not be. As such, arbitration is a private law complement to existing regimes of public enforcement of antitrust infringements by national and supranational competition authorities. As will be demonstrated in the following, arbitral tribunals are particularly competent to hear competition law disputes and to enforce private parties' rights under EU competition law by facilitating the award of private law remedies, which are not available to the European Commission.

I. Introduction

A. General

1 The present article provides guidance on bringing EU competition law claims in arbitration fora.[1] Private enforcement of antitrust cases has played a prominent role in the US for a long time, at the latest since the promulgation of the Sherman Act.[2] In Europe, the prominence of private actions in competition law enforcement is more

* The present article is based on Gordon Blanke, "EC Competition Law Claims in International Arbitration" in *Austrian Arbitration Yearbook 2009* (C Klausegger *et al* eds) (Vienna: Beck/Stämpfli/Manz, 2009) pp 3–92.

1 The use of arbitration in the context of EU merger control falls outside the scope of this article. For further detail, see Gordon Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies* (Groningen Europa Law Publishing, 2006); and Gordon Blanke, "International Arbitration and ADR in Conditional EU Merger Clearance Decisions" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

2 The Sherman Antitrust Act 1890 (15 USC) in conjunction with the later Clayton Act 1914 (15 USC).

recent and was set in motion by the Modernisation Regulation.[3] With the increase in private enforcement through the Member State courts, the question arises as to *whether* and to *what extent* private enforcement actions can be successfully brought before arbitration tribunals.

2 It is to be noted that the Treaty on the Functioning of the European Union, in shorthand the Lisbon Treaty or TFEU ("TFEU"), completed by the Treaty on European Union ("TEU") entered into force on 1 December 2009, introducing, *inter alia*, a renumbering of the original competition law provisions of the EC Treaty, Arts 81 and 82 of the EC Treaty becoming Arts 101 and 102 of the TFEU respectively. Other renumbering will be mentioned as necessary in the following article.

B. Articles 101 and 102 of the TFEU

(1) Article 3(1)(g) of the EC Treaty

3 The EU competition law provisions were and continue to be inspired by the former Art 3(1)(g) of the EC Treaty (now repealed and replaced by Art 3(b) of the TFEU bestowing upon the Union exclusive power in "the establishing of the competition rules of the functioning of the internal market"), which expressly mentioned as one of the objectives of the European Community the creation of a legal system that will prevent the distortion of competition in the common market.[4]

4 With this aim in mind, in implementing the EU competition law regime, the European Commission essentially seeks to protect the Union public interest by maintaining effective competition in the common market, which is ultimately supposed to lead to a low price level and higher living standards for the individual European consumer. The Union's competition policy is thus designed as a means to promote and achieve the public European economic good.

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3 Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

4 The "common" or "internal" market currently comprises a total of 27 EU Member States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Rumania, Slovakia, Slovenia, Spain, Sweden, the Netherlands and the UK.

(2) Article 101 of the TFEU

(a) General

5 Article 101 of the TFEU (*ex* Art 81 of the EC Treaty) prohibits as incompatible with the common market all agreements and concerted practices that restrict competition between the contracting or colluding undertakings and affect trade between the Member States. Such agreements or practices are null and void *ab initio*[5] and can only be made compatible with the common market if they comply with the individual exemption (or legal exception) provision of Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty), which prescribes certain overall efficiency gains for the agreement or practice to be exempt (or excepted). In order to qualify, the agreement or practice has to fulfil the following cumulative criteria:

> (a) it must contribute to improving the production or distribution of the relevant products or to promoting technical or economic progress;
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> (b) it must allow consumers a fair share of the resulting benefit;
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> (c) it must not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives; and
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> (d) it must not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

6 Alternatively, *prima facie* anti-competitive practices can benefit from a group exemption under one of the relevant block exemption regulations.[6]

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5 TFEU Art 101(2) (*ex* EC Treaty Art 81(2)).

6 Such as Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ L304 12, 05.12.2000, p 7; Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ L304, 05.12.2000, p 3; Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L123, 27.04.2004, p 11; Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L336, 29.12.1999, p 21; and Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L203, 01.08.2002, p 30.

(b) The impact of modernisation

7 Since entry into force of the so-called Modernisation Regulation, Art 101 of the TFEU (*ex* Art 81 of the EC Treaty) has become directly effective in its entirety. In particular, the exemption provision of Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty), which used to be the prerogative of the European Commission in Brussels,[7] is now directly applicable before the Member State courts. This means that private parties can directly and fully enforce their competition law rights before the national courts.

8 The Modernisation Regulation has introduced a system of self-assessment, whereby private parties have to assess themselves the compatibility of their agreements with the exemption criteria under Art 101 of the TFEU (*ex* Art 81(3) of the EC Treaty). In other words, under the Modernisation regime, a formal notification to the Commission of a restrictive agreement to secure its individual exemption under Art 81(3)[8] is no longer possible.[9] Accordingly, agreements and concerted practices in breach of Art 101(1) of the TFEU (*ex* Art 81(1) of the EC Treaty) that satisfy the requirements laid down in Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty) are "*valid and enforceable, no prior [Commission] decision to that effect being required*".[10] Any incompatibility will now be addressed by the national courts or an arbitral tribunal in civil law claims brought by affected (third) parties.

(3) Article 102 TFEU

9 Pursuant to Art 102 of the TFEU (*ex* Art 82 of the EC Treaty), any abuse by one or more undertakings of a dominant position within the common market is prohibited as incompatible with the common market provided it may affect trade between the Member States. In this context, dominance is defined as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant [product and geographic] market by giving it the power to behave to an appreciable

7 Article 9(1) of Council Regulation (EEC) No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, pp 205–211 (English version to be found in the English special edition of the OJ, Series I Chapter 1959–1962, pp 81 *et seq*) ("Regulation 17/62").

8 On the formal exemption mechanism, which required notification to the European Commission of the agreement concerned accompanied by a formal application for clearance, see Art 4(1) of Regulation 17/62.

9 As confirmed by Assimakis P Komninos, *Arbitration and EU Competition Law in a Multi-jurisdictional Setting* (2009), electronically accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105> (accessed 1 July 2010) at p 11.

10 Regulation 1/2003 Art 1(2).

extent independently of its competitors, customers and ultimately of its consumers".[11]

10 An abuse occurs, by way of example, where:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties;

(e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(4) Behavioural and structural remedies under Articles 101 and 102 TFEU

(a) Structural v Behavioural remedies

11 In any of the above scenarios, the parties involved are free to undertake certain remedies[12] to ensure compliance of their agreement or practice with Arts 101 and 102 of the TFEU. Such remedies can either be structural or behavioural in nature. "Structural" remedies are essentially commitments to divest a business or to sell shares; "behavioural" remedies, by contrast, constitute promises by the parties concerned to behave in a particular way, *eg*, to grant actual or potential competitors access to an essential facility or to license the use of a patent to a third-party competitor.

12 Thus, whereas structural remedies seek directly to address competition problems by attempting to restructure the market, behavioural remedies aim to control the commercial conduct of the individual business participants with a view to preventing them from behaving in a way which may render the market anti-competitive. As a consequence, whereas the implementation of a behavioural remedy is medium- to long-term and may, for that reason, require some form of monitoring, a structural remedy is immediate in its implementation without the need to put in place any medium- to long-term monitoring logistics. For the avoidance of doubt, given the behavioural (conduct-related) nature of Arts 101 and 102 of the TFEU, structural remedies play an inferior role in their application.

11 *United Brands v Commission* [1978] ECR 207 at para 65.

12 Alternatively referred to as "commitments" or "undertakings".

(b) Article 9 of the Modernisation Regulation

13 Article 9 of the Modernisation Regulation specifically provides for the Commission to accept commitments in respect of its review under Arts 101 and 102 of the TFEU (*ex* Arts 81 and 82 of the EC Treaty) and "by decision [to] make those commitments binding on the undertakings". More specifically, Art 9(1) provides that the Commission may "where [it] intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings". Importantly, under Arts 101 and 102 of the TFEU (*ex* Arts 81 and 82 of the EC Treaty), there is a strong preference for behavioural remedies.[13]

(c) The relevance of international arbitration in the remedy context

14 Behavioural remedies require, by definition, medium- to long-term supervision to ensure their correct implementation and for that purpose depend on the behaviour of the parties, who are responsible for the due and correct implementation of those remedies. Furthermore, the longer-term timeframe underlying behavioural remedies is likely to make their successful implementation dependent on potential market fluctuations over time.

15 For this reason, the effectiveness of behavioural remedies is particularly susceptible to the deficient or even non-implementation by the parties concerned, thereby running the risk of frustrating the individual rights such remedies are meant to confer on their third-party beneficiaries. Hence, disputes with regard to the performance of remedies are most likely to arise in the context of behavioural remedies.

16 Against this background, international arbitration is a suitable mechanism for the monitoring of the correct implementation of the individually-concerned behavioural remedy over time and to address any disputes arising from its deficient or non-implementation. Essentially, the third-party beneficiary of the remedy concerned is free to trigger of its own motion an arbitration commitment, which binds the parties involved.

13 Recital 12 of the Modernisation Regulation.

(5) Relevant constitutional principles of the Union Legal Order

(a) The principle of direct effect

17 Articles 101 and 102 of the TFEU (*ex* Arts 81 and 82 of the EC Treaty) as well as Commission decisions adopted under those Articles have direct effect,[14] form therefore part of the law of the land of each Member State (without the need for any prior implementing measures at the national level) and as such bind the Member State courts in their application of the law.

(b) The doctrine of supremacy

18 Under the doctrine of supremacy,[15] EU law, including the EU competition law provisions, is supreme over the domestic law of the individual EU Member States and any conflicting national laws have to be set aside. For these purposes, Commission decisions form part of the body constitutional of EU law.[16]

(c) The duty of loyal co-operation

19 By virtue of Art 10 of the EC Treaty (and now replaced in substance by Art 4(3) of the TEU),[17] the national courts of the EU

14 Case 26/62 *Van Gend en Loos v Administratie der Belastigen* (Judgment of the ECJ of 5 February 1963, Rec 1963) which constitutes the *fons origo* of the principle of direct effect, whereby sufficiently clear and unconditional Treaty provisions and Union measures, including Commission decisions, will be immediately enforceable by the Member State courts without the need for any prior implementing measures at the national level. For the direct effect of the competition law provisions of the EC Treaty (and now TFEU), see in particular Case 127/73 *Belgische Radio en Televisie (BRT) v Société Belge des Auteurs Compositeurs et Editeurs de Musique (SABAM)* [1974] ECR 51 at para 16 (Judgment of the ECJ of 30 January 1974).

15 Case 6/64 *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 585 (Judgment of the ECJ of 15 July 1964); confirmed in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA (II)* [1978] ECR 629 (Judgment of the ECJ of 9 March 1978).

16 Following Case 6/64 *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 585 (Judgment of the ECJ of 15 July 1964); confirmed in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA (II)* [1978] ECR 629 (Judgment of the ECJ of 9 March 1978), the ECJ has subsequently expressly extended the applicability of the doctrine of supremacy from Community primary law to Community secondary law, including Commission decisions; Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1 at para 6 (Judgment of the ECJ of 13 February 1969).

17 Pursuant to former Art 10 of the EC Treaty, the Member States are required to "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community" and to "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty". Importantly, this Article has been held to be binding on "all the authorities of the Member States" (see Case

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Member States are bound by a duty of loyal co-operation with the Union institutions and are therefore estopped from taking actions that run counter to the objectives of the internal market.

(d) The Commission's extraterritorial jurisdiction as "guardian of the Treaties"

20 For the purposes of EU competition, the European Commission's jurisdiction is extraterritorial to the extent that infringing behaviour has a significant impact on the internal market.[18]

21 Pursuant to former Art 211 of the EC Treaty[19] (now replaced in substance by Art 17(1) of the TEU), the European Commission is, in turn, the "guardian of the Treaties",[20] and as such responsible for the correct implementation of the EU competition law rules. Hence, under Regulation 1/2003, it is responsible for the enforcement of the EU competition rules together with the national competition authorities of the EU Member States designated to apply and enforce Arts 101 and 102 of the TFEU (*ex* Arts 81 and 82 of the EC Treaty) under the Regulation.

