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Arbitrability of European Union Competition Law

Bachelor Thesis

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Tallinn 2017

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Table of contents

Abbreviations

NCA	National Competition Authority
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
ECJ	European Court of Justice
CJEU	Court of Justice of European Union
ICC	International Chambers of Commerce
LCIA	London Court of International Arbitration
SCC	Swedish Chambers of Commerce

Introduction

International commercial arbitration as a dispute resolution mechanism between undertakings engaging in commercial activity is highly common. European Union's competition law places obstacles for the arbitrators including, for example, arbitrability of the dispute and award recognition in EU countries. Competition law traditionally has been perceived as a public order (*ordre public*) and as a mandatory provisions of law which cannot be derogated from, and the competence to deal with the competition law issues has traditionally been given to the European Commission and National competition authorities (NCAs). Competition law as an *ordre public* and mandatory provisions of law aims to protect consumers from harmful market behaviour conducted by private undertakings. The Commission's attitude towards arbitration proceedings in the sphere of competition law has been suspicious due to the nature of arbitration proceedings. Arbitration proceedings are conventionally constructed under party autonomy principle and the parties are in control of the procedural issues such as the scope of dispute and the substantive laws governing the dispute. In addition, the proceedings before arbitral tribunal are confidential. The recent changes in the field, and especially the decentralization of the enforcement regime, have provided more powers for arbitrators to deal with competition law issues in the arbitration proceedings.

The aim of the thesis is to explore and analyze the interconnection between arbitration and European Union competition law i.e. how the EU competition law and the notion of *ordre public* affects to the arbitration proceedings and to the outcomes of such proceedings.

For the purposes of this research, the research questions are constructed in the following manner:

- **To what extent arbitrators are required to follow the mandatory rules of EU competition law?**
- **What are the limitations for competition authorities to review, annul or set aside arbitration awards?**
- **Can an arbitration clause enable a party to escape from an agreement falling within the scope of article 101 TFEU?**

The structure of the thesis is as follows:

The first chapter of the thesis considers the main aspects of European Union competition law, namely the content of Articles 101 and 102 TFEU, as well as some fundamental notions of those Articles developed through CJEU's case law. The idea behind chapter 1 is to give a brief understanding for the reader about the EU competition law and to introduce the most fundamental aspects of it.

The second chapter of the thesis deals with international commercial arbitration as a dispute resolution mechanism within the international context. The chapter introduces some of the most important aspects of arbitration proceedings including, *inter alia*, the agreement to arbitrate, arbitrability of disputes and enforcement of arbitral awards. Due to limited space available it does not go into detailed evaluation of the topic. Thus, the chapter aims to give a general overview for the reader of the topic.

The third chapter consists of the analytical part of the arbitrability of EU competition law addressing to the issues as provided in the research questions. The third chapter discusses, among others, about the extent to which arbitrators are required to take into account the mandatory provisions of law, in this case Articles 101 and 102 TFEU, are arbitrators required to raise issues of competition law on their own motion without the parties will, to what extent awards relating to competition law are reviewable by competition authorities.

The thesis is based on traditional legal dogmatic method or legal method i.e. description and analysis of the existing law.

The sources of this research are based on legal texts books and legal articles relevant in the respective field. The sources based on legal articles are mainly collected from online databases such as Heinonline and Westlaw. In addition, legal provisions, international conventions and case law are referenced where relevant.

Due to the restricted space available, this thesis concerns only Articles 101 and 102 of the TFEU with regards to EU competition law. From a wider perspective EU competition law is not limited only to those two legal provisions as it includes also state aid provisions and merger control regulation provided by the Commission. It can be noted in this context that the Commission has taken, especially in the sphere of merger control, a more positive attitude towards the use of

arbitration proceedings in resolving disputes. However, Articles 101 and 102 are considered to constitute the legal backbone of the EU competition law. The aforesaid articles are the principal instruments to regulate the main aims of competition law, namely, the functioning of the internal market within EU and the protection of consumers.

Even though the regime of enforcement regarding EU competition law was renewed and decentralized by the regulation 1/2003, the role of arbitral tribunals in the private enforcement remains more or less unclear as to the scope and extent of their powers. Notwithstanding the prior, it is long established that questions regarding EU competition law are indeed arbitrable by their nature. However, arbitral tribunals are not judicial organs within the meaning of Article 267 of the TFEU. In conjunction with the principle of party autonomy this can create obstacles for the arbitral tribunals in various phases of the proceedings.

1. European Union competition law and policy

1.1 Introduction

Competition law has always been essential to the European Union and, especially, for the functioning of the internal market. In conjunction with the free movement provisions it constitutes the backbone of the single European market. Competition law's primary objective is to reinforce efficiency by maximizing consumer welfare and to allocate resources efficiently within the internal market. In addition, the competition policy protects consumers and smaller firms from large accumulations of economic power whether in the form of monopolies or cartels. Furthermore, the competition regulation aims to facilitate the formation of a single European market.[1]

In essence, the European Union's competition law aims to establish workable competition within the internal market and to prevent market structures and market behaviour that is detrimental for the consumers. Workable competition by its nature requires certain measures to be maintained. Otherwise the markets would be solely within the control of private undertakings. By abolishing harmful anti-competitive behaviour and market structures via regulations, the European Union's competition policy controls market powers and promotes competition between undertakings. Restrictions on and lack of competition between undertakings is harmful to consumers since it results in higher prices and marginal level of innovation, ultimately leaving the consumers with expensive low-quality products.

The European competition law regulation is based on the Treaty on the Functioning of the European Union (hereinafter, TFEU) Article 3 which gives an exclusive competence for the European Union to establish the necessary competition rules for the functioning of the internal market. From a wider perspective, the EU competition law consists of Articles 101 and 102 of

[1] Craig, P., de Búrga, P. EU Law, Text, Cases and Materials, 6th edition, Oxford University press 2015, p 1001-1002.

the TFEU i.e. anti-competitive agreements and abuse of dominant position, merger regulation[2] and State aid provisions.[3]

Articles 101 and 102 of the TFEU constitutes the central core of the EU's competition law. Those Articles provides rules for undertakings engaging in economic activities in the intra-EU context i.e. when two or more undertakings have their domicile in different EU Member States and the anti-competitive behaviour has effect on trade between Member States. Hence, purely domestic anti-competitive agreements and abuse of dominant positions are caught by national competition regulations.

1.2 TFEU article 101 - Prohibition of anti-competitive agreements

Article 101 of the TFEU prohibits anti-competitive agreements between undertakings that has their effect or object prevention, restriction or distortion of competition and which may affect trade between Members States. Thus, Article 101 is the main tool for prohibiting cartels, namely:

> Article 101
>
> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24, 29.01.2004

[3] See Articles 107-109 TFEU

(e) make 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.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101(1) of the TFEU imposes a non-exhaustive list of prohibited types of agreements and/ or decisions by undertakings that are deemed to be anti-competitive and prohibited. Article 101 applies only if there exists an agreement which has its object or effect prevention, restriction or distortion of competition. The object of the agreement can be derived from the contractual terms between the undertakings that have entered into the agreement, and such agreements are subject to objective assessment. If the contractual terms does not indicate clearly the object of the agreement it is indispensable to evaluate the possible effects, actual or potential, on competition. The evaluation of effect is based on individual assessment of the case taking into consideration, *inter alia*, the relevant markets and economic strength of the undertakings.[4] Where the agreement

[4] Commission notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/ C 101/07)

"appreciably" affects trade between Member States it falls within the scope of Article 101(1) and *vice versa*.[5]

In case there exists an agreement or decision that is prohibited under the Article 101(1), the effect of Article 101(2) is that they are automatically considered null and void in their entirety, unless such an agreement falls within the scope of Article 101(3) which provides grounds for exemptions in individual cases. Pursuant to Regulation 1/2003 "agreements, decisions and concerted practices caught by Article 101(1) of the Treaty which do not satisfy the conditions of Article 101(3) of the Treaty shall be prohibited, no prior decision to that effect being required."[6] The reasoning behind the Article 101(3) is that the agreements can, even though having elements that are prohibited by virtue of Article 101(1), have more pro-competitive than anti-competitive effects on the internal market. Such agreements are, however, always subject to individual assessment by the competition authorities. When Article 101(3) is used as a justification to circumvent the agreement from the scope of 101(1), all of the conditions laid down in the Article 101(3) must be fulfilled. Agreements that fall within the scope of 101(3) are legally valid and enforceable in their entirety. Furthermore, the Commission has exempted a whole range of certain types of agreements under block exemption regulations[7] from the scope of Article 101(1), provided that the agreements fulfil certain specific conditions and does not include hardcore restrictions on competition.

1.2.1 The concept of an undertaking

Article 101 of the TFEU does not contain a definition for the term undertaking but the definition is evolved through the Court of Justice of European Union (hereinafter, CJEU) case law. In case *Höfner* the court held, in the context of competition law, that "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed."[8] The definition catches various different forms of

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[5] Case 5/69 Franz Völk v S.P.R.L Ets J. Vervaecke, ECLI:EU:C:1969:35

[6] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty 04.01.2003, OJ L 001 , Article 1(1), *later on Regulation 1/2003*

[7] *See, Commission Regulation (EU) No 316/201 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements,* and *Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.*

[8] Case C-41/90, Höfner and Elser v Macrotron GmbH, ECLI:EU:C:1991:161, para 21.

undertakings, *inter alia*, corporations, partnerships and state-owned corporations provided that they operate commercially. However, state-owned undertakings when exercising their public law powers are considered not to fall within the scope of Article 101.[9] For the application purposes corporations that are legally detached, for example, parent and subsidiary company, are treated as a single economic unit because of the close economic nexus.

1.2.2 Anti-competitive agreements, decisions and concerted practices

The scope of application of the Article 101 by nature demands that between two or more undertaking exists an agreement, decision or concerted practice that have an effect on trade between Member States. Furthermore, the scope of application should not be interpreted narrowly nor limited only the written agreements. Hence, Article 101 does not only caught formal agreements concluded in writing or by technical means, but also informal agreements.

