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COMPETITION COMMITTEE

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ARBITRATION AND COMPETITION

This document compiles documentation related to a hearing on Arbitration and Competition held in the Working Party No.3 meeting of 26 October 2010. This compilation is circulated FOR INFORMATION.

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ARBITRATION AND COMPETITION

Note from the Secretariat

The Competition Committee decided to hold occasional "hearings" on selected topics which might call for further input from Competition delegates. This initiative results from delegates' perceived need to address strategic issues outside the core competition domain and to improve the dialogue in such areas where competition can be meaningful.

Experts on the selected topic are invited to present their views on what they believe are the important issues in this area, and particularly what issues might involve a significant competition element and would therefore deserve further consideration by the Committee.

The Competition Committee held a hearing on Arbitration and Competition on 26 October 2010 with the following experts:

Ms. Laurence IDOT, Professor, University Panthéon-Assas (Paris) ; and Member, Autorité de la concurrence (France)
Mr. Emmanuel JOLIVET, General Counsel at the Secretariat of the ICC International Court of Arbitration
Mr. Akira KAWAMURA, Professor, Kyoto University's Faculty of Law, and Partner, Anderson on Mori and Tomotsune (Japan)
Mr. Phillip LANDOLT, Lecturer, University of Geneva; and Partner, Charles Russel.
Mr. Christopher LIEBSCHER, Partner, Wolf Theiss.
Mr. Johannes LUBKING, Head of Unit, European Commission
Mr. Luca G. RADICATI DI BROZOLO, Professor, Catholic University of Milan; and Partner, Bonelli Erede Pappalardo
Mr. William WOOD QC, Brick Court Chamber

This document compiles the documentation related to this Hearing.

L'ARBITRAGE ET LE CONCURRENCE

Note du Secrétariat

Le Comité de la Concurrence a décidé d'organiser des auditions (« hearings ») occasionnelles sur des sujets choisis, susceptibles de générer des contributions ultérieures des délégués du Comité. Cette initiative résulte de la nécessité perçue par les délégués d'aborder certains sujets stratégiques au-delà des questions clés de concurrence. L'objectif est d'améliorer le dialogue entre responsables publics dans des domaines où la concurrence peut être déterminante.

Des experts dans les sujets choisis sont invités à présenter leurs points de vue sur les questions qu'ils jugent importantes dans le domaine traité, en particulier dans la mesure où elles comportent une dimension de concurrence significative, et, à ce titre, justifier une attention particulière du Comité à l'avenir.

Le Comité de la Concurrence a tenu une audition sur l'Arbitrage et la Concurrence le 26 Octobre 2010 avec la participation des experts suivants :

Mme. Laurence IDOT, Professeur, Université Panthéon-Assas (Paris); et Membre, Autorité de la concurrence ;
M. Emmanuel JOLIVET, Conseil général au Secrétariat de la Cour international d'arbitrage (ICC) ;
M. Akira KAWAMURA, Professeur, Faculté de droit de l'université de Kyoto ; et Associé, Anderson on Mori et Tomotsune ;
M. Philip LANDOLT, Lecturer, Université de Genève; et Associé, Charles Russel ;
M. Johannes LUBKING, Chef d'Unité, Commission européenne ;
M. Christopher LIEBSCHER, Associé, Wolf Theiss ;
M. Luca G. RADICATI DI BROZOLO, Professeur, Université catholique de Milan; et Associé, Bonelli Erede Pappalardo ;
M. William WOOD QC, Brick Court Chamber.

Ce document rassemble la documentation relative à cette audition.

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By the Secretariat

On 26 October 2010 a Hearing on Arbitration and Competition took place in Working Party N. 3 of the OECD Competition Committee. The Hearing focused on the role of arbitration in competition policy and practice and the interface between these two areas of law. The Hearing highlighted that many international proceedings involve the resolution of competition disputes and that arbitration is likely to become an increasingly important area for competition policy and enforcement.

The Hearing included presentations from six experts from the fields of arbitration and competition: Mr. Emmanuel Jolivet, General Counsel at the Secretariat of the ICC International Court of Arbitration; Mr. William Wood QC, Brick Court Chambers, specialising in commercial mediation; Ms. Laurence Idot, Professor, University Panthéon-Assas (Paris) and Member, Autorité de la Concurrence; Mr. Luca Radicati di Brozolo, Professor, Milan's Catholic University and Partner, Bonelli Erede Pappalardo; Mr. Phillip Landolt, Lecturer, University of Geneva and Partner, Charles Russell; Mr. Akira Kawamura, Professor, Kyoto University's Faculty of Law and Partner, Anderson Mori and Tomotsune; Dr. Johannes Lubking, Heat of Unit, European Commission and Dr. Christopher Liebscher, Partner, Wolf Theiss.

1. Arbitration: general remarks

Arbitration can be defined as a situation in which a private judge or arbitrator, agreed upon by the parties and under contract, is given the task of settling a dispute through issuing an arbitration decision. This definition has a number of key characteristics.

Arbitration is a private way to settle a dispute. Arbitrators are therefore distinct from judges as they have the power to state the law, but not the power to apply it. The cost of the arbitration is covered by the parties involved in the dispute. This includes the cost of the arbitrator, the arbitration institution if there is one, and any experts involved in the process. Arbitration is usually adopted in cases involving commercial issues between the parties, for example resolving a contract. However arbitration could also be used in situations involving a state body where there is no commercial relationship, between for example a company and a competition authority.

Other characteristics of arbitration include: quick resolution of the dispute and methods of recourse against the final decision of an arbitrator; the autonomy of an arbitration clause should be recognised, and the fact that the arbitration clause can be separated from the rest of the contract (i.e. if a contract is null and void following a competition violation, this does not nullify the arbitration clause). Finally it is the arbitrator who pronounces his or her competence to take on the matter rather than the state (so-called principle of 'competence-competence').

Arbitration can either be international, in which case the arbitrator has a wider freedom to establish the framework of the procedure, or domestic which means the arbitrator must apply a number of rules and regulations related to public policy.

Arbitration can also be institutional or ad hoc. Institutional arbitration is administered and managed by an arbitral institution, of which there are a number in the world to choose from. Ad hoc arbitration

follows the law of arbitration and all the relevant procedures, but is overseen by the parties' agreement. Recent cases have demonstrated a clear shift from ad hoc arbitration to institutional arbitration which is now the commonly adopted process. However, two important considerations include (i) the choice of chairperson for institutional arbitration, as if the parties do not agree this can be problematic, and (ii) the choice of institution itself, as there are a number of arbitral institutions but not all have the requisite experience. It is therefore important to choose an established arbitration institution.

1.1. Advantages of arbitration compared to litigation before a national court

- *Flexibility over choice of arbitrator and process:* Arbitration allows the parties to choose the arbitrator, in addition to allowing flexibility of choice in the legal rules and general principles for the procedure itself, and the applicable law. This may include applying competition law. It is also possible to combine different dispute mechanisms, e.g. by using arbitration and mediation together.

- *Detachment from a particular legal order:* Arbitration is not answerable to any specific legislation. This can be beneficial to the parties when a public body is involved, as the arbitration process can be detached from the usual legal order.

- *Speed of process:* Arbitration provides a faster way to resolve conflicts than through the usual channel of overburdened courts. This is particularly relevant for competition cases, which frequently involve complex matters and therefore can take up significant court time.

- *Wide enforcement of decision:* Once an arbitration dispute is awarded, the decision will be widely recognised and enforced through a number of international conventions.[1] Therefore if an arbitral award is obtained in country A, it can also be enforced in countries B,C,D and E etc. Arbitration may also facilitate the enforcement of an international principle not currently existing in the applicable law. For example, if a competition law principle is not recognised in a jurisdiction, using international arbitration instead of traditional public enforcement may allow the extension of the competition law principle into that country.

1.2. Disadvantages of arbitration compared to litigation before a national court

- *Lack of rigour:* As yet arbitration is not deemed to have the same authority and rigour as public enforcement of competition law.

- *No powers of investigation:* Competition authorities have extensive powers to request and enforce the production of documents. While parties may be asked to produce documents during the arbitration process, they cannot be compelled to do so.

- *Lack of transparency:* The confidential nature of arbitration can be perceived as a method of concealing certain practices which the parties do not wish to be made public.

- *Conflict between approaches:* There is a risk not only that two arbitration tribunals could render solutions diametrically opposed, but also that a decision given by an arbitration tribunal may conflict with that given by a competition authority.

[1] For example the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or "New York Convention"

- *Lack of precedents:* Arbitral decisions are often not published and remain confidential, and previous awards cannot be taken into consideration by other arbitration tribunals. As a result no body of rules or jurisprudence has developed. This leads to a strong risk of diverse interpretations, which can have an undesirable effect on competition law.

2. Raising competition issues within the arbitration process

The extent to which arbitrators have the power or obligation to apply competition law *sua sponte*, differs from jurisdiction to jurisdiction. An arbitrator may try to guide the parties to reflect on the competition law issue, or may raise the competition law issue directly. The issue should be raised during the course of the proceedings rather than during the final decision to allow the parties to respond appropriately.

There is no appeal structure as such within arbitration, but questions relating to public policy provisions that concern competition law can be raised. In the case of institutional arbitration it will be the institution itself (i.e. the International Chamber of Commerce) which can re-examine a decision before it is given. This ensures all competition law issues have been taken into consideration by the tribunal. In ad hoc arbitration, amicus curiae intervention can take place with either the competition agencies, or courts or other national agencies flagging issues related to competition law. Competition issues therefore appear regularly in arbitration tribunals, as arbitrators, parties and their legal experts become more aware of competition law and raise questions relating to it. However, no uniform approach to deal with these issues has been adopted as yet.

3. Mediation as an Alternative Dispute Resolution (ADR) mechanism in competition matters

3.1. Mediation: general remarks

While mediation shares some common features with arbitration (i.e. the lack of court involvement, confidentiality of proceedings and a neutral third party conducting the process), mediation raises a number of different issues from arbitration. One key distinction between mediation and other forms of ADR is the voluntary aspect. Mediation is voluntary from the point of entry, throughout the process and up until the moment at which a binding settlement agreement is signed by the parties. The parties are not obliged to remain involved and can leave at any time. In contrast with the arbitration process, a mediator provides no ruling and no award, and if the parties cannot reach agreement the result is a frustrated mediation with no settlement. The mediator's role is one of facilitation, aimed at enabling the parties to reach their own views on how they wish to deal with the dispute rather than providing an analysis of the parties' legal rights. There is also a strong degree of confidentiality under the terms of mediation agreements, and the process is more flexible and informal that other ADR mechanisms, with no set sequence of events, and no 'correct' way to conduct proceedings.

The process usually starts with initial pre-mediation contact between the key parties, in which dates and locations are discussed. A mediator must also be chosen and agreed upon by the parties. The mediator will then take the opportunity to meet and speak with the parties, or their legal counsel, and assess what both parties are looking to gain from the mediation process. A mediation agreement is then drafted, under which the parties commit to providing representatives with authority to settle. The agreement defines the dispute, fixes the mediators fee and states that until there is a signed, written agreement, there can be no settlement.

Plenary sessions, which are effectively informal hearings, are usually organised towards the beginning of the mediation. Some parties approach these sessions very analytically, drawing from case law to support their argument, while others enter into a frank and commercial dialogue. For most parties this

public airing of their grievance or defence of their case is seen as vital to the process. An equally important part of the process are the private meetings in which the mediator meets with each side, and discusses in confidence any issues they may have. This confidential information cannot be shared with the other side without express permission. This allows the mediator to have an overarching view of all the issues and the individual attitudes of each party. The mediation usually progresses from a venting of complaints and emotions at the beginning of the day, to an exploration of possible issues, through to a risk assessment of how much litigation would cost, and ultimately to a negotiation in which terms come to be signed. The mediation process is often scheduled for one day, but complex cases such as competition cases may take longer. Much mediation, including those involving competition issues, result in the principal parties in a private meeting without either lawyers or the mediator.

Mediation provides a complementary resolution process, which can enable parties to come out of the formal adjudication process. If a settlement is not reached through mediation then the parties will rely on courts to decide their case, with the inevitable solution that only one party will be happy with the result. Mediation therefore offers an opportunity for both parties to walk away from the process happy with the results. Mediation is not the only form of ADR, but other forms tend to move towards expert intervention, with either binding or non-binding assessments being given by a third party, and these ADR processes have not always proved very successful. Parties either want to benefit from the familiar and full due process rights offered by litigation and arbitration, or be part of a voluntary process such as mediation in which they have complete control and autonomy.

Mediators work in close liaison with the court, assisting in the organisation of the parties' common interests, in addition to making adjustments for any differences in factual situations. Some regulators have suggested the use of hybrid forms of ADR, using mediation at the outset, and then moving to either a non-binding ruling or binding award if the mediation does not succeed. However, these hybrid forms tend to lack credibility as the second part of the process effectively chills the first part. Parties will be unwilling to make an offer at the mediation stage in case it leads to a less favourable result later on in the process. Parties are also less likely to share confidential information early on if they know the mediator could then switch to the role of an arbitrator. A hybrid process therefore risks sacrificing the due process benefits of arbitration and litigation, while at the same time not benefiting from the autonomy and control usually associated with mediation.

In May 2011 the EU Mediation Directive came into law, and all member states are required to comply with it. The Directive aims "*to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.*" An immediate consequence under UK law will be to allow mediated settlements to be enforced as if they were court judgments, including the introduction of a form of registration for the settlements. There are currently around 6,000 civil and commercial disputes mediated in England and Wales annually and the UK government has also pledged to mediate all private disputes. However, if mediation is mandated, it is therefore compelled and this has raised concerns regarding possible conflict with Article 6 of the European Convention on Human Rights.

3.2. Mediation and competition matters

Mediation is already well established in competition litigation. It offers all the advantages of litigation and arbitration, but without the substantial costs associated with lengthy proceedings involving both legal and economic experts. There are broadly two types of competition cases that are mediated; follow on damages claims and disputes concerning ongoing relationships in an industry. In the US, mediation has been instrumental in carrying out class actions, in relation to both mass torts and to competition claims.

It can be difficult to find examples of cases which have been mediated as the details are usually kept confidential. However, two very high profile public mediations in the UK include the successful mediation between the British Marine Federation and British Waterways over the inland waterway marina and moorings market,[2] and the failed mediation between bookmakers and Turf TV over the sale of television picture to betting shops.[3]

The parties to the mediation have the same responsibilities they would have if they were reaching any other agreement. Competition law acts as the background against which the mediator works, similar to the way the Money Laundering Regulations form part of the legal background and these principles should not be offended. However, the mediator only has a duty to uphold competition law in the limited sense, i.e. by ensuring the parties do not facilitate an illegal or anti-competitive contract.

4. Arbitrability of competition law disputes

1. A distinction should be drawn between arbitration as (i) a means for individuals to privately enforce competition law and (ii) a tool for competition authorities in their public enforcement of competition law. While similarities exist between both forms, there are also significant differences. Two key questions must be considered: (i) can an arbitrator apply competition law? and (ii) if yes, which competition law will be applied and how will this be done? In order to answer these questions the constraints imposed by arbitration, civil procedure and competition rules must all be considered.

The first issue is whether the state will accept the 'intrusion' of arbitration within competition law enforcement by a public authority. During the 1970's, the jurisprudence in the US (following the *American Safety* case)[4] considered that antitrust law was not suitable for arbitration. This was also reflected in Belgian and French laws. However, following the 1985 Mitsubishi case,[5] the Supreme Court abandoned the traditional position and confirmed that, under certain conditions, competition issues could be arbitrated. This case has had a considerable impact outside the US, and a number of jurisdictions have now reconsidered their position on the use of arbitration in resolving competition disputes. The need for an arbitration convention is also a strong constraint. This is why arbitration is typically used for contractual rather than delictual disputes. Even if an arbitration clause is included in the contract, a further question arises of whether competition law issues can trigger the use of this arbitration clause. This issue arose in the *Provimi*[6] case in the UK.

Arbitration is only possible if the competition law allows for it and an arbitrator cannot prevent competition authorities from exercising their own powers to enforce competition law. The arbitrator can only intervene to determine the overarching civil law consequences relevant to the application of competition law. In practice this means *ex post* allocation of damages to one party as a result of another party violating competition law. There is a very limited role for arbitration in the *ex ante* application of competition law, for example in mergers and state aid, as these areas remain the exclusive competence of the national competition authorities (NCAs).

The increase in damages actions has had an effect on arbitration, leading to some specific problems under US antitrust law. Following the Mitsubishi case, a limit was imposed on the arbitration of

2 www.cedr.com/solve/studies/?param=186

3 http://www.ft.com/intl/cms/s/0/bdec6c28-f79f-11dc-ac40-000077b07658.html#axzz1UAHJO58Q

4 American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968)

5 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 723 F.2d 155 (1983), cert. granted, 105 S. Ct. 291 (1984)

6 Provimi Limited v. Aventis Animal Nutrition and SA & Ors [2003] EWHC 961 (Comm)

competition law to ensure claimants could not be deprived of their statutory rights. This is not problematic for litigation based on contractual claims, as is often the case in European community law. However, in the US treble damages claims and class actions play a fundamental role in creating incentives for victims of antitrust infringements to claim damages. The question is whether these should be excluded from arbitration. The US federal appeal courts were divided on the issue, but in the 2010 case of *Stolt-Nielson SA*[7] the Supreme Court held that a class action could not proceed in arbitration where the agreement to arbitrate was silent on the issue.

Arbitration is a normal tool for the settlement of commercial disputes and its use in resolving competition disputes is likely to increase. However, recourse to arbitration does not threaten or jeopardise the application of competition laws and there is no need to change the basic approach of arbitration and the review of arbitral awards to accommodate the increase of competition law disputes. Arbitration and its use should therefore be seen as one further tool for the correct application of competition law.

5. How should arbitrators deal with competition law?

Arbitrators undoubtedly have a duty to apply competition law, and are expected to do so. In the past doubts have been raised about the duties of arbitrators, with the argument that arbitration is subject to party autonomy and arbitrators should therefore not go beyond what parties want. However, if legal systems allow competition law matters to be arbitrated, this should come with the expectation that arbitrators will apply competition law. This extends to the application of competition law even after an agreement has been made between the parties. The arbitrators have a specific burden of providing comprehensive reasoning for their award to demonstrate to the courts in the review process that they have dealt with the competition law issues consistently, coherently and professionally.

The parties and any other arbitrators involved in the procedure need to agree that the competition issue forms part of the arbitration. A competition question cannot suddenly be brought into the process at the final stages, and the parties should be able to see from the case file that a competition issue is likely to be raised in the arbitration. In following the *Eco/Swiss* decision[8] of the European Court of Justice, it would seem the movement is towards a duty on arbitrators to raise legal issues in arbitration proceedings, despite some remaining hostile to any duty to apply competition laws.

In the rare case where the parties provide express instructions to disregard competition law, the arbitrator should refuse to abide by these demands, and if necessary should walk away from the arbitration. In some cases the arbitrators may even have an obligation to bring the matter before the relevant competition authority. However, one of the characteristics of arbitration proceedings is their secrecy, and therefore unless the parties specifically request it, bringing the matter into the open and collaborating with the competition authorities would not usually be encouraged. Similarly, participation by third parties, or competition authority intervention as *amicus curiae,* which is not agreed by the parties to the arbitration, would violate such basic principle of arbitration law. Further difficulties can arise in an international context, where there are several legal systems whose competition laws are potentially applicable, and a decision must be made as to which legal systems should be used.

6. How should national courts reviewing an arbitration award deal with competition law?

Courts tend to become involved in arbitration cases where there is an issue as to the enforcement of an award. Only in very exceptional circumstances will a court set aside or refuse to enforce an arbitration

7 U.S. Supreme Court's April 27, 2010 decision in Stolt-Nielsen S.A. v. Animal Feeds International Corp., No. 08-1198, 2010 WL 1655826 (U.S. Apr. 27, 2010)

8 Eco Swiss China Time Ltd v. Benetton International NV [1999] ECR I-3055

award. There are two doctrinal and jurisprudential approaches which have been adopted, the maximalist and the minimalist approach.

Under *the maximalist approach*, national courts are required to carry out an in depth review of arbitral awards when they are challenged, or when enforcement is required. This involves a full review of the entire case and all the evidence associated with it. The rationale for this approach is to avoid the risk that arbitration will be used to circumvent competition law. Courts can therefore consider in detail whether competition law has been applied 'correctly'. Under the *minimalist approach* no special treatment is given for awards raising competition law issues, and emphasis remains on taking the case outside of the courts, and settling it via arbitrators. The rationale for this approach is that if a full review of the award is carried out, this arguably defeats the purpose of going into arbitration in the first place and undermines the trust afforded to arbitrators and the institution of arbitration. Courts should therefore only overturn awards where there is a fundamental breach of public policy.

A fully fledged review of an award also conflicts with the principle that competition law is arbitrable. Competition law is a fundamental value of our legal system, and where necessary should be at the centre of the analysis. However, it is not clear that all violations of competition law are breaches of public policy. The application of competition law requires complicated, and usually economics based analysis, which a court may be better placed to carry out than an arbitral tribunal. However in many cases there are *bona fide* divergences of views on how a specific question should be answered, and arguably no single correct solution. Therefore it is not certain that either a court or an arbitral tribunal will systematically apply the law better than the other.

Minimal court review of competition law awards does not pose a serious threat to competition enforcement. Arbitrators do apply competition law, and often by their own initiative. Even if not raised by the arbitrator directly, the competition issues can also be raised by the parties, for example as a defence, and the issue then has to be dealt with under the arbitration process. In some cases parties may not want competition law to come into the discussion, and it is not necessary that every single potential violation of competition law is caught. The question therefore arises of the appropriate standard of review to be applied by the arbitrator. Following the US Supreme Court decision in Mitsubishi, courts should verify that arbitrators have addressed competition law issues with reasonable diligence and have not reached a result which is a serious contradiction of public policy (for example enforcing a price fixing cartel).

However, arbitrators do not have to engage in a fully fledged review of the facts, the legal analysis and the evidence in the file. Courts should therefore focus only on concrete and serious violations, which truly jeopardise the aims of competition law. For example not giving an award for damages is not in itself a breach of public policy, as this does not prejudice the overall application of competition law. There have been a number of cases which have dealt with awards involving competition law.[9] All these cases have adhered to the so-called minimalist position, but there has been no allegation that any of these awards were seriously prejudicial to the enforcement of competition law. It should be emphasised, however, that court review of arbitration and the approval of an award by a court is not in any way a substitutive for public enforcement. Therefore competition regulators can intervene, for example, by opening inquiries and imposing sanctions, if the arbitration process raises serious competition issues.

[9] *Benetton v.Eco Swiss* (ECJ), *Baxter v. Abbot* (7th Cir), *Thales v. Euromissile* (Paris Court of Appeal), *Tensacciai v. Terra Armata* (Swiss Federal Tribunal/Milan Court of Appeal), *Marketing Displays v. VR* (Hague Court of Appeal), *Schott* (Thuringer OLG)

7. How can the enforcement of competition law be enhanced through international arbitration?

Choosing the seat of the arbitration is crucial as this determines the applicable antitrust laws. While this is not a legal obligation, it is a generally accepted and strictly observed convention that the law of the country where the seat of the arbitration is will govern the arbitration proceeding. Selecting the right arbitrator who is confident in dealing with complicated antitrust issues is also key. Arbitrators are frequently required to apply the laws of a number of very different jurisdictions, and requiring the arbitrator to also be an expert in competition law can be a challenge.

There are some basic features of arbitration that tend to attenuate the application of antitrust laws. Arbitrators are private actors, mandated by individuals and not by the state. Arbitrators therefore do not have the same obligation that judges have to apply the law. The main concern of the parties is their contractual rights, and other concerns may be compromised. This effects not just competition issues, but also issues of corruption and trade embargoes etc. As recognised in Mitsubishi, arbitration does not encourage court intervention. Arbitration also represents a somewhat uncertain system of legal ascertainment due to its international reach, and depending on the seat of the arbitration this may result in a weakened application of the law. In addition arbitrators have no coercive powers to order the gathering of evidence, in particular against third parties, who cannot be joined to the arbitration proceedings. Arbitrators can appeal for the assistance of state courts with regard to the gathering of evidence, but this practice is currently very rare. As the enforcement of antitrust requires vigorous consequences for the failure to provide evidence, there are some clear differences between the two procedures, which can lead to conflicting outcomes.

Despite some drawbacks, arbitration offers a number of great strengths in the enforcement of antitrust law. First, unlike in civil procedure systems, the parties can choose their arbitrator as a function of his or her ability to apply competition law. Second, the New York Convention requires courts of contracting states to recognise and enforce arbitration awards made in other states. It is signed by 145 countries around the world and can be enforced quickly and efficiently. In comparison the Hague Convention 'Choice of Court Agreements' of June 2005, which recognises and enforces international judgements, has been signed by only the US, the EU and Mexico. Therefore an arbitration award which legitimately enforces antitrust principles can potentially have more international weight than a court judgement.

Antitrust systems need to be clear about what they expect from international arbitration and the enforcement of competition law. There are questions, for example, over whether all aspects of antitrust should be applied as "mandatory norms or whether only parts of antitrust law merit state intervention when they are not observed. Neither EU or US laws are clear on this point. A significant way of improving the current situation is to create and enhance incentives for private actors to enforce antitrust law through private means. This avoids the need to change or review the arbitration system, but ensures competition law enforcement does not become marginalised. US law is already well adapted to this system, and the EU is currently debating how to encourage these incentives. One example is to create situations in which no costs are levied against a party to an arbitration which ventures to assert a *bona fide* antitrust argument. When creating these incentives, it is important that they are not specific to a particular court and have wider application. Antitrust systems also have flexibility to decide on standard of proof for any competition arguments raised, as arbitration does not specify what this should be. Education and advocacy about the goals, benefits and the crucial function of competition law should also be made clear to the arbitration community to heighten awareness of its importance. The worlds of competition law and international arbitration can co-exist and the focus should be on maintaining the current system of international arbitration and increasing private incentives for using competition law within arbitration.