C. Arbitration v Litigation

22 Arbitration refers to the *private* and *confidential* adjudication of disputes by a private individual, the arbitrator,[21] who is appointed by the parties to the dispute, thus allowing the disputants to avoid any adverse publicity.[22] Importantly, arbitration is contractual in nature in that it is

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80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969 at para 12 (Judgment of the ECJ of 8 October 1987)), including, for matters within their jurisdiction, the Member State courts (see also Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 at para 26 (Judgment of the ECJ of 10 April 1984).

18 Case 306/96 *Javico v Yves Saint Laurent Parfums* [1998] ECR I-1983: Case 89/85, etc *Åhlström v Commission ("Wood Pulp I")* [1988] ECR 5193 (implementation of the anti-competitive agreement or abusive conduct inside the EU); and Case T-102/96 *Gencor v Commission* [1999] ECR II-753 (Judgment of the Court of First Instance of 25 March 1999) ("effects doctrine", *ie*, effects of the anti-competitive agreement or abusive conduct produced inside the EU).

19 According to Art 211 of the EC Treaty, "[i]n order to ensure the proper functioning and development of the common market, the Commission shall:

– ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied,
– …"

20 Case C-431/92 *EC Commission v Germany* [1995] ECR I-2189 at para 22.

21 Or in fact an arbitral tribunal, which is usually composed of three members, one of two of which are usually appointed by each of the opposing parties and another one, the chairman, by the two party-appointed members.

22 Which is arguably an important reason for businesses to opt for arbitration over litigation to resolve their general commercial and *a fortiori* competition law disputes. This is so in particular to (i) avoid antagonising present and future customers and (ii) to prevent the ready accessibility by actual or potential

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for the opposing parties to agree the arbitrator's mandate (including the issues to be determined in the arbitration) and the procedure (whether institutional[23] or *ad hoc*[24]) to be adopted for the conduct of the arbitration proceedings. The arbitrator renders an award, which is a private judgment and enforceable in over 140 leading industrial nations under the New York Convention.[25] Arbitration awards are final and binding and generally unappealable on the merits. Applications for setting aside lie to the national judiciary at the place of arbitration on jurisdictional and procedural grounds only, *ie*, if the tribunal lacks jurisdiction over the subject-matter of the dispute or for violation of mandatory principles of due process. In the light of their more streamlined procedure and their inbuilt procedural flexibility, arbitration proceedings are generally more cost-efficient and can be easily adjusted to the procedural and substantive requirements of competition law disputes. Most importantly, the arbitrator can be selected on the strength of his competition law experience and relevant industry sector expertise.

23 In the current globalising world markets, a majority of international commercial agreements, many of which are prone to give rise to competition law concerns, specify arbitration as their chosen dispute resolution forum. The internal market is a natural habitat for international contractual relations that come under the scrutiny of the national and European antitrust regulators, including the European Commission in Brussels. For these reasons alone, arbitration has come to the fore in the adjudication of competition law disputes in Europe.

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competitors to confidential information and business secrets of the contending parties in public hearings.

23 Institutional arbitration is administered by an arbitration institution under that institution's rules, such as the International Chamber of Commerce ("ICC") International Court of Arbitration, the London Court of Arbitration ("LCIA"), or the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC").

24 *Ad hoc* arbitrations are conducted without the involvement of an arbitration institution, but possibly still under a pre-determined set of rules, such as the UNCITRAL Rules of Arbitration.

25 Convention on the Recognition and Enforcement of foreign arbitral awards, done at New York, on 10 June 1958.

II. Arbitrating EU competition law

A. Context[26]

24 Most frequently, competition law issues will arise from an ordinary contractual dispute submitted to arbitration. Although sometimes presented as the principal claim, the competition law issue will often be raised as a defence, with the defendant arguing the voidness *ab initio* of the agreement under which the claimant is seeking to bring a claim.[27] Alternatively, but more rarely, a claimant may bring an action for abuse of dominance, provided the parties enter into a submission agreement to that effect, *ie*, an agreement *ex post* to submit the dispute that has arisen to arbitration.[28] Occasionally, members of a cartel may also submit their disputes to arbitration, which inevitably gives rise to the question as to whether their cartel behaviour is at the origin of their contracting activities and how far these need to be

26 For a good overview of the context within which competition law claims materialise in arbitration, see Katharina Hilbig, *Das gemeinschaftsrechtliche Kartellverbot im internationalen Handelsschiedsverfahren: Anwendung und gerichtliche Kontrolle* (Beck München, 2006) at p 1 *et seq*.; Siegfried H Elsing, "Schiedsgerichtsbarkeit und Kartellrecht" in *Enforcement – Die Durchsetzung des Wettbewerbsrechts* (Köln/Berlin/München: Carl Heymanns Verlag KG, 2005) pp 47–83 at p 49 *et seq*; and Assimakis P Komninos, *Arbitration and EU Competition Law in a Multi-jurisdictional Setting* (2009), electronically accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105> (accessed 1 July 2010) at pp 6–7.

27 In Euro-jargon, this is usually referred to as the Euro-defence. See Emmanuel Jolivet, *Chroniques de jurisprudence arbitrale de la Chambre de Commerce internationale (CCI): Quelques exemples du traitement du droit communautaire dans l'arbitrage CCI*, Gazette du Palais, Cahiers de l'arbitrage (31 May 2003) 3–8 at 3. *Eg*, ICC Award in Case No 6475 (1994), reported in 6(1) ICC International Court of Arbitration Bulletin (May 1995) at 52–54; and ICC Award in Case No 7146 (1992), reported in Jolivet at 4–6; ICC Award in Case No 7357 (1995), reported in 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) at 53–54; ICC Award in Case No 8626, reported in 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) at 55 *et seq*; and ICC Partial Award in Case No 10704 (2000/2001), reported in 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) at 66–77. In the ICC context, see also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

28 Regarding a claim for abuse of dominance under Art 102 of the TFEU (ex Art 82 of the EC Treaty), see, *eg*, ICC Partial Award in Case No 7673 (1993), reported in 6(1) ICC International Court of Arbitration Bulletin (May 1995) at 57–59; ICC Award in Case No 6106 (1991), reported in 5(2) ICC International Court of Arbitration Bulletin (November 1994) at 47 *et seq*; and ICC Award in Case No 8626, reported in 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) at 55 *et seq*. See also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

assessed in the light of the applicable antitrust rules in the arbitration.[29] Following Modernisation, follow-on damages actions may increasingly come before arbitral tribunals.[30] Finally, in the EC regulatory context more specifically, claims in relation to the correct implementation of conditions and obligations within the meaning of Regulation 17/62 or of access commitments under decisions pursuant to Art 9 of Regulation 1/2003 may be submitted to arbitration.

B. Arbitrability of EU Competition Law[31]

(1) Articles 101 and 102 TFEU

25 The arbitrability of competition law in European jurisdictions – including in particular Austria, Belgium, England, France, Germany, Italy and Switzerland – is long established and well documented.[32] In Sweden, the law itself expressly recognises the arbitrability of competition issues.[33] Against this background, it is safe to say that with rare exceptions only,[34] there is a Europe-wide consensus on the arbitrability of competition law, in particular of Arts 101 and 102 of the TFEU (*ex* Arts 81 and 82 of the EC Treaty).

26 Further, International Chamber of Commerce ("ICC") tribunals more particularly have frequently considered the voidness of commercial agreements pursuant to Art 81(2) of the EC Treaty (now Art 101(2) of the TFEU).[35] In the European context more specifically,

29 *Eg*, ICC Award in Case No 9240 (1998), reported in 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) at 59–61. Also Siegfried H Elsing, "Schiedsgerichtsbarkeit und Kartellrecht" in *Enforcement – Die Durchsetzung des Wettbewerbsrechts* (Köln/Berlin/München: Carl Heymanns Verlag KG, 2005) at p 51. See also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

30 Whereby – following a finding of liability by the European Commission or a Member State competition authority – the tribunal's task is to determine the measure of damages on the basis of quantum evidence submitted by the parties.

31 Alexis Mourre, "Arbitrability of Antitrust Law from the European and US Perspectives" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010); James Bridgeman, *The Arbitrability of Competition Law Disputes in Arbitrating Competition Law Issues: A European and a US Perspective* (Blanke ed), EBLR special edition, (2008) 19(1) EBLR 147–174.

32 For a brief overview, Gordon Blanke, "EC Competition Law Claims in International Arbitration" in *Austrian Arbitration Yearbook 2009* (C Klausegger *et al* eds) (Vienna: Beck/Stämpfli/Manz, 2009) at pp 3–92.

33 Swedish Arbitration Act 1999 s 1(3).

34 *Eg*, Lithuania: Lithuanian Law of Arbitration of 2 April 1996 Art 11(1).

35 *Eg*, the ICC Award in Case No 8626, reported in 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) at 55 *et seq* and ICC Award in Case No 10660, reported in 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) at 62 *et seq*. See also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU*

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the arbitrability of EC competition law is, *a fortiori*, intuitive in that the Community judiciary in Luxembourg has, to date, never even discussed the question of whether the EU competition rules are arbitrable in any of its judgments that deal with the interface of arbitration and EU law and has thus implicitly recognised their arbitrability.[36]

(2) Arbitrability of Article 101(3) TFEU

27 Under the old exemption regime,[37] the Commission used to approve of arbitration obligations for the purpose of monitoring the compliance by undertakings concerned with "conditions and obligations" imposed within the meaning of Regulation 17/62. By offering such "conditions and obligations", the undertakings concerned could secure an individual exemption under Art 81(3) of the EC Treaty (now Art 101(3) of the TFEU). Often, such conditions and obligations required fair and non-discriminatory access by third-party competitors to key assets, infrastructure or technology controlled by the undertakings concerned or access by third-party competitors to exhibitions and trade fairs of particular industry-specific associations organised and controlled by members of that association. The undertakings concerned frequently chose to have any disputes arising from the implementation of such conditions adjudicated by arbitration.

28 Since entry into force of the Modernisation regime on 1 May 2004, Art 81(3) of the EC Treaty (now Art 101(3) of the TFEU) has become directly effective and applicable. As a consequence, the old exemption regime, whereby an agreement that was in breach of Art 81(1) of the EC Treaty (now Art 101 of the TFEU) could only be exempted upon application to the Commission if it fulfilled the cumulative exemption criteria set out in Art 81(3) of the EC Treaty (now Art 101(3) of the TFEU), was decentralised. This means that nowadays, undertakings concerned are required to assess the compatibility of their agreements with the EU competition rules themselves. Any complaints by third-party competitors regarding the validity of those agreements can be heard directly before the Member State courts, which will grant civil law remedies (including compensatory damages) for any infringement of the competition law rules.

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and US Arbitration (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

36 To the same effect, see the judgment of the Swedish Supreme Court of 19 February, 2008 in Case No T 2808-05, reported by Karl-Johan Dhunér in (2008) 1(1) GCLR, R-24–R-25.

37 For a detailed account, see Gordon Blanke, "International Arbitration and ADR in Remedy Scenarios Arising under Articles 101 and 102 TFEU" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

29 Given the general acceptance by the European judiciary in Luxembourg of the arbitrability of EU competition law, there can be no doubt that Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty) is meant to be applied by arbitrators as much as by the Member State courts, irrespective of the semantic lacuna created by the absence of an express reference to arbitration in Regulation 1/2003.[38]

30 No doubt, the direct effect of the competition law provisions concerned is a necessary precondition for its arbitrability. In addition, the question as to whether arbitrators are empowered to apply Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty) is also subject to the laws of arbitrability of the individual Member States.[39] It appears that all of the Member States support the arbitrability of Arts 101 and 102 of the TFEU (*ex* Arts 81 and 82 of the EC Treaty) and none to date has been reported to contradict that of the individual exemption under Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty).[40]

31 In any event, arbitrators are ideally placed to review the compliance of a given agreement before them with the exemption (or legal exception) criteria under Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty), more so – most probably – than many a national judge at a Member State court. This is primarily because arbitrators can be chosen on the basis of their particular industry expertise and their economic acumen to ensure that they are in particular able to deal with the complex assessments required for the proper application of Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty). Member State judges, to the contrary, are often economically inexperienced and have not undergone any particular training in applying the competition law rules, not to mention understanding complex economic evidence.

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38 See the exhaustive discussions in Assimakis P Komninos, *Arbitration and EU Competition Law in a Multi-jurisdictional Setting* (2009), electronically accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105> (accessed 1 July 2010) at p 9 *et seq* and all the literature mentioned there.