The commission held in *polypropylene* case[10] that an oral agreement which was not even legally binding to the parties constituted an agreement contrary to the Article 101 since the parties reached consensus that limited their commercial freedom. Similarly, the scope extends to the so called informal "gentlemen's agreements" between undertakings whereby the parties refrain to compete with each other or to maintain similar price levels.[11] However, agreements between parent and subsidiary undertakings do not fall within the scope of Article 101 as they are considered to form a single economic unit.[12] Such agreements, however, may be caught by Article 102 provided that the concern in question holds dominant position in the relevant markets and abuses such position.

[9] Craig, P., de Búrga, G,., *supra* nota 1, p 1003.
[10] Dec 86/398 [1986] OJ L230/1, [1988] 4 CMLR 347
[11] Case C-373/14 P Toshiba Corporation v Commission, ECLI:EU:C:2016:26
[12] Case C-73/95 P Viho Europe BV v Commission, ECLI:EU:C:1996:405

1.2.2.1 Distinction between horizontal and vertical agreements

The distinction between horizontal and vertical agreements is derived from the CJEU's case law. Horizontal agreements are agreements that are concluded between parties that operate at the same level in the markets i.e. they are regarded as competitors at the relevant markets. Vertical agreements, on the other hand, consider those types of agreements where the undertakings operate at a different level i.e. they are not actual competitors at the relevant market.

In general, horizontal agreements between undertakings possess greater risks for anti-competitive effects and thus falling within the scope of Article 101, and are subject to stricter scrutiny by the Commission. Horizontal agreements fall outside the scope of Article 101 provided that they do not appreciably have an affect on trade between Member States (*de minimis* rule*)*. From Commission's point of view, under the *de minimis* rule, this is in principle possible provided that the aggregate market shares of the parties to a horizontal agreement, whether actual or potential competitors, does not exceed 10% on any of the relevant markets affected by the agreement.[13]

Vertical agreements between undertakings may as well fall within the Article 101 if their object or effect, actual or potential, is prevention, restriction or distortion of competition within the internal market, as it was clearly indicated in the *Consten and Grundig v. Commission* ruling.[14] Similarly with the horizontal agreements, vertical agreements are also subject to the *de minimis* rule. The market share in case of vertical agreements is set to 15% on any of the relevant markets affected by the agreement.[15]

1.3 TFEU Article 102 - Abuse of dominant position

Article 102 of the TFEU prohibits anti-competitive behaviour by one or more undertakings that hold a dominant position within the relevant market and it is one of the main tools for regulating monopolies that restrict competition. The aim of the article is to protect consumers, not

[13] Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014/C 291/01, Section II 8(a), *later referred as De Minimis Notice*

[14] *Joined cases C-56/64* and *C-58/64* Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, ECLI:EU:C:1966:41

[15] De Minimis Notice, Section II 8(b)

competing undertakings, from market behaviour that ultimately leads to the disadvantage of the consumers. It must be noted that dominant position by an undertaking itself is not prohibited, only the abuse of dominant position.

Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(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, thereby placing them at a competitive disadvantage;

(d) 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.

Abusive conduct has been characterised by the Commission as "objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition."[16]

[16] Case T-301/04 Clearstream Banking AG and Clearstream International SA v. Commission, 2009/C 256/35, para 140

1.3.1 Defining dominant position, market power

Article 102 itself is abstract and similarly to Article 101 does not contain definition for dominant position. The definition is evolved through CJEU's case law. In the *United Brands* case the court held that:

"The dominant position ... relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers."[17]

In *Hoffmann-La Roche* case it was added to the *United Brands* definition of dominant position that a dominant position "does not preclude some competition... but enables an undertaking... at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."[18] Such economic strength enables an undertaking for example to maintain or raise prices above the normal competitive level.

It seems clear from the case law that the applicability of Article 102 does not only extend to circumstances when there is no competition at all but also to cases where the competition is not effective. There might still be some competition between undertakings in the relevant markets but regardless of this, the dominant position enables the undertaking in such position to influence on the conditions of competition and to act independently in such a way that is not detrimental for the undertaking itself. As only the abuse of dominant position is prohibited by virtue of Article 102, not the dominant position itself, the undertakings in dominant position are considered to have a special responsibility not to allow its conduct to impair genuine undistorted competition on the relevant market.[19] In certain circumstances this might include granting, for example, intellectual property rights to competing undertakings.[20]

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[17] Case 27/76 United Brands Company and United Brands Continentaal BV v Commission, ECLI:EU:C:1978:22, para 65

[18] Case 85/76 Hoffmann-La Roche & Co. AG v Commission, ECLI:EU:C:1979:36, para 39

[19] Case 322/81 NV Nederlandsche Banden Industrie Michelin v Commission, ECLI:EU:C:1983:313, para 57

[20] *See, for example, case T-201/04 Microsoft v Commission,* ECLI:EU:T:2007:289

1.3.1.1 Market shares

Whether an undertaking holds a dominant position in the relevant market is generally based on calculation of the market shares. The market shares are calculated based on the sales of the relevant product in the relevant market from the previous calendar year. It allows the Commission to identify the market structure in the relevant markets. A large market share generally functions as an evidence of dominant position and *vice versa*. This was clearly indicated in *Hilti case* where the Commission held that "the existence of a dominant position may derive from a combination of several factors which, taken separately, are not necessarily determinative but among which a highly important one is the existence of very large market shares…that...are in themselves, and save in exceptional circumstances, evidence of a dominant position."[21] There are no straightforward rules on market thresholds as each case is subject to individual assessment, but generally a market share of 40% and above can be considered as an indication of dominant position.[22] However, often in such cases the structure of the market will have to be evaluated further taking into consideration other possible relevant factors e.g. the degree of vertical integration by the undertaking in question. If the market is fragmented or the undertakings' vertical integration level is considerable, dominant position is more likely to be established.

1.3.1.2 Other factors

Other factors that are relevant when defining if an undertaking holds a dominant position relates to the structure of the markets. These might include, *inter alia,* entry barriers which prevent undertakings from entering into a specific market e.g. high costs of industry, the level of vertical agreements between undertakings e.g. exclusive distribution agreements[23], and intellectual property rights such as patents and trademarks. The latter can be used by undertakings in dominant position in order to, for example, foreclose competitors from the markets.[24] When the

[21] Case T-30/89 Hilti AG v Commission, ECLI:EU:T:1991:70, paras 90-91
[22] Talus, K. Johdatus Eurooppalaiseen Energiaoikeuteen. Turku, University of Turku 2014, p 88.
[23] See, *Joined cases C-56/64* and *C-58/64* Consten and Grundig v. Commission, ECLI:EU:C:1966:41
[24] See, for example, case T-201/04 Microsoft v Commission with special emphasis on refusal to licence

barriers to market entry are high it precludes other undertakings from entering into the markets and affects negatively to competition.

1.3.2 Defining relevant product and geographical market

In the assessment whether an undertaking holds a dominant position alone or jointly with others it is necessary to evaluate the relevant market as a whole. Traditionally, the Commission has distinguished two separate markets for the evaluation, the product market and the geographical market. Additionally, the temporal element of the relevant markets are taken into consideration. As the markets are dynamic by their nature it is often necessary to consider the temporal dimension of the markets. In certain circumstances a firm may hold dominant position due to seasonal products or services. On the other hand, the temporal nature of the markets may derive from the technological progress and changes in consumer habits.[25] By defining the relevant markets the Commission may identify and define the boundaries of competition between undertakings.

An undertaking or undertakings may only have a dominant position with regard to certain products or services. When evaluating the possible abuse of dominant position, the products in the relevant market has to be identified. Only sufficiently similar products by their characteristics can constitute the relevant product market. The traditional approach by the Commission has generally considered the substitutability of the products or services by reason of their characteristics, price or intended use from the consumer's point of view.[26] This is evaluated by the demand and supply sides of the market. If the consumers are capable to substitute a particular product or service without undue obstacles to different product or service, abuse of dominant position is less likely to be established.

The Commission has defined geographic market as "the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those

[25] Craig, P., de Búrga, P., *supra* nota 1, p 1060.
[26] Commission notice on the definition of relevant market for the purposes of Community competition law, OJ 97/C 372/03

area."[27] In *Hilti* case it was held that in the absence of special factors the relevant geographic market is deemed to be the entire EU.[28]

1.4 Enforcement of European Union competition law

Prior to the reformation, the right to enforce competition law was centralized and within the competence of the Commission. Pursuant to the centralized model, the Commission had to be notified on agreements between undertakings, and the Commission had a monopoly to apply the exemptions in Article 101(3). National courts were, however, capable to apply Articles 101 and 102, excluding Article 101(3), since due to the early *the van Gend & Loos* judgement[29] EU law has direct effect enabling individuals to rely and invoke EU law provisions before national courts.[30] This created burdens for the national courts to effectively apply competition law rules on cases brought before them and, on the other hand, increased the caseload of the Commission. To address these hurdles, The White paper on Modernisation of the rules implementing articles 85 and 86 of the EC treaty contained legislative proposals for a directly applicable exception system and was adopted in 1999.

The old centralized model was replaced by the new *ex post* enforcement allowing the Commission to focus on the serious infringements of competition law. Furthermore, the role of national courts and NCAs was improved.[31] The new regime for the enforcement of competition law was created by Regulation 1/2003, which enables national courts and national competition authorities (NCAs) to apply Articles 101 and 102 in their entirety. Furthermore, Regulation 1/2003 created European Competition Network (ECN) and provides provisions, *inter alia*, on cooperation between national courts, NCAs and the Commission[32], information obligations[33] and procedural issues.[34] Under the regulation the Commission still retains the wide powers to

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[27] Commission notice on the definition of relevant market for the purposes of Community competition law, OJ 97/C 372/03, para 8

[28] Case C-53/92 P Hilti AG v Commission, ECLI:EU:C:1994:77

[29] Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der Belastingen, ECLI:EU:C:1963:1

[30] Craig, P., de Búrga, P., *supra* nota 1, p 1048-1049.

[31] Wils, W., Ten Years of Regulation 1/2003 - A Retrospective. Journal of European Competition Law and Practice (2013 Forthcoming); pp 1-18 p 5., available at http://ssrn.com/abstract=2274013 (06.02.2017)

[32] Regulation 1/2003, arts 11-16

[33] Ibid.