8. The use of arbitration clauses in merger remedies

Another way in which arbitration can be used in competition law enforcement is through the inclusion of arbitration clauses in merger remedies. However a distinction should be made between commitments in merger cases, which are voluntary tools, and the imposition of remedies. There have been a number of merger cases accepting commitments to arbitrate, but this is very rare in an imposed remedy situation. For example, in order to enforce structural remedies the parties are given a time period in which to sell the divested business. If the divestiture is not carried out within the allocated time period then a divestiture trustee takes over, with the power to sell the divested business without any minimum price. The addition of arbitration to this process would not be practical. However, where arbitration can and has been used is in access commitments.

Access commitments oblige parties to grant access to, for example, technology licences or infrastructure. The important feature of these commitments is that they are not usually addressed to a specific party identified in the commitment, but to an unidentified number of third parties. The terms of the commitment will usually state a requirement for 'fair and reasonable' access that may have to be tailored to each individual case. This inevitably causes problems in terms of monitoring. One solution is the use of dispute resolution to establish what, in each specific instance, the 'fair and reasonable' terms are. The 2008 EU Notice on Remedies specifies that these access commitments must be as effective as divestitures. In particular they must be easy to monitor, and in order for them to be enforced by market participants themselves the commitments must be self-executing, i.e. with no need for intervening court action. The remedies notice specifically acknowledges that the use of arbitration, through established arbitration tribunals, together with the assistance of trustees, is one way to monitor such commitments. An alternative way would be dispute resolution mechanisms by regulatory authorities, for example in the telecoms market.

There have been four categories of cases in which arbitration clauses have been used in commitments:

- *Access commitments*. Arbitration clauses are often use to resolve disputes concerning the terms and condition of access in access commitments to physical infrastructures or intellectual property rights. Airline cases,[10] for example, often involve slot remedies, under which parties commit to transfer slots to new or fledgling entrants in order to stimulate competition. Disputes related to slot availability or terms and conditions can be dealt with using arbitration. There have also been cases regarding access in the railway sector,[11] access to patent pools[12] and non discriminatory access to pay TV channels.[13]

- *ADR overseen by a trustee*. In these cases the trustee issues an expert opinion, which can then be reviewed by either the Commission or a regulatory authority. This process was recently used in a case concerning access to pathways and rival infrastructure for the railway between Brussels, London and Paris.[14] ADR was deemed the most appropriate solution as the commitment involved details on the technical facilities and when these could be used by the new entrant, rather than general terms and conditions.

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10 Lufthansa/Austrian (2009), Lufthansa/SN Holding (2009), Iberia/Vueling/Clickair (2009)

11 Deutsche Bahn/EWS (2008)

12 Axalto/Gemplus (2006)

13 SFR/Tele2 (2007)

14 SNCF/LCR/Eurostar (2010)

- *Access commitments and dispute resolution involving regulatory authorities.* These cases depend on arbitration laws allowing regulatory authorities to act as arbitrators, and the seat of the arbitration will have to be established where this is legally permitted. One prominent case involved the Italian communications authority,[15] and others included the appointment of arbitrators by ESA/NASA[16] and the involvement of the Austrian telecoms regulator.[17]

- *Arbitration within contractual relationships*. In these cases the contract is already set out within the framework of the procedure, but the clarification of details can be carried out by way of arbitration proceedings. This type of arbitration has occurred in cases concerning gas storage transfer,[18] space charter agreements,[19] transitional arrangements and trademarks,[20] Dutch milk fund,[21] and technical Pay-TV platform.[22]

The legal framework for combining arbitration plus normal legal proceedings has been confirmed by two judgements of the General Court.[23] The arbitration clause in a commitment agreement has a two-fold nature. First it is part of the commitments submitted by the merging parties, meaning the parties are still bound by the legal consequences under the merger regulation. The EU can therefore enforce the commitments if the parties do not adhere to the arbitrary award. Secondly, from the point of view of the arbitrators, the *erga omnes* offer to third parties contained in these access commitments is not usually how an arbitral clause is drafted. There are also limits to the extent competition authorities can adopt arbitration proceedings. The EU cannot delegate its powers to an arbitral tribunal, and it remains the overall body responsible for the monitoring of commitments. The arbitral tribunal is then responsible for resolving the private dispute between the private parties, on the basis of the commitments. The arbitral court is not a regulator and cannot substitute itself for the EU, as evidenced by the fact that the EU can modify the commitments upon the request of the parties. The arbitrator must then take the commitments as they stand. The independence of the arbitrator is maintained and the procedure is carried out under the arbitrator's own responsibility, but with an element of co-operation with the EU.

The arbitration clauses used in commitment agreements have become more standardised in recent cases. They have more stability, but are also more specifically adapted to the procedure for the enforcement of merger commitments as evidenced in a number of recent cases.[24] The majority of clauses will be based on a pre-existing procedure such as that set out by the ICC or the London Court of International Arbitration (LCIA). A specific feature of the clauses used in merger commitments is the fast track procedure, which reflects the urgency of the proceedings. In commercial arbitration compensation is usually monetary, and an award of damages is sufficient. However, in merger cases the aim of the commitments is to remove the competition consigns identified by the EU, and restore effective competition on the market. The fast-track process therefore requires only one round of written submissions, including a

15 Newscorp/Telepiu (2003)

16 Alcatel/Finmeccanica (2005)

17 T-Mobile Austria/Tele.ring (2005)

18 GdF/Suez (2006)

19 DFDS/Norfolk (2010)

20 Akzo/ICI (2007) and Schering-Plough/Organon (2007)

21 Friesland/Campina (2008)

22 Newscorp/Premiere (2008)

23 ARD (2003) and AF/KLM (2007)

24 Axalto/Gemplus (2006), SFR/Tele2 (2007), Evraz/Highveld (2007)

detailed description of the action performed. Procedural time frames are also shortened, and the process is complemented by the possibility of preliminary rulings. The other special feature of the EU proceedings is the assistance by a trustee. Mediation will often take place under the supervision of the trustee before the start of the arbitral procedure. The trustees will be familiar with the proceedings as they will have been involved in the matter from the decision phase. The trustee will suggest a detailed description of the action to be performed, including all the relevant terms and conditions, and can also be used an as expert in the proceedings.

In terms of the burden of proof, the *prima facie* evidence rule is adopted, i.e. as all the relevant information is usually with the parties, the applicants and third parties only have to make a *prima facie* case. A more controversial issue from the perspective of the arbitration community is the co-operation with the EU. These are parallel proceedings and the EU therefore has an 'amicus curiae' role i.e. it can be present and ask questions at hearings and it can submit written briefs. The arbitral tribunal may also seek the EU's interpretation on the commitments, although there is no obligation to do this, especially where this may impact on the independence of the arbitral tribunal. There is also no setting aside or review procedure afterwards. One potential conflict between arbitration and competition procedures concerns the transparency of arbitral awards. The EU procedure is to publish all of its merger decisions. Therefore if arbitral awards are to be carried out through commitments they should also be published, in order to provide insight into the practicalities of the process. Commitments with arbitration clauses are not the 'norm' and the preferred type of commitments by competition authorities remain divestitures. However, for other types of remedies another enforcement mechanism is needed and arbitration provides an effective solution.

PRINCIPALES CONCLUSIONS

Par le Secrétariat

Le 26 octobre 2010 s'est tenue une Audition sur l'arbitrage et la concurrence au sein du Groupe de travail n° 3 du Comité de la concurrence de l'OCDE. Cette audition avait pour sujet principal le rôle de l'arbitrage dans la politique et les pratiques de la concurrence et s'est par ailleurs concentrée sur l'interface entre ces deux domaines juridiques. Elle a mis en relief le fait que de nombreuses procédures internationales doivent notamment régler des litiges liés à la concurrence et que l'arbitrage occupera vraisemblablement une place croissante dans la politique et l'application du droit de la concurrence.

Au cours de cette audition, six experts de l'arbitrage et de la concurrence sont intervenus : M. Emmanuel Jolivet, Conseiller général de la Cour internationale d'arbitrage de la CCI ; M. William Wood QC, Brick Court Chambers, spécialisé dans la médiation commerciale ; M^{me} Laurence Idot, Professeur à l'Université Panthéon-Assas (Paris) et membre de l'Autorité de la Concurrence ; M. Luca Radicati di Brozolo, Professeur à l'Université Catholique de Milan et Associé du cabinet Bonelli Erede Pappalardo ; M. Phillip Landolt, chargé de cours à l'Université de Genève et Associé du cabinet Charles Russell ; M. Akira Kawamura, Professeur à la Faculté de droit de l'Université de Kyoto et Associé du cabinet Anderson Mori et Tomotsune ; M. Johannes Lubking, Responsable d'unité à la Commission européenne et M. Christopher Liebscher, Associé du cabinet Wolf Theiss.

1. Remarques générales sur l'arbitrage

L'arbitrage peut se définir comme une situation dans laquelle un juge ou arbitre privé, désigné d'un commun accord par les parties et sous contrat, est mandaté pour régler un litige en prononçant une décision d'arbitrage. Un certain nombre de caractéristiques clés ressortent de cette définition.

L'arbitrage est un mode privé de règlement des litiges. Les arbitres se distinguent donc des juges par le fait qu'ils ont le pouvoir de faire état de la loi, mais non celui de l'appliquer. Les frais d'arbitrage sont pris en charge par les parties au litige. Ils comprennent les frais liés à l'arbitre, les frais de la chambre d'arbitrage (le cas échéant), et les frais liés aux experts auquel il peut être fait recours lors de la procédure. L'arbitrage est généralement la solution retenue lors de différends commerciaux entre les parties, comme dans le cas d'un litige contractuel. Néanmoins, il peut également être utilisé dans des cas impliquant un organisme d'État, sans relation commerciale. En effet, l'arbitrage peut par exemple avoir lieu entre une société et une autorité de la concurrence.

L'arbitrage présente d'autres caractéristiques : il est généralement réglé rapidement et les modes de recours contre la décision finale de l'arbitre sont peu nombreuses ; l'autonomie de la clause compromissoire doit être reconnue, tout comme le fait qu'elle peut être séparée du reste du contrat (c'est-à-dire que si un contrat est jugé nul et non avenu en raison d'une infraction au droit de la concurrence, la clause compromissoire n'en est pas annulée pour autant). Enfin, c'est l'arbitre qui prononce sa compétence pour s'occuper de l'affaire, et non l'État (c'est ce que l'on appelle le principe de « compétence-compétence »).

L'arbitrage peut être réalisé à l'échelle internationale, auquel cas l'arbitre dispose d'une plus grande marge de manœuvre pour déterminer le cadre de la procédure, ou à l'échelle nationale, auquel cas l'arbitre doit appliquer un certain nombre de règles et règlements d'ordre public.

L'arbitrage peut également être institutionnel ou *ad hoc*. L'arbitrage institutionnel est administré et géré par une chambre arbitrale comme il en existe un certain nombre de par le monde. L'arbitrage *ad hoc* s'inscrit dans le respect du droit de l'arbitrage et de toutes les procédures pertinentes, mais il est régi par l'accord des parties. D'après les affaires récentes, l'on constate une nette tendance à délaisser les arbitrages *ad hoc* au profit des arbitrages institutionnels, devenus la procédure la plus communément adoptée. Il existe toutefois deux considérations de premier ordre : (i) le choix du président d'un arbitrage institutionnel, puisqu'un désaccord entre les parties sur ce point peut soulever des problèmes, et (ii) le choix de la chambre arbitrale elle-même, car il en existe un certain nombre mais toutes n'ont pas l'expérience requise. Il est donc important de sélectionner une chambre d'arbitrage bien établie.

1.1. Avantages de l'arbitrage par rapport aux procès devant un tribunal national

- *Souplesse dans le choix de l'arbitre et de la procédure :* l'arbitrage permet aux parties de choisir l'arbitre et confère une certaine souplesse dans le choix du droit applicable et des règles juridiques et des principes généraux applicables à la procédure même. Les parties peuvent notamment décider d'appliquer le droit de la concurrence. Il est par ailleurs possible de combiner plusieurs mécanismes de règlement des litiges, en alliant par exemple l'arbitrage à la médiation.

- *Indépendance par rapport à un ordre juridique quelconque :* l'arbitrage n'est tenu à aucun droit particulier. Cette caractéristique peut être intéressante pour les parties lorsqu'un organisme public est impliqué puisque l'arbitrage peut alors avoir du recul par rapport à l'ordre juridique usuel.

- *Rapidité du processus :* l'arbitrage fournit un moyen plus rapide de résoudre les conflits que les voies habituelles offertes par des tribunaux surchargés. C'est tout particulièrement vrai pour les affaires de concurrence, qui traitent fréquemment des sujets complexes et peuvent demander un temps considérable aux tribunaux.

- *Vaste application de la décision :* une fois une décision d'arbitrage rendue, elle sera largement reconnue et appliquée par le biais d'un certain nombre de conventions internationales[1]. Par conséquent, si une sentence arbitrale est rendue dans un pays A, elle peut également être appliquée dans les pays B, C, D, E, etc. L'arbitrage peut également faciliter l'application d'un principe international qui n'est pas encore présent dans le droit applicable. Par exemple, si un principe de droit de la concurrence n'est pas reconnu dans un pays donné, le recours à l'arbitrage international plutôt qu'aux procédures traditionnelles d'application du droit par les instances publiques peut permettre d'étendre le principe en question à ce pays.

1.2. Désavantages de l'arbitrage par rapport aux procès devant un tribunal national

- *Manque de rigueur :* à ce jour, l'arbitrage n'est réputé avoir ni la même autorité, ni la même rigueur que l'application du droit par les institutions publiques du droit de la concurrence.

- *Absence de pouvoir d'instruction :* les autorités de la concurrence disposent de pouvoirs étendus pour exiger la remise de documents et faire exécuter cette injonction. Lors d'une procédure

[1] Par exemple la Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères de 1958, ou « Convention de New York ».

d'arbitrage, les parties peuvent certes être enjointes de remettre des documents, mais elles ne peuvent y être contraintes.

- *Manque de transparence :* la nature confidentielle de l'arbitrage peut être perçue comme un moyen de dissimuler certaines pratiques que les parties ne souhaitent pas voir rendues publiques.

- *Conflit entre les approches :* il est non seulement possible que deux tribunaux d'arbitrage rendent des décisions diamétralement opposées, mais aussi qu'un tribunal d'arbitrage rende une décision en opposition avec la décision prise par une autorité de la concurrence.

- *Absence de précédents :* les décisions arbitrales ne sont bien souvent pas publiées et restent confidentielles, ce qui empêche les autres tribunaux d'arbitrage de tenir compte de sentences antérieures. Par conséquent, aucun corps de règles ou de décisions de jurisprudence n'a été constitué. Les interprétations sont donc très susceptibles de varier, ce qui peut avoir un effet indésirable sur le droit de la concurrence.

2. Soulever les problèmes de concurrence lors de la procédure d'arbitrage

Selon le pays, les arbitres sont soumis à des degrés divers de pouvoir ou d'obligation d'appliquer le droit de la concurrence *sua sponte*. Un arbitre peut tenter d'amener les parties à réfléchir au problème de droit de la concurrence, ou encore soulever directement ce problème. C'est au cours de la procédure qu'il doit l'être, plutôt qu'au moment de rendre la décision finale, afin de permettre aux parties de répondre de manière appropriée.

Il n'existe aucune structure d'appel à proprement parler au sein de la procédure arbitrale, mais des questions concernant les dispositions d'ordre public en matière de droit de la concurrence peuvent être soulevées. Lors d'arbitrages institutionnels, c'est l'institution elle-même (à savoir la Chambre de commerce internationale) qui peut réexaminer une décision avant qu'elle soit rendue. Cela permet de s'assurer que tous les problèmes relatifs au droit de la concurrence ont été pris en considération par le tribunal. Lors d'arbitrages *ad hoc*, une intervention dite *amicus curiae* peut être menée avec soit les agences chargées de la concurrence, soit avec les tribunaux, soit avec les autres agences nationales chargées de signaler les problèmes liés au droit de la concurrence. Ainsi, ce type de problème apparaît souvent dans les tribunaux d'arbitrage puisque tant les arbitres que les parties et leurs experts juridiques sont de plus en plus sensibilisés au droit de la concurrence et soulèvent des questions en la matière. À ce jour, toutefois, aucune approche uniforme n'a été adoptée pour aborder ces questions.

3. La médiation, mécanisme de règlement extrajudiciaire des litiges (ADR) dans les affaires de concurrence

3.1. Remarques générales sur la médiation

Si la médiation se rapproche par certains aspects de l'arbitrage (pas d'implication des tribunaux, confidentialité des procédures et affaire conduite par un tiers neutre), elle soulève un certain nombre de questions distinctes de celles posées par l'arbitrage. L'une des différences clés entre la médiation et les autres formes de règlement extrajudiciaire des litiges (en anglais *Alternative Dispute Resolution*, abrégé ADR) est son aspect volontaire. La médiation est un processus basé sur le volontariat d'entrée de jeu, et qui le reste jusqu'à ce que les parties signent une décision exécutoire. Les parties ne sont pas tenues de poursuivre leur engagement et peuvent se retirer à tout moment. Contrairement à un arbitre, un médiateur ne rend aucune décision exécutoire ou sentence. Si les parties ne parviennent pas à s'entendre, la médiation laissera chacune insatisfaite et aucun accord ne règlera le différend. Le médiateur intervient comme facilitateur, en permettant aux parties de déterminer par elles-mêmes la manière dont elles souhaitent régler

le différend, plutôt qu'en fournissant une analyse des droits de chacune. Les accords de médiation font aussi la part belle à la confidentialité et la procédure est plus souple et moins formelle que celle des autres mécanismes d'ADR : aucun enchaînement prédéterminé des événements et aucune manière « correcte » de mener la procédure.

La procédure démarre généralement par une prise de contact de pré-médiation entre les principales parties, lors de laquelle les dates et lieux sont évoqués. Un médiateur doit également être choisi et approuvé par les parties. Ce dernier saisira alors l'opportunité pour rencontrer les parties et s'entretenir avec elles, ou avec leurs conseillers juridiques, et pour évaluer ce que chacune attend du processus de médiation. Un projet d'accord de médiation est ensuite établi, en vertu duquel les parties s'engagent à donner à des représentants le pouvoir de conclure un arrangement. L'accord précise le litige, fixe les honoraires et frais du médiateur et stipule qu'aucun règlement n'est possible sans accord écrit et signé.

Des sessions plénières, qui sont en fait des auditions informelles, sont généralement organisées en début de médiation. Certaines parties abordent ces sessions de manière très analytique, s'appuyant sur la jurisprudence pour étayer leurs arguments, tandis que d'autres engagent un dialogue franc et commercial. Pour la plupart, exprimer en public ses motifs de grief ou sa ligne de défense dans l'affaire est une étape cruciale de la procédure. Autre étape vitale, les entretiens privés, au cours desquels le médiateur rencontre chaque partie et discute en toute confidentialité des problèmes qu'elle peut rencontrer. Ces informations confidentielles ne peuvent être communiquées à l'autre partie sans autorisation expresse. Le médiateur peut ainsi obtenir une vue d'ensemble de tous les problèmes et de l'attitude de chaque partie. Après avoir laissé place à l'expression du mécontentement et des émotions en début de journée, la médiation se mue en une étude des problèmes potentiels et en une évaluation du risque – pour estimer le coût d'un procès –, avant de se clore par une négociation au terme de laquelle les conditions de l'accord sont signées. La procédure de médiation est souvent prévue pour une journée, mais peut prendre plus de temps lors d'affaires complexes telles que celles portant sur la concurrence par exemple. Une grande partie des médiations, y compris celles traitant d'affaires de concurrence, se terminent par une réunion privée des principales parties, en l'absence d'avocats ou du médiateur.

La médiation est une procédure de résolution complémentaire qui permet aux parties de sortir de la procédure d'adjudication formelle. Si la médiation échoue à aboutir à un règlement, les parties s'en remettront aux tribunaux pour statuer sur leur affaire, ce qui se soldera inévitablement sur le contentement d'une seule d'entre elles. La médiation donne donc la possibilité aux deux parties d'être satisfaites du résultat de la procédure. Il ne s'agit pas de la seule forme d'ADR, mais les autres tendent à s'approcher des interventions d'experts dans le cadre desquelles un tiers fournit des évaluations opposables ou non – et ces procédures d'ADR n'ont pas toujours livré un bilan très positif. Les parties veulent soit bénéficier des droits à la garantie d'une procédure régulière familière et intégrale dans le cadre d'un procès ou d'un arbitrage, soit s'engager dans une procédure reposant sur le volontariat telle que la médiation, dans laquelle elles disposent d'une autonomie et d'une maîtrise totales.

Les médiateurs travaillent en étroite collaboration avec le tribunal. Ils contribuent à organiser les intérêts communs des parties, tout en apportant les ajustements nécessaires afin de tenir compte de toute différence entre les situations de fait. Certaines autorités de tutelle ont suggéré d'utiliser des formes hybrides d'ADR : commencer par la médiation, puis s'orienter soit vers une décision non opposable, soit vers une sentence opposable si la médiation échoue. Ces formes hybrides ont toutefois tendance à manquer de crédibilité car la deuxième partie de la procédure réduit dans les faits l'efficacité de la première. Les parties seront réticentes à faire une offre en phase de médiation, pour peu qu'elle entraîne un résultat moins favorable ultérieurement. Les parties sont également moins susceptibles de communiquer des informations confidentielles en début de procédure si elles savent que le médiateur pourrait par la suite endosser le rôle d'arbitre. Par conséquent, une procédure hybride risque de compromettre les avantages d'une procédure

régulière d'arbitrage et de procès, tout en ne conférant pas l'autonomie et la maîtrise généralement offertes par la médiation.

En mai 2011, la Directive sur la médiation de l'UE est entrée en vigueur et tous les États membres doivent s'y conformer. Elle a pour objet de *« faciliter l'accès à des procédures alternatives de résolution des litiges et de favoriser le règlement amiable des litiges en encourageant le recours à la médiation et en garantissant une articulation satisfaisante entre la médiation et les procédures judiciaires »*. L'une des conséquences immédiates de cette Directive en droit britannique sera de permettre aux règlements issus d'une médiation d'être appliqués au même titre que le jugement d'un tribunal, ce qui nécessitera entre autres la mise en place d'une forme de consignation des règlements. L'Angleterre et le Pays de Galles recensent actuellement environ 6 000 litiges civils et commerciaux par an qui font l'objet d'une médiation, et le gouvernement britannique s'est par ailleurs engagé à agir en qualité de médiateur pour l'ensemble des litiges privés. Cependant, si la médiation est obligatoire, elle est imposée, ce qui a soulevé des craintes de conflit avec l'Article 6 de la Convention européenne sur les Droits de l'Homme.

3.2. Médiation et concurrence

La médiation est une procédure déjà bien ancrée dans les contentieux ayant trait à la concurrence. Elle offre tous les avantages d'un procès et de l'arbitrage, sans les coûts élevés qu'entraîne une longue procédure impliquant des experts juridiques et économiques. Globalement, il existe deux types d'affaires de concurrence qui font l'objet de médiations : les demandes de dommages-intérêts faisant suite à des décisions de condamnation par les autorités de la concurrence, et les différends relationnels concernant l'organisation actuelle d'un secteur. Aux États-Unis, la médiation a contribué aux recours collectifs, que ce soit en rapport avec des *mass torts*, ces délits ayant touché une multitude d'individus, ou des demandes de dommages-intérêts pour infraction au droit de la concurrence.

Il peut être difficile de trouver des exemples d'affaires ayant fait l'objet d'une médiation puisque les informations sont généralement confidentielles. Il est possible toutefois de citer deux médiations publiques de premier plan qui ont eu lieu au Royaume-Uni, la médiation réussie entre British Marine Federation et British Waterways à propos du marché des aires de mouillage et des marinas d'eaux fluviales[2], et la médiation avortée entre des preneurs de paris et Turf TV sur la vente d'images télévisées aux lieux de paris[3].

Les parties en médiation sont investies des mêmes responsabilités que si elles concluaient tout autre type d'accord. Le médiateur travaille avec le droit de la concurrence en toile de fond. De même, la réglementation de lutte contre le blanchiment de capitaux constitue une partie de l'arrière-plan juridique, et ces principes ne doivent pas être enfreints. Toutefois, le médiateur n'est tenu de respecter le droit de la concurrence que de manière limitée, c'est-à-dire en s'assurant que les parties ne facilitent pas un contrat illégal ou anticoncurrentiel.

4. Les litiges portant sur le droit de la concurrence peuvent-ils faire l'objet d'un arbitrage ?

Il faut établir une distinction claire entre l'arbitrage (i) en tant que moyen pour les personnes d'appliquer le droit de la concurrence par une action d'ordre privé et (ii) en tant qu'outil à la disposition des autorités de la concurrence pour faire appliquer le droit de la concurrence par le biais d'actions publiques. S'il existe des similitudes entre ces deux formes, ces dernières présentent également des différences considérables. Deux questions clés doivent être examinées : (i) un arbitre peut-il appliquer le droit de la concurrence ? et, (ii) si oui, quel droit de la concurrence sera appliqué, et comment ? Pour

2 www.cedr.com/solve/studies/?param=186

3 http://www.ft.com/intl/cms/s/0/bdec6c28-f79f-11dc-ac40-000077b07658.html#axzz1UAHJO58Q

répondre à ces questions, il convient de tenir compte de toutes les contraintes imposées par l'arbitrage, les procédures civiles et les règles de concurrence.