39 Or alternatively the law applicable to the arbitration agreement; the outcome of the analysis (*ie*, confirmation of arbitrability of EU competition law) here being the same, provided the law concerned is that of one of the Member States. For a practical example of this approach, see the Interim ICC Award in Case No 6106 (1988), reported in 5(2) ICC Bulletin (November 1994) at 44 *et seq*.; and Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

40 To the same effect, Assimakis P Komninos, *Arbitration and EU Competition Law in a Multi-jurisdictional Setting* (2009), electronically accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105> (accessed 1 July 2010) at footnote 35, where he states that "[t]o our knowledge, there has been no view published in any scholarly journal supporting the lack of arbitrators' jurisdiction to apply Art 81(3) [now Art 101(3) of the TFEU]".

(3) Arbitrability of Article 9 under Regulation 1/2003

32 Under Art 9 of Regulation 1/2003, the European Commission is empowered to adopt decisions in order to make binding upon the undertakings concerned commitments which they offer to remove the Commission's initial competition concerns under Arts 101 and 102 of the TFEU (*ex* Arts 81 and 82 of the EC Treaty). The Commission has recently adopted a number of such decisions,[41] each of which incorporates an arbitration mechanism allowing third-party beneficiaries to enforce their rights under the commitments by way of arbitration.

C. The arbitrator's ex officio *duty to raise EU competition law*

(1) The arbitrator's ex officio *duty*

(a) The arbitrator's duty to render an enforceable award

33 It is incumbent upon an international arbitrator to give due consideration to the prospective enforceability of his award in *those* States which are closely related to the dispute at hand or which the parties have expressly requested him to take into account with a view to prospective enforcement actions.[42] The arbitrator's duty may be characterised as a best efforts commitment.[43]

34 In order to comply with this duty, the arbitrator is expected to ensure that the award complies with (a) the formal and essential requirements of the *lex arbitri*; with (b) the requirements of the major

41 *DaimlerChrysler*, Case COMP/E-2/39.140, Commission decision of 13 September 2007; *Toyota*, Case COMP/E-2/39.142, Commission decision of 13 September 2007; and *Opel*, Case COMP/E-2/39.143 Commission decision of 13 September 2007; Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003, *German Electricity Wholesale Market*, Cases COMP/B-1/39.388 and COMP/B-1/39.389; *German Electricity Balancing Market*, OJ C 146, 12.6.2008, 34–35, as reported by Gordon Blanke & Renato Nazzini in 1(3) GCLR (2008), R-68; *Joint selling of the media rights to the German Bundesliga*, Case COMP/C-2/37.214, Commission decision of 10 January 2005, OJ [2005] L134/46. For a detailed account, Blanke, "International Arbitration and ADR in Remedy Scenarios Arising under Articles 101 and 102 TFEU" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

42 Gordon Blanke, "The Role of EC Competition Law in International Arbitration – A Plaidoyer" (2005) 16(1) EBLR 169–180 at 178. *Cf* ICC Award in Case No 8626 (1996), reported in 14(2) ICC International Court of Arbitration Bulletin (2003) at 55 *et seq*, in particular at para 18. See also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

43 To make sure that the award be enforceable at law: Martin Platte, "An Arbitrator's Enforceable Awards" (2003) 20(3) J Int'l Arb 307–313 at 312.

international arbitration conventions, first and foremost the New York Convention; and with (c) the law of any jurisdiction to which the parties specifically draw the tribunal's attention as a likely place of enforcement.

35 The most common and practically relevant proposition in this context is that arbitrators are expected to render awards that are enforceable under the by now *quasi*-ubiquitous New York Convention.[44] The New York Convention is the most frequently used enforcement instrument worldwide and therefore the yard stick normally used by arbitrators to ensure their compliance with the duty to make reasonable efforts to ensure the legal enforceability of their awards. All EU Member States are parties to the Convention and the Member State courts are therefore bound by its provisions.

(b) Competition law as "public policy" under the New York Convention

36 In *Eco Swiss China Ltd v Benetton International NV*[45] ("*Eco Swiss*"), the European Court of Justice ("ECJ") held that "the provisions of Article 85 [now Art 101 of the TFEU] of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention". At para 36, in turn, the ECJ emphasised the unique characteristics of Art 85 of the EC Treaty (now Art 101 of the TFEU), which led it to consider that Article to form part of the public policy concept within the meaning of the New York Convention:

> [A]ccording to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC) [now repealed and replaced by Art 3(b) of the TFEU], Article 85 EC [now Art 101 of the TFEU] … constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community [and now Union] and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) EC [now Art 101(2) of the TFEU] …, that any agreements or decisions prohibited pursuant to that article are to be automatically void.

37 Importantly, the meaning of "public policy" as used in the New York Convention is determined by the domestic notion of public policy of the individual Convention State whose courts have been asked to enforce or set aside an award.[46] For the purposes of the application of

44 A total of more than 140 countries to date. For the full text and an up-to-date membership of the New York Convention, see <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> (accessed 1 July 2010).

45 Case C-126/97 *Eco Swiss China Ltd v Benetton International NV* [1999] ECR I-3055 at para 39 (Judgment of the ECJ of 1 June 1999).

46 "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought

(*cont'd on the next page*)

Art 85 of the EC Treaty (now Art 101 of the TFEU), this notion has further been defined by the ECJ in *Eco Swiss* in the following terms:[47]

> [W]here its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) [now Art 101(1) of the TFEU] of the Treaty.

38 Given that each Member State possesses some such procedural rules, this means that a supervisory court sitting in one of the Member States may be bound to set aside or refuse enforcement of an award that does not comply with the EU competition law provisions. This is irrespective of whether the domestic public policy rules of the individual Member State specifically capture infringements of corresponding provisions of national competition law.[48]

39 Relying on the preceding paragraphs of *Eco Swiss*,[49] the ECJ clarified in its recent ruling in *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*[50] ("*Manfredi*") that "Articles 81 and 82 EC [now Arts 101 and 102 of the TFEU] are a matter of public policy which must be automatically applied by national courts".[51] In essence, this ruling clarifies that the notion of public policy extends to Art 82 of the EC Treaty (now Art 102 of the TFEU).

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finds that … (b) [t]he recognition or enforcement of the award would be contrary to the public policy of *that* country." [emphasis added] Article V(2)(b) of the New York Convention.

47 Case C-126/97 *Eco Swiss China Ltd v Benetton International NV* [1999] ECR I-3055 at para 37 (Judgment of the ECJ of 1 June 1999).

48 Essentially, this means that by its wording in Case C-126/97 *Eco Swiss China Ltd v Benetton International NV* [1999] ECR I-3055 (Judgment of the ECJ of 1 June 1999), the ECJ expanded more restricted domestic public policy concepts (which may not have covered corresponding national competition law rules) to encompass Art 85 of the EC Treaty (now Art 101 of the TFEU), thus effectively widening the ambit of Member State supervisory court review of arbitration awards and as a consequence increasing the likelihood of *de facto* full compliance of such awards with EU competition law. This was, in fact, the case in *Eco Swiss China Ltd v Benetton International NV*, where the public policy concept within the meaning of Art 1065(1)(e) of the Dutch Code of Civil Procedure did not cover Dutch competition law.

49 Case C-126/97 *Eco Swiss China Ltd and Benetton International NV* [1999] ECR I-3055 at para 39 (Judgment of the ECJ of 1 June 1999).

50 Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA*, and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* (Judgment of the ECJ of 13 July 2006).

51 Para 31 of the ECJ's ruling in Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA*, and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* (Judgment of the ECJ of 13 July 2006).

40 In other words, following the ECJ's ruling in *Manfredi*,[52] there is a strong argument that when acting as supervisory courts of arbitration awards, Member State courts must consider the issue of the compliance of the award with EU competition law as a matter of public policy. This, in turn, means that an arbitrator who is faced with EU competition law issues during arbitration proceedings has to keep in mind that if relevant competition law issues are not duly taken into account in the award, the award may be refused enforcement or may be set aside.

41 The Swiss courts, on the other hand, have been more sceptical, having excluded the EU competition rules, and antitrust laws more generally, from the scope of international public policy as applicable under Swiss law for the enforcement or setting aside of foreign arbitral awards.[53] This approach has met with scathing criticism from academic as well as practitioners' quarters.[54] In the EU, by contrast, the public policy concept has more recently even been widened to include "consumer protection laws".[55]

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52 Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA*, and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* (Judgment of the ECJ of 13 July 2006).

53 *Tensacciai v Terra Amata* (Judgment of 8 March 2006), 1er Cour civile. For a comment, see Landolt, (2006) 24(3) ASA Bulletin 535 *et seq*.; and Phillip Landolt, "Judgment of the Swiss Supreme Court of 8 March 2006 – A Commentary", in *Arbitrating Competition Law Issues: A European and a US Perspective* (Blanke ed), EBLR special edition, (2008) 19(1) EBLR 129–145.

54 François Knoepfler, "Droit de la concurrence et réserve de l'ordre public en arbitrage" (2006) 3 Concurrences 16–20; Benoît Merkt, "Ordre public et droit de la concurrence: 'Utopie' ou réalite?" (2006) 3 Concurrences 21–25; Constantine Partasides & Laurence Burger, "The Swiss Federal Tribunal's decision of 8 March 2006: A deepening of the arbitrator's public policy dilemma?" (2006) 3 Concurrences 26–28; and Marcel Meinhardt & Michael Ahrens, "Wettbewerbsrecht und Schiedsgerichtsbarkeit in der Schweiz – Eine Würdigung des Entscheids des Bundesgerichts vom 8 März 2006" SchiedsVZ (2006), 182–188. Professor Luca Radicati di Brozolo even referred to the exclusion of competition laws from the Swiss Court's interpretation of public policy as an "overkill": Luca Radicati di Brozolo, "Arbitrage Commercial International et Lois de Police: Considérations sur les conflits de jurisdictions dans le commerce international" Académie de Droit International de la Haye, tome 315 (2006).

55 Case C-168/05 *Elisa María Mostaza Claro v Centor Móvil Milenium SL* (Judgment of the ECJ of 26 October 2006), not yet reported. For a comment, see Phillip Landolt, "Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements" (2007) 23(1) Arb Int 63–92; Bernd U Graf & Arthur E Appleton, "Elisa María Mostaza Claro v Centor Móvil Milenium: EU Consumer Law as a Defence against Arbitral Awards, ECJ Case C-168/05" (2007) 25(1) ASA Bulletin 48–64; Professor Laurence Idot, (2007) 1 Rev de l'arb 115–121. Some commentators have argued for an even wider concept of Community public policy, encompassing the four freedoms of movement: Ulrich Haas, *Practitioner's Handbook on International Arbitration* (2002) at p 524, footnote 17; and Andy Ruzik, "Die Anwendung von Europarecht durch Schiedsgerichte" in *Beiträge zum Transnationalen Wirtschaftsrecht* (Christian Tietje, Gerhhard Kraft and Rolf Sethe) Heft 17, August 2003, at pp 23–24.

(c) The arbitrator's implicit duty to raise and decide competition issues *ex officio*

42 Despite the foregoing, it can be said with confidence that there is no *express* duty on the part of the arbitrator to *apply* or *decide* competition law issues *ex officio*. Any such duty would violate the sacrosanct principle of party autonomy underlying arbitration proceedings, which reserves to the parties the right to determine the arbitrator's substantive mandate, *ie*, the issues he is required to adjudicate upon in his final award. For the arbitrator to decide competition law issues *sua sponte* without being mandated to do so would expose his award to an application for setting aside on grounds of being *extra petita*[56] under Art V(1)(c) of the New York Convention.[57] With reference to the EU context more specifically, van Houtte makes the following instructive qualification:[58]

> That arbitrators do not have to apply EC competition law *ex officio*, does not mean, however, that they are not entitled to draw the attention of the parties to questions of competition law when they deem this necessary. For instance, sitting in the EU, they may fear that their award risks to be set aside if they would not apply EC [EU] competition law. Indeed, it is possible that parties do not raise Art 81 or 82 [now Arts 101 and 102 of the TFEU] issues during the arbitration proceedings, but challenge the award afterwards on public policy grounds. Inviting the parties to address relevant issues is different from *ex officio* application: in the first hypothesis, the parties have to elaborate the arguments themselves; in the second one, the arbitrators' application of competition rules takes the parties by surprise.