[34] Regulation 1/2003, arts 17-22

investigate possible infringements of EU competition law and to render decisions concerning anti-competitive behaviour.

1.4.1 National courts and NCAs

Due to the reformation of the enforcement regime, the Commission, national courts as well as NCAs are now eligible to apply articles 101 and 102 in their entirety. Regulation 1/2003 obliges, under Article 3, the national courts and NCAs to apply EU law in conjunction with national competition law to agreements or practices falling within the scope of Articles 101 or 102. In addition, application of national competition law may not lead to a prohibition of agreements or practices that are not prohibited by virtue of Article 101. However, Member States have a wider discretion for applying stricter national laws with regards to Article 102.[35]

The role of the national courts and NCAs differs from Member State to Member State. Some jurisdictions allows NCAs to impose sanctions e.g. fines for competition law infringements, while in others they have only the power to bring the case before national courts. Furthermore, decisions on competition law infringements are subject to judicial review by national courts in case they are rendered by NCAs. In addition, parties have a right to appeal on higher court instances on the decisions by national courts. [36]

1.4.2 Judicial review of decisions in EU courts

Decisions made by the Commission, national courts and NCAs are subject to review under Articles 263 and 267 of the TFEU by the General Court and the CJEU. The CJEU is, however, only capable to review the legality of the decisions made by the Commission and in case of illegal acts to annul them. Based on the findings the CJEU is obliged to declare an illegal decision by the Commission null and void either in its entirety or partially.[37]

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[35] Wils, W., *supra* nota 31, p 7.
[36] Wils, W., *supra* nota 31, p 10.
[37] Geradin, D., Petit, N., Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment, Tilburg Law and Economics Center (TILEC) Law and Economics Discussion Paper No. 2011-008 and Tilburg Law School Legal Studies Research Paper No. 01/2011, 2010, pp 1-41 p 21., available at http://ssrn.com/abstract=1698342 (08.02.2017)

Under Article 263 the General Court can review the legality of acts of the Union's bodies, offices or agencies that are intended to produce legal effects vis-à-vis third parties. It enables natural and legal persons to initiate proceedings against an act directed to that person provided that they have a standing on the case, or which is of direct and individual concern to them. Seeking annulment for the Commission's decisions on competition law infringements will generally establish such legal position for the appellant.[38]

In addition to the prior, decisions by national courts and NCAs are subject to challenge by virtue of Article 267 TFEU which enables reference to preliminary rulings for the interpretation of the Treaties as well as the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Under the Article, where such question is raised before any court or tribunal of a Member State, that tribunal or court may… request the court to give a ruling thereon. The only limitation is that the body making the reference for preliminary ruling must be a Member State's court or tribunal. The legal status of the court or tribunal is decided by the CJEU. Thus, individuals, natural or legal, may not address their issues directly to the CJEU under Article 267 since the CJEU's status is not to function as an appeal court for individuals. Furthermore, in most of the cases, except under some rare circumstances, arbitral tribunals are considered not to fall within the scope of Article 267. [39]

The parties are also allowed to appeal on the decision made by the General Court under Article 263 to the CJEU if the appeal is admissible . In the appeal proceedings the CJEU does review only the legal characterization of the facts found by the General Court i.e. it does not re-examine the merits of the case. Based on the findings it may set aside the General Court's decision.

[38] Craig, P., de Búrga, G,., *supra* nota 1, p 1051.
[39] Craig, P., de Búrga, G,., *supra* nota 1, p 468.

2. International Commercial Arbitration

2.1 Introduction

International commercial[40] arbitration is a form of alternative dispute resolution (ADR) that is based on the parties express agreement to submit the dispute between the parties before an arbitration panel instead of submitting the matter to national courts. It is distinguished from a purely domestic arbitration proceedings which takes place in the territory of a particular state and involves parties that have their place of business therein. The requirement is that the parties have their place of business in different states, or one of the following places is outside the state where the parties have their place of business: (i) the place of arbitration, (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected. In addition, the parties may agree that the subject matter of the arbitration agreement relates to more than one country.[41]

In the context of international trade between businesses, arbitration has become a common way to resolve disputes between the parties. In essence, the reasons for selecting arbitration over private litigation in national courts are based on the characteristics of the arbitration proceedings. The parties of the dispute may be reluctant to adjudicate their dispute in national courts on various reasons. These might include factors like possible fear of bias, language that the court uses or high expenses of court litigation. Furthermore, probably one of the most essential reasons for selecting arbitration is its speed compared to traditional court litigation.[42]

Arbitration proceedings by their nature offer more flexibility to the parties compared to the traditional litigation in national courts. The underlying principle regarding arbitration proceedings relates to party autonomy. With regard to procedural issues, the parties are allowed, *inter alia*, to select whether they prefer to have dispute resolved by a sole arbitrator or a panel of arbitrators and to appoint them, the rules that govern their proceedings from institutional set of

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[40] UNCITRAL Model Law on International Commercial Arbitration provides that: "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.", footnote 1, p 1.

[41] UNCITRAL Model Law on International Commercial Arbitration, Article 1

[42] Sattar, S., National Courts and International Arbitration: A Double-edged sword?, Journal of International Arbitration 2010, Vol.27(1) , pp 51-73 p 51-52.

rules, or they may select the rules by themselves in case of *ad-hoc* proceedings.[43] The parties are also eligible choose the substantive law that is to be applied to their contract (*lex contractus*) in case they want to cover the main contract with different law that governs the arbitration proceedings (*lex arbitri*). Furthermore, the final award rendered by the arbitrator, or panel of arbitrators, is binding by its nature to the parties and can not be revised on the merits of the case. In addition, it is also enforceable under the New York Convention on the recognition and enforcement of foreign arbitral awards (hereinafter, the New York Convention) in 156 countries.[44]

2.2 Agreement to arbitrate

International commercial arbitration has become more or less as a default for businesses engaging in international trade to resolve their disputes. This has its own effect on the formation of a valid arbitration clause. In the context of international commercial arbitration, the arbitration proceedings and the agreement to arbitrate may be affected by multiple national laws, namely:

- Law of the country that determines the parties ability to make an arbitration agreement and to appear in the arbitration proceedings as a litigant;
- Law of the country based on which the parties representatives right to make an legally binding arbitration agreement that affects the principal is evaluated;
- Law applicable to the arbitration agreement;
- Law of the country where arbitration proceedings take place (*lex arbitri*);
- Law of the country applicable to the main contract (*lex contractus*) and;
- Law of the country where the party seeks to enforce the award[45]

The agreement to arbitrate forms probably the most essential part of the arbitration proceedings and is subject to certain qualifications in order to be valid. In addition, the agreement contains

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[43] An *ad-hoc* proceeding refers to "proceeding that is not administered by others and requires parties to make their own arrangements for selection of arbitrators. The parties are under discretion to choose designation of rules, applicable law, procedures and administrative support.", https://definitions.uslegal.com/a/ad-hoc-arbitration/, (12.01.2017)

[44] See up to date list at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (12.01.2017)

[45] Savola, M., Välityslausekkeen laadinnasta kansainvälisluontoisissa sopimuksissa I, Defensor Legis, 1/2008, pp 13-52 p 13-14.

the relevant procedural rules that cover the proceedings including, *inter alia*, seat of the arbitration and respectively the *lex arbitri,* applicable substantive law and the explicit subject matter of the dispute over which the tribunal has jurisdiction. If the agreement to arbitrate does not correspond with the requirements set out, or the contractual terms are drafted too vaguely, the parties encounter a risk not to have their dispute resolved by arbitral tribunal.

Under the UNCITRAL Model Law on International Commercial Arbitration (hereinafter, "the Model Law") the agreement to arbitrate shall be in writing.[46] This requirement is also recognized in the New York Convention Article 2(1). However, the form of the agreement to arbitrate is irrelevant provided that the content of such agreement is recorded by some means.[47] This indicates, *inter alia,* that the agreement can be concluded, for example, orally or by other technological means such as an exchange of email. The arbitration proceedings can be based on institutional rules if the parties have agreed in the arbitration clause to submit the matter some of the existing arbitration institutions[48], or the dispute can be solved based on *ad-hoc* proceedings in which case the parties determine the applicable rules that cover their proceedings. In the latter case, the parties usually use the Model Law rules to cover the arbitration proceedings.

Depending on the formation of the arbitration clause the parties may refer an existing dispute (*compromis*) or any dispute arising in the future (*clause compromis-soire*) to the arbitration tribunal. In general, if the parties agree to settle their dispute in accordance with institutional rules it is common for the parties to use standard clauses provided by the arbitration institutions. An example of this could be the ICC standard clause: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."[49]

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[46] UNCITRAL Model Law on International Commercial Arbitration, Article 7(2)

[47] UNCITRAL Model Law on International Commercial Arbitration, explanatory note, Section II, p 28.

[48] *See, for example, International Chambers of Commerce (ICC), Swedish Chambers of Commerce (SCC) or London Court of International Arbitration (LCIA)*

[49] International Chambers of Commerce, 2017 Arbitration rules and 2014 Mediation Rules, p 68., PDF available at http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/ (13.01.2017)

2.2.1 The principle of separability

The principle of separability is an universally acknowledged principle of arbitration according to which the main contract and the agreement to arbitrate are distinguished from each other. Under the institutional rules, the principle can be found, *inter alia*, from the ICC and LCIA arbitration rules.[50] Thus, the effect of the rule is that the arbitral tribunal shall have jurisdiction over the dispute even though the main contract does not legally exists and/or is null and void provided that the agreement to arbitrate is effective. This implies, that the arbitral tribunal shall have the power to determine the rights and claims in respect of the parties and render an enforceable award.