Le premier souci est de savoir si l'État acceptera « l'intrusion » de l'arbitrage dans la sphère de l'application du droit de la concurrence par une autorité publique. Dans les années 1970, la jurisprudence américaine (après l'affaire *American Safety*[4]) considérait que le droit de la concurrence n'était pas un terrain sur lequel l'arbitrage pouvait s'appliquer. Le droit français et le droit belge s'inscrivaient dans la même veine. Cependant, après l'affaire Mitsubishi de 1985[5], la Cour Suprême a délaissé la position traditionnelle et confirmé que, dans certaines conditions, les problèmes de concurrence pouvaient faire l'objet d'un arbitrage. Cette affaire a eu des conséquences considérables hors des États-Unis et un certain nombre de pays ont aujourd'hui changé de position sur le recours à l'arbitrage dans la résolution de litiges portant sur la concurrence. La nécessité d'une convention d'arbitrage est également une forte contrainte. C'est pourquoi l'arbitrage est généralement employé pour les litiges contractuels plutôt que délictuels. Même si le contrat comporte une clause compromissoire, la question se pose ensuite de savoir si des problèmes ayant trait au droit de la concurrence peuvent déclencher l'application de cette clause. Le cas s'est produit dans l'affaire *Provimi*[6] au Royaume-Uni.

L'arbitrage n'est possible que si le droit de la concurrence l'autorise et qu'un arbitre ne peut empêcher les autorités de la concurrence d'exercer leurs propres pouvoirs pour faire appliquer le droit de la concurrence. L'arbitre ne peut intervenir que pour déterminer les conséquences globales en droit civil de l'application du droit de la concurrence. En pratique, cela signifie l'attribution *ex post* de dommages et intérêts à une partie en conséquence de l'infraction au droit de la concurrence d'une autre partie. L'arbitrage ne peut jouer qu'un rôle très restreint dans l'application *ex ante* du droit de la concurrence, notamment dans les concentrations et les aides d'État, puisque ces domaines relèvent toujours de la compétence exclusive des autorités nationales de la concurrence (ANC).

L'augmentation des demandes de dommages et intérêts a eu des répercussions sur l'arbitrage, ce qui a entraîné certains problèmes spécifiques liés au droit de la concurrence américain. Après l'affaire Mitsubishi, une limite à l'arbitrage en matière de droit de la concurrence a été imposée afin de s'assurer que les demandeurs ne puissent être privés de leurs droits légaux. Cela ne pose aucun problème pour les procès intentés sur la base de droits contractuels, comme c'est souvent le cas en droit communautaire européen. Aux États-Unis toutefois, le rôle des demandes en triples dommages et des recours collectifs est fondamental en cela qu'il incite les victimes d'infractions au droit de la concurrence à demander des dommages et intérêts. La question est de savoir si ces cas doivent être exclus de l'arbitrage ou non. Les cours d'appel fédérales américaines se sont montrées divisées sur la question, mais lors de l'affaire *Stolt-Nielson SA*[7] en 2010, la Cour Suprême a statué qu'une action collective ne pouvait se faire en ayant recours à l'arbitrage si la convention d'arbitrage ne traitait pas cette question.

L'arbitrage est un outil normal de règlement des litiges commerciaux qui sera vraisemblablement de plus en plus employé pour résoudre des différends portant sur la concurrence. Le recours à l'arbitrage ne menace ni ne compromet toutefois l'application du droit de la concurrence, et il n'est aucunement nécessaire de modifier l'approche de base de l'arbitrage et l'examen des sentences arbitrales pour faire face à l'augmentation des contentieux portant sur le droit de la concurrence. L'arbitrage et son utilisation

4 American Safety Equip. Corp. contre J.P.MaGuire & Co., 391 F.2d 821 (2e cir. 1968)

5 Mitsubishi Motors Corp. contre Soler Chrysler-Plymouth, Inc. 723 F.2d 155 (1983), cert. granted, 105 S. Ct. 291 (1984).

6 Provimi Limited contre Aventis Animal Nutrition et SA & Ors [2003] EWHC 961 (Comm)

7 Cour Suprême des États-Unis, 27 avril 2010, décision dans l'affaire Stolt-Nielsen S.A. contre Animal Feeds International Corp., n° 08-1198, 2010 WL 1655826 (États-Unis, 27 avril 2010).

doivent donc être considérés comme un outil supplémentaire permettant d'appliquer correctement le droit de la concurrence.

5. Quelle doit-être l'attitude des arbitres à l'égard du droit de la concurrence ?

Il ne fait aucun doute que les arbitres ont le devoir d'appliquer le droit de la concurrence, et c'est ce que l'on attend d'eux. Par le passé, les devoirs des arbitres ont soulevé des doutes. Certains soutenaient alors que l'arbitrage étant sujet à l'autonomie des parties, les arbitres ne devaient pas aller au-delà de ce que ces dernières souhaitaient. Cependant, si les systèmes juridiques autorisent l'arbitrage des affaires de concurrence, on est en droit d'attendre que les arbitres appliquent le droit de la concurrence. Cela s'étend à l'application du droit de la concurrence même une fois qu'un accord a été conclu entre les parties. Les arbitres ont le devoir de justifier leur sentence par une argumentation d'ensemble, afin de démontrer aux tribunaux qu'ils ont traité les questions de droit de la concurrence d'une manière rigoureuse, cohérente et professionnelle.

Les parties, ainsi que tout autre arbitre impliqué dans la procédure, doivent convenir que la question de la concurrence fait partie intégrante de l'arbitrage. Une question d'arbitrage ne peut être soudain soulevée en fin de procédure et les parties doivent être capables de déceler, dans le dossier de l'affaire, qu'elle est susceptible de survenir au cours de l'arbitrage. Si l'on en croit la décision *Eco/Swiss*[8] de la Cour européenne de justice, il semblerait que la tendance soit à imposer aux arbitres le devoir de soulever toute question relative à la concurrence lors de la procédure d'arbitrage, bien que certains demeurent hostiles à tout devoir d'application du droit de la concurrence.

Dans les cas, rares, où les parties donnent l'instruction expresse de ne pas tenir compte du droit de la concurrence, l'arbitre doit refuser d'accéder à cette demande et, si nécessaire, se retirer de l'arbitrage. Dans certains cas, les arbitres peuvent même être tenus de porter l'affaire devant l'autorité de la concurrence compétente. Néanmoins, l'un des principes de base de l'arbitrage étant le secret, en l'absence de demande expresse à cet effet de la part des parties, l'arbitre ne serait généralement pas incité à divulguer l'affaire et à collaborer avec les autorités de la concurrence. De même, la participation de tiers ou l'intervention d'une autorité de la concurrence selon le principe de l'*amicus curiae*, si elle n'a pas été avalisée par les parties concernées, enfreindrait ce principe de base du droit de l'arbitrage. D'autres difficultés peuvent se présenter dans un contexte international lorsqu'il existe plusieurs systèmes juridiques dont le droit de la concurrence serait éventuellement applicable, et qu'il convient d'en choisir un.

6. Comment les tribunaux nationaux chargés d'examiner une sentence d'arbitrage doivent-ils traiter le droit de la concurrence ?

Les tribunaux sont généralement impliqués dans les affaires d'arbitrage lorsque survient un problème d'application de la sentence. Ce n'est que très exceptionnellement qu'un tribunal laissera de côté ou refusera l'application d'une sentence d'arbitrage. Deux approches doctrinales et jurisprudentielles ont été adoptées, la thèse maximaliste, et son homologue minimaliste.

Dans le cadre de *l'approche maximaliste*, les tribunaux nationaux sont tenus de réexaminer en profondeur les sentences arbitrales lorsqu'elles sont remises en cause ou lorsque leur application est requise. Cela comprend un réexamen complet de l'ensemble de l'affaire et de tous les éléments probants connexes. Derrière cette approche, il y a la volonté d'éviter le risque que l'arbitrage serve à contourner le droit de la concurrence. Les tribunaux peuvent donc examiner en détail si le droit de la concurrence a été « correctement » appliqué. Dans *l'approche minimaliste*, aucun traitement spécial n'est accordé aux sentences soulevant des problèmes de droit de la concurrence et l'accent reste mis sur une procédure hors

[8] Eco Swiss China Time Ltd contre Benetton International NV [1999] CEJ I-3055

tribunal et la signature d'un règlement à l'aide des arbitres. L'argumentaire consiste ici à soutenir qu'un réexamen complet de la sentence irait sans doute à l'encontre de l'objectif initial d'un recours à l'arbitrage et saperait la confiance accordée aux arbitres et à la chambre d'arbitrage. Les tribunaux ne devraient donc casser les sentences que lorsqu'elles constituent une atteinte grave à l'intérêt public.

Le réexamen à part entière d'une sentence va par ailleurs à l'encontre du principe selon lequel le droit de la concurrence peut faire l'objet d'arbitrages. Ce droit est une valeur fondamentale de notre système juridique et, si nécessaire, il doit être au cœur de l'analyse. Cependant, il n'est pas clairement établi que toutes les infractions au droit de la concurrence portent atteinte à l'intérêt public. L'application du droit de la concurrence appelle une analyse complexe et généralement économique qu'un tribunal peut être plus à même de mener qu'un tribunal d'arbitrage. Néanmoins, dans de nombreux cas, les opinions divergent sincèrement sur la manière dont une question particulière devrait être traitée et il n'existe sans doute pas de solution unique. Il n'est donc pas certain qu'un tribunal ou une chambre d'arbitrage applique systématiquement la loi mieux que l'autre.

Un réexamen minimal par les tribunaux de sentences ayant trait au droit de la concurrence ne menace pas sérieusement l'application de ce droit. Les arbitres l'appliquent eux-mêmes, et souvent de leur propre chef. Même si elles ne sont pas directement soulevées par l'arbitre, les questions de concurrence peuvent également l'être par les parties, dans le cadre de leur défense par exemple, et doivent ensuite être traitées dans le cadre de la procédure d'arbitrage. Dans certains cas, les parties peuvent ne pas vouloir que le droit de la concurrence entre dans la discussion et il n'est pas nécessaire que chaque infraction potentielle au droit de la concurrence soit décelée. Se pose dès lors la question de déterminer le mode d'examen approprié que l'arbitre doit appliquer. Depuis la décision de la Cour Suprême américaine dans l'affaire Mitsubishi, les tribunaux doivent vérifier que les arbitres ont traité les questions de droit de la concurrence avec une diligence raisonnable et n'ont pas abouti à un résultat qui constitue une atteinte grave à l'intérêt public (en appliquant par exemple une entente sur la fixation des prix).

Les arbitres ne sont toutefois pas tenus de s'engager dans un réexamen complet des faits, de l'analyse juridique et des éléments probants du dossier. Par conséquent, les tribunaux doivent se concentrer uniquement sur les infractions sérieuses et concrètes portant réellement atteinte aux objectifs du droit de la concurrence. Par exemple, le fait de ne pas prononcer le versement de dommages et intérêts dans la sentence ne porte pas en soi atteinte à l'intérêt public et ne porte pas préjudice à l'application du droit de la concurrence en général. Un certain nombre d'affaires ont porté sur des sentences en rapport avec le droit de la concurrence[9]. Toutes ont adhéré à ce que l'on appelle l'approche minimaliste, sans que l'on prétende de quelque manière qu'une d'entre elles portait gravement atteinte à l'application du droit de la concurrence. Il convient toutefois de souligner que le réexamen des arbitrages par les tribunaux et l'approbation d'une sentence par un tribunal ne peuvent en aucun cas se substituer à l'application du droit par les instances publiques. Les autorités chargées de la concurrence peuvent donc intervenir, par exemple, en ouvrant des enquêtes et en imposant des sanctions si la procédure d'arbitrage révèle de sérieux problèmes de concurrence.

7. Comment l'arbitrage international peut-il améliorer l'application du droit de la concurrence ?

Le choix du siège de l'arbitrage est un élément crucial car il détermine quel droit de la concurrence s'appliquera. Bien qu'il ne s'agisse pas d'une obligation juridique, il est généralement admis, et c'est là une convention strictement observée, que le droit du pays où se trouve le siège de l'arbitrage régira la

9 *Bennetton contre Eco Swiss* (CEJ), *Baxter contre Abbot* (7e cir), *Thalès contre Euromissile* (Cour d'appel de Paris), *Tensacciai contre Terra Armata* (Tribunal fédéral suisse/Cour d'appel de Milan), *Marketing Displays contre VR* (Cour d'appel de la Haye), *Schott* (Thuringer OLG)

procédure d'arbitrage. Il est également essentiel de choisir le bon arbitre, un arbitre convaincu d'être en mesure de traiter des questions de droit de la concurrence compliquées. Il est souvent demandé aux arbitres d'appliquer les lois d'un certain nombre de pays très différents. Dans ces circonstances, il peut être délicat d'exiger d'eux qu'ils soient également des spécialistes du droit de la concurrence.

Certaines caractéristiques fondamentales de l'arbitrage tendent à atténuer l'application du droit de la concurrence. Les arbitres sont des acteurs privés mandatés par des personnes et non pas par l'État. Ils ne sont donc pas tenus d'appliquer la loi au même titre que les juges. Les parties sont essentiellement préoccupées par leurs droits contractuels et les autres sujets peuvent être délaissés. Cela affecte non seulement les questions de concurrence, mais aussi les problèmes de corruption et d'embargos, etc. Comme l'a révélé l'affaire Mitsubishi, l'arbitrage n'encourage pas l'intervention des tribunaux. L'arbitrage représente par ailleurs un système quelque peu incertain de constatation juridique en raison de sa dimension internationale. Selon le siège de l'arbitrage, l'application de la loi peut s'en trouver affaiblie. Par ailleurs, les arbitres ne disposent d'aucun pouvoir coercitif pour recueillir des preuves, notamment contre des tiers ne pouvant être associés aux procédures d'arbitrage. Ils peuvent certes demander l'aide de tribunaux d'État pour le recueil de preuves, mais cette pratique est actuellement très rare. L'application du droit de la concurrence, quant à elle, exige de sévères conséquences en cas de rétention de preuves. Les deux procédures sont donc clairement différentes, ce qui peut conduire à des résultats contradictoires.

Malgré quelques désavantages, l'arbitrage offre un certain nombre d'atouts majeurs en matière d'application du droit de la concurrence. Tout d'abord, contrairement à ce que l'on observe dans les systèmes de procédure civile, les parties peuvent choisir leur arbitre en fonction de sa capacité à appliquer le droit de la concurrence. Ensuite, la Convention de New York impose aux tribunaux des États signataires de reconnaître et de faire appliquer les sentences arbitrales prononcées dans d'autres États. Elle a été signée par 145 pays du monde entier et peut être appliquée rapidement et efficacement. À titre de comparaison, la Convention de la Haye du 30 juin 2005 sur les accords d'élection de for, qui reconnaît et fait appliquer les jugements internationaux, n'a été signée que par les États-Unis, l'Union européenne et le Mexique. Par conséquent, une sentence d'arbitrage faisant appliquer légitimement des principes du droit de la concurrence peut parfois avoir plus de poids à l'international qu'un jugement de tribunal.

Les systèmes régissant le droit de la concurrence doivent stipuler clairement ce qu'ils attendent de l'arbitrage international et de l'application du droit de la concurrence. Entre autres, la question de savoir si le droit de la concurrence doit être obligatoirement appliqué dans tous ses aspects ou si seuls certains points de ce droit méritent l'intervention de l'État en cas d'infraction n'a pas été tranchée. Ni la législation américaine, si celle de l'Union européenne ne sont claires à cet égard. Il est une approche non négligeable qui permettrait d'améliorer la situation actuelle, celle de créer et d'améliorer des dispositions incitant les acteurs privés à faire appliquer le droit de la concurrence par des moyens privés. Elle éviterait d'avoir à modifier ou réviser le système arbitral, tout en assurant que l'application du droit de la concurrence ne devienne pas marginale. La législation américaine est d'ores et déjà bien adaptée à ce système et l'Union européenne mène actuellement des débats pour déterminer comment encourager ces incitations. Il serait par exemple possible de créer des situations dans lesquelles aucuns frais ne seraient imputés à une partie à l'arbitrage qui tenterait de faire valoir un argument de bonne foi relevant du droit de la concurrence. À cette occasion, il faudrait veiller à ce que ces incitations ne soient pas propres à un tribunal particulier et s'appliquent de façon bien plus vaste. Les systèmes de concurrence peuvent également décider des règles en matière de preuve s'appliquant à chaque question de concurrence, puisque l'arbitrage ne les précise pas. Pour accroître la sensibilisation à l'importance du droit de la concurrence, il faudrait également former la communauté arbitrale et promouvoir clairement auprès d'elle les objectifs, les avantages et le rôle déterminant de ce droit. Les mondes du droit de la concurrence et de l'arbitrage international peuvent coexister et il convient de viser avant tout la préservation du système actuel d'arbitrage international et l'incitation croissante des acteurs privés à utiliser le droit de la concurrence dans le cadre des arbitrages.

8. Le recours aux clauses d'arbitrage dans les mesures correctives des affaires de concentration

L'arbitrage peut aussi être employé pour appliquer le droit de la concurrence grâce à l'insertion de clauses d'arbitrage dans les mesures correctives des affaires de concentration. Il faut toutefois faire la distinction entre les engagements que peuvent prendre les parties dans les affaires de concentration sur une base volontaire, et l'imposition de mesures correctives. Dans un certain nombre d'affaires, l'engagement des parties à recourir à l'arbitrage a été accepté, mais l'arbitrage est très rarement imposé dans le cadre d'une mesure corrective. Par exemple, pour faire appliquer des mesures correctives structurelles, les parties disposent d'un délai pour vendre les activités dont elles doivent se désengager. Si elles ne le font pas dans les délais impartis, un mandataire chargé du désengagement prendra le relais et sera habilité à vendre l'activité concernée sans contrainte de prix minimum. L'ajout de l'arbitrage à cette procédure n'aurait aucun intérêt pratique. Toutefois, comme il l'a déjà prouvé, l'arbitrage peut être utile dans les engagements d'octroi d'accès.

Ces derniers contraignent les parties à octroyer l'accès à des licences technologiques ou infrastructures, entre autres. La caractéristique particulière de ces engagements est qu'ils ne s'adressent généralement pas à une partie donnée identifiée dans l'engagement, mais à un nombre inconnu de tiers. Les conditions de l'engagement exigeront généralement un accès « équitable et raisonnable », qui devra éventuellement être adapté à chaque affaire. Cela pose inévitablement des problèmes de surveillance. L'une des solutions consiste à utiliser une procédure de règlement des litiges pour établir, dans chaque cas, ce que seraient des conditions « équitables et raisonnables ». La Communication de l'UE sur les mesures correctives de 2008 précise que ces engagements d'octroi d'accès doivent être aussi efficaces que des désengagements. Ils doivent notamment être simples à surveiller et, afin que les acteurs de marché eux-mêmes puissent les faire appliquer, ils doivent s'exécuter d'eux-mêmes, c'est-à-dire sans que les tribunaux aient besoin d'intervenir. La communication sur les mesures correctives reconnaît spécifiquement que le recours à l'arbitrage par l'intermédiaire de tribunaux d'arbitrage, avec l'aide de mandataires, est un moyen de surveiller ces engagements. Il serait également possible que les autorités de tutelle mettent en place des mécanismes de règlement des litiges, sur le marché des télécoms par exemple.

On distingue quatre catégories d'affaires dans lesquelles des clauses d'arbitrages ont été employées dans des engagements :

- *Engagements d'octroi d'accès*. Les clauses d'arbitrage sont souvent utilisées pour régler des litiges portant sur les modalités et conditions générales d'accès dans le cadre d'engagements d'octroi d'accès à des infrastructures physiques ou à des droits de propriété intellectuelle. Les affaires impliquant des compagnies aériennes[10] comportent par exemple souvent des mesures correctives prévoyant l'engagement, par les parties, de transférer des créneaux horaires à de nouveaux entrants ou à de tout jeunes acteurs afin de stimuler la concurrence. Les litiges concernant la disponibilité des créneaux horaires ou les modalités et conditions générales de l'engagement peuvent être résolus via l'arbitrage. D'autres affaires ont également porté sur l'accès dans le secteur des chemins de fer[11], l'accès aux pools de brevets[12] et l'accès non discriminatoire aux chaînes télévisées à péage[13].

10 Lufthansa/Austrian (2009), Lufthansa/SN Holding (2009), Iberia/Vueling/Clickair (2009)

11 Deutsche Bahn/EWS (2008)

12 Axalto/Gemplus (2006)

13 SFR/Tele2 (2007)

- *ADR supervisés par un mandataire*. Dans ces cas, le mandataire exprime une opinion d'expert, qui peut par la suite être réexaminée soit par la Commission, soit par une autorité de tutelle. Cette procédure a été récemment employée dans une affaire d'accès à des chemins et infrastructures concurrentes pour la voie ferrée entre Bruxelles, Londres et Paris[14]. Un ADR a été jugé comme la solution la plus appropriée puisque l'engagement précisait quelles installations techniques pouvaient être employées par le nouvel entrant, et quand, plutôt que des modalités et conditions générales d'accès.

- *Engagements d'octroi d'accès et règlement de litiges impliquant les autorités de tutelle*. Ces affaires nécessitent que le droit de l'arbitrage permette à des autorités de tutelle d'agir en qualité d'arbitre. Le siège de l'arbitrage devra donc être établi dans un pays où c'est le cas. Dans une affaire de premier plan, l'autorité italienne chargée des communications était impliquée[15]. Dans d'autres, des arbitres ont été désignés par l'ESA/la NASA[16] ou encore l'autorité de réglementation du secteur des télécoms autrichienne était impliquée[17].

- *L'arbitrage dans le cadre des relations contractuelles.* Dans ces cas, le contrat est déjà présenté dans le cadre de la procédure, mais un arbitrage peut permettre de clarifier certains détails. Ce type d'arbitrage a pu être observé dans des affaires portant sur le transfert de stockage de gaz[18], des contrats d'affrètement spatial[19], des accords transitoires et marques commerciales[20], la fondation Dutch Milk Fund[21] et une plateforme technique de télévision à péage[22].

Le cadre juridique dans lequel l'arbitrage peut être allié à une procédure juridique normale a été confirmé par deux jugements du Tribunal de première instance des Communautés européennes[23]. La clause d'arbitrage d'un accord d'engagement a une double nature. Tout d'abord, elle fait partie des engagements proposés par les parties à la concentration. Par conséquent, les conséquences juridiques découlant de la réglementation des concentrations restent opposables à ces parties. L'UE peut donc faire appliquer les engagements si elles n'adhèrent pas à la sentence arbitrale. Deuxièmement, du point de vue des arbitres, l'offre applicable à tous les tiers (*erga omnes*) que contiennent ces engagements à l'octroi d'accès est différente des clauses arbitrales habituelles. Il existe par ailleurs des limites à la capacité des autorités de la concurrence à adopter l'arbitrage. L'UE ne peut déléguer ses pouvoirs à un tribunal d'arbitrage et elle demeure l'organisme global chargé de surveiller les engagements. Le tribunal arbitral est ensuite chargé de régler le litige d'ordre privé entre les parties privées, sur la base des engagements. Il n'est pas une autorité de tutelle et ne peut se substituer à l'UE, comme le prouve le fait que l'UE puisse modifier les engagements sur demande des parties. L'arbitre doit alors accepter les engagements tels quels. L'indépendance de l'arbitre est conservée et la procédure est menée sous sa propre responsabilité, mais moyennant une certaine coopération avec l'UE.

14 SNCF/LCR/Eurostar (2010)

15 Newscorp/Telepiu (2003)

16 Alcatel/Finmeccanica (2005)

17 T-Mobile Austria/Tele.ring (2005)

18 GdF/Suez (2006)

19 DFDS/Norfolk (2010)

20 Akzo/ICI (2007) et Schering-Plough/Organon (2007)

21 Friesland/Campina (2008)

22 Newscorp/Premiere (2008)

23 ARD (2003) et AF/KLM (2007)

Les affaires récentes ont révélé un recours plus systématique aux clauses d'arbitrage dans les accords d'engagement. Outre leur plus grande stabilité, elles offrent l'avantage d'être plus précisément adaptées à la procédure d'application des engagements de concentration, comme en témoignent un certain nombre d'affaires récentes[24]. La majeure partie des clauses se fondent sur une procédure déjà existante, comme celle établie par la CCI ou la London Court of International Arbitration (LCIA). Les clauses employées dans le cadre d'engagements liés à une concentration présentent une caractéristique particulière : la procédure accélérée, qui fait écho au caractère urgent de ces cas. Dans les arbitrages commerciaux, la réparation est généralement pécuniaire et une sentence réclamant des dommages et intérêts est suffisante. Dans les affaires de concentration, toutefois, les engagements ont pour objectif de neutraliser les obstacles à la concurrence identifiés par l'UE et de restaurer une concurrence efficace sur le marché. La procédure accélérée ne requiert donc qu'une phase de soumissions écrites, qui comporte une description détaillée de l'action entreprise. Les délais de procédure sont également raccourcis et le processus est complété par la possibilité de poser des questions préjudicielles. L'autre caractéristique particulière des procédures de l'UE est l'aide apportée par un mandataire. Le médiation est souvent menée sous la supervision de ce mandataire avant le début de l'arbitrage. Les mandataires connaissent les procédures car ils sont impliqués depuis la phase décisionnelle. Ils suggèrent une description détaillée (modalités et conditions générales pertinentes comprises) de l'action à entreprendre et peuvent également être utilisés à titre d'experts dans la procédure.

Pour ce qui est de la charge de la preuve, c'est la règle du commencement de preuve qui est adoptée, c'est-à-dire que toutes les données pertinentes sont généralement détenues par les parties et que les demandeurs et tiers ne sont tenus d'établir qu'un commencement de preuve. Du point de vue de la communauté arbitrale, il existe une question plus controversée, celle de la coopération avec l'UE. Il s'agit de procédures parallèles et l'UE a donc un rôle d'*amicus curiae*, à savoir qu'elle peut être présente et poser des questions lors des auditions et soumettre des dossiers écrits. Le tribunal arbitral peut également demander à l'UE son interprétation des engagements, bien qu'il n'y soit pas tenu, notamment lorsque son indépendance peut être affectée de ce fait. Il n'existe par ailleurs aucune procédure de mise à l'écart ou de réexamen a posteriori. Les procédures d'arbitrage et de concurrence peuvent entrer en contradiction sur le front de la transparence des sentences arbitrales. La procédure de l'UE consiste en effet à publier toutes ses décisions en matière de concentration. Par conséquent, si des sentences arbitrales doivent prendre la forme d'engagements, elles doivent également être publiées afin de donner des informations sur les aspects pratiques de la procédure. Les engagements comportant des clauses d'arbitrage ne sont pas les plus courants et les autorités de la concurrence continuent de privilégier les désengagements. Cependant, le besoin d'un autre mécanisme d'application se fait ressentir pour d'autres types de mesures correctives et l'arbitrage constitue une solution efficace.