43 In other words and more generally speaking, to ensure compliance with the parties' right to be heard, the arbitrator should submit any unseen and/or uncommented competition issues to the parties for their comments. To *raise* a competition law issue *ex officio* is

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56 *Ie*, outside the arbitrator's mandate; or *ultra petitum*, beyond the arbitrator's mandate. Although see the more permissive approach adopted by the ICC tribunal in ICC Case No 10694 (2002), reported in Katharina Hilbig, *Das gemeinschaftsrechtliche Kartellverbot im internationalen Handelsschiedsverfahren: Anwendung und gerichtliche Kontrolle* (Beck München, 2006) at p 139. Also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

57 According to which recognition and enforcement of the award may be refused where "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration".

58 Hans van Houtte, "The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission" in *Arbitrating Competition Law Issues: A European and a US Perspective* (Blanke ed), EBLR special edition, (2008) 19(1) EBLR 63–87 at 66.

very different from *deciding* competition law issues *ex officio* and is arguably a necessary *prerequisite* for the arbitrator to *go on* to decide any of those issues.

44 In the EU more particularly, the arbitrator is not bound by the principle of loyal co-operation under the former Art 10 of the EC Treaty (as now replaced in substance by Art 4(3) of the TEU) and is therefore – unlike a Member State court – not considered a Community organ within the meaning of the *Nordsee* jurisprudence.[59] However, this does not *prima facie* absolve the arbitrator sitting in the EU from applying the EU competition rules. To the extent that the *lex contractus*, *ie*, the substantive law applicable to the underlying contract, or more generally the substantive law governing the dispute,[60] is the law of one of the Member States, the arbitrator will be empowered to apply the EU competition law rules as part of that law by virtue of the principle of supremacy,[61] whereby EU law forms part of the law of the land of the individual Member State.[62] Furthermore, by virtue of the doctrine of direct effect, the arbitrator has the power to apply those norms of EU law that are directly effective in the Member States, including Arts 101 and 102 of the TFEU (*ex* Arts 81 and 82 of the EC Treaty). Furthermore, EU competition law may apply regardless of the *lex contractus*. To avoid the risk of the award being set aside on grounds of *extra petita*, the arbitrator is well advised to raise any relevant competition law issues with the parties and hear their arguments.[63] However, to the extent that the reviewing court considers the application of the EU competition rules mandatory[64] – as some Member State courts no doubt do – an application for setting aside the award may well be unlikely to succeed.

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59 Case 102/81 *Nordsee v Reederei Mond* (Judgment of the ECJ of 23 March 1982).

60 Such as determined by the applicable conflicts of laws rules (which the arbitrator considers appropriate on a case-by-case basis), where the parties have not agreed the law governing their contractual relationship (including the arbitration agreement).

61 For a practical example, see *Radenska v Kajo*, Judgment of the OGH, the Austrian Supreme Court, of 23 February 1998, ZfRV 1999, 24.

62 Also note in this context that even where the arbitrator is asked to adjudicate *ex aequo et bono*, without referring to any particular substantive law, basing his reasoning on principles of equity and fairness entirely, he is arguably still bound by the application of EU competition law; Case C-393/92 *Almelo v NV Energiebedrijf* [1994] ECR I-1477 (Judgment of the ECJ of 27 April 1994). Also see the quote from Hans van Houtte, "The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission" in *Arbitrating Competition Law Issues: A European and a US Perspective* (Blanke ed), EBLR special edition, (2008) 19(1) EBLR 63–87 at 66.

63 *Sarl Enodis c/ Sté SNC Prodim*, Cour d'appel de Paris, Judgment of 16 March 1995, (1996) Rev Arb 146.

64 According to Hochstrasser: "Mandatory rules of law (lois de police in French) are defined as imperative provisions of law which must be applied to an international relationship irrespective of the law that governs that relationship; they are a matter of public policy (ordre public), and, moreover, reflect a public policy so

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45 Last but not least, the arbitrator's duty to make best efforts to render an enforceable award are defined by the *lex arbitri*. As van Houtte advises:[65]

> It is through its seat that the arbitration procedure is brought within the ambit of a governing arbitration statute (*ie* the *lex arbitri*) and under the control of the national courts of the seat.
>
> …
>
> Consequently, arbitrators have to apply EC [EU] competition law when the seat of the arbitration is located within the European Union. It is part of the public policy of the country where they perform their duties; a breach of public policy of the *lex arbitri* may lead to the annulment of the award. Even arbitrators deciding according to equity ("*amiable composition*") have to respect public policy, *ie* including Art 81 and 82 [now Arts 101 and 102 of the TFEU].
>
> [footnotes omitted]

46 The same considerations developed with respect to the arbitrator sitting within the EU apply to the arbitrator sitting *outside* the EU provided the *lex contractus*, the *lex arbitri* or again the governing substantive law more generally is that of one of the EU Member States and/or enforcement is likely to be sought within the EU. To the extent that the EU competition regime claims extraterritorial jurisdiction, an arbitrator may be well advised to raise an antitrust issue even if the alleged anti-competitive effects occur in a State other than the State where the arbitration has its juridical seat if the antitrust issue is likely to have an impact on the enforceability of the award in that State. In other words, the arbitrator should consider the proper application of those antitrust rules that belong to the place affected by the anti-competitive behaviour to the extent that this place may also be a future place of enforcement.[66]

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commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant conflicts-of-laws rule." Daniel Hochstrasser, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration" (2001) 18(5) J Int'l Arb 57–86 at 67–68.

65 Hans van Houtte, "The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission" in *Arbitrating Competition Law Issues: A European and a US Perspective* (Blanke ed), EBLR special edition, (2008) 19(1) EBLR 63–87 at 65.

66 For a practical application of this rule with respect to the extraterritorial reach of EU competition law, see the ICC Award in Case No 10246 (2000), reported in Emmanuel Jolivet, "Chroniques de jurisprudence arbitrale de la Chambre de Commerce internationale (CCI): Quelques exemples du traitement du droit communautaire dans l'arbitrage CCI" Gazette du Palais, Cahiers de l'arbitrage, 31 May 2003, 3–8 at 7–8; ICC Cases No 7315 (1992) and 7181 (1992), reported in H Verbist, "The Application of European Community Law in ICC Arbitrations: Presentation of arbitral awards" in *International Commercial Arbitration in Europe*, Special Supplement, ICC International Court of Arbitration Bulletin (1994)

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(d) The Commission as "guardian of the Treaties"

47 In accordance with the former Art 211 of the EC Treaty (as now replaced in substance by Art 17(1) of the TEU), the European Commission is the "guardian of the Treaties" and, under Regulation 1/2003, it is responsible for the enforcement of the EU competition rules together with the national competition authorities of the EU Member States designated to apply and enforce Arts 101 and 102 of the TFEU (*ex* Arts 81 and 82 of the EC Treaty) under the Regulation.

48 An arbitration award does not bind the Commission or national competition authorities and does not preclude enforcement action on their part. A non-compliant arbitration award may itself trigger the intervention of the European Commission or a national competition authority. Such intervention would be undesirable because it would defeat the parties' original objective of resorting to arbitration and go against the spirit of Modernisation and private enforcement, cause unwanted adverse publicity to the parties involved and increase the overall costs of the proceedings.

49 For these reasons alone, arbitrating parties are well advised to treat competition law issues that arise in arbitration proceedings deferentially.

(e) The parties' obligations under EU law

50 Private parties cannot contract out of their duties under EU competition law.[67] This includes where private undertakings endeavour to circumvent the competition rules by resorting to arbitration with the intent not to submit the competition law issues between them to the tribunal for final determination.

51 As the ECJ said in its *Nordsee* ruling:[68]

> As the court has confirmed in its judgment of 6 October 1981 *Broekmeulen*, Case 246/80 (1981) ECR 2311), Community [now Union] law must be observed in its entirety throughout the territory of all the member states; parties to a contract are not, therefore, free to

at 43–44. See also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

67 See again the ECJ's ruling in Case 26/62 *Van Gend en Loos v Administratie der Belastigen* (Judgment of the ECJ of 5 February 1963, Rec 1963), according to which the Community legal order creates rights and obligations for individuals in the legal context of the Community. For present purposes, such obligations include the abidance by the EU competition law provisions.

68 Case 102/81 *Nordsee v Reederei Mond* (Judgment of the ECJ of 23 March 1982) at para 4.

> create exceptions to it. In that context attention must be drawn to the fact that if questions of Community [Union] law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award – which may be more or less extensive depending on the circumstances – and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.

52 In the competition law context more specifically, Advocate General Saggio in his Opinion in *Eco Swiss* emphasised that "although they [*ie*, the EU competition law rules] govern relations between individuals, individuals are not free to create exceptions to them, on pain of automatic annulment of any agreement concluded in breach of the prohibition contained in Article 85(1) [now Art 101(1) of the TFEU]".[69] The Advocate General further echoed the ECJ's ruling in *Hoechst v Commission*[70] to the effect that also in competition law, private undertakings are absolutely bound to comply with the provisions of the EC Treaty (now of the TEU and TFEU).[71]

53 Also in its earlier ruling in *Almelo v NV Energiebedrijf*,[72] the ECJ made clear that private parties could not avoid the application of the EU competition rules by opting for the resolution of their disputes by way of "amicable composition".[73]

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69 Case C-126/97 *Eco Swiss China Ltd and Benetton International NV* [1999] ECR I-3055 at para 38 (Judgment of the ECJ of 1 June 1999).

70 Cases C-46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859.

71 Opinion of Advocate General Saggio in Case C-126/97 *Eco Swiss China Ltd and Benetton International NV* [1999] ECR I-3055 at para 36 (Judgment of the ECJ of 1 June 1999).

72 Case C-393/92 *Almelo v NV Energiebedrijf* [1994] ECR I-1477 (Judgment of the ECJ of 27 April 1994).

73 Also known by its French synonym "amiable composition", which essentially allows the appointed decision-maker to rule *ex aequo et bono* (*ie*, on principles of equity and fairness, without reference to any particular substantive law).

Case C-393/92 *Almelo v NV Energiebedrijf* [1994] ECR I-1477 at paras 23–24 (Judgment of the ECJ of 27 April 1994). For ICC arbitral practice on this point, see ICC Case No 7097 (1993), reported in Emmanuel Jolivet, "Chroniques de jurisprudence arbitrale de la Chambre de Commerce internationale (CCI): Quelques exemples du traitement du droit communautaire dans l'arbitrage CCI" Gazette du Palais, Cahiers de l'arbitrage (31 May 2003) 3–8 at 4. *Contra*, however, Partial Award in ICC Case No 6503 (1990), reported in H Verbist, "The Application of European Community Law in ICC Arbitrations: Presentation of arbitral awards" in *International Commercial Arbitration in Europe*, Special Supplement, ICC International Court of Arbitration Bulletin (1994) at 39–40. See also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US*

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(f) Conclusion: The arbitrator's *implicit* duty to *raise* and *decide* competition law issues *ex officio*

54 In light of the foregoing, it is *arguable* that irrespective of the place of arbitration (*ie*, whether in or outside the EU), the arbitrator has an *implicit* duty to *raise and decide* EU competition law issues of his own accord, provided that the competition issue appears from the pleadings or the evidence submitted by the parties, and a duty to raise the issue with the parties in order to comply with their right to be heard and to avoid motions for setting aside the resulting award on grounds of *extra petita*.

55 The question of the arbitrator's *ex officio* duty to decide competition law issues is by no means settled. There have been views for[74] and against[75].[76] Pending conclusive certainty on the issue, it will be for the arbitrator to take a judgment call on a case-by-case basis. The arbitrator should consider how likely it is for one of the parties to apply for the setting aside of the award or raise a public policy defence in prospective enforcement proceedings and how likely it is for such a setting aside application or defence to succeed before the relevant court. Their potential success is, in turn, dependent on the intensity of review applied by the supervisory court.

Arbitration (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

74 *Eg*, Gordon Blanke, "The Role of EC Competition Law in International Arbitration – A Plaidoyer" (2005) 16(1) EBLR 169–180; Professor Laurence Idot, "Case note on *Eco Swiss*" (1999) Rev Arb 642 *et seq*; Thomas Eilmansberger, "Die Bedeutung der Art 81 und 82 EG für Schiedsverfahren" SchiedsVZ (2006), Heft 1, 5–17 at 10 *et seq*.

75 *Eg*, Denis Bensaude, "*Thalès Air Defence BV v GIE Euromissiles*: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law", (2005) 22(3) J Int'l Arb 239 *et seq*. *Contra* Gordon Blanke, "Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law: A Réplique to Denis Bensaude's '*Thalès Air Defence BV v GIE Euromissile*'" (2006) 23(3) J Int'l Arb at 249 *et seq*.