2.3 Is the subject matter arbitrable?

In European context the term arbitrability refers "to the permission granted by state laws for a dispute to be settled by arbitration, rather than compulsory judicial settlement."[51] Accordingly, the question on whether or not the subject matter of the dispute is arbitrable or solely within the competence of national courts or state organs is usually determined with reference to the domestic statute law.[52] Fortier suggests that it is possible to identify at least four stages in the arbitration proceedings when issues relating to the arbitrability of the subject matter may arise:

- At the beginning of proceedings by request of a party before arbitration tribunal which subsequently has to rule its jurisdiction over the case
- A party may contest the arbitrability of the subject matter by referring a request to a State court which then must determine whether the subject matter is arbitrable
- Non-arbitrability may be invoked in national courts where the arbitration takes place in order to set aside the arbitration proceedings
- In the enforcement phase before the court where a party seeks recognition and enforcement of the award[53]

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[50] International Chambers of Commerce (ICC), Arbitration rules, Article 6(9), London Court of International Arbitration (LCIA), Arbitration rules, Article 23.2

[51] Bantekas, I., The Foundations of Arbitrability in International Commercial Arbitration, Australian Yearbook of International Law 2008, Vol. 27(1) pp 193-223, p 193.

[52] Ibid.

[53] Fortier, Y., Arbitrability of Disputes, Global Reflections on International Law, Commerce and Dispute Resolution, Eds. Aksen, G. *et al*, ICC Publishing 2005, pp 269-284 p 271-272.

The first and second point refers to the validity of the agreement to arbitrate and to the scope of such agreement i.e. whether the subject matter of the dispute falls within the agreement to arbitrate or not. In the early stages, the question of arbitrability may only be raised by the parties to the dispute when the arbitral tribunal asks for answer to the request to arbitrate and any possible counterclaims.[54] The arbitral tribunal is competent to rule on its own jurisdiction following the *kompetenz-kompetenz* principle.[55] In case the counterclaim is successful, the arbitral tribunal shall rule that it does not have jurisdiction in the subject matter and refrain from the arbitration proceedings. The same effect can be achieved by contesting the validity of the arbitration clause in national courts pursuant to the applicable arbitration rules.[56]

The third and fourth point relates to the post-proceeding acts by the parties. The non-arbitrability of the dispute may invoked pursuant to the New York Convention Article 5 in case the matter is not capable of being settled by arbitration or is contrary to public policy.[57]

Thus, the parties must have sufficient certainty that the subject matter is arbitrable pursuant to the law where the seat of the arbitration proceeding is (*lex arbitri*). The arbitrator is not obliged to solve a non-arbitrable dispute deriving from the *lex arbitri proprio motu*. Subsequently, if the subject matter is not arbitrable by virtue of the *lex arbitri* the parties must select an alternative forum for the arbitration in order to settle their dispute through arbitration.[58] In addition, the subject matter of the arbitration must comply with the public policy and laws of the *lex contractus* and where the party seeks enforcement and recognition of the award.[59] In the enforcement phase, the national court of the country where the party seeks enforcement may reject to enforce the award, at request by the party against whom it is invoked or *sua sponte*, if it considers that the award is contrary to the provisions set out in Article 5 of the New York Convention.[60]

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[54] ICC Arbitration rules, Article 5(5)
[55] *see sub-section 2.3.1.1*
[56] *See, for example, ICC Arbitration Rules Article 6(3&4),*
[57] See sub-section 2.3.1
[58] Bantekas, I., *supra* nota 51, p 194.
[59] Ibid.
[60] see chapter 2.4

2.3.1 Subject matters outside the scope of arbitration

In general, there are no standard rules in the sphere of international commercial arbitration that prohibit the use of arbitration in resolving disputes regarding particular fields of law. However, certain spheres that are not subject to arbitration proceedings can be derived from the Articles 2(1) and 5(2) of the New York Convention, since the recognition and enforcement of the awards is not available to the disputes of specific nature and it would frustrate the whole regime of arbitration. Articles 2(1) and 5(2)(a) rules out matters that are not capable of being settled by arbitration. Furthermore, Article 5(2)(b) limits the enforcement and recognition of arbitral awards that are contrary to the public policy. In addition, both of these notions can also be found, for example, from the Model Law article 34(2)(b).

2.3.1.1 The principle of Kompetenz-Kompetenz

The principle of *Kompetenz-Kompetenz* has a relevant nexus whether the subject matter is arbitrable and does the arbitral tribunal has jurisdiction over the dispute. Under the principle an arbitral tribunal is competent to rule on its own jurisdiction regarding the dispute. This indicates, *inter alia,* that the arbitral tribunal is the first instance to address on the issue of whether the dispute can be arbitrated or not. However, the question on jurisdiction of the arbitral tribunal is under scrutiny of national courts when the principle of *Kompetenz-Kompetenz* is applied by the arbitral tribunal. Thus, for example, under the Model Law a party may request a court, within thirty days after having notice on such ruling, to decide the matter. The decision made by the court is not subject to appeal.[61]

2.3.1.2 Mandatory provisions of law

Mandatory provisions of law are those types of statutory provisions that cannot be disregarded i.e. they prevail whether or not the parties intended to apply such provisions to their agreement and supersede the law normally applicable.[62] Such provisions may stem from law applicable to

[61] UNCITRAL Model Law on International Commercial Arbitration, Article 16(3)

[62] Bonnard, S., Touchard, S., Mandatory rules in international arbitration: the example of recent awards, International Business Law Journal 2015,Vol. 5, pp 453-462 p 453.

the contract, law of the seat of the arbitration, or law of the country where party seeks enforcement of the award.[63] When dealing with mandatory laws the arbitrators, firstly, must decide whether the subject matter and certain aspects of the dispute falls within the scope of application of the mandatory law.[64] The scope of mandatory provisions is usually limited by virtue of the legislation in question, not by arbitrators, and applies only to the extent as defined in the relevant law. Thus, *lex contractus* is applicable to matters that does not fall within the defined scope of mandatory rules of law.[65] As mandatory provisions are imperative by their nature, the arbitrators has to apply them with due caution since any contrary application of the mandatory provisions would most likely render the award subject to annulment.

2.3.1.3 Matters not capable of being settled by arbitration

Disputes that are not capable of being settled by arbitration, even though the dispute falls within the scope of arbitration agreement, require a recourse to the law applicable in order to determined. The dispute can be non-arbitrable because the law applicable to the arbitration proceedings renders jurisdiction in specific cases solely to the national courts. Often disputes that are not capable of being subject to arbitration proceedings are closely related to the public policy and public interests or mandatory provisions of a State, such as insolvency matters and criminal law. The reason for excluding such disputes from the ambit of arbitration has a relevant nexus with the characteristics of arbitration i.e. private and confidential nature of the proceedings. Due to these characteristics, arbitration should not be used as a mechanism in matters that are related to public interests.[66]

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[63] Ibid.

[64] Bonnard, S., Touchard, S., *supra* nota 62, p 456.

[65] Bonnard, S., Touchard, S., *supra* nota 62, p 457.

[66] Nazzini, R., Are Claims For Tortious Damages For Breach of The Antitrust Rules Arbitrable In The European Union? Some Reflections On The CDC Case In The Court of Justice, Italian Antitrust Review 1 2016, pp 70-86 p 70-71.

2.3.1.4 Article 5(2) and notion on public policy (ordre public)

Firstly, it must be noted that a concept of international public policy is non-existent except for the fundamental notions of justice. Public policies are always constructions of national institutions such as courts. Furthermore, the concept of public policy is hard to define in detail.[67] Some authors have suggested that international public policy relates to the fundamental values, basic ethical standards and moral consensus.[68] The model law provides that a public policy "is to be understood as serious departures from fundamental notions of procedural justice."[69] Such notions may include, for example, the right to be heard before a court. Subsequently, the content of public policy, aside from the most fundamental notions of law, varies from country to country. Furthermore, public policies are capable to alter over time. In the context of international arbitration this denotes, on its worse, a lack of legal certainty for the parties, especially in the enforcement phase since the parties, nor the arbitral tribunal, are not capable to anticipate the possible standing of the national court enforcing the award. However, the tendency of national courts to narrowly interpret the concept of public policy and the pro-enforcement attitude towards arbitral awards may itself constitute a public policy of a State.[70]

2.4 Enforcement of awards

One of the duties of an arbitral tribunal is to render an enforceable award. This duty is acknowledged, *inter alia*, in scholarly opinions, ethical codes and national laws.[71] Arbitration awards rendered by the arbitral tribunals are binding to the parties, unless otherwise agreed, and most often voluntarily complied with. However, a party may refuse to comply with the award in certain circumstances.[72] In order to secure the effectiveness of arbitral proceedings awards are capable of being enforced and recognized by national courts under the New York Convention in countries that have ratified the convention. The enforcement of awards in national courts is also

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[67] Sattar, S. Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach? Transnational Dispute Management 2011, Vol. 5, pp 1-14 p 4., available at, http://www.employmentlawalliance.com/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf (25.01.2017)

[68] Barraclough, A., Waincymer, J., Mandatory Rules of Law In International Commercial Arbitration, Melbourne Journal of International Law 2005, Vol.6(2), pp 205-244 p 218.

[69] UNCITRAL Model Law on International Commercial Arbitration, Section II, explanatory note, p. 35, para. 46

[70] Sattar, S., *supra* nota 67, p 4-5.

[71] Barraclough, A., Waincymer, J., *supra* nota 68, p 215.

[72] Sattar, S., *supra* nota 42, p 55.

considered as one of the most fundamental aspects of the arbitral proceedings.[73] Article 1 of the New York Convention defines the scope to awards rendered in a country other than where the enforcement and recognition is sought, between physical or legal persons for disputes arising out of contractual or non-contractual relationships. In addition, the scope of the article extends to institutional and ad-hoc tribunals awards.[74] At the enforcement stage the award is subject to scrutiny by the national courts, on its own motion, if it considers that the enforcement of the award is contrary to Article 5(2)(a) or (b), or at the request of the party against whom it is invoked. The national court may not go into detailed examination on the merits of the case when reviewing the award. Thus, the review is only limited on the exclusive grounds provided in the New York Convention.