[24] Axalto/Gemplus (2006), SFR/Tele2 (2007), Evraz/Highveld (2007)

ARBITRATION AND COMPETITION LAW: THE POSITION OF THE COURTS AND OF ARBITRATORS[*]

Note by Prof. Luca Radicati di Brozolo

The interplay between arbitration and competition law has for years been the subject of a lively debate amongst academics and practitioners and has led to interesting jurisprudential developments.[1] The initial divergences have now been largely overcome, if not on every issue of principle, at least when it comes to most of the practical implications. The time is therefore ripe for an overall assessment of the state of the matter.

One way to approach the topic is to consider it from the different viewpoints of those who are called upon to deal with it in practice. The first one is that of the courts. Before a court, the impact of competition law on arbitration can be raised in two situations, at the moment of the assessment of the validity of an arbitration agreement (and specifically in relation to arbitrability) and in setting aside or enforcement proceedings. The second viewpoint is that of the arbitrator, for whom competition law raises a variety of delicate problems.

There is in principle a third perspective from which the topic could be approached, and that is the one of the enforcers of competition law. However, nowadays the attitude of competition law enforcers towards arbitration is less problematic than it was in the earlier stages of awareness of the problems involved, at least in Europe, where the European Commission displayed a certain level of hostility towards arbitration. Now that the debate has progressed, it seems accepted that arbitration does not pose a particular risk to the enforcement of competition policy.

One of the purposes of focusing on this topic, and specifically of this paper, is therefore precisely to provide reassurance that this relaxed attitude is justified. Indeed, an unprejudiced analysis shows that arbitration does not stand in the way of effective competition enforcement; at the same time, it reveals that

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[*] This article is based on a discussion paper prepared by the author for *The Round Table on Arbitration and Competition Claims* organized within Working Party No. 3 of the Competition Committee of the OECD on October 26, 2010. It draws on earlier publications of the author on the subject, some of which are referred to below and which contain more detailed references to scholarly writings and decided cases. Luca G. Radicati di Brozolo is a professor at the Catholic University of Milan. Partner, Bonelli Erede Pappalardo, Milan-London.

[1] The literature on this topic is by now very extensive: for a full review of the subject matter and for comprehensive references see A. Komninos, *Arbitration and EU Competition Law*, forthcoming in J. Badow, S. Francq, L. Idot, *International Antitrust Litigation: Conflict of Laws and Coordination*, Hart, 2011. See also G. Blanke & P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer, 2010. More recently see also L. Idot, *Arbitration in Competition Law Disputes*, in I. Lianos and I. Kokkokis (eds.), *The Reform of EC competition law : new challenges*, Kluwer, 2010, p. 75 ff; M. De Boisséson, *Arbitrabilité et droit de la concurrence*, in *Liber Amicorum Bernardo Cremades*, 2010, p. 243 ff.

the need to respect the demands of competition enforcement does not pose undue strains on the general principles of arbitration.[2]

1. National Courts and Competition Law

In principle almost any question of competition can arise in private litigation. Competition law can be used by litigants as a defense (as a shield as is sometimes said) or as a ground for a claim (as a sword). When the dispute falls under an agreement to arbitrate, the applicability of competition law can be used as a ground to contest the validity or the effects of the agreement before a court, in particular before the which may be seized of the dispute by the party resisting arbitration. The issue is then one of arbitrability. Since the debate on this point is essentially settled, it can be dealt with quite briefly here.

If, on the other hand, the arbitration has taken place and an award has been rendered, the treatment by the arbitrators of questions of competition law alleged to be implicated by the award can give rise to an action for setting aside or for the refusal of recognition or enforcement. This aspect has given rise to considerable more controversy and raises significant theoretical and practical issues that deserve to be addressed in some detail.

1.1. The arbitrability of competition law

Since the seminal *Mitsubishi* judgment of the US Supreme Court[3] courts and commentators almost universally accept that the relevance of an issue of competition law to the settlement of the dispute is not a bar to arbitrability.

The consensus on this point rests to a large extent on the dual premise that arbitrators are under a duty to apply, and will apply, the relevant competition rules, more often than not just as competently as national judges, if not more, and that in any case in setting aside and enforcement proceedings the courts retain the possibility to cast a «second look» on the solution reached by the arbitrators. On a practical level, the justification for permitting the arbitrability of antitrust disputes rests on the fact that today the importance of competition law is almost universally recognized, since most legal systems contain some form of competition rules. Unlike in the past, arbitrators are well prepared to apply these rules and understand that it is one of their duties to apply them, just as they are required to apply all other mandatory rules relevant to the solution of the case. This goes hand in hand with the acknowledgment that, as will be shown below, arbitration is not a means to circumvent competition law and does not interfere with antitrust enforcement.

The recognition of the arbitrability of these disputes also has much to do with the need to respect the integrity of the arbitral process. Given the potential relevance of competition law in a broad range of disputes, if antitrust matters (just like matters relating to any other mandatory law) were not arbitrable, there would be an enormous scope for tactical manoeuvres aimed at interfering with the proper effects of the arbitration agreement.[4]

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2 This paper will not deal with the use of arbitration to police behavioural remedies, in particular under European Union merger control, which raises interesting problems which for the moment have remained largely academic since this type of arbitration has not been used in practice: see L.G. Radicati di Brozolo, *Arbitration in EC Merger Control : Old Wine in a New Bottle*, in *European Journal of Business Law*, 2007, p. 7 ff.

3 *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth*, 473 US 614 (1985)

4 For a more in-depth discussion of this subject see L.G. Radicati di Brozolo, *Arbitrage commercial international et lois de police*, in *Collected Courses of the Hague Academy of International Law*, vol. 315 (2006), p. 308 ff.; see also G. Blanke and R. Nazzini, *Arbitration and ADR of Global Competition*

1.2. The review of arbitral awards by courts in setting aside and enforcement proceedings

If there are few doubts as to what a court should do when confronted with a plea of inarbitrability based on competition law, there is greater uncertainty at the approach it should take when competition law is raised as a ground for setting aside the award or to resist its enforcement. The reason is a perceived tension between two fundamental pillars of the areas of law involved.

The first one is the basic tenet of arbitration law, now accepted in the majority of legal systems, that arbitral awards are in principle final, and from a practical point of view should enjoy the status of a decision of a State court not subject to review by a higher court. They can therefore be set aside or refused enforcement only on exceptional grounds. Specifically, there can be no review of the merits and the only grounds for annulment or refusal of enforcement having to do with the merits are public policy and *ultra petita*. The other lynchpin of the discussion is that competition law is mandatory and actually a fundamental underpinning of modern legal systems that must be vigorously enforced. The fundamental nature of competition law entails that it is almost unanimously acknowledged to be part of public policy.[5] The question is therefore whether the mandatory and public policy nature of competition law imposes a type of review of the award going beyond the minimal review normally considered indispensable to safeguard the finality in principle of arbitral awards.

As will be shown below, the recognition that competition law is part of public policy is not dispositive of how courts should review arbitral awards raising competition law issues and which are alleged to have violated that law because either they did not apply it or because they applied it erroneously. In such a situation a court is faced with two questions: (*i*) does the purported violation of competition law rise to the level of an infringement of public policy, and (*ii*) what type of review of the award must the court conduct to ascertain whether public policy is violated.[6] It is these two issues that must be addressed here.

1.2.1. The "maximalist" and "minimalist" approaches

The two issues have at one point been the subject of a heated debate amongst scholars, even though the courts have generally adopted a fairly converging approach which succeeds in reconciling the apparently opposite policy objectives of minimal review of awards and effective enforcement of competition law. Although also the doctrinal divergences have now been largely overcome, it is useful to give a brief overview of the opposite positions of commentators, often referred to as the maximalist and the minimalist positions.

The maximalist position is alleged to be dictated by a greater emphasis on the need to enforce competition law effectively. In essence, it rests on the axiom that only a very strict standard of review of

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Disputes: Taking Stock, in *Global Competition Law Review*, 2008, p. 48 ff. and J.-B. Racine, *Arbitrabilité et lois de police*, in *Revista Brasileira de Arbitragem*, 2009, 79 ff.

5 This principle was expressed in clear terms by the European Court of Justice in *Eco Swiss v. Benetton*, judgment of June 1, 1999, case 126/97, E.C.R. 1999, p. I-3055, the implications of which are the subject of varying interpretations by commentators (see L. G. Radicati di Brozolo, *Arbitrage commercial international*, cit. p. 351 ff.). The public policy nature of competition law was denied by the Swiss Supreme Court in *Terrarmata v. Tensacciai*, March 6, 2006, in *Revue de l'arbitrage*, 2006, p. 736 which has been criticized by several commentators (e.g. Radicati di Brozolo, *ibid*., p. 769).

6 These issues are treated more extensively in L. G. Radicati di Brozolo, *Court Review of Competition Law Awards in Setting Aside and Enforcement Proceedings*, in G. Blanke & P. Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer, 2010, p. 759 ff. (§ 22-001 ff.) For a broader perspective see Racine, *Droit économique et lois de police*, in *Rev. internationale de droit économique*, 2010, 61 ff. and L. G. Radicati di Brozolo, *Arbitrage commercial international*, cit. p. 363 ff.

arbitral awards raising competition law issues is capable of avoiding the flouting of competition law and an interference with the enforcement of competition policy. Hence maximalists argue in favour of a full-fledged review by the court of the award's findings of fact and of law to verify its flawless compliance with competition law even in the face of a mere allegation of its violation.[7] This position draws the extreme consequences from the proposition that competition law is part of public policy, which is held to imply an in-depth review of the award aimed at verifying that competition law has been correctly applied by the arbitrators. It is also an extreme application of the "second look doctrine" postulated by the Supreme Court in *Mitsubishi*, which in essence justified the arbitrability of competition law on the premise that courts retain the possibility to cast a "second look" at the award at the setting aside and enforcement stage. According to the maximalists from this it would follow that a strict standard of review of the award by the courts is the necessary *quid pro quo* for the enlargement of arbitrability.

Whilst in no way downplaying the fundamental role of the defence of competition law, the opposite position postulates that this objective is achievable in a way which is more respectful of general principles relating to arbitration and to the role of courts in the review of arbitral awards. This view contends that, also when faced with awards raising issues of competition law, the reviewing court should confine itself to verifying that the arbitrators have addressed them (where they have been raised before them or, in any case, where it was undisputable that they were pertinent or were intentionally concealed from them) and that they have decided them in a competent manner. The court should refrain from reviewing the arbitrators' findings of fact or of law and should not purport to ascertain whether competition law has been applied "correctly".[8]

The minimalist position rests largely on the proposition that considerable deference should be accorded to the solution reached by the arbitrators and to the ability of the latter to apply competition law in a competent manner. This deference is viewed as the almost inescapable corollary of the recognition of the arbitrability of competition law and, more generally, of mandatory rules. Moreover, it is predicated on the principles of finality and neutrality of arbitration and on the prohibition of a review of the merits. Deference to the arbitrators' decision is also justified by the fact that arbitration is recognized by States as a means of settlement of disputes on a par with recourse to national courts and that —at least with reference to international arbitration —this recognition is even dictated by an international convention (the New York Convention). It is true that States recognize arbitration only subject to their courts having the last word, but this is only insofar as it is necessary to avert the risk of serious and obvious violations of fundamental principles.

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7 For a comprehensive expression of the maximalist doctrine see C. Seraglini, *L'affaire Thalès et le nonusage immodéré de l'exception d'ordre public*, in Cahiers de l'arbitrage, 2005, n. 2, p. 5 ; B. Hanotiau, O. Caprasse, *Public Policy in International Commercial Arbitration*, in E. Gaillard and D. Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards*, London, 2008, p. 787 ff. For a re-reading of the maximalist position in a more moderate light see P. Mayer, *L'étendue du contrôle, par le juge étatique, de la conformité des sentences arbitrales aux lois de police*, in Mélanges Gaudemet Tallon, Paris, 2008, p. 459 ff.; Ch. Seraglini, *Le contrôle de la sentence au regard de l'ordre public international par le juge étatique: mythes et réalités*, in Cahiers de l'arbitrage, 2009/1, p. 5.

8 See L.G. Radicati di Brozolo, *Antitrust: A Paradigm of the Relations Between Arbitration and Mandatory Rules – A Fresh Look at the Second Look*, in *International Arbitration Law Review*, 2004, p. 23 ff.; L.G. Radicati di Brozolo, *L'illicéité 'qui crève les yeux' : critère de contrôle des sentences au regard de l'ordre public international*, *Revue de l'arbitrage*, 2005, p. 529 ff.; L.G. Radicati di Brozolo, *Arbitrage commercial international et lois de police*, cit. pp. 363 ff.; K. Hilbig, *Das gemeinschaftsrechtliche Kartellverbot in internationalem Handelschiedsverfahren*, München, 2006; A. Mourre, note in *Journal du droit international*, 2008, p. 1107; P. Schlosser, *Articles 81 and 82 EC-Treaty and Arbitration: A German Perspective*, in Cahiers de l'arbitrage, 2009/1, p. 27.

The presumption of deference to the decision of the arbitrators finds support in the exemplary language of the US Supreme Court, which laid the cornerstones of the standard of review of arbitral awards in antitrust matters:

> "while the efficacy of the arbitral process requires that substantive review at the award enforcement stage remain minimal, *it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them*"[9]

The full meaning of this holding, and the relation between the recognition of arbitrability of anti-trust claims and a standard of minimal review, has been authoritatively enunciated by another US court which reasoned that

> "*Mitsubishi* did not contemplate that, once arbitration was over, the federal courts would throw the result in the waste basket and litigate antitrust issues anew. This would just be another way of saying that antitrust matters are not arbitrable"[10]

The nature of the review of awards in the minimalist perspective is equally well encapsulated in yet another US judgment which approved a lower court's rejection of a request for vacatur of an award in the following terms:

> "it is not manifest that the arbitrator disregarded the law in finding […] this finding was not irrational, arbitrary or capricious"; "a review of the arbitration record, including the pleadings and exhibits submitted to the arbitrator, transcripts, and the arbitrator's award and findings, indicates that the arbitrator was fully appraised of both parties' arguments, the applicable law and developed an extensive familiarity with the case. […] Nor is it evident to this Court that the arbitrator purposely ignored the applicable law in making the award";
>
> "the arbitrator, in coming to its findings, was well versed in the legal elements that constituted exclusionary, anticompetitive conduct, as well as the facts of the case"[11]

While these pronouncements are expressed with reference to US antitrust law, their intellectual underpinnings are equally applicable to court review of arbitral awards under other competition law systems. Competition law is indeed no less fundamental in the US than elsewhere. Actually the role of courts in the enforcement of competition law is more significant in the US than, for example, in Europe, where public enforcement of competition law is much more important than private enforcement since the brunt of enforcement rests on the European Commission and on national competition authorities. There is thus no reason to believe that a stricter standard of court review of awards should be necessary elsewhere than in the United States.

The view that an in-depth review of the merits of awards implicating competition law is not indispensable to safeguard public policy also rests on the assumption that, contrary to the belief of the maximalists, public policy does not coincide with mandatory rules. This means that not every conceivable violation of, or non-compliance with, a mandatory rule, and specifically with a rule of competition law, can be characterized as a breach of public policy under Article V(2)(b) of the New York Convention or under

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9 *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth*, 473 US 614 (1985), at p. 638, italics supplied

10 *Baxter Int'l v. Abbott Laboratories*, 315 F. 3d 716 (7th Cir. 2003)

11 *American Central Eastern Texas Gas Company v. Union Pacific Resources Group* (5th Cir. 2004) which premised these findings on the statement that "the reviewing court must resolve all doubts in favor of arbitration".

national provisions on annulment of awards. It is only the most serious violations of these rules that rise to the level of breaches of public policy.

Furthermore, this approach rejects the Manichaean belief that it is always possible to draw a clear distinction between "correct" and "incorrect" applications of competition law (and of law in general) and is accordingly less sanguine about the assumption that an in-depth review of arbitral awards is invariably capable of ensuring the "correct" application of competition law. Indeed, it seems naïve to believe that, in the presence of a subject matter replete with factual and legal complexities, as is the case in most disputes involving competition law, there is only one "correct" solution to the issue and that this is moreover self-evident. In such circumstances it seems a pure petition of principle to hold that the findings of the court reviewing the award can be considered a more "correct" application of competition law than those of the arbitrators.

To take the most common situation in the review of competition law awards, there is no assurance that an arbitrator's finding of absence of violation of competition law (e.g. that the contract is not null because it is does not conflict with the prohibition of anticompetitive agreements or because it meets the conditions for an exemption) is any less "correct" than the possible contrary finding by a reviewing court that competition law has been violated. The court's finding may well be due to reasons having nothing to do with a better enforcement of competition law. The court may not necessarily be as well, or better, versed in competition law than the arbitrators; it may simply be more conservative or more formalistic; often it will not have had the opportunity to review the evidence or the economic analysis in as much detail as the arbitrators; it may have a different appreciation of the facts or of the legal principles; or, quite simply, it may just have a diverging view on an issue that is intrinsically debatable.

The hypothetical greater ability of courts compared to arbitrators to detect and sanction violations of competition law is all the more debatable after the shift from a formal approach to the application of competition rules to an economics-based approach.

Not only, therefore, does an in-depth review not automatically lead to a better application of competition law. What is worse, such a review entails an exponential increase in the likelihood of annulment or non-enforcement of awards as a consequence of the courts' second- guessing the arbitrators' appreciation of the facts and the law. This is because courts are not immune to the almost innate propensity of any reviewer to find faults in what has been done by others.[12] If required to review in depth the merits of the arbitrators' findings, it is inevitable that courts will very often have different views. The upshot is a very serious threat to the finality in principle of awards that is not justified by the need to avoid serious infringements of competition law — or, indeed, even just be the enforcement of competition law.

Moreover, a requirement that courts review awards in depth whenever a violation of competition law is simply alleged would provide a formidable tool for dilatory and bad faith tactics by the losing party in the arbitration, whose motivation is merely self-interest and not the "correct" application of the law. The prospect of negative consequences arising from a finding that the attempt to attack the award was spurious (damages, interest, penalties, legal costs etc.) may not necessarily act as an effective deterrent, especially if there is a reasonable likelihood that the attack will be upheld as a result of a propensity of the court to review the merits and of a scarce tendency to sustain the finality of awards.

[12] As aptly put by the US Supreme Court in *Burchell v. Marsh*, 58 U.S. 344, at 350 (1854): "We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion".

1.2.2. The compatibility of a restrained review of awards with effective competition law enforcement

Accepting the arbitrators' decision, save if it manifestly violates a fundamental principle, is by no means tantamount to abdicating the State's ultimate role of ensuring the proper enforcement of competition law. In other words, trusting the arbitrators does not mean allowing private parties to manipulate the law or being "soft" on anti-trust enforcement.

An in-depth review of the award is not indispensable to ensure the effectiveness of private enforcement of competition law and to act as a deterrent against the use of arbitration to circumvent competition law. Arbitrators routinely, and quite competently, apply competition law, more often than not even of their own motion when they consider it applicable. Therefore, even if the parties opt for arbitration in the hope of avoiding competition law, they have no certainty of achieving this result. There is always a strong likelihood that competition law claims will eventually be raised in case of dispute by the party which believes it can benefit from them. As will be discussed below, it is implausible that arbitrators will knowingly lend themselves to a strategy by the parties to use arbitration to achieve illegitimate anticompetitive goals.[13] In any event, especially given the publicity usually surrounding these cases if they are brought to court, were an unpardonable violation of competition law to remain unsanctioned by the court reviewing the award, there remains also the possibility of an intervention by the competent competition authorities or of a suit for damages by third parties.[14] Competition authorities are not prevented from acting in the presence of an alleged violation of competition rules even in the presence of a final award. The *res judicata* effect of the latter between the parties is not preclusive of a different assessment by the enforcers.

Thus, contrary to the fears voiced by the supporters of an in-depth review, the standpoint which is more in line with the basic principles of arbitration law in no way underrates the fundamental importance of competition law or the need to enforce it effectively and to prevent the use of arbitration to circumvent it. Where the two positions differ is in the belief that an in-depth control is better suited to ensure this goal, or is perhaps the only instrument for this. Even a restrained review is capable of leading to the annulment or to the refusal of enforcement of awards that unquestionably violate competition law and thus of protecting the interests of competition law and policy. Where the violation is not *prima facie* apparent from a perusal of the award —and possibly, if circumstances require, of the pleadings and the main elements of the file — it is unlikely that the award can be so seriously flawed as to entail an actual violation of public policy.

Even if such a review were not to weed out every single award which could be conceived to endorse an incorrect application of competition rules, this would not per se be fatal to competition policy. Indeed, what is crucial for competition policy is that there be no opportunity for an award that is seriously and indisputably flawed (or that is the result of a deliberate attempt to evade competition law) to escape annulment or refusal of enforcement and, more generally, that there be no risk of a systematic abuse of arbitration to circumvent competition law. A review of awards aimed at ensuring that the arbitrators have addressed the competition law issues in a competent manner and have not condoned a patent and undeniable violation of the applicable rules suffices to ensure the attainment of this goal.

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13 See L.G. Radicati di Brozolo, *Arbitrage commercial international* (*supra*, footnote 8), p. 379 ff. and P. Mayer, *L'étendue du contrôle…* (*supra*, footnote 7), § 25

14 It is interesting that in none of the cases where an award was alleged to violate competition law (including the very broadly publicized *Thalès v. Euromissile* case discussed below) does there seem to have been an intervention of the competition authorities, although such an intervention was invoked at least in the *Tensacciai v. Terra Armata* case (Swiss Federal Tribunal, March 6, 2006, *supra*, footnote 5) and Milan Court of Appeal, July 15, 2006, in *Riv. dell'arbitrato*, 2006, p. 645 ff., with an annotation by L.G. Radicati di Brozolo).

Competition policy does not require that each and every situation which could, on some reading of the applicable rules, be characterized as violating competition law be scrutinized in detail and sanctioned. In other words, competition policy is not jeopardized if occasionally an award which applies competition law in an a debatable way is left to stand.[15] A review of the published court decisions that have annulled or refused enforcement to arbitral awards for an alleged contrast with competition law shows that the awards in question either were not even "wrong" from a competition law perspective or had in any event adopted a solution which was at most questionable,[16] but certainly not serious enough to rise to the standard of a breach of a fundamental principle capable of threatening the overall effectiveness of antitrust enforcement.

In sum, the approach favourable to a restrained review aims to strike the balance between an effective and realistic protection of competition law objectives and the principles governing arbitration. The opposite approach seems motivated by an overrated concern that arbitration provides a means for the elusion of anti-trust law and by the belief that ordinary mechanisms for the control of arbitral awards are unable to tackle the possible risks. What this view overlooks is that even such a scrutiny is incapable of preventing the paradigmatic situations in which arbitration would be used to circumvent competition law. For instance, in cases where both parties are seriously bent on violating competition law and on using arbitration to resolve their disputes relating to such illegal conduct without calling into question the underlying illegality. Even the strictest standard of court review would be unavailing if, in such a situation, the parties succeed in their intent and obtain an "award" settling the dispute with the assistance of "arbitrators" who, whether intentionally or not, lend themselves to the parties' strategy. This is because the award is unlikely ever to be submitted to a court.

1.2.3. The practice of courts

Overall, the practice of the courts follows the approach that awards raising competition law issues should not be subject to a more intrusive court review than other awards and that the ordinary review in the light of public policy is sufficient.

The courts in the United States are unwavering in their position that arbitral awards cannot be subject to an in-depth review and that the decisions of arbitrators should be deferred to, save in exceptional circumstances.[17]

The situation is now essentially the same in Europe.[18] Even the European Court of Justice, which in *Eco Swiss* firmly laid down the now uncontested principle that competition law is part of public policy, recognized that "it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances".[19] The position of the French courts is particularly firm in holding that an intrusive inquiry into the award should always be avoided. In the widely publicized *Thalès v. Euromissile* judgment, the Paris Court of Appeal refused to annul an award for damages for breach of contract which

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15 Experience shows that even national courts, including the highest ones, can sometimes make serious "mistakes" in applying competition law (see for instance the infamous judgment of the Italian Corte di Cassazione which held that consumers are not protected by competition law: Cass. civ. n. 17475/2002 in *Danno e responsabilità*, 2003, p. 390).

16 See A. Mourre and L.G. Radicati di Brozolo, *Toward Finality of Arbitral Awards: Two Steps Forward and One Step Back*, in J. of Int. Arbitration, 2006, p. 180

17 See for instance the cases referred to in footnotes 10 and 11 above

18 For a detailed review of the case law see L.G. Radicati di Brozolo, *Court Review of Competition Law Awards*, cit., § 35-035 ff

19 *Eco Swiss v. Benetton* (*supra*, footnote 5), para. 35

had not even examined the antitrust issue, given that this was raised for the first time in the annulment proceedings.[20] The court held that the violation of public policy must be "flagrant, effective and concrete" and that it was not for it to decide the merits of a very complex dispute relating to the mere allegation of illegality of certain contractual provisions that had been neither pleaded nor decided before the arbitrators. This approach has been confirmed several times by the French courts, including the Cour de Cassation both in setting aside and in enforcement proceedings.[21]

A restrictive approach to court review is followed also by the courts in Italy,[22] in Germany,[23] Sweden,[24] Belgium[25] and Greece.[26] There have been a few decisions which followed a more intrusive standard of review, one of which has been reversed on appeal, but they do not seem to express the mainstream position on the subject.[27]

1.2.4. The standard of court review of awards raising competition law issues

Despite some remaining divergences on the proper approach to the review by courts of awards raising competition law issues, the main points now seem fairly well established and broadly shared.