76 See also Siegfried H Elsing, "Die ex officio Anwendung drittstaatlicher Eingriffsnormen (insbesondere des Kartellrechts) in internationalen Schiedsverfahren" in *Festschrift für Karl Peter Mailänder zum 70. Geburtstag* (Karlmann Geiss, Klaus-A Gerstenmeier, Rolf M Winkler and Peter Mailänder) (De Gruyter Recht, Berlin) at pp 87–101.

(2) Experience from actual practice

(a) Actual practice of arbitration tribunals

56 Various ICC arbitrations[77] bear testimony to the fact that in the past, arbitrators have indeed raised competition law issues of their own motion and submitted them for a fair hearing to the arbitrating parties.

57 One prominent, and very recent, example proving the point is the *Cytec* arbitration,[78] chaired by Professor Hans van Houtte. In this arbitration, which was concerned with the legality under Art 81 of the EC Treaty (now Art 101 of the TFEU) of two consecutive supply contracts between the same parties, the tribunal raised and decided the compatibility of the first contract with the EU competition law rules even though the parties had queried the legality of the second, amended contract only.[79] Under the specific circumstances of the case, the tribunal concluded that this first contract between the parties did not violate Art 81 of the EC Treaty (now Art 101 of the TFEU).

58 A further striking example from the ICC inventory concerned an agreement between an Italian seller and a South-Korean buyer that was governed by South-Korean law.[80] In this case, the arbitrator decided that in order to ensure the future enforceability of the resulting award, "the Tribunal must … on its own initiative investigate whether the Agreement comes under the prohibition of Art 85, para 1 of the [EC]

77 ICC Case No 8423 (1998), JDI 2002, 1079–1084 (commented by J J Alvarez, Jdi 2002, 1084, intimating the tribunal's *ex officio* application at p 1085); ICC Case No 7539, [1996], JDI 1030 and ICC Case No 7181 (1996), reported in H Verbist, "The Application of European Community Law in ICC Arbitrations: Presentation of arbitral awards" in *International Commercial Arbitration in Europe*, Special Supplement, ICC International Court of Arbitration Bulletin (1994) 33–55 at 43; ICC Case No 7315, reported in H Verbist, "The Application of European Community Law in ICC Arbitrations: Presentation of arbitral awards" in *International Commercial Arbitration in Europe*, Special Supplement, ICC International Court of Arbitration Bulletin (1994) 33–55 at 43 *et seq*; ICC Case No 7539 (1995), JDI 1996, 1030–1034 at 1033; and ICC Case No 10694 (2002), reported in Katharina Hilbig, *Das gemeinschaftsrechtliche Kartellverbot im internationalen Handelsschiedsverfahren: Anwendung und gerichtliche Kontrolle* (Beck München, 2006) at p 139. For a detailed review of ICC practice, see also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

78 *SNF SAS c/ Cytec Industries BV*, Judgment of the Paris Court of Appeal of 23 March 2006. *La SNF SAS c/ La Cytec Industrie*, Judgment of the Tribunal de Première Instance de Bruxelles of 8 March 2007, RG 2005/7721/A No 53 71ième Chambre.

79 Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards – A Never-Ending Saga" SIAR 2007:2, 51–78 at 54.

80 ICC Case No 4132 (1983), YCA X (1985), 49–51.

Treaty [now Art 101(1) of the TFEU]".[81] Even Swiss ICC tribunals have pronounced themselves in favour of the *ex officio* application of EU competition law.[82]

59 As regards collusions between cartel members more specifically, these have been reported to have been addressed in one of two ways when arising before an arbitration tribunal: either (i) by the parties' withdrawal of the issue of collusion from the arbitrator's mandate; or (ii) by redrafting the underlying agreement between the cartel members in a way to make it competition-law compliant.[83]

(b) Actual practice of Member State supervisory courts

60 Whereas the Swiss Federal Supreme Court has pleaded against the application *ex officio* of EU competition law,[84] even the very conservative, arbitration-friendly French courts have pronounced themselves in favour, most graphically in the recent *Thalès v Euromissile* ("*Thalès*") ruling.[85]

61 In the net result, as a lowest common denominator, Member State supervisory courts will expect arbitral tribunals to raise and decide competition law issues *ex officio* where hard core infringements are concerned and/or where the infringement is "blindingly obvious",[86] always provided that the underlying factual issues appear from the pleadings or the evidence. Some Member State courts may, however, have more exacting standards,[87] and since its ruling in

81 ICC Case No 4132 (1983), YCA X (1985), 49–51 at 50.

82 ICC Case No 9347 (2000), reported in Katharina Hilbig, *Das gemeinschaftsrechtliche Kartellverbot im internationalen Handelsschiedsverfahren: Anwendung und gerichtliche Kontrolle* (Beck München, 2006) at p 139, where the tribunal in fact extended the *ex officio* applicability of EU competition law to Greek competition law.

83 Siegfried H Elsing, "Schiedsgerichtsbarkeit und Kartellrecht" in *Enforcement – Die Durchsetzung des Wettbewerbsrechts* (Köln/Berlin/München: Carl Heymanns Verlag KG, 2005) at p 57.

84 X S.A./Y S.A., judgment of the Swiss Federal Supreme Court of 13 November 1998, Bull ASA 1999, 529 *et seq* at 535.

85 *Thalès v Euromissile*, Judgment of the Paris Court of Appeal of 18 November 2004.

86 Which, in actual practice, is most probably synonymous with infringements hard core. *See also* Gordon Blanke, "Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law: A Réplique to Denis Bensaude's '*Thalès Air Defence BV v GIE Euromissile*'" (2006) 23(3) J Int'l Arb 249–258.

87 *Eg*, the Brussels Court of First Instance in *La SNF SAS c/ La Cytec Industrie*, Judgment of the Tribunal de Première Instance de Bruxelles of 8 March 2007, RG 2005/7721/A No 53 71ième Chambre and the Hague Court of Appeal in *Marketing Displays International Inc v VR Van Raalte Reclame BV*, Judgment of the Court of Appeal of The Hague of 24 March 2005.

Manfredi,[88] the ECJ may now arguably expect arbitrators to apply the EU competition law provisions *ex officio*.

(3) The arbitrator's liability in case of non-compliance

(a) The arbitrator's potential complicity in the prohibited infringement

62 In extreme circumstances, to ignore clearly relevant competition law issues may expose the arbitrator to becoming complicit in the competition law infringement and thus liable for his role in facilitating the infringement under EU law. More specifically, in providing his arbitral services, the arbitrator arguably constitutes an "undertaking" within the meaning of EU competition law[89] and by actively enforcing contractual provisions of a cartel agreement, he becomes liable for facilitating the continued operation of the cartel[90].[91]

(b) Potential ways for the arbitrator to minimise the risk of complicity

63 As a last resort, if the parties agree that the arbitral tribunal should ignore clearly relevant competition issues that fall within the scope of the arbitration clause, it may be that the proceedings are being used to avoid the application of mandatory rules or even to further an illegal purpose (for instance, if the arbitration is used to resolve disputes relating to the operation of a cartel).

64 If this is the case, the arbitrator should consider whether it may be appropriate for him to resign on the basis that he is prevented from performing his mandate in accordance with internationally accepted

88 Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA*, and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* (Judgment of the ECJ of 13 July 2006).

89 Eric Barbier de La Serre & Cyril Nourissat, "Contrôle des sentences arbitrales à l'aune du droit de la concurrence: à la recherche du bon équilibre …" Revue Lamy de la Concurrence, no 2, février 2005/avril 2005, 68–73.

90 For confirmation, see Assimakis P Komninos, *Arbitration and EU Competition Law in a Multi-jurisdictional Setting* (2009), electronically accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105> (accessed 1 July 2010) at p 16: "[Arbitrators] 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 fines for breach of Articles 81EC [now Art 101 of the TFEU]. " [footnote omitted]

91 By analogy to Case COMP/E-2/37.857 *Organic Peroxides* [2005] OJ L110/44; affirmed by the European Court of First Instance in Case T-99/04 *AC-Treuhand AG v Commission of the European Communities* (Judgment of the European Court of First Instance of 8 July 2008).

arbitral obligations, *ie*, the consideration of a mandatory aspect of the applicable laws, or on the basis that he does not have jurisdiction.[92] If the proceedings are used for an illegal purpose, the arbitrator may arguably have a duty to resign.

65 In the alternative, when the parties specifically agree, either in the arbitration clause or subsequently,[93] that relevant competition law issues are to be excluded from the arbitration, Robert von Mehren has suggested that:[94]

> [T]he arbitration should go forward and the arbitrators should discuss with the parties the difficulties that may be created if the issues are not dealt with in the arbitration. If the parties do not agree to include these matters in the arbitration, the arbitrators should advise them that any final award issued by the tribunal will include a provision to the effect that the award will not be final until the parties advise the tribunal that the impact, if any, of anticompetitive laws upon the award has been determined by judicial proceedings or in some other binding manner and reserving the jurisdiction of the tribunal to alter its award to take into account the impact of such laws as so determined.

66 As reported by Dolman and Grierson, this is exactly what happened in *Repsol/Arco*, where an arbitration dealing with the non-competition-related aspects of the case took place in parallel with competition law proceedings before the European Commission and the competent national competition authorities.[95]

67 Last but not least, where the accurate interpretation of an ambiguous contract provision is in issue, the tribunal may simply attempt to interpret that provision in a manner that is competition-law-compliant.[96]

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92 Note in this context the concerns expressed along similar lines by Advocate General Saggio in his Opinion in Case C-126/97 *Eco Swiss China Ltd and Benetton International NV* [1999] ECR I-3055 at para 24 (Judgment of the ECJ of 1 June 1999). To the same effect, Siegfried H Elsing, "Schiedsgerichtsbarkeit und Kartellrecht" in *Enforcement – Die Durchsetzung des Wettbewerbsrechts* (Köln/Berlin/München: Carl Heymanns Verlag KG, 2005) at pp 56–57.

93 *Eg*, by way of submission agreement or the terms of reference (the latter of which are normally used in arbitration proceedings under the ICC Rules).

94 Robert von Mehren, "The Eco-Swiss Case and International Arbitration" (2003) 19 Arb Int 464 at 465.

95 M Dolmans & J Grierson, "Arbitration and the Modernization of EC Antitrust Law: New Opportunities and New Responsibilities" 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) 37–51 at 44.

96 M Dolmans & J Grierson, "Arbitration and the Modernization of EC Antitrust Law: New Opportunities and New Responsibilities", 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) 37–51 at 42.

D. The arbitrator's co-operation with the competition authorities and the courts

68 A certain level of co-operation between the European Commission and the arbitrator may be advisable to the extent that this will assist the arbitrator in rendering an enforceable award.

69 The same reasoning arguably applies *mutatis mutandis* to the arbitrator's co-operation with national competition authorities, which are responsible for the correct implementation of the domestic competition rules.

(1) Indirect references to the ECJ

70 Recourse to the Commission may be especially important in light of the fact that arbitration tribunals do not qualify as national courts or Member State authorities and are therefore not allowed to make direct references to the Union courts under Art 267 of the TFEU (*ex* Art 234 of the EC Treaty).[97]

71 An indirect preliminary reference mechanism may, however, be available to the arbitrator, whereby he can request a Member State court at the place of arbitration to make a reference to the ECJ on a particular point of Union law on which the arbitrator requires clarification.[98] In some Member States, the arbitral assistance by the Member State courts may be triggered by the perceived need to allow an EU law issue to be ventilated properly before a judicial forum.[99] By way of example, in *Bulk Oil Ltd v Sun International Ltd*,[100] the losing party in an English arbitration brought an appeal on a point of Community law before the English Court of Appeal with the intention to obtain a reference to the ECJ. The Court of Appeal, in turn, upheld the decision to grant leave to appeal against the arbitration award on the basis that the point of

97 Case 102/81 *Nordsee v Reederei Mond* (Judgment of the ECJ of 23 March 1982), and more recently Case C-125/04 *Denuit v Transorient* [2005] ECR I-923 (Judgment of the ECJ of 27 January 2005).

98 *Eg* the Danish Arbitration Act 2005. See also Andy Ruzik, "Die Anwendung von Europarecht durch Schiedsgerichte" in *Beiträge zum Transnationalen Wirtschaftsrecht* (Christian Tietje, Gerhhard Kraft and Rolf Sethe) Heft 17, August 2003, at p 29 *et seq*.