The recognition and enforcement of the award is sought in the national courts where the party wishes to effect the award. Thereby, the award must conform with the *lex loci arbitri,* as setting aside the award by the national court where the arbitration takes place would prevent the enforcement in most jurisdictions. Additionally, the party seeking enforcement of the award must obtain a leave from the court in order to enforce it in the jurisdictions where the respondent has sufficient resources to cover the award.[75] Once an award is successfully enforced through national courts it obtains a status of court-decree with the adverse consequences if not complied with.[76]

2.4.1 Refusal to enforce and recognize an award and setting aside an award

The New York Convention[77] and the Model law[78] provides grounds for the national courts to refuse the enforcement and recognition of arbitral awards, and, additionally, grounds for annulment and setting aside an award. As international commercial arbitration is subject to and controlled by national laws as agreed by the parties, the role of the national court is to supervise that arbitral tribunals comply with the national laws. Some authors have suggested the

[73] Bachand, F., Court intervention in International Arbitration: The Case for Compulsory Judicial Internationalism, Journal of Dispute Resolution 2012,Vol. 2012(1), pp 83-100 p 88.
[74] the New York Convention, art.1
[75] Style, C., Balthasar, S., Enforcing International Arbitral Awards: Pitfalls and Strategies, Dispute Resolution International 2012, Vol. 6(1), pp 3-15 p 4.
[76] Sattar, S., *supra* nota 42, p 55.
[77] The New York Convention, Article 5
[78] The Model Law, Articles 34 & 36

supervisory role of the courts as "checks and balances" for the parties in order to ensure the fairness and impartiality of the arbitration procedure.[79]

Article 5(1) of the New York Convention and Article 34(2)(a) of the Model Law deals with validity of the agreement to arbitrate and procedural errors by arbitral tribunals, whereas the New York Convention Article 5(2) and 34(2)(b) of the Model Law consists of the public policy notion, and matters not capable of being settled by arbitration. The Model Law contains identical provisions with the New York Convention and distinguishes between grounds proven by one of the parties, and grounds that a court may consider on its own motion. An award may only be set aside in case the award is challenged, when:

- The parties lack legal capacity to conclude an arbitration agreement
- The agreement to arbitrate is not valid
- A party could not present his case properly, or was not given a proper notice of the appointment of the arbitrator or of the arbitration proceedings
- The arbitrator exceeds his powers and renders an award regarding matters not submitted to arbitration
- The arbitral tribunal is not composed or the arbitration proceedings are not held in accordance with the parties arbitration agreement, or failing that, to the Model law.

Additionally, a court may set aside or refuse to enforce an award *sua sponte* if the court finds that:

- The subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- the award is in conflict with the public policy of this State

The grounds for refusal to enforce the award and setting aside an award are almost identical by their wording in the Model Law, and perceived as an exhaustive list. Hence, the party against whom the award is rendered may only contest the validity of the award pursuant to the above Articles. However, there is a practical distinction between setting an award aside Article 34(2)

[79] Sattar, S., *supra* nota 67, p 3.

and refusal to enforce an award Article (36)(1). Article 34(2) may be invoked only in the national courts where the *forum* of the arbitration was, whereas an application for Article 36(1) can be made in a court in any State.[80]

Furthermore, as the New York Convention and neither the Model Law regulates the grounds in detail, domestic law and national courts have left with discretion on the questions with respect to the enforcement of the awards and with respect to the arbitration agreement.[81] In essence, this is notable with the public policy notion and mandatory provisions of law. On the other hand, arbitrators are not required to follow public policies or *ordre public* of various States when rendering their award. The same applies to mandatory provisions of law.[82] However, in such cases the award rendered most likely would not be recognized and enforced, which would run contrary to the arbitrator's obligation to render an enforceable award.

[80] UNCITRAL Model Law on International Commercial Arbitration, p 36.
[81] Bachand, F., *supra* nota 73, p 88.
[82] Naon, A. H., The role of international commercial arbitration, Arbitration 1999, Vol 65(4), pp 266-277 p 269.

3. Arbitration and the European Union Competition Law

3.1 Arbitrability of competition law claims

Disputes involving competition law issues were regarded to be outside the scope of arbitration mostly because of their public policy nature. Thus, party autonomy should be superseded by the public policy notions and, hence, prevent the parties to resolve their by means of arbitration. Furthermore, questions were raised due to the private enforcement of competition law.[83] The confidential nature of arbitration proceedings were perceived as an obstacle since competition law ultimately protects the public interest.[84]

As has been noted above, the arbitrability of disputes can be challenged in various phases.[85] Arbitrability of competition law claims before arbitral tribunals can be challenged on equal grounds as any other legal claim. Hence, the question may be raised prior to the initiation of arbitration proceedings, e.g. in a case where *lex arbitri* does not permit arbitrability of competition law claims, during the proceedings e.g. a party invokes that the matter falls within competition law provisions which are not arbitrable by virtue of law, or at the enforcement phase e.g. a party challenges the award before national court claiming that it violates public policy or mandatory provisions of law.

Competition law issues oftentimes fall within the domain of arbitral tribunal by submitting an ordinary contractual dispute to arbitration. Typically a claim involving competition law element is not presented as a principal claim and as a trigger for the initiation of the arbitration proceedings.[86] Rather, claims including aspects of competition law most often arise as a "shield" i.e. a party uses competition law provisions as a defence for a breach of contract or other claim. Thus, in this case, the party breaching the contract seeks to justify the act by invoking that competition law is inconsistent with the contract and therefore the whole contract is invalid. Alternatively, competition law can also used as a "sword" in arbitration proceedings, for example

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[83] Ragazzo, C., Binder, M., Antitrust and International Arbitration, UC Davis Business Law Journal 2014, Vol.15, pp 173-200 p 175-176.

[84] Alija, N., To Arbitrate or Not to Arbitrate… Competition Law Disputes, Mediterranean Journal of Social Sciences 2014, Vol. 5(1), pp 641-648 p 641.

[85] *See section 2.3*

[86] Blanke, G., Actions Under Article 101 and 102 TFEU in International Arbitration, Singapore Academy of Law Journal 2010, Vol. 22(3), pp 539-582 p 548.

a party is seeking for damages from the other party of the contract due to violations of competition law.[87]

3.1.1 The European context

Arbitrability of disputes involving competition law issues in Europe was the aftermath of the notorious *Mitsubishi* case[88] from the US. The notion of public policy, national or international, offered an instrument to control arbitrability of competition law claims whether such disputes are national or international by their nature. Not shortly after the judgement by the US Supreme Court several jurisdictions in Europe affirmed the same approach.[89] According to Blanke (2008) the arbitrability of disputes involving competition law is well documented and long established and within European jurisdictions there is a consensus on the arbitrability of competition law, and in particular the arbitrability of EU competition law. Provisions enabling arbitration proceedings in competition law matters can be found, *inter alia,* from Sweden, Germany, France and Italy.[90] The question of arbitrability regarding disputes relating to competition law has never been directly addressed before the CJEU nor its predecessor. However, the ECJ indirectly ruled on the arbitrability of competition law claims in the *Eco Swiss* case.[91] The judgement itself did not deal with arbitrability of competition law itself, rather it addressed to the issues of possible consequences related to violations of competition law in the award enforcement phase. However, among legal scholars, it is widely acknowledged to have similar status with the *Mitsubishi* case as the foundation for arbitrability of competition claims.

3.1.2 EU competition law as a public policy (*ordre public*)

In the *Eco Swiss* case, the ECJ emphasized that Article 3(g) EC (now Article 3(1)(b) TFEU) in conjunction with Article 81 (now Article 101 TFEU) constitutes a fundamental provision of law "which is essential for the accomplishment of the tasks entrusted to the Community and, in

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[87] Korzun, V., Arbitrating Antitrust Claims: From Suspicion to Trust, N.Y.U Journal of International Law and Politics 2016, Vol. 46(3), pp 867-931 p 880-881.
[88] Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc, 473 US 614, (1985).
[89] Blanke, G., The Role of EC Competition Law in International Arbitration: A Plaidoyer, European Business Law Review 2005, Vol.16(1), pp 169-181 p 172.
[90] Blanke, G., Nazzini, R., Arbitration and ADR of global antitrust disputes: taking stock: Part 1, Global Competition Litigation Review 2008, Vol. 1(1), pp 46-56 p 49.
[91] Blanke, G., Nazzini, R., *supra* nota 90, p 50.

particular, for the functioning of the internal market."[92] After the characterization of the role and essential nature of the EU's competition law, the court went further and stated:

"It follows that where 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 81(1) EC"[93]

Furthermore, the ECJ made it clear that EU competition law constitutes an integral part of the public policy by stating: "the provisions of Article 81 EC may be regarded as a matter of public policy within the meaning of the New York Convention."[94] In *Manfredi* the ECJ affirmed, based on the *Eco Swiss* case, that Articles 81 and 82 EC must be automatically applied by national courts as a matter of public policy.[95]

From the traditional point of view, public policies are always constructions of the national institutions such as courts, except when the question is about the most fundamental notions of law.[96] Furthermore the New York Convention, as well as the Model law, refers to the public policy of a country where a party wishes to effect the award. The ruling in *Eco Swiss* case, and later on *Manfredi*, imposes requirements for national courts and arbitral tribunals when dealing with EU competition law provision. National courts of Member States are required to take into account and to apply Articles 101 and 102 TFEU, even *ex officio.*[97] Thus, Articles 101 and 102 can be considered as mandatory provisions of law which cannot be disregarded. When using their supervisory powers on the enforcement and recognition phase national courts must take into consideration EU competition law and whether or not the award rendered by an arbitral tribunal complies with the competition law provisions. Subsequently, this has an effect on the arbitral tribunal's duty to render an enforceable award. Hence, when a question concerning competition law arises before an arbitrator, he must take into consideration the relevant provisions of

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[92] Case C-126/97 Eco Swiss China Time Ltd and Benetton International NV, ECLI:EU:C:1999:269, para 36

[93] *Ibid*. para 37

[94] *Ibid*. para 39

[95] Joined Cases C-295/04 to C-298/04,Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA., ECLI:EU:C:2006:461

[96] *See chapter 2.3.1.4*

[97] Joined Cases C-430 & 431/93, van Schijndel & van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten, ECLI:EU:C:1995:441

competition law, and in particular those arising out of Articles 101 and 102, since failure to comply with the provisions would most likely deny the enforcement and recognition of the award, or the award may be set aside in the EU Member States.[98]

3.2 Are arbitrators required to raise competition law issues *ex officio*?

As arbitration is an alternative dispute resolution mechanism controlled by the parties explicit agreement and party autonomy principle, the parties are eligible to decide the scope of their dispute when submitting it before the arbitral tribunal. Therefore, if arbitrators extend the scope of the dispute without respecting the party autonomy principle, the award clearly can become subject to annulment under Article 5(1)(c) of the New York Convention. Thus, arbitrators can only deal, generally, with the claims and issues raised by the parties before or during the proceedings. On the other hand, as seen in the *Eco Swiss* and *Manfredi* cases by the ECJ, EU competition law provisions are perceived as mandatory provisions of law and forming a part of public policy (*ordre public*) of the EU. As such non-obedience with the provisions most likely render the award subject to annulment and unenforceable. There clearly exists a dilemma for the arbitrator between the party autonomy principle, public policy considerations and the extent to which EU competition law rules should be applied in the arbitration proceedings.