To begin, there is a consensus that court review of awards in setting aside and enforcement proceedings is essential to ensuring that arbitration is not used as a tool to avoid competition law, on the assumption that arbitrators are under an obligation to apply competition law.[28] Therefore, awards that raise

20 Paris Court of Appeal, November 18, 2004, in *Rev. arb*., 2005, p. 271. See L.G. Radicati di Brozolo, *"L'illicéité qui crève les yeux": critère de contrôle des sentences au regard de l'ordre public international*, *ibid*., p. 529 ff.; A. Mourre, in *Journal du droit international*, 2005, p. 357; D. Bensaude, in *Journal of International Arbitration*, 2005, p. 239 ff

21 Cour de Cassation, June 4, 2008, *SNF v. Cytec*, in *Rev. arb*., 2008. p. 473, annotated by I. Fadlallah ; *Journal du droit international*, 2008, p. 1107, annotated by A. Mourre; JCP 2008.I.164 § 8, note by Ch. Seraglini; Paris Court of Appeal, March 15, 2007, *Tamkar c. RC Group*, unpublished; Paris Court of Appeal, October 22, 2009, *Linde v. Halyvourgiki*, in *Cahiers de l'arbitrage/The Paris Journal of International Arbitration*, 2010, p. 181 with annotation by L.G. Radicati di Brozolo, *Arbitrage et droit de la concurrence: vers un consensus*

22 Court of Appeal of Milan, July 15, 2006, *Terrarmata v. Tensacciai* (*supra*, footnote 14) and Court of Appeal of Florence, March 21, 2006, *Nuovo Pignone v. Schlumberger*, in Riv. dell'arbitrato, 2006, p. 741

23 OLG Thüringen, August 8, 2007, *SchiedsVZ*, 2008, p. 44

24 Svea Court of Appeal May 4, 2005, *Republic of Latvia v. Latvijas Gaze*, discussed in A. Mourre, note in *Journal du droit international*, 2008, p. 1107 ff

25 Brussels Court of Appeals, June 22, 2009, *Cytec v. SNF*, in *Cahiers de l'arbitrage/The Paris Journal of International Arbitration*, 2010, p. 181 with annotation by L.G. Radicati di Brozolo

26 Court of Appeal of Thessaloniki, Judgment 1207/2007 confirmed by the Greek Supreme Court, Judgment 1665/2009, referred to in A. Komninos (supra fn. 1)

27 OLG Düsseldorf, July 21, 2004, *IPRspr*, 2004, p. 443; The Hague Court of Appeal, March 24, 2005, *Marketing Displays*, in *Stockholm International Arbitration Review*, 2006, p. 201; see A. Mourre and L.G. Radicati di Brozolo, *Towards Finality of Arbitral Awards* (*supra*, footnote 16) showing that the award entailed no error in the application of competition law; Tribunal de Bruxelles, March 8, 2007, *SNF c. Sytec*, *Rev. arb*., 2007, p. 303 ff. reversed by the judgment of the Court of Appeal mentioned in the preceding footnote

28 See L.G. Radicati di Brozolo, *Arbitrage commercial international et lois de police* (*supra*, footnote 8), p. 438 ff

issues of competition law may in certain — albeit exceptional — circumstances be set aside or refused enforcement if they violate competition law. The instrument for this is public policy.

The scrutiny of awards through the prism of public policy to filter out unacceptable violations of competition law raises two separate issues. First, what types of violations of competition law constitute breaches of public policy? Second, what is the appropriate level of analysis to which courts must subject an award in order to detect whether its treatment (or non-treatment) of competition law violates public policy? An adequate balance between the two competing policies of finality of awards and effective antitrust enforcement can be struck with regard to both of these prongs of the standard for review of awards.

1. The infringements of competition law that qualify as breaches of public policy

From the fact that competition law, or at least its basic objectives, are part of public policy it does not follow that any alleged violation of competition law can result in the setting aside or refusal of enforcement of an award for violation of public policy.

Even the most rigorous and respected supporters of in-depth review[29] now concede that, in order to ensure a balance between the respect of public policy and the effectiveness of arbitration, the breach of public policy (and therefore of competition law) must be "effective" and "concrete". This means that the compatibility of the award with public policy must be verified with regard to the situation at hand, so as to determine whether the arbitrators' solution truly jeopardizes the goals of competition policy. The erroneous application, and even the non-application, of competition law by the arbitrators, and even a mere departure from a decision of a competition authority,[30] are not in and of themselves sufficient to lead to a breach of public policy. The only breaches of competition law capable of qualifying as violations of public policy, and thereby of entailing the setting aside or refusal of enforcement of an award, are therefore those which seriously jeopardize the goals of competition policy. From the requirement that the violation of public policy must be serious it follows that the arbitrators' decision cannot be chastised for errors or omissions which do not entail severe consequences for competition policy.

This conclusion takes into due consideration the aim of finality in principle of awards. It is also premised on the acknowledgement that opinions may differ as to the correct solution to a specific problem involved in the application of competition law to a given set of facts and that

> "It does not make sense to […] to set the award aside when the judge in setting aside proceedings does not completely agree with the arbitrators' solution, whether he is of the opinion that the arbitrators should have been more stringent in applying [...] competition law, or whether he suspects that the arbitrators did not exhaust their possibilities to acquire an accurate picture of the market situation."[31]

This approach in essence also takes stock of the fact that sanctioning each and every purported violation of competition law, even if this remains undetected or unpunished in an arbitral award, is not indispensable to the furtherance of competition policy. The deterrent effect sought by the rules of competition law remains intact as a result of the certainty that any serious violations of such rules which

29 See P Mayer, *L'étendue du contrôle…* (*supra*, footnote 7), para. 21; Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), p. 16 ff

30 See A. Komninos, M. Burianski, *Arbitration and Damages Actions Post-White Paper: four common misconceptions*, in G.C.L.R., 2009, at p. 27

31 See P. Schlosser, *Articles 81 and 82 EC Treaty and Arbitration* (*supra*, footnote 8)

may have been condoned in the award will not pass muster at the stage of the review of the award, coupled with the lack of certainty that the arbitrators themselves will be amenable to condone any such violation.[32]

Even a leading supporter of the maximalist view concurs that — to qualify as a breach of public policy — an infringement of competition law must be "*concrete, effective and serious*".[33]

Obviously, like with all general rules, it may be difficult to pinpoint with precision what constitutes a concrete, effective and serious violation of competition law. There will however be little doubt that an award which condones a horizontal agreement embodying a so-called hard-core restriction of competition law, such as market sharing, price fixing or exchange of sensitive information in a horizontal agreement, will easily be found to run counter to public policy. It is less obvious that a violation of public policy will be found in an award dealing with a vertical restriction, since this type of restriction is generally viewed as less serious.[34] Likewise, at least certain types of abuses of dominant position could under given circumstances be considered as typifying serious violations of competition law entailing a breach of policy, as could certain violations of State aid rules. A violation of public policy could perhaps be found also where an award deliberately and unjustifiably ignores competition law.

As even the maximalists now concede, in such cases a breach of public policy will obtain only if the award imposed the perpetuation of an anticompetitive behavior.[35] Instead, public policy would not in principle be contravened if the arbitrators simply award damages for a past conduct, in a situation where the purported violation of competition law has ceased.[36] It is on the basis of this reasoning that a traditional maximalist[37] has approved the French courts' decision to grant enforcement to an award which, despite declaring an agreement null and void for breach competition law, awarded damages for an amount greater than that which would have been due under the avoided contract.[38] The courts and the commentator recognized that, once the anticompetitive behaviour has ceased, also as a result of the declaration of nullity of the contract, the award for damages is immaterial from the perspective of public policy. Such a decision does not reduce the deterrent effect of the likelihood that in future cases serious breaches will be sanctioned by the arbitrators or by the courts.

2. The nature of the scrutiny of the award by the reviewing court

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32 See supra, footnote 13

33 See Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), para. 32 ff. This formula is a variation of the one used by the French courts (in particular in the *Thalès* and *SNF* cases referred to in footnotes 20 and 21 above) where the term "flagrant" is replaced by "serious". In practical terms this position does not differ from the one a staunch supporter of a minimalist review of awards, who explains that "flagrant", as used by the French courts, means that the violation must be "clear" (as opposed to debatable) and "substantive" (as opposed to formal): see I. Fadlallah, *supra*, footnote 21, p. 484.

34 See A. Mourre, note in *Journal du droit international*, 2008; L. G Radicati di Brozolo, *Arbitrage commercial international* (*supra*, footnote 8), p. 374

35 See P Mayer, *L'étendue du contrôle…* (*supra*, footnote 7), para. 21; Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), p. 18

36 See P Mayer, *L'étendue du contrôle…* (*supra*, footnote 7), para. 21; Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), para. 34

37 Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), para. 34

38 See the decisions of the Paris Court of Appeal and of the Cour de Cassation, as well as the one of the Brussels Court of Appeal, in the *SNF* case, *supra* footnotes 21 and 25

A broad convergence of views exists also as to the intensity of the scrutiny of the award by the courts to assess whether a violation of public policy has occurred. Maximalists too in practice recognize that an in-depth scrutiny —while not to be ruled out altogether — should remain exceptional.

(i) Review based only on the award

The review should not entail a re-judgment of the dispute.[39] The proceedings for the setting aside or the enforcement of the award should not be an opportunity for the losing party in the arbitration, so to speak, to have a second bite at the cherry. On the other hand, it is difficult to contest that, if the review is to be meaningful in order to operate as a deterrent against awards seriously capable of jeopardizing competition, the remit of the reviewing courts cannot merely be that of rubberstamping awards. Courts must therefore exercise some measure of control. As noted by one commentator, this control should be "*genuine, while at the same time restrained*".[40] This means that courts cannot simply limit their review to verifying that, on its face, the award fails to reveal blatant illegalities. In order to carry out their function properly, courts must be in a position to have a sufficiently clear picture of the overall situation. The reviewing court cannot therefore restrict itself to controlling the operative part of the award, since, taken by itself, this will almost invariably be meaningless for the purposes of revealing a possible breach of public policy. The reviewing court must at least examine in some detail the reasoning of the award. In the majority of cases this should be sufficient to stave off the need for a more exhaustive analysis into the merits of the case.[41] This will generally be the case where the reasoning is sufficiently exhaustive as to the underlying legal and factual issues and as to the grounds for the arbitrators' conclusions on the issues of competition law.[42]

The court's review of a comprehensive reasoning should fairly easily reveal the absence, or the presence, of any violation of public policy. Such a review will allow the court to assess whether the tribunal has addressed the relevant competition law issues with the requisite attention and competence, or the reasons for its failure to do so (for instance, because they were not pleaded by the parties). In most cases where the arbitrators have dealt with competition law diligently, there will be no possibility for setting aside or refusal to enforce on grounds of public policy. As mentioned above, the reviewing court cannot refuse to endorse the arbitrators' decision simply because it disagrees with it, because it considers the reasoning or the conclusions to be incorrect, or because it believes that there has been a mere error of law or an insufficient or incorrect appreciation of the facts (including, importantly in competition cases, the economic analysis) or a contradiction in the reasoning.[43] This applies also where the arbitral tribunal has held competition law to be inapplicable in the given case (for example because there was no restriction of competition in light of its conclusions of the structure of the markets). Conversely, the perusal of the reasoning may reveal whether the tribunal has ordered the continuation of a clearly and seriously anti-competitive behaviour or has inexcusably pardoned behaviours that are completely irreconcilable with the basic tenets of competition law. In these cases the court will be in a position to set aside the award or to refuse enforcement without an in-depth review into the underlying facts and law. If no violation of public

39 Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), p. 19

40 Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), para. 23

41 For a discussion of the meaning of the prohibition of the review of awards on the merits, and for a criticism of the more restrictive views of P. Mayer and Ch. Seraglini, see I. Fadlallah, in *Rev. arbitrage*, 2008, p. 480 ff

42 The need to limit the scrutiny to the reasoning of the award seems to have been endorsed even by the Brussels Court of First instance which adopted a maximalist approach in the *SNF* decision (*supra*, footnote 27) subsequently reversed by the Court of Appeals (*supra*, footnote 25).

43 It is in this sense that the dictum of the US Supreme court in the *Mitsubishi* decision (see footnote 9 above) still retains its entire forcefulness.

policy is apparent upon the examination of an exhaustively reasoned award, it is difficult to imagine that the award can be so seriously flawed as to require further analysis by the reviewing court.

(ii) Exceptional cases calling for a review going beyond the scrutiny of the award

In certain cases the mere analysis of the arbitrators' reasoning may be insufficient to allow the reviewing court to evaluate with due consideration whether the award entails a violation of public policy. In these circumstances it is probably inevitable that the court will have to look further. It may have to look into the elements of the file of the arbitration (in particular the pleadings and the evidence). In extreme cases it is even conceivable that the detection of a breach of public policy would require a full-fledged investigation into the facts and the law.

However, only in exceptional circumstances should there be a need for such further review, going beyond the analysis of the award and at most a general review of the main elements of the file. (*a*) The first category of awards for which a mere scrutiny of the reasoning could prove insufficient is that of awards so poorly drafted, summary or difficult to understand that they provide no indication whatsoever allowing the court to assess whether the arbitrators have addressed the competition law issues with a minimum of competence and professionalism. Even in this case, however, a further review of the award may be justified only if it is *prima facie* evident that such a review would be likely to lead to the discovery of a violation of competition law that is concrete, effective and serious enough to constitute a breach of public policy, and not merely an incorrect application of competition law, in the terms discussed above. (*b*) A further investigation may also be justified in the presence of a well grounded suspicion that the arbitrators have (wittingly or unwittingly) lent themselves, through their award, to provide a fraudulent cover to an anti-competitive behaviour. This could occur where the award itself does not reveal any factual or legal circumstances which could be characterized as violations of competition law, but other elements justify an inference that the arbitration was used to conceal a clearly illegal transaction. A typical example would be the case where the arbitration was aimed at resolving a dispute relating to the functioning of a cartel (for instance for the violation of a market-sharing or price-fixing agreement), but this is not reflected in the award. As mentioned above, this situation is unlikely to occur with any frequency. (*c*) A third situation which may warrant court scrutiny going beyond the reasoning of the award is where the issues of competition law have not been raised or pleaded in the arbitral proceedings and the arbitrators have failed to raise the point of their own motion. Even in such cases, however, a full-fledged review is not necessarily required. It will definitely not be required where, from the facts of the case as recounted in the award, it is apparent that, even if ascertained, the purported violation of competition law would not arise to the level of a breach of public policy, in the sense discussed above.[44] If, on the other hand, based on such facts, a strong case could be made for a breach of public policy, one could conceivably admit that the court undertake a further examination of factual and legal arguments, but this only to a very limited extent. The court should also give due regard to the reasons why the matter was not brought up during the arbitration.[45]

(iii) The importance of the reasoning of the award and the presumption of deference to the arbitrators' conclusions

Except in these situations, at least the first two of which are likely to be relatively rare, it should usually be sufficient for the reviewing court to examine the reasoning of the award. For the reasons

44 This was the situation, for instance, in the *Thalès* case (*supra*, footnote 20) where the competition law issue had not been raised, but where the arbitrators simply awarded damages, without ordering the continuance of a possibly illegal conduct. According to the principles discussed above (Section B.4.1) such an award is not contrary to public policy.

45 L.G. Radicati di Brozolo, *Arbitrage commercial international et lois de police* (*supra*, footnote 8), p. 1431 ff. and Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), para. 41

mentioned above, this examination should be carried out with an *a priori* positive disposition towards the work of the arbitrators, or in other words with a presumption of deference to their conclusions.[46] The reviewing court should not review such conclusions in depth, and so much the less should it second-guess them, save in the face of serious reasons.

Obviously, the reviewing courts' amenability to accept the arbitrators' conclusions should be all the greater if the reasoning of the award shows that they have tackled the task of dealing with competition law in a competent manner, even if their decision is not shared by the court. This indirectly puts a strong onus on the arbitrators to provide a thorough and exhaustive reasoning of their decision on these matters. Given that the reviewing court must be put in a position to verify that competition law issues were duly appraised in the arbitration, if arbitrators want to shield their award from the risks of annulment or refusal of enforcement, or at least from intrusive scrutiny, they bear the burden of demonstrating that they have considered the relevant issues of law and fact and dealt with them in a professional manner. Only in this way can they increase the chances of insulating the arbitration from a scrutiny going beyond the analysis of the award and minimize the risk of setting aside and refusal of enforcement.

Since a full-fledged review of the merits of the case is structurally inconsistent with the scope of the review of awards at the setting aside and enforcement stages, it is reasonable that the review of the award and of the arbitral process should remain fairly minimal even in the three special categories of cases considered in the preceding sub-section. Given the specific features of these situations, in extreme cases one could imagine a sort of reversal of the presumption that, failing an unambiguous indication of a concrete, effective and serious breach of competition law, an award cannot be held to fail the standard of public policy. In other words, exceptionally an award falling within one of the three categories could be declared contrary to public policy even in the presence only of reasonable doubts, as opposed to a certainty, as to the existence of a concrete, effective and serious breach of competition law.

A further conclusion is that the mere allegation of a breach of competition law —or, for that matter, even evidence of a breach of competition law or of the arbitrators' failure to sanction such failure — cannot suffice to provoke a review of the result of the arbitration in the light of public policy. In order to obtain such a review by the court, the party petitioning for setting aside or resisting enforcement on these grounds must show with a very high degree of persuasiveness that the breach, if ascertained, would constitute a serious, effective and concrete breach of public policy, according to the principles outlined above.[47]

2. Arbitrators and Competition Law

Having identified the proper role of national courts at the review stage of awards implicating competition law, one must turn to consider the position of arbitrators when confronted with disputes which raise this issue. This is an equally thorny subject that goes to the source of the arbitrator's power and duty to apply competition law and to the way in which arbitrators should exercise their prerogatives in this respect.[48]

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46 Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), para. 40

47 Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), para. 42

48 For a more exhaustive treatment of this issue see Radicati di Brozolo, *Arbitrage commercial international et lois de police*, cit., p. 438 ff.; G. Blanke and R. Nazzini (*supra*, footnote 4), p. 79 ff

2.1. The source of the arbitrators' "duty" to apply competition law

Particularly with regard to the application of competition law, as of all other mandatory rules, the position of arbitrators is substantially different, and more delicate, than that of judges. Judges are organs of the State with an unquestionable duty to apply the competition rules of the forum and in most cases are entitled to disregard those of other countries, given that neither the enforceability of their judgments abroad nor the enforcement of foreign competition law is their concern. Conversely, arbitrators are not organs of any State and have no forum; moreover they owe their primary allegiance to the parties who, in most cases, will not have specifically agreed to the application of competition law. Yet, there is an expectation, perhaps even a requirement, that arbitrators apply competition law. As shown above, the arbitrability of competition law is premised largely on the assumption that antitrust rules will be applied by the arbitrators. Moreover, a serious violation of competition law enshrined in the award or an unjustified failure by the arbitrators to apply competition law may lead to the setting aside or to refusal of enforcement within the limits discussed in the previous section. Given this situation, it is not easy to assess whether arbitrators have the power, or an actual legal obligation, to apply competition law.

2.1.1. The irrelevance of the will of the parties, of the lex causae and of the lex arbitri

The arbitrators will find little guidance in the sources on which they primarily rely to assess their duties in relation to the application of legal principles, i.e. the will of the parties, the *lex arbitri* and the *lex causae*. This is because the applicability of competition law depends on criteria which are specific to it. The one principally used to determine its territorial scope is the effect on competition in the market of the country whose law is at stake.

In the light of this, the source of the arbitrators' duty to apply competition law obviously cannot lie in the will of the parties. As noted above, the parties will normally have made no specific provision for the application of competition law by the arbitrators and they may even have assumed that competition law would not be applied. Nonetheless, the absence of party agreement cannot of itself be a bar to the application by the arbitrators of mandatory rules such as those of competition law. Conversely, even in the presence of an agreement of the parties purportedly providing for the application of competition law, the arbitrators would be well advised to pursue the matter further with the parties if the competition law in question does not require to be applied by virtue of its own criteria for application.

By the same token, also the law governing the merits of the arbitration, even if it has been chosen by the parties, is irrelevant. The competition rules of the *lex causae* do not require to be applied merely by virtue of their being part of this law, even if chosen by the parties, unless their own criteria so dictate. For example, if the law governing the merits is Swiss or English law (whether or not by virtue of a specific designation), but the contract does not affect the Swiss market or the English market (or the EU market, since EU competition law is part of English law), there is no apparent justification for applying Swiss, English or EU competition law.

For the same reason, the arbitrators' power or duty to apply competition law will as a rule not derive from the law of the seat of the arbitration, since that law will not mandate the application of the local competition law if the relationship submitted to arbitration has no effects on the markets of that country. For instance, if the seat of the arbitration is in Switzerland and the relationship impacts on the market of the European Union, of the United States or of Brazil, Swiss competition law will not be applicable. On the other hand, the *lex arbitri* (including its conflict of laws rules which may or may not be applicable also to arbitrators) is unlikely to require the application of the competition law of a third State. To continue with

the same example, Swiss law will not require that arbitrators sitting in Switzerland apply a foreign competition law.[49]

2.1.2. Other principles and criteria: which competition law?

Since the ordinary sources of their power to apply the law are unavailing in this respect, and since conversely a failure to apply competition law can impact on the destiny of the award, arbitrators find themselves in a serious predicament when faced with a situation where competition law is arguably applicable.

In such a situation arbitrators can find some guidance in broader considerations. One is their duty to render an enforceable award spelled out in the ICC Rules of Arbitration (Article 35) but usually considered inherent in the arbitrators' mandate. This implies that they will be expected to take into account the competition rules in force at the place of enforcement, assuming of course that such rules require to be applied based on their own criteria. More generally, arbitrators will have to bear in mind something akin to a professional duty not to become accomplices of a violation or circumvention of the law. While it is true that arbitrators are primarily at the service of the parties, it is now recognized that that they are not their mere servants and that in some way they are also under a broader duty to see that justice is done. As repeatedly underscored above, it is indeed largely on the assumption that arbitrators will not knowingly disregard applicable competition law that States allow the arbitrability of competition law disputes. Thus the application of competition law by arbitrators is in a sense the implementation of a bargain between States, on the one hand, and the arbitral community, on the other hand.[50]

Whilst this may be useful as a starting point, it will not necessarily be entirely helpful, save perhaps in the most straightforward situations, typically where there is a coincidence between the place of arbitration, the place of enforcement and the affected market. For, instance where the contract affects only the market of the European Union, the *lex arbitri* is that of a Member State and the award is likely to be enforced only in a Member State, because all the parties and their assets are located there, from a purely pragmatic standpoint there should be little discussion that the arbitrators should apply EU competition law.

The solution will be less obvious in more complex situations. This is typically the case in the presence of a plurality of competition laws that at least in principle could be held to be applicable or where the place of enforcement cannot be identified in advance, also bearing in mind that the enforcement court will not normally be concerned about the violation of the competition law of another country. In such circumstances arbitrators are confronted with the absence of any generally recognized conflict principles on the coordination of public and mandatory law, since such principles do not exist even for States and their courts, let alone for arbitrators.

They should therefore start by considering the competition rules which claim to be applied, taking into account the countries whose markets are affected by the transaction. The applicability of those rules by virtue of their own criteria, regardless of any specific agreement of the parties and of whether they are part of the law of the seat or of the *lex causae* and even of the place of likely enforcement, could be justified following an approach based on the principle of "self-connection" of mandatory rules (*auto-rattachement*

49 See e.g. the judgment of the Swiss Federal Tribunal in the *Terra Armata* case (*supra*, footnote 5)

50 In applying competition law arbitrators may also have in mind a broader consideration of the "interests of arbitration" which requires that they confirm the perception that arbitrators apply competition law, since a generalized refusal of arbitrators to do so could have negative repercussions on the future amenability of courts to recognize arbitrability in this field.

des lois d'application immediate) propounded by some French scholars.[51] Such an approach, which might be viewed as the flip side of the arbitrators' lack of a forum, must obviously be applied with reason and pragmatically. Indeed, if applied in an absolute manner it would lead to the application of all the potentially applicable competition laws. This would be somewhat of a paradox, since it would mean that competition law would be more likely to be taken into account in arbitrations, than before courts, which as a rule will only consider their own competition rules.

Therefore, in deciding whether to apply competition law, and which one to apply, the arbitrators should consider only those having a genuine and reasonable title do be applied in light of the circumstances of the case. For this purpose, it is reasonable that some consideration be given also to what would be the most likely alternative fora to the arbitration, given the parties' places of business and other relevant jurisdictional connecting factors, and to what competition law would have applied in such fora. For instance, in the case of a contract between an English and a US party having an anticompetitive effect in either the EU or the US, or in both, EU and US antitrust laws would consider themselves applicable. An arbitrator, even if sitting in a third country, should arguably apply such rules, regardless of the prospect of enforcement of the award in the UK or in the US, since those rules would be applied in the most likely alternative fora to arbitration, were the latter not available. Simply put, by failing to apply competition law in such a situation the arbitrator could be regarded as an accomplice of a circumvention of the applicable competition laws. The situation would be different if the contract between the same parties were to affect competition in the market of a third country before whose courts the dispute between the parties would be unlikely ever to be brought, even absent the arbitration agreement. Although that country's competition law would certainly claim to be applied in principle, because its courts would lack jurisdiction over the dispute, it would difficult to view the recourse to arbitration as determined by the intent to evade the competition law of that country. The case for the application of that competition law by the arbitrators is thus less compelling.