99 This is in line with the relevant ECJ's jurisprudence on the point to ensure a uniform application of Community law throughout the internal market. See amongst others Case C-126/97 *Eco Swiss China Ltd and Benetton International NV* [1999] ECR I-3055 at para 40 (Judgment of the ECJ of 1 June 1999); and Case 102/81 *Nordsee v Reederei Mond* (Judgment of the ECJ of 23 March 1982).

100 [1984] 1 WLR 147; [1984] 1 All ER 386.

Community law in issue[101] was complex and "capable of serious argument",[102] the wish to make a reference having expressly been raised before the arbitrator.[103]

(2) Co-operation with the European Commission and national competition authorities[104]

72 The co-operation mechanisms provided for under Regulation 1/2003 and the Commission Cooperation Notice apply exclusively to the Commission and the Member State courts and therefore cannot be relied upon by arbitral tribunals.[105] In the absence of any Community legislation governing the interaction between the Commission and arbitration tribunals, the potential co-operation between the two has to be dealt with on a case-by-case basis.[106] The following considerations are applicable *mutatis mutandis* to the arbitrator's co-operation with national competition authorities.

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101 Whether the UK government policy in the period from April to June 1981 relating to the export of North Sea crude oil from the UK was void or unlawful under EEC law.

102 [1984] 1 WLR 147 at 153 *et seq*; [1984] 1 All ER 386. The point of law referred was indeed "an entirely new one on which there was no authority", "a question of potentially very great importance" on which "authoritative guidance was necessary".

103 As subsequently referred to the ECJ: Case 174/84 *Bulk Oil v Sun International* [1986] ECR 559.

104 For best practices with respect to the Commission's role and the arbitrator's interaction with the Commission in international arbitration proceedings, see Carl Nisser & Gordon Blanke, "Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings" (2006) 4 ECLR 174–183; Carl Nisser & Gordon Blanke, "Projet de lignes directrices sur la Commission européenne intervenant en tant qu'amicus curiae dans les procedures d'arbitrage international" Revue Lamy de la Concurrence, juillet/septembre 2007, 148–158. For a critical view, see also Alexis Mourre, "Opinions dissidente sur un projet inutile et dangereux" Revue Lamy de la Concurrence, juillet/septembre 2007, 158–164. Alternatively, also see the corresponding contributions by Carl Nisser & Gordon Blanke and Alexis Mourre in *Arbitrating Competition Law Issues: A European and a US Perspective* (Blanke ed), EBLR special edition, (2008) 19(1) EBLR 193–231.

105 Assimakis P Komninos, *Arbitration and EU Competition Law in a Multi-jurisdictional Setting* (2009), electronically accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105> (accessed 1 July 2010) at p 18 *et seq*.

106 It may be desirable for the Commission to publish a Notice on Co-operation with Arbitrators. For further considerations, see Assimakis P Komninos, *Arbitration and EU Competition Law in a Multi-jurisdictional Setting* (2009), electronically accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105> (accessed 1 July 2010) at pp 26–27.

(a) Potential request by the arbitrator to the Commission

73 In order to be in a position correctly to assess the relevant product and geographic markets,[107] the arbitrator may require relevant information and data from the Commission that may otherwise not be readily available, especially where relevant documentary evidence may not be forthcoming from the respondent. The arbitrator may also wish to ask the Commission's view on certain competition issues to ensure an accurate competition assessment of the case at hand (*ie*, an assessment that is compatible with the Commission's own approach), in order to avoid any inconsistencies that could lead to the unenforceability or the setting aside of the resulting award. For the same reason, and given that the tribunal has no power to refer legal questions to the ECJ (now the General Court) under Art 267 of the TFEU (*ex* Art 234 of the EC Treaty), the arbitrator may request the Commission to make a submission to the tribunal on its own interpretation of points of competition law that are decisive for its ruling and on which there is no settled case law by the Union courts and which do not qualify for an "*acte clair*".

74 This said, the Commission's view will not be binding on the arbitrator, who should remain entirely free to digress from the Commission's advice. It is after all the arbitrator who remains in charge of the arbitration proceedings.

(b) The Commission as *amicus arbitri*

75 Furthermore, the Commission may play a useful role as *amicus curiae* (*arbitri*), providing relevant expert evidence to the arbitrator in the arbitration proceedings.[108] This option, however, should only be used by the arbitrator if the Commission is already fully aware of the ongoing proceedings, *eg*, where parallel administrative proceedings have been instigated before the Commission, unless the parties have given their express consent. Otherwise, the tribunal may raise the Commission's suspicion and provoke its intervention in the proceedings (despite the parties express wish not to be exposed to the Commission's involvement).

76 Any form of co-operation between the tribunal and the Commission must comply with the parties' right to be heard. Given the

107 Which constitute the main point of reference for the assessment of anti-competitive agreements or concerted practices and the abuse of a dominant position under Arts 101 and 102 of the TFEU [*ex* Arts 81 and 82 of the EC Treaty] respectively.

108 *Eg*, ICC Case No 7146 (2001) XXVI YB Comm Arb 119. See also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

potentially significant implications of involving the European Commission in the arbitration, it is submitted that the tribunal will have to seek the parties' views before taking any procedural steps in this direction. Furthermore, the tribunal will have to give the parties the opportunity to comment on any submission by the Commission, whether in the form of a general statement on the relevant legal principles or in the form of production of evidence or comments on the facts of the case. Finally, it goes without saying that the tribunal will not be bound by any submission of the Commission and retains its power and duty to decide the dispute on the evidence before it.

(c) Co-operation under Article 9 commitment decisions and Article 81(3) EC Treaty (now Article 101(3) TFEU) individual exemptions

77 Finally, as for arbitrations under Art 9 commitment decisions or within the framework of Art 81(3) (now Art 101(3) of the TFEU)[109] individual exemptions under the old exemption regime, the above restrictions arguably do not apply.[110]

78 This is because such arbitrations have their origin in a remedy package agreed by the undertakings concerned with the European Commission in return for the commitment decision or the individual exemption. As part of this deal, the undertakings concerned have agreed to have the correct implementation of those remedies arbitrated upon the request of third-party beneficiaries under the remedy packages. Upon commencement of the arbitration, the opposing parties will have agreed to the Commission's supervisory and/or investigatory status during the proceedings, the Commission ultimately remaining responsible for the accurate performance of the remedies in accordance with its original commitment or exemption decision.

E. The arbitrator's mandate

79 The arbitrator's private law mandate is complementary to the public law of the European Commission or the national competition

109 Note in this context that due to the fact that after Modernisation, the Commission has lost its power to grant individual exemptions, individual exemption decisions only really exist under Art 81(3) of the EC Treaty and do not continue in existence under the TFEU and hence the new Art 101(3) of the TFEU. The only exception would probably be where individual exemptions granted under Art 81(3) of the EC Treaty persist in duration to date, justifying their renaming as individual exemptions under Art 101(3) of the TFEU. Apart from their exemption, Art 101(3) of the TFEU will only give rise to "legal exceptions".

110 For a detailed account, see Gordon Blanke, "International Arbitration and ADR in Conditional EU Merger Clearance Decisions" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

authorities. Whereas the European Commission and the national competition authorities formally investigate the parties' competition law infringements as well as prohibit anti-competitive agreements and practices, it is for the arbitrator to draw the civil law consequences from any such infringements. In this sense, the arbitrator's mandate is identical to that of the national courts.[111]

(1) The determination of the applicable antitrust law(s)

80 Irrespective of the governing law of the main contract and in light of the fact that antitrust laws have been found to fall within the public policy concept under the New York Convention, the arbitrator will have to ascertain which antitrust laws to take into account in his deliberations to ensure the enforceability of the resulting award in the relevant enforcement jurisdictions and to avoid any successful challenges for setting aside. The criteria for the application of EU competition law may not be the same as those for the determination of the *lex contractus*. In particular, EU competition rules may apply if the agreement or conduct in question is capable of affecting cross-border economic activity within the EU irrespective of the *lex contractus* and irrespective of the seat of the arbitration or the place of residence or incorporation of the undertakings.[112] This criterion is clearly satisfied when agreements are implemented within the EU.[113]

81 In order to ensure compliance with the overarching principles of due process in international arbitration, and especially the *audi alteram partem* rule, the arbitrator is best advised to hear the parties on the potentially applicable antitrust laws in the individual case.

(2) Declarations of nullity and voidness of the main contract and findings of behavioural abuse

82 Arbitrators have jurisdiction, depending on the scope of the arbitration agreement, to draw the civil law consequences from competition law infringements.[114]

111 As indeed confirmed by the ICC tribunal in ICC Case No 7673 (1993), reported in H Verbist, "The Application of European Community Law in ICC Arbitrations: Presentation of arbitral awards" in *International Commercial Arbitration in Europe*, Special Supplement, ICC International Court of Arbitration Bulletin (1994) at 37. See also Gordon Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Arbitration* (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

112 Commission Notice: Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty [2004] OJ C101/81, para 101.

113 Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A Ahlström Osakeyhtiö v Commission* [1988] ECR 5193.

114 The meting out of administrative sanctions, such as the payments of fines, remains the prerogative of the European Commission.

(a) Article 101 TFEU

83 As regards European jurisdictions more particularly, in the light of the Modernisation Regulation, the arbitrator is empowered to apply the entirety of Art 101 of the TFEU (*ex* Art 81 of the EC Treaty) and:

(a) to declare an infringing agreement null and void under Art 101(2) of the TFEU (*ex* Art 81(2) of the EC Treaty); or

(b) to consider amendments to an infringing agreement to make it compliant with the exemption (legal exception) criteria under Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty) or a relevant block exemption and thus to declare the new agreement compliant with Art 101(3) of the TFEU (*ex* Art 81(3) of the EC Treaty) or that block exemption;

(c) to declare that the allegedly infringing agreement is in fact not in breach of Art 101(1) of the TFEU (*ex* Art 81(1) of the EC Treaty) at all; and

(d) to award damages to the party who suffered loss caused by the infringing agreement.

(b) Article 102 TFEU

84 Subject to the same provisos made with respect to the adjudication of competition claims under Art 101 of the TFEU (*ex* Art 81 of the EC Treaty), the arbitrator is empowered to draw the relevant civil law consequences from an infringement of Art 102 of the TFEU (*ex* Art 82 of the EC Treaty). Thus, the arbitrator is empowered to:

(a) find an abuse of a dominant position;

(b) to award damages for loss suffered by the past breach to the claimant;

(c) to order relevant remedies; and

(d) to order the infringing undertaking to refrain from continuing to engage in the abusive conduct.

(c) Article 9 commitment decisions and Article 81(3) EC (Article 101(3) TFEU) individual exemptions

85 Finally, the arbitrator is empowered to decide upon the correct implementation of remedies provided for under Art 9 commitment decisions or under Art 81(3) (Art 101(3) of the TFEU)[115] individual

115 For a detailed account, see Gordon Blanke, "International Arbitration and ADR in Remedy Scenarios Arising under Articles 101 and 102 TFEU" in *EU and US*

(*cont'd on the next page*)

exemption decisions. In this context, the arbitrator is most likely to award damages to compensate for harm caused for past non- or deficient performance and to order the undertakings concerned properly to perform the remedies going forward.

(d) Consent award

86 In all the above scenarios, the arbitrator is empowered to make a consent award upon the parties' request based on a settlement between the parties, provided such settlement and award are competition-law compliant.[116]

(3) The arbitrator's powers to award civil law remedies

87 Broadly speaking, arbitrators have the same powers to award civil law remedies as the courts. The most important limitations relate to multiple or punitive damages and, depending on the *lex arbitri* and the agreement of the parties, interim remedies.

(a) Compensatory damages

88 The arbitrator is empowered to award damages caused by a competition law infringement under the doctrine developed by the ECJ in *Courage Ltd v Bernard Crehan*[117] ("*Courage*") and *Manfredi.*[118]

89 Issues of causation and the measure of damages, however, are determined by the applicable substantive law.[119] Provided that this law is the law of one of the EU Member States, these issues have to comply with the principle of equivalence or non-discrimination and the principle of effectiveness (together the principle of procedural autonomy) within the meaning of the ECJ's jurisprudence in *Courage*[120] and *Manfredi*.[121] This means that the redress for the infringement at the

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Arbitration (Gordon Blanke & Phillip Landolt eds) (forthcoming with Wolters Kluwer in 2010).