Arbitrators are not bound by the mandatory provisions of law and neither by the public policy notions since international arbitrators have no specific *forum* like national courts, and all national laws and legal rules are foreign to them as determined by the parties or by the arbitrators where relevant.[99] An arbitrator should, when discovering that the dispute involves competition law elements, submit the issue to the parties for their comments. Thus, arbitrators have no express duty to apply competition law provisions nor to decide competition law issues *ex officio.*[100][101] They merely have an implicit duty to raise, when necessary, questions concerning competition

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[98] Blanke, G., Nazzini, R., Arbitration and ADR of global antitrust disputes: taking stock: Part 2, Global Competition Litigation Review 2008, Vol.1(2), pp 78-89 p 81.

[99] Dempegiotis, I. S., EC Competition law and International Arbitration in the Light of EC Regulation 1/2003, Conceptual conflicts, Common Ground, and Corresponding Legal Issues, Journal of International Arbitration 2008, Vol. 25(3), pp 365-395 p 382.

[100] Blanke, G., Nazzini, R., *supra* nota 98, p 83.

[101] Arbitrators have applied EU competition law *ex officio* only in few awards but have found no violation of EU competition law, *see van Houtte, H. The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission, European Business Law Review 2008, Vol.19(1), pp 63-75 p 65.*

law for which the parties will develop their arguments.[102] Any contrary application of competition law would violate the principle of party autonomy which is one of the most essential principles of the arbitration proceedings. In addition, the *Eco Swiss* ruling did only consider the role of national courts in the enforcement phase of arbitral awards being very careful not to interfere with arbitration proceedings themselves.[103] The reasons for the ruling can be found - carefully drafted - from the characteristics of arbitration proceedings. Even though private, arbitral tribunals execute the same judicial functions as any other court and are bound by the legal provisions selected by the parties. In addition, the ruling made it clear that national courts use their supervisory powers over the awards and ensure their compliance with competition law.

Furthermore, following the *Nordsee*[104] ruling, arbitral tribunals are not courts of the EU Member States within the meaning of Article 234 EC (now Article 267 TFEU). Therefore, arbitrators are not bound by Article 10 EC (now Article 4(3) TEU) and are not obliged to follow the principle of loyal co-operation as national courts are. However, as such, arbitrators are not released from their obligation to apply the relevant EU competition law provisions when encountering disputes with competition law elements.[105]

3.2.1 Implicit *ex officio* application of EU competition law by arbitrators

Arbitrators have no express obligation to apply competition law and to decide competition law claims *ex officio*. They solely are obliged to draw the parties attention to the relevant questions of EU competition law whenever they consider it relevant in the light of the dispute at hand.

Arbitrator's duty to apply relevant competition law provisions may, however, stem from the circumstances of the case. When an EU Member State law forms a part of *lex contractus* i.e. the substantive law governing the contract, arbitrators are under a duty to apply the relevant EU law provisions to the dispute.[106] Under the ECJ ruling in *Costa v. ENEL*, EU law has supremacy over

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[102] van Houtte, H., The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission, European Business Law Review 2008, Vol.19(1) pp 63-76 p 66.
[103] Dempegiotis, I. S., *supra* nota 99, p 384.
[104] C-102/81 Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG, ECLI:EU:C:1982:107
[105] Blanke, G., Nazzini, R., *supra* nota 98, p 82.
[106] *Ibid.*

the national laws, and thus, EU law inherently forms a part of the Member States legal order.[107] Furthermore, following the direct effect principle derived from the *Van Gend en Loos* case, arbitrators has the capacity to apply EU law provisions that are directly effective in Member States.[108] According to Dempegiotis it cannot be assumed when the parties choose a *lex contractus* that they wish to exclude mandatory provisions of law which can be relevant to the case.[109] EU law provisions confer rights - horizontal and vertical - which national courts are obliged to enforce. Even though competition law provisions ultimately aims to protect consumers they still offer protection for undertakings against misbehavior by other undertakings. The parties are free to create exemptions and to select the possible legal rules applicable but due to the legal nature of mandatory provisions exemptions created for EU competition law provisions are void. Accordingly, when the parties subject their dispute to any of the EU Member State laws through *lex contractus*, EU competition law provisions are inherently part of the arbitration proceedings.

The same applies by analogy when the seat of arbitration is within one of the Member States since the exequatur, and the possible annulment, of an arbitration award is rendered by national courts whose *forum* is in the seat of arbitration proceedings prior to the enforcement procedure in other states. Arbitrators have an obligation to render an enforceable award which, on the other hand, must conform with the public policy of the *lex arbitri.* As clearly stated in *Eco Swiss* and *Manfredi* cases, EU competition law forms an integral part of the public policy of the Member States and is applied *ex officio* by the national courts. Thus, arbitrators by virtue of the public policy notion willingly apply relevant competition law provisions when the seat of the arbitration is in any of the Member States in order to follow the arbitrator's obligation to render an enforceable award. Failure to observe the national public policy where the *forum* of the court is will lead to situation where the national court will not grant a leave for the award.

Furthermore, when it is clear from the circumstances that a party seeks to enforce the award within the EU, arbitrators generally are bound to follow EU competition law provisions. Dempegiotis (2008) suggests two main reasons for this: firstly, the agreement or conduct may have affect on trade between Member States, and secondly, based on two obligations of

[107] Case 6/64 Flaminio Costa v E.N.E.L, ECLI:EU:C:1964:66
[108] Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der Belastingen, ECLI:EU:C:1963:1
[109] Dempegiotis, I. S., *supra* nota 99, p 385.

arbitrators, namely: the duty of arbitrators to render an enforceable award, and to meet the legitimate expectations of the parties involved. Non-application of the mandatory provisions of law undermines both of the arbitrator's obligations.[110]

Consequently, it is clear from the above scenarios that arbitrators are obliged, and as a matter of fact have a *de facto* duty, to apply the mandatory provisions of EU competition law when the parties subject their dispute to national laws of EU Member States.[111]

3.2.2 Can the parties opt-out from EU competition law provisions

In cases where the parties have not made express choice regarding the law applicable to the merits of the dispute and the rules determining the law applicable are straightforward. In such circumstances, the arbitral tribunal shall determine the rules of law which it considers to be appropriate taking into account, *inter alia*, the provisions of the contract.[112]

However, due to the party autonomy principle underlying the arbitration proceedings, the parties are free to determine the substantive law applicable *(lex contractus*) and select the seat of arbitration, and thus *lex arbitri*, a situation may arise where the parties in *mala fides* or in collusion try to circumvent the law normally applicable to their dispute. In addition, it is possible that in order to avoid certain laws, in the absence of express choice by the parties, the applicable law is dictated by a dominant party.[113]

The prevailing view is that EU competition law is independent from the *lex contractus* and the parties to a contract may not opt-out their agreement from EU competition law by selecting a law that is not a law of an EU-country.[114] According to settled case law by the ECJ, in *Aéroports de Paris* it was held that: "the public policy nature of competition law is specifically designed to render its provisions mandatory and to prohibit traders from circumventing them in their agreements."[115] As a consequence, the parties are not free to create explicit or implicit

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[110] *Ibid.*

[111] *Ibid.*

[112] *See for example*, ICC Arbitration Rules, Article 21

[113] Kurkela, S. M., Levin, C. R., Liebscher, C., Sommer, P., Certain Procedural Issues in Arbitrating Competition Cases, Journal of International Arbitration 2007, Vol.24(2), pp 189-210 p 195.

[114] Dolmans, M., Grierson, J., Arbitration and the Modernization of EC antitrust Law: New opportunities and New Responsibilities, ICC court of Arbitration Bulletin 2003, Vol.14(2), pp 37-51 p 45.

[115] Case T-128/98, Aéroports de Paris v. Commission, ECLI:EU:T:2000:290, para. 241.

exemptions from the EU competition law. In cases where the parties select the seat of the arbitration proceedings outside the EU but the *lex contractus* derives from EU Member State law the parties must also follow the respective provisions.

Di Brozolo suggests that the possible application of competition law by arbitrators should be based on the effects in the relevant markets. Hence, the possible effects of the agreement - or conduct - must be evaluated by the arbitrators when deciding whether or not to apply competition law.[116] Dempegiotis draws similar conclusions and supports the effect based application.[117] Therefore, when the agreement or conduct has effect on trade within the EU arbitrators should be bound to abide the relevant EU competition law provisions. The prior approach is in line with the fact that infringements of EU competition law are generally evaluated based on their object or, alternatively, on direct or indirect effects on the markets by the Commission. Arbitral tribunals, when dealing with competition law claims, should preserve the same aims in the private competition law enforcement field even though they are not regarded as tribunals of the Member States. They still have the same judicial function as national courts and the Commission. However, arbitrators seating in a non-EU country have come to a different conclusion also as to the nature of EU competition law as a part of public policy and the possible effect based approach. In a Swiss case the Tribunal Fédéral did not set aside an award rendered between two Italian undertakings, which submitted their case under Italian law, on the grounds of public policy even though the arbitral tribunal presumably failed to apply Italian and EU competition law.[118] Even though the public policy was of major concern in this case - and failure to apply it - the arbitrators could have taken into consideration the effect based approach more specifically, especially due to the fact that the case concerned two Italian domiciled undertakings which had entered into a non-compete agreement concerning public bidding, thereby clearly having an effect on the markets even in the EU wide scale. On the other hand, and from a more practical point of view, arbitrators can rely only on the evidence submitted by the parties which make it difficult to evaluate the possible effects on the markets in indistinct cases. Furthermore, guidance from the Commission is only possible if the parties agree to this.