All this said, the arbitrators remain without hard and fast principles to guide them in these circumstances. They must therefore exercise good judgment in navigating between the twin perils of being accused of aiding in the violation of competition law and of assuming a role of universal enforcers of competition law which certainly is not theirs. Their task is made easier by the convergence between national competition law systems, at least on the basics, and by the fact that awards can be set aside or refused enforcement only in case of serious violations of basic principles. This means that, where more than one competition law system is applicable, arbitrators may not have to decide whether to apply one or the other and can be held to act conscientiously if they abide by common fundamental principles.

2.2. Duties of arbitrators and party autonomy

From the conclusion that arbitrators are under a generic duty to apply competition rules unquestionably deserving to be applied in light of the circumstances, and that the will of the parties is not paramount in this context, it does not follow that the will of the parties is necessarily irrelevant. Different situations must be considered.

It may first of all happen that the parties expressly agree on the application of competition law. Although, as noted above, the will of the parties should not be decisive for the application of a competition law that is not applicable of itself, such an agreement may aid the arbitrators in resolving some of the problems outlined in the previous section.

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[51] See e.g. P. Mayer, *Le phénomène de la coordination des ordres juridiques étatiques en droit privé, Cours general de droit international privé*, in Collected Courses of the Hague Academy of International Law, vol. 327 (2007), p. 180 ff

A second situation is the one where competition law is invoked by one of the parties. Provided of course that it is applicable by virtue of its own connecting factors, in the light of the foregoing discussion, in such a case there is little room to contest that the arbitrators may, and should, apply competition rules. The fact that the party may be reneging on an earlier tacit or explicit agreement not to invoke competition law would seem immaterial. Given the obvious illegality of such an agreement, neither the parties nor the arbitrators would be bound by it, nor could that agreement in any way be viewed as a condition for the parties' consent to arbitration. Incidentally, as observed earlier, it is precisely the arbitrators' power to apply competition law in such circumstances that greatly reduces the risk of arbitration being used to circumvent competition law, since, once a dispute has arisen, the parties will invariably resort to all available tools, including invoking a presumed illegality under antitrust law. The application of competition law by the arbitrators in such a situation would also be difficult to criticize as a violation of the principle *ne eat arbiter ultra petita partium*.

It goes without saying that the arbitrators are expected to apply competition law to its fullest extent, and are therefore not bound by the more restrictive standard to which courts have to adhere at the stage of the review of the award, as discussed in Section II above. In applying competition law the arbitrators are also entitled to make use of all their powers, in particular when it comes to evidence. It is, however, questionable whether they may consult the competent antitrust authorities, even where a court could do so in similar circumstances, such as for instance pursuant to Article 15 of Reg. (EC) 1/2003. In any event the procedures would have to be tailored to the specifics of arbitration, in particular its consensual nature.[52]

The situation is more complex if both parties are in agreement in directing the arbitrators not to consider competition law. As intimated above, such a condition appended to the arbitrators' mandate would be illegal and certainly would not bind the arbitrators. Of course, the arbitrators cannot be prevented from acting on the parties' instructions. However, their doing so would the entail the risk of their being held personally liable for aiding and abetting an illegal conduct[53] and even put their fees at risk, given the illegality of their mandate. If, instead, the arbitrators refuse to be a party to the illegality, they would be well advised not to accept the mandate if the instructions to disregard competition law are given at the outset of the arbitration. If, on the other hand, the issue arises at a later stage, in principle the arbitrators could proceed with their mandate and render their award applying competition law. However, since this would be in stark contrast to the will of the parties, for whom any ensuing award would presumably be worthless, it is questionable that the arbitrators would indeed be allowed to render an award dealing with the competition law issues. Were they to do so, assuming that their mandate had not been revoked beforehand, the parties would presumably be entitled to refuse to pay the arbitrators' fees for any activity performed after requesting that they not deal with the issue. Conversely, of course, the arbitrators would be entitled to resign for good cause and would be entitled to their fees until the moment the issue arose, and possibly also to damages.

The final and more realistic possibility is that competition law is not pleaded by the parties, whether intentionally or because they fail to realize its relevance. In such a case the question is whether arbitrators are permitted to, or should, raise the matter of their own motion.[54] The answer is in principle in the affirmative. If the arbitrators have a "duty" to apply competition law on account of its mandatory nature,

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52 See L.G. Radicati di Brozolo, *Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration: a Fresh Look at the "Second Look"*, in *Int. Arb. L.R.*, 2004, p. 33 f

53 Under European Union competition law, for example, they could be considered as instruments of the anticompetitive conduct, in line with the reasoning of the Court of First Instance in *Treuhand v. Commission*, Judgment of July 8, 2008, in case T-99/04. See G. Blanke and R. Nazzini (*supra*, footnote 4), p. 87 ff

54 For a discussion of this issue see L.G. Radicati di Brozolo, *Arbitrage commercial international*, cit., p. 479 ff

there is no reason why they should not do so simply because the parties do not refer to it. Also in such a case the arbitrators are entitled not to be seen to condone a violation of mandatory rules. One of the difficulties is that, except where the failure to invoke competition law is the result of an illegal agreement between the parties, raising the issue by the arbitrators could have the result of favoring the party which might benefit from its application. Arbitrators must therefore tread carefully before applying competition rules not invoked by the parties. They should do so only in the presence of strong indications, based on the record, that competition law would indeed be applicable in the given case and that the failure to take it into account would result in a serious violation. It is equally clear that, if the arbitrators decide to apply competition rules of their own motion, they cannot do so without giving the parties the opportunity to address the matter in detail, absent which they could be faulted for a violation of due process.[55]

3. Conclusion

Initially the discussion on the relations between arbitration and competition law was characterized by a tension between the experts of the two areas of law. Competition specialists saw arbitration as a threat to effective competition law enforcement. Arbitration specialists feared that the need to ensure the respect of competition law could become a Trojan horse to subvert well established principles on the nature of the review of arbitral awards and of party autonomy.

The foregoing analysis should have demonstrated that both concerns are unjustified and that an adequate balance can be struck between the two competing, but equally fundamental, policies of antitrust law and of arbitration law. The balance is the result of a better understanding that both policies can be properly taken into account in the complementary phases of the arbitration itself and of the review process by the courts.

As to the arbitration, the misplaced idea that arbitrators are purely at the service of the parties and can do nothing without their consent has been abandoned. It is now admitted that, in addition to their primary duties to the parties, arbitrators owe a broad duty also to the legal systems that recognize arbitration as a mechanism for the settlement of domestic and international commercial disputes on a par with the courts and that allow the arbitrability of antitrust matters on the assumption that competition law will be respected and applied. Arbitrators fully recognize this duty and for the most part routinely apply competition law at least as competently as most national courts and are not afraid to raise the issue of their own motion if the circumstances so warrant. Respectable arbitrators are unlikely to accept to overlook a serious breach of competition law even if so requested by the parties. One cannot of course rule out that unscrupulous parties will on occasion try to resort to arbitration with the assistance of unscrupulous arbitrators. However, such pathological situations would occur even if the arbitrability of competition law were excluded, and regardless of the standard of court review. In this respect arbitration is a tool, just like contracts are a tool. Both can be used also for illegal purposes, but nobody has ever proposed prohibiting the conclusion of contracts or subjecting all contracts to intensive court scrutiny to ensure that they do not conceal violations of competition law.

The evolution in the understanding of the role of arbitrators with regard to competition law is matched by the evolution in the approach to the role of courts. It is uncontested that court review of awards must be an effective tool to prevent arbitration being used to circumvent competition law and consequently cannot be perfunctory. At the same time, it is acknowledged that court review cannot systematically jeopardize the finality of awards, which is a cornerstone of arbitration, and especially of international arbitration, which in turn is key for the settlement of commercial disputes and for the promotion of business. Even if the result

[55] See the Report and Recommendations of the ILA Committee on International Commercial Arbitration on (in particular Recommendation No. 13) on *The Ascertainment of the Content of the Applicable Law in International Commercial Arbitration*, in *Arbitration International*, 2010, p. 191 ff

of the arbitration is eventually confirmed, this cannot occur at the end of a burdensome procedure which, in practical terms for the parties (particularly as relates to costs, time and uncertainty as to the outcome of the litigation), amounts to a rehearing of the case.

The consensus is thus that an award should be set aside or refused enforcement for violation of competition law only if, having regard to all the circumstances, there is unambiguous evidence that it perpetuates a breach of competition law which is concrete, effective and serious. In verifying this aspect courts should, insofar as possible, be guided by a high level of deference for the arbitrators' conclusions. The mere examination of the award's reasoning, where it is exhaustive, should enable the court to decide whether the award violates public policy, without need for a review of the merits or a more in-depth inquiry or, at most, with a very limited review of the key elements of the file. The court's function is not to determine whether the arbitrators have "correctly" applied competition law nor to second-guess their solutions.

Only exceptionally, when a mere analysis of the reasoning does not enable the court to assess the risk of a contravention of public policy, can a somewhat more extensive analysis be called for. Even in such circumstances the court should tread as lightly as possible, bearing in mind that the review of awards at the setting aside and enforcement stages should not entail a full-fledged review of the merits.

The proper relationship between arbitration and competition law thus ultimately depends on the competence and on the wisdom of arbitrators and courts. Both have so far demonstrated their ability to live up to the challenge. Arbitrators show a sense of responsibility in applying competition law competently and in providing adequate reasoning for their decisions, which in turn justifies the courts' confidence in them. For their part, courts have generally well understood their role and shown a commendable restraint in their review of awards involving competition law, whilst at the same time not relinquishing their role of guardians of public policy, including competition law. Published case law reveals no instance where the courts have condoned violations of competition law of such magnitude as to qualify as breaches of public policy. If anything, there have been instances where the courts have arguably gone too far in condemning awards for breaches of competition law that may not even have been characterizable as such, and that any event were difficult to consider as concrete, effective and serious violations of competition law so as to qualify as violations of public policy, even by the most rigorous standards.[56] This standard of review, which is capable of picking up unacceptable breaches of competition law, acts as a powerful deterrent against any temptation by the arbitrators to breach the trust that the system puts on them or by the parties to consider arbitration as an instrument to sidestep competition law.

In sum, the combination of the professional approach of arbitrators and of the attitude of the courts, which is mindful of effective application of competition law and respectful of the basic principles of arbitration, notably finality of awards and adequate deference to the findings of the arbitrators, is amply sufficient to allay any concerns, particularly of antitrust enforcers, that arbitration can be a device to flout competition law, while at the same time not subverting traditional thinking on the proper relation between courts and arbitration.

Antitrust enforcers can therefore rest assured that arbitration is an acceptable and useful mechanism for private anti-trust enforcement on the same level as the action of the courts. On the other hand, neither arbitration nor courts can relieve competition authorities of their own enforcement responsibilities.

[56] Ch. Seraglini, *Le contrôle de la sentence* (*supra*, footnote 7), para. 34

ARBITRATION AND COMPETITION

Note by Prof. Laurence Idot

1. Introduction

This article has been written for the competition authorities and members of the Competition Policy Committee of the OECD, and focuses on the relationship between arbitration and competition law, an issue which has also been the subject of numerous studies.[1] Given the nationality of the author, the analysis provided will be based primarily on the situation within the European Union.

As a starting point, and in an effort to prevent any misunderstanding, it is important to revisit the two subject terms: arbitration and competition law.

1.1. Arbitration

A common difficulty encountered in the field of arbitration arises from the different senses in which the word "arbitration" is used outside the circle of specialists in the field. In private law,[2] regardless of whether arbitration is used to simplify the relationships between companies, the primary objective is private dispute resolution, characterised by the intervention of a third party who is not attached to a state legal system. The same word can therefore be used in both a broad and more narrow sense.

In a broad sense, arbitration and ADR (*Alternative Dispute Resolution*) are comparable processes, in which mediation, arbitration committees, and many other similar variations are found. Recourse to this so-called 'extra-judicial' method of resolving disputes[3] remains based on the willingness of the parties, but the powers granted to third parties, whether such third party is an arbitrator, mediator, or an expert, can vary greatly.

In a narrow sense, the word "arbitration" only covers what is known as "jurisdictional arbitration" under a number of European laws.[4] In addition to the intervention of a third party, arbitration in the strict

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1 Many English literary references on this subject can be found in Professor L. Radicati di Brozolo's report. In this study we will focus on French literary references. Concerning the situation in the European Union, see. as an example, the bibliography (not exhaustive) in Ch. Jarosson, L. Idot V. Arbitrage, *Encyclopédie Dalloz de droit communautaire* January 2010. *For a recent study, see also* A. Komninos, "Arbitration and EU Competition Law in a Multi-jurisdictional Setting", to be published in *International Antitrust Litigation – Conflicts of Laws and Coordination* (J. Basedow, L. Idot, S. Francq, ed.), Hart Publishing, Oxford.

2 Arbitration can also be used to settle disputes between States. Concerning disputes between States and economic operators, for example in the framework of investment contracts, the parties adhere to the rules of "private" arbitration, although there are some specifics regarding the arbitration agreement, the determination of applicable law, or even in "ICSID" (International Centre for Settlement of Investment Disputes) cases, control of the award.

3 European institutions typically use the term "extra-judicial resolution" of disputes.

4 Specific rules on jurisdictional arbitration can be found in the Civil Procedure of many States (e.g. In French law, Book IV of the Civil Procedure Code, Articles 1442-1507 NCPC; J-F Poudret J.-F., S. Besson, *Comparative Law of International Arbitration*, Thomson, 2nd ed., 2007). The best example of an

sense of the word implies the existence of a dispute that the arbitrator decides; in effect, arbitration in the strict sense is characterised by the fact that the arbitrator must render a decision, an award which will be *res judicata* and may be granted enforceability following an enforcement procedure.

This distinction is crucial because the legal system differs, especially in those European States following the continental tradition. However, the clauses providing for third party intervention are sometimes ambiguous and in countries where the qualification of these third parties is an issue, as is the case in France, litigation can ensue. Rather than the operators, it is the countries and institutions that typically are the source of confusion. The European Union is a good example of this.[5] Aside from the stance taken by the least confused members of the European Parliament[6] the case of the former Article 3.6 of the Commission's New Block Exemption Regulation No. 1400/2002/EC of 31 July 2002 related to the automobile distribution should be mentioned.[7] Fortunately, the new block-exemption regulation[8] no longer includes this requirement. In general, European institutions seem to have recognised this distinction. For example, Directive 2008/52 of 28 May 2008[9] only covers mediation which is one the most widespread forms of ADR and, in discussions on the revision of the so-called "Brussels I" Regulation No. 44/2001 on the international jurisdiction, recognition and enforcement of judgements, the only debate remaining concerns the possible insertion, or conversely the continued exclusion, of arbitration in the strict sense, i.e. jurisdictional arbitration.[10]

Nevertheless, this distinction is not neutral, as there is an opportunity to subsequently use it in the possible alternative applications of arbitration (in the broader sense) in competition law, owing to the fact that the benefits generally attributed to the institution are not necessarily the same. In both cases, the main advantages are the possibility to select the "judge" and enjoy full confidentiality as to the outcome of a dispute. However these advantages do not extend further. The practical arguments relating to the speed and reduced cost are undoubtedly still valid for ADRs, but have not been applicable to arbitration for many years, in particular with regard to international arbitration, which has become very "jurisdictionally based" in the last twenty years. Arbitration in the strict sense is expensive, especially international arbitration, and it is not necessarily faster than state proceedings. The ability to choose the arbitrators, to have a wider range of choices on the applicable law, and/or to use an "amiable composition" solution remains critical,

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international text using the more narrow definition is the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958.

5 For further details, L. Idot, "L'arbitrage, les modes alternatifs de règlement des différends et le droit communautaire ", study 293-70, in *Lamy Procédures Communautaires* (eds. G. Canivet, L. Idot, D. Simon), Paris 2005

6 Resolution on promoting the use of arbitration in resolving disputes, OJEC (Official Journal of the European Communities), July 25, 1994, pg. 514

7 OJEC No. L. 203, 1st August 2002. A similar provision existed in former Regulation No. 1475/95. Given that the distribution agreement is covered by the exemption, the parties should include a clause in the contract providing for "the right of either party to use an independent expert or arbitrator in any dispute related to the fulfilment of their contractual obligations (...) ", this right being without prejudice to each party before a national court. Thus there was first a blending between expertise and arbitration, then a legal aberration, as by definition, the jurisdiction of the arbitrator, if established, automatically entails the incompetence of the state court. This type of rule led the parties to include "pathological clauses" in their distribution agreements; such clauses were impossible to invoke in the event of litigation.

8 Regulation No. 461/2010 of 27 May 2010, OJEU No. L. 129, 28 May 2010

9 OJEU, No. L. 136 24 May 2008. On the tendency of European institutions to promote alternative dispute resolution (Ch. Jarrosson, L. Idot, See V° Arbitrage Op. cit. Sp., No. 72)

10 Ch. Jarrosson, L. Idot, See V° Arbitrage Op. cit. sp., No. 2-14

especially given that, paradoxically, outside the EU,[11] it is easier to obtain the recognition and enforcement of an arbitral award under the New York Convention scheme than of foreign judgements. Nevertheless, the "club effect" remains the most crucial. In a domestic context, the data can be different and depend on the State judicial system,[12] but the same considerations are found to a lesser extent.

1.2. Competition law

For the purposes of this discussion, "Competition Law" shall be understood in the narrow sense, that is, excluding unfair competition. Also excluded are branches related to competition law but specific to a national law (e.g. Title IV of Book IV of the Commercial Code on restrictive practices) or specific to EU Law, such as the control of State aids.[13]

The meeting points between arbitration and competition law are found primarily in antitrust[14] and secondarily in merger controls. Whether in the presence of an *ex post* control, as in antitrust, or an *ex ante* control, as found in merger control, the nature of competition law public policy is no longer the subject of discussion.[15]

At first glance, the two branches of law are opposite. Competition law is dominated by public order while, in contrast, arbitration law is dominated by the principle of the autonomy of will. This explains why, initially, the competition authorities were for a long time very wary and reluctant vis-à-vis arbitration as a method of dispute resolution. Manifestations of this mistrust are well known, whether it involved the assertion of an inability to arbitrate disputes, or, in former authoritative systems, the obligation to notify the competition authority of the awards.[16] The situation has changed considerably in recent years and the time when arbitration was perceived by cartels as a method for escaping the competition authorities is undoubtedly over.[17]

Nevertheless, arbitration can be used in competition law insofar as the latter permits. Therefore, the fundamental distinction between *public enforcement* and *private enforcement* must be taken into account.

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11 The situation differs in intra-community litigation as a result of the so-called "Brussels I" Regulation No 44/2001

12 Thus, for example, in France, domestic arbitration is expensive compared to State judicial proceedings and is not necessarily faster, given the broader discretion granted to the arbitrators. Recourse to arbitration somewhat reflects a distrust of the commercial courts, which is composed of non-professional magistrates. A good example of a criticism of arbitration (high costs, club effect...) is provided by the party who referred a matter to the Competition Authority in *Decision No. 10-D-08 of 3 March 2010 relating to practices implemented by Carrefour in the general food supply commerce sector*, see. No. 46 to 51.

13 Contrary to what one might think, arbitration is not excluded from State aid. We have, on at least two occasions, been involved in disputes referred to arbitration, which raised a problem of qualification of a measure to determine whether it was or not, aid within the meaning of Article 107 TFEU. The problems presented are similar to those encountered in antitrust laws. For a Dutch case, see T. Baumé, S. Janssen, e-Competitions/No. 15034, August 2007.

14 Herein the term is used in the strict sense given by the European Commission as covering cartels and abusive practices, not the broader sense of American law.

15 For an example see the statements contained in the famous *Mitsubishi* and *Eco-Swiss* cases (listed below), by the Supreme Court in the United States and the Court of Justice in the European Union respectively

16 See for example, L. Idot, "L'arbitrage, les modes alternatifs de règlement des différends et le droit communautaire", study 293-70, in *Lamy Procédures Communautaires* sp. no. 293-10 to 293-30

17 See the examples given by J. Werner, "Application of Competition Laws by Arbitrators: The Step Too Far", 12 (1) J. Int'l Arb. (1995), p. 21, sp. p. 23

Public enforcement falls under the exclusive jurisdiction of the competition authorities. Arbitration shall in no way replace the latter and plays only a minor "accompanying" role, whether this relates to antitrust or merger control. However, since competition law tolerates *private enforcement*, there is a place for arbitration.

Until recently, arbitration has been considered only in the context of *private enforcement.* The argument then rests on arbitration in the strict sense and the question is to what extent the arbitrator may resolve a dispute by applying competition law in its award. The arbitrator thus becomes a veritable *private enforcement* agent (2). More recently, arbitration has emerged in the context of *public enforcement*. The competition authorities have at times had recourse to arbitrators, in the broader sense, to ensure the implementation of commitments, both in terms of merger control or antitrust. The arbitrator is no longer a *public enforcement assistant* (3). The problems arising in these two cases are not identical.

2. The arbitrator, a *private enforcement* agent

Here, arbitration is referred to in the strict sense of the term, i.e. as jurisdictional arbitration. The data are comparable whether related to an *ad hoc* arbitration, that is, a situation where the parties establish an arbitration by mutual agreement without going through an arbitral institution, or so-called "institutional" arbitration. Depending on the object under litigation, the arbitration may be a domestic or an international arbitration.

Typically, domestic arbitrations are *ad hoc* arbitrations. They are commonly used, for example, in resolving disputes relating to distribution agreements. The parties, however, may prefer to use an arbitral institution, which merely serves to supervise the conduct of the arbitration and has no decision power in the dispute. The same is true for international arbitrations. In the latter, some arbitral institutions dominate "the market". Such is the case of the *International Chamber of Commerce*, so-called "ICC Arbitration" which is very commonly used in international business,[18] but the *London Court of International Arbitration* can be also included in this list.[19] At the international level, the rules developed by UNCITRAL (United Nations Commission on International Trade Law/Commission des Nations-Unies pour le Droit Commercial International) must also be taken into account.[20]

Whatever the chosen arbitration method, the situations are similar. The first issue is that of the field open to arbitration (2.1). Since the arbitrator may apply competition law in his award, it must then be determined how such law will be applied (2.2). Finally, as a matter of public policy, the issue of control of the award is especially significant (2.3).

2.1. The field of arbitration

The arbitrator[21] is a private judge. His intervention is thus only possible within the limits imposed by arbitration laws[22] adopted within a jurisdiction[23] (2.1.1). In competition law, this private judge, i.e. the

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18 The ICC offers rules of arbitration (which date back to 1998 and are currently under review), a model arbitration clause, and lists of arbitrators. It has within its domain an International Arbitration Court, which does not rule on disputes, but enforces rules of arbitration, controls the appointment of arbitrators, etc. For a presentation, see the ICC website. www.iccwbo.org/home/menu_international_arbitration.asp.

19 www.lcia.org

20 *UNCITRAL Arbitration Rules*. The 1976 version was revised in June 2010

21 The term "arbitrator" is used for ease of reference to mean the arbitral tribunal, which may consist of one or several members. In English, we use the term "arbitration court".

arbitrator, is in a situation comparable to that of a national court of law. The arbitrator may not have more powers than the court and is faced with the same constraints (2.1.2).

2.1.1. The limits imposed by arbitration laws

Two sets of constraints, under arbitration laws, may limit the use of arbitration in competition law in the future. The first constraint concerns the willingness of the jurisdiction to tolerate and accept this private form of judicial proceeding, therefore admitting the arbitrability of disputes in this regard. The second constraint concerns the will of the parties: the use of this private form of legal proceeding is possible only because the parties wanted it, hence the need for an arbitration agreement.

(a) The arbitrability

The arbitrability of the dispute has been a much debated issue in competition law, but the situation did not occur in the same way in the United States and Europe.

In the United States, the solution has long been dominated by *American Safety* jurisprudence,[24] from which it followed that claims based on the *Sherman Act* were not suitable for arbitration. Three main reasons justify the inability to arbitrate these disputes: the nature of public policy of antitrust law; the fact that the judicial system was better equipped to deal with the complexity of antitrust litigation; and the risk that arbitrators would favour business interests at the expense general interest. Added to this was the fact that the arbitrators did not have the same resources as the judge, especially in terms of *discovery*. However, the principle of an inability to arbitrate recognised these limitations and the parties could seek arbitration if the arbitration agreement occurred after the commencement of the claims, in other words, if a compromise was reached.[25]

The situation experienced a significant upheaval in 1985 with the intervention of the Supreme Court ruling in the famous *Mitsubishi* case.[26] In this case, the dispute concerned the distribution agreements of the Japanese automaker, which were contested by a Swiss company and a Puerto Rican company. The contract was subject to Japanese law and provided for arbitration in Japan. Citing a violation of the *Sherman Act*, the claimant denied the jurisdiction of the arbitral tribunal. For the first time the Supreme Court rejected these claims and found that on grounds of "*international comity, respect of the capacities of foreign and transnational tribunals, and has sensitivity to the need of the International Commercial System for predictability in the resolution of disputes*" led to accepting arbitration. The solution was clearly adopted in the framework of international arbitration and to date, to our knowledge, the Supreme Court has not ruled in the context of domestic arbitration.[27]

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22 In this field, as in others, we are witnessing a phenomenon of convergence. The UNCITRAL Model Law on International Commercial Arbitration adopted in 1985 and revised in 2006 reflects the most commonly accepted solutions, at least in international arbitrations. The text is available on the UNCITRAL website: http://www.uncitral.org/uncitral/fr/uncitral_texts/arbitration/1985Model_arbitration.html

23 In EU Law, there are currently no rules on arbitration. The EU law therefore reverts to the national laws of Member States.

24 391 F2d 821 (2nd cir. 1967)

25 See *Cobb v. Lewis*, 488 F. 2d 41 (5th cir. 1974)

26 *Mitsubishi Corp. Solers v. Soler Chrysler Plymouth*, 473 US 614 (1985). This ruling gave rise to many comments which are not detailed here.