116 To the same effect, Siegfried H Elsing, "Schiedsgerichtsbarkeit und Kartellrecht" in *Enforcement – Die Durchsetzung des Wettbewerbsrechts* (Köln/Berlin/München: Carl Heymanns Verlag KG, 2005) at p 57.

117 Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297 in particular at paras 24–28 (Judgment of the ECJ of 20 September 2001).

118 Joined Cases C-295/04 to C-298/04*Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA* and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* (Judgment of the ECJ of 13 July 2006).

119 Paolisa Nebbia, "Damages actions for the infringement of EC competition law: compensation or deterrence?" (2008) 33(1) EL Rev 23–43.

120 Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297 especially at paras 25 *et seq* (Judgment of the ECJ of 20 September 2001).

121 As regards causation, the ECJ held as follows in Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria*

(*cont'd on the next page*)

national level (and thereby before the arbitrator) must be no less favourable than redress for a comparable infringement of national law and must be effective, and not rendered virtually impossible or excessively difficult. Subject to the application of the principles of equivalence and effectiveness, the claimant's contributory negligence and unjust enrichment will play a part in the calculation of the overall damages recoverable by the claimant depending, *inter alia*, on the claimant's individual commercial power and the defendant's commercial standing.[122]

90 International arbitrators tend to award compound interest, which is likely to result in a closer reflection of the genuine opportunity costs the claimant has suffered by not being able to invest the awarded damages over the delayed period of non-payment by the defendant.

(b) Extra-compensatory damages

91 The nature of and measure of the recoverable damages is determined by the applicable law, subject again to the principles of equivalence and effectiveness.[123]

92 Importantly, it appears from the ECJ's wording in *Manfredi*[124] that apart from actual loss, loss of profit is recoverable for an infringement of EU competition law as a Union right and does not depend on its availability for corresponding infringements at the national level of the individual Member States.[125] This is not surprising as loss of profit is often seen as properly forming part of the

Sai SpA and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* (Judgment of the ECJ of 13 July 2006) at para 64.

122 Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297 at paras 32–33 and 36 (Judgment of the ECJ of 20 September 2001); and Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA* and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* (Judgment of the ECJ of 13 July 2006) at para 99.

123 Assimakis P Komninos, *Arbitration and EU Competition Law in a Multi-jurisdictional Setting* (2009), electronically accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105> (accessed 1 July 2010) at p 210 *et seq.*

124 Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA* and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* (Judgment of the ECJ of 13 July 2006).

125 For further detail on the recoverability of actual loss and loss of profits for EU competition law infringements in the various Member States, see the Study on the conditions of claims for damages in case of infringement of EC competition rules prepared by Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, also referred to as the Ashurst Report, electronically available on the European Commission's website at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_reportclean_en.pdf> (accessed 1 July 2010); and *A Practical Guide to National Competition Rules Across Europe* (Homes & Davey eds) (Kluwer Law International, 2nd Ed, 2007).

compensatory element of damages. Only the recoverability of damages of an extra-compensatory nature will be governed by the principles of equivalence and effectiveness. By way of illustration, as regards English law, the English High Court has recently held in the *Vitamins* litigation that in that case, no restitutionary nor punitive or exemplary, but only compensatory damages are available in competition law claims before the English courts.[126]

(c) Injunctions

93 The arbitrator is authorised to pronounce various forms of injunctions, whether mandatory or prohibitory, including specific performance of an agreement, to the extent that such measures of relief are available means of redress under the applicable substantive law.

94 By way of caution, it should be noted that, if the governing law is English law, orders for specific performance may not be available in certain circumstances, as held by the English Commercial Court in *Lauritzencool AB v Lady Navigation Inc.*[127] As demonstrated in this case, especially in competition law proceedings – in which time is of the essence – injunctions can also play an important role at a preliminary stage, before the commencement of the arbitration proceedings. Court support may indeed be necessary provided the tribunal has not been constituted and the applicable arbitration rules provide for court support at this stage.

F. Review of EU competition law awards by the Member State courts

95 Arbitral awards are subject to review by national courts, commonly referred to as the "second look". This may happen by way of an action for setting aside the award, generally at the seat of the arbitration, or when the successful party seeks enforcement of the award, almost invariably under the New York Convention. A review of the award on the merits is in principle excluded, but competition law is likely to be a ground of review as part of the public policy at the seat of the arbitration or in the State where enforcement is sought.

126 *Devinish Nutrition Ltd v Sanofi-Aventis SA (France)* [2007] EWHC 2394 (Ch) (Judgment of 19 October 2007).

127 [2005] 2 Lloyd's Rep. 63; [2005] EWCA Civ 579 CA (Civ Div).

(1) The "second look" in Europe

(a) Variations of the "second look" across Europe

96 The extent or intensity (*intensité*) of the supervisory court review of arbitration awards involving EU competition law varies from Member State to Member State, depending on the individual court's perception and understanding of its own jurisdictional duties under EU competition law.

97 The Paris Court of Appeal's and the Brussels Court of First Instance's rulings in *Cytec* provide a recent instructive example of the diametrically opposed approaches Member State supervisory courts can take in their review of competition law awards.[128] Whereas both these courts agreed that consideration of competition law issues formed part of the public policy concept under Art V(2)(a) of the New York Convention, the Paris court held that to the extent that the competition law issues had been considered by the arbitrator and the arbitrator had taken a decision on them, it was not supposed to submit the solution given to those issues to any further substantive analysis. The arbitrator's holdings on the competition law issues were considered to be final and binding.

98 The Brussels court, by contrast, held that it was necessary to submit the reasoning part of the award to a detailed analysis to ascertain that the arbitration tribunal had not breached the competition law rules. In the result, the Paris court proceeded to the enforcement of the underlying award, whereas the Brussels court set aside the award for infringement of the EU competition law provisions.

99 The French Supreme Court has recently confirmed the Paris Court of Appeal's decision in *Cytec*.[129]

128 *SNF SAS c/ Cytec Industries BV*, Judgment of the Paris Court of Appeal of 23 March 2006. *La SNF SAS c/ La Cytec Industrie*, Judgment of the Tribunal de Première Instance de Bruxelles of 8 March 2007, RG 2005/7721/A No 53 71ième Chambre.

129 Arrêt no 680, Cour de Cassation, 4 June 2008. For a comment, see also Gordon Blanke & Renato Nazzini in (2008) 1(2) GCLR, R-44–R-46.

(b) The "minimalist" and "maximalist" schools of thought[130]

100 Essentially, the Paris court and the *Cour de Cassation* adopted the approach previously established in *Thalès*,[131] according to which – even where the competition law issues were not raised during the arbitration proceedings – enforcement of an award can only be refused where the competition law infringement was "blindingly obvious",[132] thus advocating what has become known as the "minimalist" school of supervisory court review.[133] Essentially, this approach requires a review

130 See also the recent discussions in Assimakis P Komninos, *Arbitration and EU Competition Law in a Multi-jurisdictional Setting* (2009), electronically accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105> (accessed 1 July 2010) at p 36 *et seq*.

131 *Thalès v Euromissile*, Judgment of the Paris Court of Appeal of 18 November 2004. For an approving comment on the Paris Court of Appeal's approach in context, Pierre Heitzmann & Jacob Grierson, "The French Approach to Arbitrating EC Competition Law in the Light of the Paris Court of Appeal's Decision in *SNF vs Cytec Industrie*" in *Practical Aspects of Arbitrating EC Competition Law* (T Zuberbühler & C Oetiker eds) (Zurich Schulthess, 2007) at pp 187–215; and Alexis Mourre, Note, *Thalès v Euromissile*, JDI, avril-mai-juin, 2005, 357 *et seq*. For a distinctly critical view of the *Thalès* decision, Christophe Seraglini, "L'affaire *Thalès* et le non-usage immodéré de l'exception d'ordre public (ou les dérèglements de la dérèglementation)" in *Les Cahiers de l'Arbitrage* (Alexis Mourre ed) at pp 87–101; and Diederik de Groot, *Observations*, SIAR 2005:2, 209–216, arguing for the need of an "effective review".

132 Within the meaning of a "*violation flagrant, effective et concrète*".

133 Leading proponents of the minimalist school include in particular Alexis Mourre and Professor Luca Radicati di Brozolo. See their case comments on *SNF c/ Cytec* (2007) 2 Rev Arb 303 *et seq*; and most recently the Brussels Court's decision in *La SNF SAS c/ La Cytec Industrie*, Judgment of the Tribunal de Première Instance de Bruxelles of 8 March 2007, RG 2005/7721/A No 53 71ième Chambre, in (2007) Rev de l'Arb 318–339. Further, Luca Radicati di Brozolo, "Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration – A Fresh Look at the 'Second Look'" (2004) 1 Int ALR 23–37; and Christoph Liebscher, "Arbitration and EC Competition Law – The new Competition Regulation: Back to Square One?" (2003) 3 Int ALR 84–89. For a critical assessment of the Brussels Court's decision in *La SNF SAS c/ La Cytec Industrie*, Judgment of the Tribunal de Première Instance de Bruxelles of 8 March 2007, RG 2005/7721/A No 53 71ième Chambre; see also Pierre Heitzmann & Jacob Grierson, "*SNF v Cytec Industrie*: National Courts within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Art. 81 EC" SIAR 2007:2, 39–49. Most vociferously in support of the "minimalist" view more generally, see also Alexis Mourre & Luca Radicati di Brozolo, "Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back" (2006) 23(2) J of Int'l Arb 171–188; and Alexis Mourre, "Le libre arbitre, ou l'aveuglement de Zaleucus: Variations sur l'arbitrage, l'ordre public et le droit communautaire" in *Mélanges en l'Honneur de François Knoepfler* (François Bohnet & Pierre Wessner eds) (2005) at pp 283–323.

For another example of the "minimalist" approach to supervisory court review of competition law awards in practice, see *Nuovo Pignone Spa c Schlumberger Sa*, Judgment of the Court of Appeal of Florence of 21 March 2006; for a contextual comment, *Luca Radicati di Brozolo*, "Controllo del lodo internazionale e ordine publico" Rivista dell'Arbitrato (2006), 629–747. For a further recent French judgment confirming the minimalist approach, see *Jean-*

(*cont'd on the next page*)

of the arbitration award for the purpose of ascertaining that the relevant competition issues have been addressed and decided, with the review mainly focusing on the compatibility of the operative part of the award with the competition law rules.[134] The Brussels court, by contrast, subscribed to the "maximalist" school of review,[135] which has also recently been applied by The Hague Court of Appeal in *Marketing Displays International Inc v VR Van Raalte Reclame BV*.[136] This requires a review of both the reasoning and the operative parts of the award in order to ensure that the entire award be compatible with the competition law rules.[137] On occasion, different supervisory courts even

Louis Jacquetin c La Société Intercaves SA, Cour d'Appel de Paris (1 ere Ch, SC), Judgment of the Paris Court of Appeal of 20 March 2008, RG 06/06860, as reported by Gordon Blanke & Renato Nazzini in (2008) 1(3) GCLR, R-67–R-68. Most recently, see also *La Société Linde Aktiengesellschaft c. La Société Halyvourgiki – AE*, Cour d'Appel de Paris (Pôle 1 Chambre 1), Judgment of the Paris Court of Appeal of 22 October 2009, RG 2008/21022, as reported by Gordon Blanke & Renato Nazzini in (2010) 3(1) GCLR, R-1–R-2.

134 With a view to ascertaining that the "recognition or enforcement of the award", *ie*, that the outcome of the award does not violate competition laws. To this effect, *see* also Christoph Liebscher, "Arbitration and EC Competition Law – The new Competition Regulation: Back to Square One?" (2003) 3 Int ALR 84–89 at para 3.5. *Contra*, see Sébastian Bollée, "Observations – Cour d'appel de Paris (1re Ch C), 11 mai 2006" (2007) 1 Rev de l'arb 101–108.

135 With a tendency towards the "maximalist" approach, *eg*, Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards – A Never-Ending Saga" SIAR 2007:2, 51–78; Christophe Seraglini, *Lois de police et justice arbitrale internationale* (2001); Christophe Seraglini, "L'intensité du contrôle du respect par l'arbitre de l'ordre public: Note – Cour d'appel de Paris (1re Ch C) 14 juin 2001" (2001) 4 Rev d'arb 781–804; Phillip Landolt, "Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements" (2007) 23(1) Arb Int 63–92; and Walid Abdelgawad, *Arbitrage et Droit de la Concurrence: Contribution à l'Etude des Rapports entre Ordre Spontané et Ordre Organisé* (2001). For an example of a staunch maximalism, see also B Hanotiau & O Capresse, "Introductory Report" in *The Review of International Arbitration Awards* (E Gaillard ed) (Juris, 2010) at p 7 *et seq*, especially at p 74 *et seq*; and B Hanotiau's contributions as discussant in "Discussion" in *The Review of International Arbitration Awards* (E Gaillard ed) (Juris, 2010) Annex 3, 359 *et seq*, at 366–367.