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[116] Radicati di Brozolo, L., Competition Law and Arbitration, Competition Law International 2011, Vol. 7(2) pp 12-15 p 12.
[117] Dempegiotis, I. S., *supra* nota 99, p 385.
[118] van Houtte, H., *supra* nota 102, p 67.

The situation is more complex when EU domiciled parties choose a *lex contractus* from a non-EU Member State, the seat of the arbitration proceedings is in non-EU Member State and the parties clearly indicate that they will not seek enforcement within EU. Flere suggests that in such circumstances the application of EU competition law by arbitrators as mandatory provisions of law has not been yet resolved and is under debate due to opposing views.[119] On the contrary, Dempegiotis identifies two separate alternative approaches for the problem: firstly, *ex officio* application of the EU competition law as a part of international public policy, and secondly, that arbitrators respect the will of the parties and preserve their legitimate expectations.[120] On the other hand, it is questionable to what extent EU competition law fall within the domain of international public policy which can generally be considered as "serious departures from fundamental notions of procedural justice."[121] In the context of the New York Convention, the public policy notion concerns only the public policy of a particular state. Swiss tribunals, for example, have denied the possibility of *ex officio* application of EU competition law as a part of international public policy.[122] Furthermore, by respecting the parties will in cases where the parties clearly try to circumvent the applicable rules of law, arbitral tribunal's mandate to preserve justice and fairness as an alternative mechanism for national courts becomes controversial. Arbitration proceedings should not be used for illegal purposes. Some authors have suggested that under the previous circumstances arbitrators should refrain from the arbitration proceedings.[123] According to van Houtte arbitrators may apply EU competition law when such rules are regarded "as a foreign *loi de police* (mandatory rules of immediate application) that is so closely connected to the facts of the case that it may have to be given effect."[124] The prior situation lefts much discretion for the arbitrators when deciding the law applicable to the dispute and is also a quite controversial approach with the most prevalent principles of arbitration proceedings, namely, the principle of party autonomy. Further, if the arbitrators were to decide solely the law applicable to the dispute based on "closely connected facts of the case" the question arises, firstly, what can be regarded as those facts, and secondly, when arbitrators have exceeded their powers with regards to Article 5(c) of the New York

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[119] Flere, P., Impact of EC Competition Law on Arbitration Proceedings, Slovenian Law Review 2006, Vol. 3 pp 155-175 p 167.
[120] Dempegiotis, I. S., *supra* nota 99, p 385.
[121] *See chapter 2.3.1.4 which concern the topic of public policy more generally*
[122] van Houtte, H., *supra* nota 102, p 66.
[123] *See for example*, Blanke, G., *supra* nota 86, p 565.
[124] van Houtte, H., *supra* nota 102, p 67.

Convention hence making the award subject to possible annulment due to the arbitrator's initial decision to apply law that the parties have not explicitly chosen. Arbitrators autonomy to select the applicable law should be, at least from the author's point of view, subordinate to the party autonomy principle and applicable only when the parties have not addressed to the issue. This is clearly indicated, for example, in the ICC arbitration rules Article 21.

3.2.2.1. Arbitrator's liability for Competition law infringements

Arbitrators' can be liable for competition law infringements if they ignore manifestly apparent competition law rules and thus facilitate the EU competition law violations. Following the jurisprudence from the EU, especially case *Höfner*[125], it is plausible that arbitrators are regarded to form an undertaking within the meaning of the established case law when offering their services for the parties. Thereby, in a case involving anti-competitive agreement falling within the scope of Article 101 TFEU an arbitrator, if ignoring manifestly competition law, can possibly be regarded as colluding with a cartel.

3.3 Review and annulment of arbitral awards by competition authorities

As noted above, arbitral awards rendered by arbitral tribunals are binding by their nature, unless otherwise agreed by the parties, and enforceable in majority of the countries world wide due to the New York Convention. Thus, arbitral awards are not subject to appeal in the national courts. Awards may only be set aside or refused to be recognized on the explicit grounds as provided in the New York Convention. Not only did the *Eco Swiss* case indirectly declare that competition law claims can be subject to arbitration proceedings but it did also impose an obligation for the national courts to review, and possibly annul, arbitral awards that does not comply with the rules of EU competition law. The review of arbitral awards by national courts in the enforcement or annulment phase *de facto* made it possible that issues regarding public policy, such as EU competition law, can fall within the scope of arbitration proceedings. National courts of the EU Member States are obliged to follow the principle of loyal cooperation and the European Union

[125] Case C-41/90, Höfner and Elser v Macroton GmbH, ECLI:EU:C:1991:161

legal order. Thus, they must ensure that the award rendered by the arbitral tribunal complies with the EU competition law. This function of the national courts is often referred as "the second look doctrine".[126] As arbitral tribunals are not courts of the Member States within the meaning of Article 267 TFEU, and thus not allowed to make a reference for a preliminary ruling to the CJEU, the purpose of the second look doctrine is to secure the full effectiveness of the EU competition law in the post-arbitration phase by enabling national courts to review the awards and address to the possible competition law infringements.[127] However, the second look doctrine can have its pitfalls on securing the effectiveness of competition law. This is mostly due to the fact that it can only be set in motion by the parties after completing the arbitral proceedings in the exequatur or enforcement phase before national courts of the Member States. However, the parties are not under an obligation to bring such actions.[128]

3.3.1 Different approaches to the standard of review by national courts

The practice regarding the standard of review by national courts varies within jurisdictions of the EU Member States. Under the traditional point of view arbitral awards are final and binding to the parties, unless otherwise agreed, and are not subject to appeal or to review based on the merits of the case. Thus, national courts may only look from the award whether or not arbitrators have complied with, and applied where relevant, the competition law rules without going into further examination on the details of the case. The review of awards is possible since EU competition law forms part of the public policy - a notion which is recognized as a ground for annulment and unenforceability in the New York Convention. However, especially in the field of EU competition law, national courts of the EU Member States have obtained different standings for the standard of review. This is mostly due to the fact that the scope and content of the public policy varies from Member State to Member State. The New York Convention offers no guidelines for the issue. In addition, under the EU law national courts have procedural autonomy and are free to determine the extent of the award review. Hence, a situation may arise where an

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[126] Billiet, P., Arbitrators means to ensure compliance with competition law and limits of court review on awards in Europe, Arbitration 2010, Vol. 76(1), pp 86-97 p 88.
[127] De Groot, D., Arbitration and the Modernisation of EC Competition Law, European Business Law Journal 2008, Vol.19(1), pp 175-189 p 185-186.
[128] *Ibid.*

award may be enforceable in one of the Member States and unenforceable in others. Due to the relatively vague wording in the *Eco Swiss* case - "...the review of the arbitration award, which may be more or less extensive depending on the circumstances..."[129] - national courts have mainly obtained two alternative approaches for the standard of review, the minimalist approach and the maximalist approach. Moreover, the *Eco Swiss* case itself did not address to the issue what kinds of infringements of EU competition law can be considered as a violation of public policy within the meaning of New York Convention, merely that EU competition law forms a part of public policy. The vague wording of the case has been criticised by legal scholars in the field of arbitration.[130]

When following the minimalist approach national courts of the Member States respect the finality of arbitral awards without going into extensive examination on the merits of the case. The approach aims to ensure that arbitrators have addressed and decided issues regarding competition law, and that the awards' operational part complies with competition law.[131] In the French *Thalés* case, the court found that refusal to enforce an arbitral award is only possible where the infringement of EU competition law is flagrant, effective and concrete.[132] Refusal to enforce or recognise an award is thus possible only in circumstances where a serious and obvious breach of competition law is maintained by the arbitral tribunal in the award rendered. Clearly this could be the case in a blatantly apparent market sharing agreement between the parties or in case abuse of dominant position leads to monopolisation of markets. On the other hand, the approach supposedly leaves possible minor infringements of competition law untouched if they are not properly addressed by arbitrators. In this sense, the Commission should address to the issue and to some extent draw a line between minor and manifestly apparent competition law infringements.

On the contrary, the maximalist approach adopted by some European jurisdictions demands for full and extensive review on the merits of the case.[133] This can include, *inter alia*, examining the operational part of the award and the arbitrator's reasoning, hearing the witness statements and expert opinions again in the award review phase. The maximalist approach is linked to the fact

[129] Case C-126/97 Eco Swiss China Time Ltd and Benetton International NV, ECLI:EU:C:1999:269, para 32
[130] *See for example,* Dempegiotis, I. S., *supra* nota 99, p 390.
[131] Blanke, G., Arbitration and ADR of global antitrust disputes: taking stock: Part 3, Global Competition Litigation Review 2008, Vol.1(3), pp 133-147 p 142.
[132] Thalés Air Defence v G.I.E. Euromissile, decision of the Paris Court of Appeal of November 18, 2004.
[133] Ragazzo, C., Binder, M., *supra* nota 83, p 186.

that as a matter of public policy EU competition law should be under strict scrutiny. Thus, national courts are not obliged to follow the finality of the arbitral awards and neither the findings made by arbitral tribunals since the matter concerns public policy. The approach is more or less contradictory with the principles and aims of international commercial arbitration, not least with the principle of finality of the arbitral awards. The parties expect that the award rendered is final and enforceable under the New York Convention, and thus subject only to the specific annulment and unenforceability grounds. In addition, the parties usually have some underlying reason to resort to arbitral proceedings, most oftenly the speed and efficiency of the procedure. By reopening the case on the grounds of a mere alleged violation of public policy heavily affects to the parties legitimate expectations, especially in cases where the parties have raised the relevant EU competition law issue during the proceedings and the arbitral tribunal has addressed to the question, for example, by properly applying the relevant legal provisions.

Arguably, the issue regarding the standard of review of arbitral awards is contradictory due to the two significantly opposing views that national courts of the EU Member States are eligible to apply when reviewing awards. In addition, as each national court enjoy procedural autonomy and are capable of choosing the extent of the award review, as well as the scope of national public policy, the award may be granted an exequatur in one of the Member States under the minimalist approach but challenged for annulment under the extensive review on the merits of the case.[134] However, it can be said that the minimalist approach is prevailing in European jurisdictions, as to the author's knowledge the maximalist approach has been applied only to one case in so far.[135] The current situation is - at least to some extent - adequate due to the EU wide consensus on the matter allowing extensive review of, and refusal to enforce, an award only in exceptional cases where infringements of competition law are so manifest that they cannot be disregarded in the light of the circumstances. However, since national courts are capable to define the limits of the standard of review, and the alterations of public policy e.g. the attitude towards arbitration, a debate may arose in the future between the two opposing views. If so, the issue need to be addressed properly in order to secure the effectiveness of the New York Convention and finality of arbitral awards.