27 Authors (P.E. Greene, P.S. Julian, J. Bedard, "Arbitrability of Antitrust Claims In The United States of America", 19 E.B.L.Rev, (2008), issue 1, pg. 43) cite the *Gilmer v. Interstate v. Johnson Lane Corp.*

Despite the *ratio decidendi* of the *Mitsubishi* ruling, which was clearly geared towards international arbitration, the lower courts have generally agreed to implement domestic arbitration as a solution. However, they then encountered another difficulty. The Supreme Court has recognised arbitrability "*so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum*". The obstacles occur less often in arbitration law than competition law itself and will be examined as such.[28]

In Europe, the situation presented itself in a different light depending on the content of national arbitration law, which can be divided into two groups. In one group are all arbitrable disputes involving rights which the parties are free to dispose.[29] In these States, the arbitrability of disputes involving competition law has been accepted very quickly and without discussion,[30] to the extent otherwise required by reason of the exclusive jurisdiction of the authorities.[31]

In contrast, in a second group of countries, including France[32] and Belgium[33] the issue of arbitrability has been linked to that of public order. While the character of public order in competition law was not the subject of debate, in the 1970s a lively debate ensued on the arbitrability of disputes involving competition law.[34] The situation changed significantly in the early 1990s. In France, the Court of Appeal of Paris has played a major role in allowing arbitrators to render civil sanctions related to the rules of public order. Asserted for the first time in 1991 outside a competition law context,[35] the solution was applied in 1993 through Article 81 EC.[36] The possibility for arbitrators to apply competition law in their awards is no longer contested, as evidenced by the lack of debate on this issue before the Court of Cassation in France.[37] An identical solution was adopted in Belgium.[38]

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decision (500 US 20 (1991)), but the latter does not involve competition law. The Mitsubishi ruling is indeed mentioned at the outset but simply to recall that "statutory claims" can be arbitrable.

28 See *infra*

29 See for example Art. 1025 of the German Procedural Code; Art. 2.1 of the Spanish Law on Arbitration of 23 December 2003; Art. 1020 of the Dutch law of July 2, 1986; comp. Art. 177 of the Swiss Act on Private International Law of 18 December 1987 which holds the similar notion of "pecuniary claims"

30 *Bundesgerichtshof*, 27 February 1969; *adde*, XIIth Annual Conference of the Institute of Law and Practice of International Affairs of the ICC, *Arbitration and Competition Law*, Paris, October 1990, ICC Publishing, 1993, sp. synthesis report, by L. Idot, No. 28

31 See *infra*.

32 Art. 2060 Civil Code

33 Art. 1676 Judicial Code and Art. 2045 of the Civil Code; for a presentation, L. Goffin, "L'arbitrage et le Droit Européen ", Revue Internationale Droit Comparé, 1990.315

34 See in particular, *L'arbitrage et le Droit de la Concurrence*, quoted above

35 CA Paris, 29 March 1991, *Ganz*, Revue de l'Arbitrage, 1991.478, note L. Idot

36 CA Paris, 19 May 1993, *Sté Labinal* v. *Sté Mors*, Revue de l'Arbitrage, 1993.645, note Ch Jarrosson, Journal de Droit International, 1993.957, note L. Idot

37 Cass. com., 14 February 1995, Sté Labinal, Bull. civ. IV, No. 48, pg. 42; Cass. 2nd civ., April 5, 1994, Sté Hostin, Revue de l'Arbitrage 1995.85, note Ch. Jarrosson

38 See, B. Hanotiau, " L'Arbitrage et le Droit Européen de la Concurrence," in *L'Arbitrage et le Droit Européen*, Cepani, Bruylant, Brussels, 1997 pg. 31-64, sp. No. 26 et seq

To our knowledge, the question of the arbitrability of the civil consequences for a breach of competition law is no longer debated in Europe.[39]

(b) The arbitration agreement

Assuming that a jurisdiction admits the arbitrability of disputes, an arbitration agreement should still be drawn up. The private judge, which in essence is the role fulfilled by the arbitrator, derives his powers solely from the willingness of the parties. This arbitration agreement is usually in the form of a pre-dispute arbitration agreement, and more rarely of an actual compromise. The solution is identical in all legal systems.

The first issue is the need for an arbitration agreement.[40] The problem can be acute for actions whose grounds are founded in European tort law; in such cases it is not always easy to reach a compromise agreement. In any case, its scope of the agreement raises undeniable practical difficulties under competition law.

The scope of the arbitration agreement must first be assessed in terms of the claims. In general, pre-dispute arbitration agreements are drafted broadly enough so as to cover a large number of claims, as illustrated by the model agreements included in the rules of arbitral institutions. In legal systems where a distinction is made between legal actions based on contract law and those on tort law, the issue may arise as to whether the arbitration agreement, designed for disputes arising under a contract also covers tort actions. It is a question of interpretation of the agreement.

An example of a difficulty can be seen in a dispute submitted to a French court in which the claimant based his claim for damages on the breach of both Article 81 EC and Article 82 EC. The action, founded on the basis of Article 81 EC, had a contractual basis and was covered by the pre-dispute arbitration agreement, while the Article 82 EC action had a basis in tort law. The courts held that the pre-dispute arbitration agreement did not cover the second action and refused to recognise the divisibility of the dispute.[41] This led to a collapse of the case. Other examples can be cited, such as the Eurotunnel case before the High Court in London,[42] or the Swedish case on the sea link between Ystad and Bornholm.[43]

Another difficulty arises in the plurality of defendants, with some being bound by an arbitration agreement, and others not. It must be determined whether the pre-dispute arbitration agreement can summon respondents who are not party to the agreement. The solutions are given by the Civil Procedure Rules of the State in question.[44]

The issue has mainly been a subject of debate in the United States. It seems that an extension of the agreement to non-signatory respondents was admitted by estoppel in the case of *JLM Industries v. Stolt*

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39 See in the United Kingdom, *ET Plus SA v. Welters*, [2005] EWHC 2115. *Adde*, J. Bridgeman, "The Arbitrability of Competition Law Disputes", 19 EBLR (2008), pg 147-174

40 For a discussion on the identification of the arbitration agreement in U.S. law, see *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th cir. 2007), section I

41 CA Paris, 19 May 1993, *Sté Mors v. Labinal* op. cit

42 Ch. Balmain, R. Lambe, e-Competitions/No. 311, November 2005

43 C. Wetter, CJ Sundqvist, e-Competitions/No. 21218, February 2008. The case is also interesting as the Swedish court has requested the Commission's view on the part of the dispute not covered by the pre-dispute arbitration agreement the basis of Article 15, §1 of Regulation No. 1/2003.

44 In Europe, at present the problem arises in the "neighbour" context, not an arbitration agreement, but an election of jurisdiction clause as in the famous *Provimi* case.

Nielsen.[45] But the jurisprudence seems rather negative and the converse solution seems to prevail in the sense that some courts refuse to produce effects to an arbitration agreement that only binds, in a multilateral agreement, certain respondents. The solution is justified by the fact that an allegation of horizontal agreement, of conspiracy, is not the same as a breach of contract, and that the dispute is not divisible. [46] A similar argument was held in the *In re Cotton Yarn Antitrust Litigation* in 2007. [47] Added to this is the issue of holding a plurality of claimants that can be grouped in a *class action*. The problem arises if the waiver of a "class" action resulting from the arbitration agreement precludes, or does not preclude, the statutory rights that the claimants derive from the *Clayton Act*. This issue then touches on the question of the limits imposed by competition laws.

2.1.2. The limits imposed by competition law

An arbitrator may only intervene in competition law if the competition law so allows. The problems that arise differ depending on the branch of competition law concerned and the legal system. Thus under European laws granting *public enforcement* to administrative authorities, the arbitrator can only act insofar as he does not affect the exclusive jurisdiction of the competition authority. In the United States, the arbitration is permitted only if it does not deprive the claimant of his rights under the law (*statutory rights*).

(a) General rules

With regard to merger control, it could be assumed that arbitration is not possible since the majority of systems rely on a system of prior authorisation that falls under the exclusive jurisdiction of the competition authority. However, although limited, there is still a place for the common law judge.

First, it may occur that operators have an opportunity to dispute a decision of devolution, or that the judge is called for matters relating to the civil penalties of a merger that has not been notified. This hypothetical situation has not occurred to our knowledge, but is not unprecedented.[48]

The problem may then arise, in particular under EU law, regarding ancillary restrictions. Under the new system introduced by Regulation No. 139/2004, compatibility decisions are "considered to cover" those restrictions that are directly and necessarily related to the merger. In case of dispute, as the Commission stated in the 2005 notice on ancillary restrictions, it is for the judge to decide whether the restriction may or may not qualify for classification as an ancillary restriction. As the powers of an arbitrator are aligned with the common law judge, an arbitrator can very well be faced with an issue of qualifying a restriction related to a merger. If the arbitrator denies the qualification of an ancillary restriction, he must then assess the agreement within the context of Article 101 TFEU and decide whether it falls within the scope applicable antitrust solutions.

In antitrust law, most national laws (as well as EU law) are now based on systems of prohibition. The main anti-competitive practices (cartels, abuses) are prohibited. In the context of *public enforcement*, the national authorities may, if the violation is discovered, impose administrative sanctions on the offenders in

45 387 F.3d 163 (2d cir. 2004), cited by P. Greene, P. Julian J. Bedard, op. cit

46 *In Jung v. Association of Am. Med. Colleges*, 300 F. supp. 2d 119 (DDC, 2004), cited by P. Greene, P. Julian J. Bedard, op. cit

47 *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th cir. 2007), section II

48 Relatively speaking, the problem is identical to that which exists concerning State aid for aid projects which have not been notified. As the common law judge, an arbitrator may have to take a position on the classification of a State measure and determine whether it is or is not, illegal.

the form of fines or injunctions,[49] or refer the case to *criminal court* so that said courts can render punishment for the offence.[50] This relates to exclusive powers. In contrast, *ordinary national courts* may impose civil penalties such as bans, declare the invalidity of legal acts contrary to prohibitions, or award damages. In principle, arbitrators have the same powers.

In practice it is rare that arbitrators are directly summoned for requests related to a breach of competition rules. Most often, the question is raised incidentally in the course of a dispute the primary objective of which is something different. The dispute is almost exclusively contractual in nature, which does not mean there are no damages.[51] A dispute relating to the improper or non performance of a contract, is subject to the arbitrators in the context of debates. One party raises the illegality of the contract, and in the vast majority of cases, the unlawful nature of a particular clause.

In Europe, the majority of disputes therefore focus on the application of Article 101, §1 TFEU and/or equivalent rules of national laws. It is at this stage that the classic distinction between horizontal and vertical agreements is found. Cooperation agreements, which are complex by nature, are often the subject of litigation and are almost always brought before arbitrators. Most known awards[52] involve such agreements. The non-competition clauses, in particular, are often the subject of debate. Arbitration is often also used for distribution agreements.[53] In the motor vehicle sector, it is the Commission itself that encourages arbitration. As a private judge, the arbitrator is in a situation comparable to that of the national court of law. It cannot therefore have more power than the court…[54] In the context of these disputes, it is rare that the claim directly bears on the invalidity of the clause; it is the aggrieved party, by reason of non-performance of the clause, who claims damages. Before ruling on the merits of this claim, the arbitrator is required to first make a judgement as to the legality of the clause.

Similarly, nothing prevents an arbitrator from ruling on the abusive nature of a practice within the meaning of Article 102 TFEU or equivalent national legislation, when imposing civil penalties. However, in practice, disputes relating to abuse of a dominant market position are much rarer.[55]

(b) Problems specific to E.U. Law

A first difficulty lies in passing, as concerns exemptions, an authorisation system prior to a legal exception system. Under the rights found in a legal exception system, such as in French law, the arbitrator could rule both on the prohibition and the possible exemption under Article 10 of the Ordinance of 1 December 1986. This is because the Competition Council did not hold any exclusive jurisdiction. In

49 See the European Union system and that of most EU Member States

50 See in particular, the US system and that of some European countries, such as Ireland

51 In continental law, a distinction is made between contractual damages, which are based on a breach of contract, and tort damages, which are based in tort law.

52 For a list of awards, see L. Idot, "Arbitre et Droit Communautaire", *Lamy Procédures Communautaires*, op. cit., Study 295, sp. No. 295-35

53 As seen from the decision 10-D-08 (op. cit.), most large retailers include in pre-dispute arbitration agreements in their franchise agreements. Litigation occurs most often when the franchise changes its trade name. The franchisor then refuses a non re-affiliation clause and asks for damages, often substantial, for breach of the clause.

54 See Art. 3.6 of Regulation No. 1400/2002, op cit

55 See in France, the *Mors v. Labinal* case where the claim was based both on Article 81 EC and Article 82 EC; see also the *Cytec* case (discussed *infra* under the control of the award) where one of the claims was based on Article 82 EC

contrast, under Community law, in the system under Regulation No. 17/62, the Commission had exclusive jurisdiction to issue individual exemptions. The arbitrator was thus in the same position as the State court of law. He could apply the various block-exemption regulations, but could not apply Article 81 § 3 EC on an individual case basis, since it fell under the exclusive jurisdiction of the Commission.

The situation has changed since the entry into force of Regulation No. 1/2003 which replaced the former authorisation system with a legal exception system. The Commission no longer has exclusive jurisdiction to apply Article 101, §3 TFEU. NCAs and national courts should now include this text in their decisions; and the same is true for the arbitrator. Given the nature of the agreements referred to under arbitration – e.g. cooperation agreements and distribution agreements - it is often, however, Article 101, §3 TFEU that is the subject of debate. Most of the disputes relating to Article 101, §3 TFEU are of an arbitral nature.[56] The applicability of Article 101, §3 TFEU now seems acceptable to the international community.[57]

However, there is one point on which an arbitrator has no power, which is, the withdrawal of a block exemption regulation. Such power can only be exercised by a competition authority, initially only the Commission, and now under certain conditions, the NCA. Regarding exemption regulations, the arbitrator can only verify, as would the national court, that the agreement falls well within the scope of the regulation invoked and meets the necessary conditions.

Concerning abusive practices, to the extent that objective and efficiencies justifications are now permissible, including in the application of Article 102 TFEU,[58] it is questionable if the arbitrator can also take a position on this point. The response is definitely positive. There is, again, no exclusive jurisdiction of the competition authorities.

The second difficulty concerns the desired development of actions for damages**.** If the recourse to arbitration is common in contract law, naturally one wonders whether actions for damages would be able to be arbitrated.

The response to date is overwhelmingly positive. There is no exclusive jurisdiction of the competition authorities in this area. Moreover, given the fact that they are mostly administrative authorities, in most systems, they have no power to award damages. Court proceedings are essential in these matters. Finally, the penalty system is purely compensatory. Under European law there are no objections to the arbitrability of actions for damages for tortious breach of competition rules.[59]

The numerous problems do not arise from competition law, but from the arbitration law. They stem primarily from the existence of an arbitration agreement, which would be much more difficult to obtain in

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56 When one party alleges that an agreement or a clause is contrary to Article 101, §1 TFEU, the other party not only contests the restrictive nature of competition, but also systematically cites the benefit of Article 101 §3 TFEU.

57 See in particular, L. Idot, " La place de l'arbitrage dans la résolution des litiges en droit de la concurrence," Rec. Dalloz, 2007. 2681 or in English, "The role of Arbitration in Competition Disputes", in *The reform of EC competiton law. New challenges,* (I. Lianos, I. Kokkoris, ed.) Kluwer, 2010, p. 75 ; on this point, the numerous references cited by A. Komninos, op. cit. sp. Note 35. However, the Commission's position seems unclear; see, D. De Groot, "Arbitration and the Modernisation of EC Competition Law", 19 EBLR (2008), p. 175

58 Commission; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJEU, No. C. 45, 20 February 2009

59 A. P. Komninos, M. Burianski "Arbitration and Damages Actions Post-White Paper: Four common misconceptions" 2009, GCLR, pg. 16

tort law. The plurality of the parties compounds the problem. Thus, for example, arbitration may resolve the issue of damages resulting from an abuse of a dominant market position in a relationship between two parties.[60] However, it is difficult to imagine an equivalent solution for cartels, due both to the plurality of respondents and the presence of multiple claimants. Recourse to arbitration would then be combined with the development of a class action...

(c) Problems specific to U.S. Law

Some of the previous conclusions apply to the U.S., but the specificity of the system must also be considered. The first observation is that the distinction between *private enforcement* and *public enforcement* is much clearer in Europe where Member States favour an administrative system. In the *American Safety* case[61] the court recalled that the action for treble damages developed in the *Clayton Act* did not have as an objective providing redress to victims of anticompetitive practices, but served to assist the public action by making the claimants "*private attorney generals*". This explains in particular the punitive aspect of *treble damages*. The second consideration that must be taken into account are the specificities of the US Rules of Civil Procedure. Under continental European laws, arbitrators have powers over the administration of proof that are similar to those of national judges. In US law, the powers of *discovery* of the national judge are much broader than those of the arbitrator. Moreover, *class actions* must also be included, which are intended to enable claimants to join their efforts.

The different situations may explain why in the *Mitsubishi* case, the Supreme Court only admitted arbitrability after the claimants were prevented from being deprived of the rights they derived from the law through arbitration.

However, the Supreme Court has not given any indication on what was to be understood by the *Mitsubishi* case. Generally, the lower courts have placed the burden of proof on the party opposed to the arbitration; initially they did not find any precedent for this situation.

Currently, the problem arises mainly in the context of actions for *treble damages* as to whether arbitration can be an obstacle to the rights that the claimants derive from the *Clayton Act*. In addition, the interference of *class actions* must also be considered.[62]

Regarding the right to treble damages, the First Circuit Court held that it could not waive the rights to an action for treble damages because of an arbitration agreement[63] and it appears, that it was recently followed by the Second Circuit Court.[64] A further requirement is that the waiver of treble damages is certain, which is not always the case.[65]

Concerning the right to a class action, the Federal Appellate Courts are divided. In competition law, in the *Comcast* case,[66] the district court was entitled to invoke the class action and refused to validate the

60 In practice, either the parties settle immediately, or the injured party brings an action for damages before the judge and, given the difficulties in assessing the damage, the parties subsequently settle the matter.

61 Op. cit

62 It seems that the practice provides for class action waivers, but that the US courts are hostile to such waivers: *In re American Express Merchants Litigation*, 554 F. 3d 300 (2d Cir 2009)

63 *Kristian v. Comcast Corp.*, 446 F.2 d 25 (1st cir. 2006)

64 *In re Am. Express Merchants Litigation*, 554 F.3 d 300 (2nd cir. 2009)

65 See *PacifiCare Health Systems Inc. v. Book* (538 US 401 (2003)) cited

66 Op. cit

waiver. In contrast, in the *Cotton Yarn* case in 2007, the Fourth Circuit Court adopted a favourable stance on arbitration, considering that neither the waiver to *class action*, or the admission in an arbitration agreement of a term for bringing the action to court below the statute of limitations, would deprive the claimants of the rights that they derived from the *Clayton Act*.

Whatever its merits, this argument is specific to US law. However it highlights difficulties that might arise in Europe when suits for compensation will be more developed than they are today.

In conclusion, if arbitration has a limited role in *ex ante* controls based on prior authorisation systems, its scope of action in antitrust law for handling "so-called civil consequences" for non-compliance with competition law is undeniable. In practice, these mainly concern claims made in connection with contractual disputes. Intervention in actions for compensation is virtually excluded, whether in the United States, given the state of the jurisprudence in that country, or Europe, as a result of the poor development of these actions.

2.2. The arbitration process

During the arbitration process, some non specific issues may arise. For example, the central question of the administration of evidence and the powers of arbitrators in this area who rely on the law applicable to arbitration.[67] This is not necessarily contrary to a common held opinion under the law of the country where arbitration takes place. In practice, such disputes are often based on contract law, the contracts are at the jurisdiction of the arbitral tribunal. The debates do not concern the existence of an agreement, but the existence of restraints of competition.

There are two factors underlying the specificity of competition disputes before arbitrators: the process of applying competition law on the one hand (2.2.1) and the possible need to use "experts" in its interpretation on the other (2.2.2).

2.2.1. The process of applying competition law

The problems specific to international arbitration will be considered, before examining some of the issues inherent to domestic arbitration and international arbitration.

(a) Difficulties inherent to international arbitration

In a domestic arbitration, the issue of determining the applicable law does not arise. Within the limits that will subsequently be considered,[68] the arbitrator is required to apply its law. It falls to him only to verify that the situation is within the substantive and jurisdictional scope of the competition law. This means, for example, that in a federal State, the arbitrator must verify that the situation falls within the domain of the federal law of competition. The same is true within the European Union. EU law being included in each national legal order, in a domestic arbitration, the arbitral tribunal must, in the same manner as a national court of a Member State, apply Articles 101 and 102 TFEU as soon as practices affect trade between Member States.[69] For example, in franchise agreements that bind the French groups to their franchisees,[70] disputes that arise in cases of a change of affiliation give rise to domestic arbitrations under French law. It is not only the French competition law, i.e. Article L. C. 420-1 com. that is applicable, but

67 See, as example for this point, the solutions adopted in the UNCITRAL texts

68 See *infra*.

69 Regulation No. 1/2003, Art. 3

70 See. Competition Authority, December 10-D-08, op. cit

also EU law, as there is no doubt that, because of the cumulative effect of contracts and the size of the groups, the various clauses preventing exit from the network are likely to affect trade between Member States.[71]

The situation is certainly more complex when the arbitration is international, that is to say in this context, issues of international trade.[72] However, whether the action is based in contract or tort law should be distinguished.

In the majority of instances, the action has a contractual basis. To resolve the dispute, the arbitrator must first determine the law applicable to the contract subject to the action, in the language of internationalists, the *lex contractus*. Without going into further detail, it is possible to consider that the solutions adopted by the UNCITRAL[73] reflect the law commonly admitted.

In principle, the arbitrator is bound to the parties' choice of applicable law; in absence of such choice, the arbitrator is free to choose the rule of law that it deems appropriate, particularly taking trade usages into account. This law is not necessarily a rule of state law; the law may in fact be general principles of private codes... Such freedom, given to both parties and the arbitrators, may seem surprising, when rules of public order, such as competition laws are involved. Since there is a risk that an award that ignores such mandatory rules is not then recognised, a whole series of mechanisms are in place that allow the arbitrator to apply competition law.

The mechanism most commonly used is that of mandatory rules (*lois de police*).[74] The imperativeness of competition laws is such that they must be applied irrespective of the law applicable to the contract. One is then faced with the more general question of enforcing the mandatory rules *(lois de police)* on the part of the international arbitrator.[75] Although the method has been criticised, there is a general tendency to

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71 Experience shows that enforcement of Article 101 TFEU in these cases depends on the knowledge of the arbitrators and the parties. Even the Court of Cassation does not necessarily reason with the Community law in these cases.

72 See for example, in French law Art. 1492 Code of Civil Procedure

73 Model Law on Arbitration: Article 28. Rules applicable to the substance of the dispute:

1) The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressly stated, as directly referring to the substantive law of that State and not its conflict of laws.

2) Failing any designation by the parties, the arbitral tribunal shall apply the law designated by the rules of conflict of laws which it considers applicable in this case.

Arbitration Rules, as revised in 2010, Article 35

1. The arbitral tribunal shall apply the law designated by the parties as being those applicable to the basis of the dispute. Failing any designation by the parties, the tribunal shall apply the law that it deems appropriate.

74 In an isolated event, the Swiss Act on Private International Law provides for a bilateral conflict rule in Article 137, which means the law of effects. See not. M-A. Renold, "Les conflits de lois en droit antitrust. Contribution à l'application internationale du droit économique", Zurich, 1991. From our point of view, such a rule does not help to solve the problems that exist in international relations (see L. Idot, "Les conflits de lois en droit de la concurrence", Journal du droit international, 1995.321). This criticism is shared by other authors, see not. references, cited by A. Komninos (2010).

75 For a comprehensive study, see Ch. Ch Seraglini, *Lois de police et justice arbitrale internationale*, Paris, Dalloz, Nouvelle bibliothèque des thèses, 2001

distinguish according to whether the competition law does or does not belong to the *lex contractus*. Indeed, the distinction makes sense only if, at the same time, the arbitrator verifies the scope of application of the competition law, because the arbitrator cannot enforce a mandatory rule outside its territorial area.[76]

The reasoning is therefore as follows. First, it must be verified that the situation falls within the territorial scope of the competition law whose application is sought. For example, if a party invokes Article 101 TFEU, the arbitrator must verify that the practice is likely to have anti-competitive effects in the European Union and affect trade between Member States.

If the answer is affirmative, two situations are possible:

- Either the *lex contractus* chosen by the parties or appointed by the arbitrator, is the law of a Member State, and the arbitrator must apply the law of the EU integrated into national law. The doctrine is in this sense[77] and such reasoning has been followed in a number of awards made in Europe.[78] The location where the arbitration takes place is not important and it may be a third party country, for example Switzerland.[79]

- Or the *lex contractus*, which is the law of a third party State - for example, in a case where Article 101 TFEU applied, the contract law that is the law of an Asian State – and the situation is then more difficult, especially if the *lex contractus* was specifically chosen by the parties and has not been designated by the arbitrator. The practical application of competition law that claims its application to the situation will depend on the recognition by the arbitrator of the theory of mandatory rules (*lois de police*), which is itself dependent on the evolution of private international law.[80] The doctrine has long been uncertain, but the movement is increasingly in the direction of the application of competition law and even the practice of arbitration.[81] Arbitrators may use different methods for this purpose whether they resort specifically to the theory of

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76 This is the reason why it does not seem necessary, in our view, to distinguish between lex fori and unilateral conflict rules. Determining the scope of application in a case of lex fori is made in any event following the unilateralist method.