136 *Marketing Displays International Inc v VR Van Raalte Reclame BV*, Judgment of the Court of Appeal of The Hague of 24 March 2005; Diederik de Groot, "Observations" SIAR 2006:2, 217–229. For a further instructive example of the "maximalist" school in practice, *see Sesam v Betoncentrale*, Hof Amsterdam, 12 October 2000, (2002) Nederlandse Jurisprudentie (NJ), case no 111, reported in M Dolmans & J Grierson, "Arbitration and the Modernization of EC Antitrust Law: New Opportunities and New Responsibilities", 14(2) ICC International Court of Arbitration Bulletin (Fall 2003) 37–51, at footnote 9; and the decision of the District Court of The Hague of 1 August 2007 in *Dutch State v BV Nederlands Elektriciteit Administratiekantoor*; Diederik de Groot in (2008) 1(3) GCLR, R-69–R-70.

137 Arguably allowing, however, the tribunal a certain margin of appreciation both in the evaluation of the evidence and in the application of the law to the facts. See in particular the Brussels court's mandate in *La SNF SAS c/ La Cytec Industrie*,

(*cont'd on the next page*)

in one and the same Member State have adopted contradictory standards of review.[138] Despite long-standing views to the contrary, it has recently been argued that, on a literal reading, *Eco Swiss*[139] requires a substantive review of the award in question and prescribes the annulment or setting aside of any award that is incompatible with the relevant EU competition law provisions (here Art 81 of the EC Treaty (now Art 101 of the TFEU)),[140] irrespective of the type or degree of the infringement.[141]

101 The main arguments for and against either school of thought are an exact mirror image of one another and have been rehearsed by the main participants in the discourse time and again. Essentially, the adherents of the minimalist school preach the classical principles of international commercial arbitration and in particular the *finality* of arbitration awards.[142] They argue that the review of the award should be confined to its "recognition and enforcement" with a view to ensuring that the operative part of the award is competition-law compliant and that especially in the context of the recognition and enforcement of foreign arbitral awards, review is – by definition – very limited.[143] The proponents of the maximalist school, by contrast, are more forward-looking in that they allow for a functional adjustment of the workings

Judgment of the Tribunal de Première Instance de Bruxelles of 8 March 2007, RG 2005/7721/A No 53 71ième Chambre, as discussed in Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards – A Never-Ending Saga" SIAR 2007:2, 51–78 at p 58 *et seq*.

138 *Eg*, Germany: OLG Düsseldorf, judgment of 21 July 2004, Vi-Sch (Kart) 1/02; and OLG Thüringen, judgment of 8 August 2007, Az 4 Sch 03/06. On the German perspective, see also Siegfried H Elsing, "Schiedsgerichtsbarkeit und Kartellrecht" in *Enforcement – Die Durchsetzung des Wettbewerbsrechts* (Köln/Berlin/München: Carl Heymanns Verlag KG, 2005) at p 65 *et seq*.

139 *Eco Swiss China Ltd and Benetton International NV*, Case C-126/97, Judgment of the European Court of Justice of 1 June 1999 [1999] ECR I-3055

140 Which now, at the latest since Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA* and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* (Judgment of the ECJ of 13 July 2006), can be extended to infringements of Art 102 of the TFEU [*ex* Art 82 of the EC Treaty].

141 Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards – A Never-Ending Saga" SIAR 2007:2, 51–78.

142 See in particular Alexis Mourre & Luca Radicati di Brozolo, "Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back" (2006) 23(2) J of Int'l Arb 171–188. For a most radical approach, see also Alexis Mourre, "Le libre arbitre, ou l'aveuglement de Zaleucus: Variations sur l'arbitrage, l'ordre public et le droit communautaire" in *Mélanges en l'Honneur de François Knoepfler* (François Bohnet & Pierre Wessner eds) (2005) pp 283–323, where – by virtue of the intended finality of arbitration awards – he goes as far as to encourage the abolition of any reasoning of awards.

143 As the award would normally not have any link with the place of enforcement and therefore not raise any public policy issues or other issues that may ground a refusal of enforcement in the first place.

of international arbitration to the specific requirements of the internal market, which lies at the heart of the project of European Integration.[144] In their view, there must not be any ground for circumventing the EU competition law rules by resorting to arbitration; this, in turn, can only be achieved by putting in place some form of *effective* review system that allows for a *genuine* second look at the arbitrator's assessment of or his omission to assess relevant competition law issues. In principle, according to the maximalists, a stricter review is a logical consequence of the widening of the concept of arbitrability to include competition law disputes; by this token, an effective review is to secure the Member States' trust in conceding some of their sovereign powers in the competition law context and thereby their continued approval to permit and promote antitrust arbitrability.[145] One key argument of the maximalists in this respect is the widely-accepted view that for an arbitration award to be valid and enforceable, it needs to be reasoned sufficiently, which in turn is to enable supervisory courts properly to review the award for compliance with mandatory rules.[146] According to the maximalists, to confine the review of a competition law award to its operative part only would void the review process of its *raison d'être* and render it nonsensical.[147] *A fortiori*, a more detailed review in the EU competition law context may be justified on the basis that an EU competition law award may well produce effects on the internal market more widely and therefore also have a direct impact on the economic situation of the Member State in which enforcement is sought. The minimalists, in turn, claim that supervisory court judges often have no more expertise in applying EU competition law than the arbitrators themselves and have even been found to have misapplied the EU competition law provisions in the exercise of their supervising function. According to the minimalists, judgment debtors seek to get a second chance to present new competition arguments on the merits or to have some competition arguments reheard before the supervisory courts.[148]

102 For as long as there is no consensus amongst the Member States' supervisory courts on the required intensity of review of arbitration

144 Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards – A Never-Ending Saga" SIAR 2007:2, 51–78.

145 P Landolt, *Modernised EC Competition Law in International Arbitration* (The Hague Kluwer Law International, 2006).

146 In particular, Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards – A Never-Ending Saga" SIAR 2007:2, 51–78, including ample references to the relevant literature.

147 See the discussions in Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards – A Never-Ending Saga" SIAR 2007:2, 51–78.

148 As clearly articulated by the Paris Court of Appeal in *Tamkar SA c/ RC Group*, Judgment of 15 March 2007, RG no 2005/18660, 6, within a pleaded breach of the award of French competition law.

awards for compatibility with EU competition law, the best option for the arbitrator who is faced with EU competition law issues is caution, pending a definitive decision by the ECJ. In the meantime, however, it should be acknowledged that in actual practice, the difference between the maximalists and the minimalists may be more imagined than real. In actual practice, there may well be a "middle way" that allows a practical combination of the two schools of review, creating a workable balance between the sacrosanct principle of the finality of arbitration awards on the one hand and an effective review of EU competition law awards on the other.[149] According to the Brussels Court of First Instance in *Cytec*,[150] when reviewing the arbitral award, it assumes a verificatory function: It has to verify whether the tribunal has or has not violated Arts 81 and 82 of the EC Treaty (now Arts 101 and 102 of the TFEU) in rendering the award. The court fulfils this function by undertaking a textual review of (read: reading) the award and by checking whether the tribunal has assessed (i) the facts before it (such as presented by the parties);[151] and (ii) the application of the law to the facts such as assessed by the tribunal in compliance with Arts 81 and 82 (now Arts 101 and 102 of the TFEU). In other words, the court is mandated to submit the reasoning of the award to a substantive review on the basis of the facts such as distilled by the tribunal in the award, without re-opening the proceedings *per se*.[152] The court has thus no jurisdiction to *re-assess* the facts of the case. Some commentators have approved of the middle way.

(2) Consequences of non-compliance

103 Irrespective of the Member State courts' differences in approach to reviewing competition law awards, it should be cautioned that a Member State court's non-compliance with the EU competition law rules by giving effect to an award that breaches those rules may entail the enforcing State's responsibility within the meaning of the relevant state liability principles developed within the context of EU law.[153]

149 For a practical example, see the Milan Court of Appeal's approach in enforcement proceedings in *Terra Amata Srl v Tensacciai Spa*, Judgment of 5 July 2006; Phillip Landolt, "Judgment of the Swiss Supreme Court of 8 March 2006 – A Commentary" in *Arbitrating Competition Law Issues: A European and a US Perspective* (Blanke ed), EBLR special edition, (2008) 19(1) EBLR 129–145 at 141 *et seq.*

150 *La SNF SAS c/ La Cytec Industrie*, Judgment of the Tribunal de Première Instance de Bruxelles of 8 March 2007, RG 2005/7721/A No 53 71ième Chambre

151 Including the evidence presented by the parties.

152 *Ie*, without rehearing the evidence.

153 To this effect also, Eric Barbier de La Serre & Cyril Nourissat, "Contrôle des sentences arbitrales à l'aune du droit de la concurrence: à la recherche du bon équilibre …" Revue Lamy de la Concurrence, no 2, février 2005/avril 2005, 68–73.

104 According to the ECJ's ruling in *Francovich v Italy*,[154] it is a principle of Community (now Union) law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community (Union) law for which they can be held responsible.

105 More specifically, there is reason to believe that a Member State supervisory court – which qualifies as an emanation of the State – may engage the State's liability within the meaning of the *Köbler*[155] jurisprudence, if it does not comply with its obligations properly to review an arbitration award for compliance with EU law. Under the *Köbler* doctrine, the injured party would be entitled to claim reparation for damages caused to it by an arbitral award that infringes the EU competition law provisions, provided that the conditions for the State's liability enumerated at para 51 of the ECJ's judgment are met in the individual case:

> (a) the rule of law infringed must be intended to confer rights on individuals (which is the case of EU competition law);
>
> (b) the breach must be sufficiently serious (which again could be the case with respect to an EU competition law infringement through an arbitral award, depending on the individual case and the kind and gravity of the infringement);[156] and
>
> (c) the causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured party (the causal link between the infringing award and the supervisory court's failure to annul or set aside the award being manifest).[157]

106 Even though this may appear a draconian measure to take in practice, it is theoretically possible.[158]

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154 Cases C-6 and C-9/90 *Francovich v Italy* [1991] ECR I-5357, at para 37 (Judgment of the European Court of Justice of 19 November 1991).

155 Case C-224/01 *Gerhard Köbler v Republik Österreich* (Judgment of the ECJ of 30 September 2003), especially at paras 31, 32, 36 and 51 *et seq*; confirmed by Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica Italiana* (Judgment of the European Court of Justice of 13 June 2006).

156 There being no Community definition, the degree of seriousness of the breach is subject to interpretation by the Member State courts. In *Stephen Cooper v HM Attorney-General* [2008] EWHC 2285, Plender J of the English High Court recently held that State liability can be incurred only in cases where the national court manifestly infringed the applicable law.

157 Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards – A Never-Ending Saga" SIAR 2007:2, 51–78 at footnote 97.

158 By way of caution, it should also be noted that two recent examples of Member State courts testify to the high thresholds that have to be met for the *Köbler*-doctrine to apply: Thus, in its judgment of 7 October 2008 in *Stephen Cooper v HM*

(*cont'd on the next page*)

III. Conclusion

107 Following Modernisation, private enforcement of EU competition law through arbitration tribunals will no doubt increase over the years to come. Arbitrators faced with EU competition law issues in arbitration proceedings need to be aware of the delicate balance to be struck between arbitration as a private dispute resolution mechanism on the one hand and EU competition law as a means to pursue the European economic public interest on the other. To the extent that specialist arbitrators are highly experienced in antitrust arbitrations, they may well be better suited to hear competition law disputes than less specialist Member State judges. This said, in order to inject a measure of greater procedural certainty into EU competition arbitrations, it may well be advisable for the European Commission and their national counterparts to provide some guidance on the possibilities of co-operation between arbitrators and the competent regulatory public prosecutors.

Attorney-General [2008] EWHC 2285, the English High Court (Chancery Division) held that the claims based on the *Köbler* cause of action were to be reserved for exceptional cases involving errors that were manifest. This approach seems to reflect the French case law on setting aside of competition law awards only to the extent that a breach constitutes a "*violation flagrante, effective et concrète*".