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[134] *This was in fact the case in SNF v Cytec industries BV, where the Court of first instance in Belgium granted annulment of the award based on extensive review of the decision. However, the decision was later overturned by the Court of appeal. Thus, it can be said that Belgium also follows the minimalist approach.*

[135] *This happened in Market Display International (MDI) case where the Dutch court refused to enforce a foreign award on the grounds of public policy violations pursuant to Article 5(2)(b) of the New York Convention.*

Conclusion

EU competition law aims to maximise consumer welfare and to allocate resources efficiently within the internal market. Additionally, it protects consumers and smaller firms from large accumulations of economic power. For these purposes, a regulatory framework that prohibits certain types of market behaviour for the detriment of consumers and smaller enterprises is mandatory. Article 3 of the TFEU gives an exclusive competence for the EU to regulate competition in order to secure the functioning of the internal market.

Articles 101 and 102 of the TFEU constitute the legal backbone of the EU competition law regulation. The prior provisions are the most essential instruments regulation wise used to achieve the most fundamental aims of the European competition policy - secondary legislation also forms an important part of the EU competition regulation, especially Council regulation 1/2003 which defines, *inter alia*, the important powers and cooperation principles of the Commission and NCAs. Article 101 of the TFEU prohibits anti-competitive agreements between two or more undertakings, thus forming the so-called cartel prohibition provision. Due to the established case law, the provision catches various types of agreements, even those that are not formally legally binding between the parties. On the other hand, Article 102 of the TFEU prohibits abuse of dominant market position by one or more undertakings.

Traditionally, the enforcement of competition law has been centralised and in the hands of the Commission. However, due to proposed reformations in The White paper on Modernisation of the rules implementing Articles 85 (now Article 101 TFEU) and 86 (now Article 102 TFEU), the old enforcement model was changed into a decentralised model that allows national courts and NCAs to apply Articles 101 and 102 TFEU in their entirety.

Arbitrability of disputes involving competition law was subject to debate mostly due to the fact that as a matter of public policy such disputes should fall outside the scope of arbitration. Hence, the contractual freedom and party autonomy principle which underlies the arbitration proceedings should be superseded by public policy notions. In addition, as arbitration proceedings are private and confidential in nature they were perceived incompatible with the aims and functions of competition law which ultimately concerns public interest. However, it can be said with confidence that in Europe the question on whether competition law issues can be

subject to arbitration proceedings is affirmative, even though it never has been raised directly before the CJEU nor the ECJ. The issue of arbitrability of competition law claims was addressed indirectly in the *Eco Swiss* case where the ECJ highlighted the importance of national courts in the enforcement phase and the consequences if an award does not comply with the relevant competition law provisions. Furthermore, there is no indication that national laws of the EU Member States explicitly prohibit the use of arbitration in disputes between the parties that involve competition law elements. National courts are under EU law obliged to follow the principle of loyal cooperation and to apply the relevant competition law provisions where necessary even *ex officio.* Due to the established case law by the ECJ in *Nordsee,* arbitral tribunals are not courts of the Member States within the meaning of Article 267 TFEU. As arbitrators operate in the international field and have no specific *forum,* arbitrators are not bound by the same mandatory obligations as national courts are. The strict obligation to address to the possible competition law infringements *ex officio* is not common for international arbitrators mostly due to the principle of party autonomy i.e. the parties decide the scope of their dispute and the law applicable in their submissions which cannot be exceeded by the arbitrators.

However, even though arbitrators are not bound by the same obligations as national courts it does not relieve them from the application of the relevant competition law provisions. If encountered by a dispute involving antitrust elements arbitrators are required to raise the issues at hand and submit them to the parties for their comments in order to ensure that the parties have knowledge of the possible competition law element. The *Eco Swiss* and *Manfredi* cases made it clear that EU competition law forms a part of the public policy of the EU, a notion that is recognised as a ground for the annulment and unenforceability of an award pursuant to the New York Convention. However, the scope of public policy varies between the Member States as it is determined solely on the national grounds. Since arbitrators are under a duty to render an enforceable award they must ensure that the award complies with the public policy of EU Member State where the party seeks to enforce an award.

The arbitrator's *de facto* obligation to apply relevant competition law provisions may, however, stem from the circumstances of the case. Arbitrators are bound by and obliged to apply national laws selected by the parties in their agreement to arbitrate. When the parties subject their dispute to national laws of an EU Member State, EU law inherently forms a part of the national legal

order due to the principles of supremacy and direct effect. Thus, when national laws of the EU Member States forms the *lex contractus* or the *lex arbitri* arbitrators are also obliged to apply the relevant EU law provisions as well. Moreover, the competition law provisions must be taken into account when the winning party seeks to enforce the award within the EU due to the fact that under the established case law competition law forms a part of the public policy of the EU. Any contrary application of competition law would render the award challengeable in the recognition and enforcement phase under the New York Convention's public policy grounds, hence making it possibly subject to annulment, or the award may be refused to be enforced.

Under the EU law, competition law provisions are perceived to construct a part of the public policy of the EU and are applied *ex officio* by the Member State's national courts. Hence, the competition law provisions can be perceived as mandatory provisions of law. Due to the imperative nature of such provisions, derogations from mandatory provisions are not permissible and the parties may not, under the established case law, contract out of their duties in order to circumvent competition law by explicitly or implicitly stating that the relevant competition law provisions are outside the scope of their agreement to arbitrate. National courts are obliged to enforce the rights conferred by the EU law provisions. Moreover, if the parties try to circumvent the relevant competition law provisions in *mala fides* arbitrators may refrain from continuing with the arbitration proceedings. In essence, the arbitral tribunals have the same judicial functions as national courts have. Despite the fact that the parties are in control of the arbitration proceedings pursuant to the principle of autonomy it can be argued that arbitrators remain masters of the arbitral proceedings and does not serve the parties illegitimate purposes. Moreover, if arbitrators facilitate the competition law infringements they can be held liable for colluding with a cartel. Supposedly, the only chance that enables a party to escape from an agreement that infringes Article 101 TFEU is an error by the arbitrators to apply the relevant competition law provisions and a national court in a non-EU country grants a leave for the arbitral award due to the fact that EU competition law does not fall within the scope of international public policy and it does not violate the public policy of the *forum* and the parties comply with the award voluntarily without enforcement proceedings in the EU. The award most likely will be refused to be enforced by the national courts of the EU where the party seeks to enforce the award, since clearly manifest infringements of competition law invariably form a base for the public policy ground in the New York Convention. An infringement concerning

Article 101 TFEU almost certainly falls within the scope of manifest infringement of competition law.

One of the most controversial issues regarding the use of arbitration in disputes involving competition law relates to the standard of review executed by the national courts. Since competition law forms a part of the public policy of the EU under the E*co Swiss* and *Manfredi* cases, national courts are capable of reviewing the awards pursuant to the New York Convention's public policy grounds as elaborated in the Article 5(2)(b). Traditionally arbitration awards are perceived to be final and binding to the parties and thus not subject to appeal and incapable of being reviewed based on the merits of the case. An award can be subject to annulment or unenforceability in the national courts only in accordance with the explicit grounds as provided in the New York Convention. However, national courts of the EU Member States have obtained two different approaches for the standard of review in the aftermath of the *Eco Swiss* ruling in conjunction with the principle of procedural autonomy. The minimalist approach stands for a limited review of an arbitration award without going into detailed examination on the merits of the case. Rather, it aims to ensure that arbitrators have *de facto* addressed and decided the possible competition law infringements. Hence, refusal to enforce or recognise an award is possible in circumstances where the infringement of competition law is manifest. The maximalist approach is more controversial with the principles of international arbitration, especially with the finality of arbitral awards. Under the approach national courts are capable to conduct a full and extensive review on the merits of the case. Since competition law concerns public policy it should be placed under greater scrutiny. Thus, a mere alleged violation of competition law opens a pathway for the national courts to reexamine the case on its merits. However, with regards to the standard of review, there seems to exists an European wide consensus about the prevailing approach since the maximalist approach has been used only once in the award enforcement phase by national courts. Thus, the grounds for review, annulment and setting aside an award are solely within the discretion of national courts and dependant on how the national court perceives public policy at the time when an award is presented before it.

Under the argumentation presented, it can be said that the use of arbitration in disputes involving competition law, especially Articles 101 and 102 of the TFEU, is well established and generally workable dispute resolution method for private undertakings in practice. Arbitrators willingly

apply the relevant competition law provisions in order to fulfil their duties and obligations under the laws chosen by the parties. Moreover, misapplication of mandatory provisions of law by the arbitrators would certainly undermine the regime of international commercial arbitration leading to a mistrust on the part of the Commission and NCAs.

However, one can also find possible pitfalls in arbitrating competition law disputes. Since the scope of public policy is determined exclusively by national courts - and it is highly questionable does competition law provisions fall within the scope of international public policy - the parties may encounter a situation where the award is enforceable in one member state and refused to be enforced in other. Moreover, the vague wording of the *Eco Swiss* ruling opened a pathway for national courts to intervene with the finality of the awards in the enforcement phase, thus affecting to the parties legitimate expectations, the efficiency of the proceedings as well as to the effectiveness of the New York Convention.

The research has shown that despite competition law disputes are arbitrable, there still exists some discrepancies as to the scope of the standard of review executed by national courts as well as the extent of the notion public policy. For these purposes, the thresholds of what can be considered as manifest infringements of competition law, thus enabling the refusal of enforcement under the prevailing minimalist approach, should be evaluated in order to secure the effective and uniform application of EU competition law. In addition, consideration could be given what would be the impacts of uniform EU-wide recognition of arbitral awards, a similar approach as provided for other court judgements in Brussel I-regulation.[136]

[136] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 351, 20.12 2012

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