77 See in particular Y. Derains, Competition and Arbitration Law in *L' arbitrage et le droit de la concurrence*, ICC Publishing, 1993 pg. 251; id., "Specific Issues Arising In The Enforcement of EC Antitrust Rules by Arbitration Courts", in *European Competition Law Annual 2001, Effective Private Enforcement of EC Antitrust Law* (C-D Ehlermann & I. Atananiu, ed.) Oxford: Hart Publishing, pg. 323

78 See a list in L. Idot " Arbitre et droit communautaire", study 295, op. cit. sp. No. 295-65

79 See example of the case before the Federal Court, April 28, 1992, Revue de l'arbitrage, 1993.124, note L. Idot

80 See in particular Ch. Seraglini op. cit. Also, in Europe, Art. 7.1 of the Rome Convention of 1980 on the law applicable to contracts accepted the application of foreign mandatory rules. Curiously, in the so-called "Rome I" regulation (EC Reg. No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations, *OJEU, No.* L 177 of 4 July 2008), this solution was withdrawn, but the drafting of the new Art. 9.3 on the applicability of foreign policy laws has no bearing on competition law: see not., L. Idot, "Le cas du droit de la concurrence dans les textes de référence" in *La Matière Civile et Commerciale en Droit International Privé Européen* (ed. S. Peruzzetto), Paris, Dalloz, 2009

81 See in particular Y. Derains "L'application du droit européen par les arbitres. Analyse de la jurisprudence" in L'arbitrage et le droit européen. Cepani Symposium, Bruylant, Brussels, 1997, pg. 65 and the references cited; H. Verbist, " L'application du droit communautaire dans les arbitrages de la CCI" Bull. ICA/ICC in November 1994 and cited references

mandatory rules, or use the law of competition that is deemed applicable, simply to ensure the further performance of the award.[82]

A third situation could arise, one where several competition laws with conflicting solutions are applicable, but to our knowledge, this has not yet materialised.[83] The conflict between mandatory rules is most likely to occur in cases of actions for compensation.

The situation is somewhat different when the action has a basis in tort law. To date, the problem does not appear to have arisen in the United States, but it is unclear whether the cases in which arbitration was considered could be classified as international. In any event, it is likely that, as for national judges, arbitrators will only apply the US antitrust laws.

In the EU, in general private international law, Member States had used a bilateral conflict rule, which designated the *lex loci delecti*, the law where the tort takes place. However, the latter then recognised the many variants, especially in the frequent assumption of the separation between the event and the damage. The situation has changed again as a result of the adoption in 2007 of the so-called "Rome II" regulations on the law applicable to non-contractual obligations.[84] The regulation not only codifies the rules of conflict in tort law favouring the *lex damni*, but above all, it contains a specific provision for competition law, Article 6.

Originally designed for unfair competition actions, Article 6 was extended at the last moment to include antitrust at the request of the Commission.

In technical terms, it raises many challenges and much attention has already been drawn to the doctrine.[85] Rather than starting from the observation that the rules of antitrust laws are mandatory rules and therefore have recourse to the unilateralist method, Article 6 §3, a) enacts a bilateral conflict rule that designates the law of the market affected. However, as in most situations, several markets will be affected, Article 6, §3, b) allows certain conditions to revert to the *lex fori*. Such a solution is not justified. The authors of this regulation have only reasoned in the context of the European Union with the assumption that the rule of competition violated is always Articles 101 and/or 102 TFEU and that the only issue to be resolved is the identification of the law applicable to the claim for compensation. In intra-community relations, the system can work. In contrast, in relations with third party States, the solution holds little meaning since, according to Article 2 of the Regulation, the rules of conflict enacted by the text are universal and can also designate the law of a third party State, for example, US law.

Certainly, international arbitrators are no more required to implement EU regulations than the international treaties. The fact remains that these instruments reflect commonly accepted solutions.

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82 See A. Komninos, op. cit. (2000)

83 For solutions that could be adopted, see "Les confits de lois en droit de la concurrence", op cit., From a theoretical point of view, this raises the problem of resolution conflicts between mandatory rules.

84 Reg. EC No. 864/2007 of the European Parliament and Council of 11 July 2007 on the law applicable to contractual obligations, OJEU L. 199 of 11 July 2008

85 See Pironon, "Concurrence déloyale et actes restreignant la libre concurrence " in the *"Rome II" Community Regulation on the law applicable to contractual obligations*, Credimi, vol. 31, Litec, 2008, pgs. 111-128; by the same author, " L'entrée du droit de la concurrence dans le règlement Rome II: bonne mauvaise idée?" Europe, February 2008, study 2. See, (to be published), the results of the study ordered by the Commission, *International Antitrust Litigation. Conflicts of Laws and Coordination*, (J. Basedow, S. Francq, L. Idot, ed.), Hart Publishing, in particular, the study by S. Francq and W. Wurmnest "Rome II and Antitrust Litigation"

To date, more than the resolution of conflicts of mandatory rules, arbitrators have faced other difficulties.

(b) Difficulties common to domestic and international arbitration

A first problem is the impact of an amiable composition clause, which can be defined as a waiver for the arbitrators to apply the rules of law. It is questionable if such a stipulation may lead arbitrators to dispense with applying the mandatory rules of competition laws. The answer depends on the design of the amiable composition of the State whose law is applicable to arbitration.

In a number of arbitration laws, the waiver to apply the rules of law under the amiable composition clause does not cover the mandatory rules. The fact that the parties granted the arbitrators the power of *amiable composition* does not then alter the previous solutions; the same is true regardless of whether it is domestic or international arbitration. This is the solution in French law, but also under Belgian law[86]and the ruling of the Court of Justice in the famous *Commune d'Almelo* case[87] can be interpreted in this sense. On the contrary, under Swiss law of arbitration, the waiver extends to mandatory rules.

Another difficulty is the silence of the parties on competition issues. In practice, one of the parties may raise the issue of competition during the proceedings, but this is not always the case. Should the arbitrators then automatically raise the issue of competition law? This has been debated under Community law, in the *Van Schjindel* case,[88] and in the famous *Eco Swiss* case.[89] In the latter case, the Dutch court, specifically with regard to an arbitration, having given rise to two successive awards, asked the question directly at the Court of Justice. The problem arose from the fact that the Court did not consider it necessary to answer this question due to the answers given to the other preliminary questions asked by the *Hoge Raad*, which allowed for different readings of the ruling, which still persist today.

Two points are established.

First, nothing prevents the arbitrator from automatically raising the problem of competition if he finds sufficient elements in the facts submitted to him to identify a problem. He has the authority to automatically invoke the rules of public policy and if he decides to do so, he must then arrange for a contradictory discussion on this question, even if it means reopening the arguments. Some arbitration awards made under the aegis of the ICC were able to be interpreted in this way.[90]

Second, it is necessary to distinguish the silence of the parties on one side and the exceptional case where the parties might prohibit the arbitrator from ruling on the competition law on the other side. If he respects this order, the arbitrator exposes himself to an annulment of his award as being inconsistent with public policy.[91] He should then logically be declared incompetent.[92]

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86 B. Hanotiau, "L'arbitrage et le Droit Européen", Cepani Symposium, Brussels, Bruylant, 1997

87 CJEC, 27 April 1994, C-393/92, ECR-I-1477

88 CJEC, 14 December 1995, C-430 and 431/93, ECR-I-1405. On the transposition, see note, B. Hanotiau, op. cit., L. Idot, "Arbitrage et Droit Communautaire", RDAI/IBLJ, 1996. 561, sp. No. 31

89 CJEC, 1st June 1999, case C-126/97, Rec., p. I-3055. For a list of comments, see not., the collection of notes under the decisions of CJCE on the Court website www.curia.eu

90 See in particular, the references cited, *Lamy Procédures Communautaires*, study 295, sp. no. 295-75. *Adde*, M. Blessing cited 16 cases in 1999 ("Introduction to Arbitration – Swiss and International Perspectives", Swiss Commercial Law Series, vol. 10, Helbing & Lichtenhann (1999))

91 See *infra*.

The one true problem remains. In case of silence, and not prohibition, must the arbitrator, automatically raise the problem? The opinions differ.

Personally, we have always maintained the affirmative[93] and it seems to us that this position is reinforced by the two decisions subsequently rendered by the Court of Justice with regard to consumer law.[94] However, this reading is not unanimous precisely because the concern to protect the weak party which justifies the solution of the *Mostaza Claro*and *Asturcom* decisions is not found in competition law.[95]

In truth, the answer is inseparable from the solutions adopted with regard to the review of the arbitration award.[96]

2.2.2. Cooperation with the "experts"

Although recourse to arbitration presents the great advantage of choosing one's judge as well as appointing arbitrators who understand competition law, it is not impossible for the court to feel the need to be informed about the problems it must resolve. In practice, the problems encountered are inversely proportional to the discussion that this question engendered... In fact, once the parties decide to put competition law into the discussion, they will not hesitate to surround themselves with specialists aware of these questions particularly in international arbitrations. Consequently, we witness instead the battles of experts, each party arriving with its team of consultants, both lawyers and economists... and it is up to the arbitrator to decide between the various theses that are presented to him.

We do not know if the problem exists outside of the European Union. There it has been the subject of numerous discussions. We will only mention as a reminder the traditional question of knowing if the arbitrators are able to ask the Court of Justice preliminary rulings based on article 267 TFUE (ex. art. 234 CE). The Court of Justice responded in the negative in the *NordSee* decision[97] in 1982 and does not seem ready to re-examine the solution, as is evidenced by the *Denuit* decision[98] rendered in consumer law in 2005.

Contrary to a portion of the doctrine, we are not in favour of a reversal. Besides it being difficult on a practical level to impose an additional burden on the Court of Justice, it does not seem justified to us for two reasons. In the first place, in case of difficulty, at some time or another one will go before the national judge and the latter may ask a prejudicial question, as was illustrated in the *Commune d'Almelo* and Eco *Swiss* decisions.[99] This may be late, but in any case, it makes it possible to preserve the uniformity of European Union law, which remains the objective of this recourse. In the second place, the immense majority of arbitrations in Community law concern competition disputes and, in this case, it is cooperation with the competition authorities which must be developed if the need to do so is felt.

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92 For an analysis of this situation, see Ch. Seraglini, op. cit., sp. no. 994 et seq

93 Note, Revue de l'arbitrage, 1999.631

94 CJEC, 26 October 2006, *Mostaza Claro*, C-168/05, ECR-I-10421, Revue de l'arbitrage, 2007.109, L. Idot note, Journal de droit international; 2007.581, A. Mourre note; CJEC, 6 October 2009, *Asturcom*, C-40/08, Revue de l'arbitrage , 2009.813, Ch. Jarrosson note

95 See in particular, the position of L. Radicati di Brozolo

96 See *infra*.

97 CJEC, 23 March 1982, 102/81, ECR.1095

98 CJEC, 27 January 2005, C-125/04, ECR-I-923, Revue de l'arbitrage, 2005.765, L. Idot note

99 Decisions op. cit

Concerning the latter, in practice, two case scenarios present themselves: either the procedure before the arbitrator is autonomous - the case is not brought before any other authority at the same time, or one is in the presence of consecutive or parallel proceedings. The first situation is much more frequent than the second.

(a) Autonomous procedures

Since the generalisation of systems of legal exception, the dispute submitted to the arbitrators is a dispute which is no longer handled in practice by the competition authorities. The procedures before the arbitrators in no way interfere with the actions brought before the competition authorities, but the problems submitted to the arbitrators are often in a "grey zone", hence the interest in a possible "discussion" with the competition authorities. The opportunity for such "cooperation" is much debated in relations with the Commission, but in the context of the European Competition Network, the problem also arises in relations with the NCA [National Competition Authority].

- **Relations with the Commission**. Even if it was possible to ask the question at the time of the first communication on cooperation with the national courts in February 1993,[100] the adoption of regulation no. 1/2003 reopened the discussion on the Commission's possible cooperation with the arbitrators. A number of authors were questioned on the point of knowing whether the cooperation mechanisms institutionalised in article 15 for the ordinary state court and explained in the new communication dated 27 April 2004[101] could apply to the arbitrators.[102] The *amicus curiae* procedure of article 15, § 3, of the regulation appears to be excluded.[103] The problem may arise in practice only for the requests for opinion and information of article 15, § 1. Independent of the fact that this mechanism is already functioning poorly with the state courts[104] from a legal point of view, the situation has not changed since the *Delimitis* decision. Cooperation between the Commission and the national courts of Member States finds its basis in the principle of sincere cooperation (former article 10 EC, now art. 4 TEU), which does not apply to arbitrators who are not under the jurisdiction of Member States.

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100 OJEC, no. C. 39, 13 February 1993. This communication is a follow-up to the *Delimitis* decision, CJEC, 28 February 1991, C-234/89, ECR-I-935. See our interrogations, Europe, April 1993, comm. no. 173

101 See the new Commission communication dated 27 April 2004 on cooperation between the Commission and the national courts for the implementation of articles 81 and 82 EC, OJEU, no. C. 101, 27 April 2004

102 See on the basis of the Commission regulation proposal dated September 2000, the works of panel III, in *European Competition Law Annual 2001. Effective Private Enforcement of EC Law*, op. cit., with the statement of views of Y. Derains, A. Komninos, L. Idot; C. Nourissat, "L'arbitrage commercial international face à l'ordre juridique communautaire: une ère nouvelle", RDAI/IBLJ, 2003, no. 7, p. 761; W. Abdelgawad, "L'arbitrage international et le nouveau règlement d'application des articles 81 et 82 CE", Revue de l'arbitrage, 2004, p. 253, sp. p. 265; more recently, H. Van Houtte, "The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission", 19 EBLR (2008), p. 63 ; R. Nazzini, "A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as *Amici Curiae* and the Status of their Decisions in Arbitral Proceedings", 19 EBLR (2008), p. 89

103 In the first place, on the practical level, the intervention of an authority under the terms of § 3 is only possible because it was previously informed of the case. As § 2 cannot be applied to arbitrators (see *infra*, a practical problem is already raised. Assuming that the Commission is informed, we do not see how it could impose its participation on the arbitrators and on the parties*; contra* and isolated, W. Abdelgawad, op. cit..

104 For a recent report, "La coopération entre la Commission et les juridictions nationales en droit de la concurrence", Revue affaires européennes [Review of European Affairs], 2009/2010, pg 59-72

Since there is no doubt that the communication on cooperation with national courts does not apply to arbitrators, the question arises as to whether it might be advisable to adopt a communication specific to arbitration,[105] as in an informal manner, representatives of the Directorate-General for Competition had in the past stated that they would not be hostile to answering requests for information from arbitrators.[106]

That being the case, some authors have presented the idea of adopting a specific communication for arbitrators and a draft was submitted to an *ICC Task Force for Arbitrating Competition Law Issues*.[107] This private text is intended to cover both ordinary EC antitrust arbitrations and remedy related arbitrations. As the participation of the arbitrator in the context of obligations raises specific problems, it seems at the very least essential to clearly distinguish the two situations, and even to prepare two texts, if we adhere to the principle of such a communication.

We will be interested here only in measures which concern ordinary arbitration where the existence of such a text conflicts with the traditional principles which govern it: autonomy and detachment vis-à-vis state legal systems, confidentiality...

An initial problem is that of the legal nature of such a document. It would only be a matter of a *soft law* text, and in the hierarchy of *soft law* texts, the lowest category is, perhaps, *Best Practices*, which would not even be published in the JOUE...

The second problem of course concerns the contents. The author takes up the three points of article 15 of regulation n° 1/2003.

Information would be transmitted to the judge-auditor and would require, in order to respect the basic principles of arbitration, the consent of the parties. It may concern the request for arbitration, the mission statement... In fact, the draft does not specify why this transmission should occur within the context of ordinary arbitration... It seems to make sense only in order to inform the Commission in the hypothesis where the arbitrator would request its assistance... The draft stipulates that the request, which may concern either the interpretation of community law, or information may be done at the initiative of the court, without the consent of the parties. Going even further, the draft stipulates that the Commission may submit observations to the arbitrator at any time!

A third problem is to know what the scope of this text may be for international arbitrations in which articles 101 and 102 TFEU are applicable, but which take place outside of the European Union and are subject to a *lex arbitrii* of a third country.

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105 See also A. Komninos, (2010, op. cit.)

106 C. Gauer, Paris Colloquium, "Les réformes du droit communautaire de la concurrence et l'arbitrage international: un nouveau rôle pour les arbitres?", report, Revue de l'arbitrage 2002, p. 1069, by F. X. Train. It even seems that this was actually the case. See the references given by A. Komninos (20110, op. cit., note 87) who quotes the statements of J. Temple Lang and mentions a Spanish case.

107 C. Nisser and G. Blanke, "Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings", ECLR (2006), no. 4, p. 8; id., "Projet de lignes directrices de la Commission européenne intervenant en tant qu'*amicus curiae* dans les procédures d'arbitrage international", Revue Lamy droit de la concurrence, July/Sept. 2007, no. 12, p. 148, the same in English, "ICC Draft Best practice Note on the European Commission Acting as Amicus Curiae in International Arbitration Proceedings – An Explanatory Note", vol. 19 EBLR (2008) p. 193, and the text, p. 198

Sharp and reasoned critiques have addressed this text.[108] Apart from general considerations, the transposition of article 15 is not only unfounded, but also lacking utility, in view of the experience available regarding its application in relations with state courts.[109] From a purely technical point of view, it makes no sense to request the consent of the parties in order to transmit information and then to no longer plan for it.

While it is possible to debate the interest of *best practices* in the specific context of "commitment arbitrations", the text does not seem to be essential for ordinary law arbitrations. The request for information may be made in an informal manner. As for the intervention of the Commission in the proceeding, it must be left to the decision of the court as is already the case in investment arbitrations[110] and must be limited to the submission of written observations.[111]

- **Relations with the NCAs**. In internal arbitrations, but also even within the context of an international arbitration taking place in a member State, it may be tempting for an arbitration court to question the NCA rather than the Commission. In the majority of the national laws of the Member States, the ordinary law court may, in fact, consult the expert who is the specialized authority for an opinion.[112]

  Such is the case in French law, for example, where the opinion procedure of article L. 462-3 of the Commercial Code initially provides for only French law to be extended after regulation no. 1.2003 to Articles 81 and 82 EC pursuant to order no. 2004-1173 dated 4 November 2004[113] which adapts the French law on anti-competitive practices to regulation no. 1/2003. Here again, we wonder if the Council on Competition could be questioned by an arbitration tribunal. The situation has not yet presented itself. The answer to the question depends on the interpretation which will be given to the word "court" cited by the text. But to assume the affirmative response, the formalism and the length of the procedure hardly seem adapted to the constraints of arbitration.

  The situation may vary, however, according to the legal systems and it might be interesting to conduct a comparative study on this point.

(b) Consecutive and parallel procedures

In the presence of consecutive procedures, when the competition authority has already taken a position on the competitive aspect of a problem, the question arises as to whether it is necessary to

108 A. Mourre, "Opinions dissidentes sur un projet inutile et dangereux (à propos de l'intervention de la Commission comme *amicus curiae* dans les procédures arbitrales", RDLC, July/Sept., 2007, no. 12, p. 158, the same in English, "Dissenting Opinion on a Dangerous Project", 19 EBLR (2008), p. 219. See also A. Komninos, "Arbitration and EU Competition Law in a Multi-jurisdictional Setting", to be published in *International Antitrust Litigation*, forthcoming

109 See on this point the conclusions made by the Commission itself in the evaluation report of regulation no. 1/2003 in 2009

110 See S. Ménetrey, "L'immixtion de la Commission européenne dans les arbitrages intracommunautaires", study presented at the colloquium organized by the Collège Européen de Paris (dir. C. Kessedjian), *L'arbitrage et le droit européen de l'investissement*, Publ. Université Paris II, 2010

111 A. Komninos (op. cit. 2010), proposes to follow the example of EFTA arbitration

112 For a brief survey of solutions, specifically in Belgium, see "The cooperation between the Commission..", op. cit.

113 JORF, 5 November 2004

recognize a *res judicata* in the decision of the competition authority. Numerous misunderstandings result from the lack of precision of the "binding" English terminology, which for jurists trained in continental procedural law does not mean a great deal...

Faced with a decision by the Commission, this leads to questioning the application of article 16, § 1, of regulation no. 1/2003 by the arbitrators. The answer is certainly negative in the case of an international arbitration, since the arbitrators are then deprived of jurisdiction and are not attached to a particular State.[114] One may be more hesitant in the case of an internal arbitration which takes place in a Member State. However, if there is no *res judicata*) in the legal meaning of the term, the decision of the Commission has a *persuasive authority*.

The practical consequences are not neutral. This means that if it wishes to set aside the solutions adopted by the Commission, the arbitration court will have to provide solid grounds for its award in order not to risk exposing itself to an annulment. The problem is not relevant at this stage.[115]

The authority for a decision issued by an NCA depends on the applicable national law. We know that certain Member States, Germany, in particular, have generalized the solution affirmed by article 16, § 1, of regulation no. 1/2003 to all of the decisions issued by NCAs[116] members of the European Competition Network. It is not certain to what extent the solution can be applied equally to the arbitrators. In French law, in the condition of positive law, the decisions of the Competition Authority have no *res judicata* and only benefits from the persuasive authority which is connected with an expert's position.

That being the case, the scope of this authority certainly depends on the nature of the decision adopted by the competition authority. Prohibition decisions perhaps have greater scope than commitment decisions, in which the infringement is not established. Among the prohibition decisions, there is no doubt that the prohibition of a cartel has greater force than a prohibition of a vertical restraint. This authority is connected only to the operative part, the heart of the decision, and not on points which are primarily factual. The existence of the participation of a business or its duration; one may very well consider that the arbitrator has a different position.[117] Finally, the fact that pursuant to an appeal, the decision of the competition authority was confirmed by the court responsible for judicial review strengthens the *de facto* authority connected with it, including in an international arbitration.[118]

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114 See also in this regard, A. Komninos (2010. op. cit.)

115 We completely share the opinion of A. Komninos according to which only the arbitrator's non-compliance with article 16 of the regulations would be a cause for annulment of the award (an idea seemingly expressed by G. Blanke).

116 Art. 33, § 4, of the German law revised in 2005. We will leave aside the specific provisions of British law, art. 58 A and 47 A of the Competition Act, which concerns only actions for recovery before the Competition Appeal Tribunal.

117 See A. Komninos (2010, op. cit.). The authority of the decision, including that of the Commission in article 16 of the regulation, is connected only with the operative part.

118 We have consulted in an arbitration decision where the discussion concerned the authority of a decision of an NCA which had been the subject of an appeal before the review court, which had confirmed the decision. The arbitrator took this solution into consideration, but as the "persuasive authority".

Conversely, the arbitrators are in no way bound by the preliminary considerations which may appear in the preparatory acts, as for example, the notice of leniency in French law,[119] which were not the subject of any open discussion.

The latter situation, is therefore one of parallel proceedings and it is questionable whether there is an opportunity for a stay of proceedings, which may be considered on both sides.

Must the arbitration court wait for the position of the specialised authority? The answer is most certainly negative. No text - not even article 16, § 1, of regulation no. 1/2003 - requires the arbitration court to adopt such a position. Conversely, the arbitration court is also free to stay the proceedings if it deems it necessary. However, it may adopt this decision only in compliance with the rules of arbitration law. Consequently, it will have to take into account the time frame in which it must make its award and obtain its extension from the two parties.

Likewise, the competition authority is no longer responsible for staying the proceedings, even if there is nothing prohibiting it from doing so.[120] It may also continue the investigation and question the conclusions of the arbitrator.

2.3. The review of the award

Under arbitration law, any award may be subject to review by the court of the state in which one of the parties wishes it to have effect. If the case also raises a problem of competition, under the habitual review of the court (2.3.1), a possible review by the competition authorities may be added (2.3.2).

2.3.1. Review by the state courts

As the subject is complex and has given rise to abundant and much debated jurisprudence in recent years, it may be useful to recall the particulars of the problem before reviewing the most recent jurisprudence. There is a tool which makes it possible to review the awards, but which gives rise to divergent applications, hence the need to try to draw up guidelines.

(a) The existence of a tool

The review of the sentence is not always carried out, since the sentence can of course be executed spontaneously by the parties. It assumes that one of the parties, in general the one that was ordered to pay, objects to the enforcement of the award. If certain Member States give a *res judicata* automatically to an award, as in France, the enforcement assumes an exequatur. The losing party may object to the exequatur, but may also, in a preventive manner, file an action for annulment of the award. The latter is only possible in the State where the sentence is rendered.[121] The laws of arbitration seek to have a coherent system. A

119 The question may be asked in French law to the extent that the scope of the leniency program is not limited solely to hard-core cartels, but covers all horizontal agreements. We have been involved as a consultant in an arbitration where the problem was raised. The response of the arbitration court was very clearly negative. This aspect of the case was also the subject of a filing.

120 In the French case, where the question of the scope of the notice of leniency was debated before the arbitration court, the Competition Council had decided to stay the proceedings while awaiting the position of the arbitration court. This part of the case was filed subsequent to the award.

121 This duality of procedural means, as regards international arbitration, that we might be in the presence of contradictory solutions. An award may be annulled in the country of origin while it may be declared enforceable in another State. See on this point, *infra*, the *Cytec* case.

pertinent example is provided by French law in which bridges are built between the different procedural means in order that a single jurisdiction, the Paris Court of Appeals, deal with the different claims.

In addition to the review procedures which are a matter for national arbitration laws, it is necessary to take an interest in the extent of the review. Modern arbitration law is dominated by a major principle: *no review on the merits*. This means that the state court cannot retry the case on merits and may only carry out its review on certain points.

In international arbitration cases, the reference text remains the New York Convention of June 10, 1958 on the recognition and the enforcement of foreign arbitral awards ratified by more than 140 States. On the extent of review, it is necessary to refer to article V which lists seven foundations making it possible to object to the enforcement of the award. For competition law, the following are relevant: article V.2, sub a) which cites the hypothesis where the subject of the dispute is not capable of settlement by arbitration, and article V.2, sub b) when it is contrary to public policy. These two grounds were used by the UNCITRAL model law in article 36.1 sub b). They are found in all national arbitration laws.[122] While it constitutes a standard, the New York Convention is nevertheless rarely invoked in practice, because in application of the principle of maximum effectiveness it establishes, it is still possible for a contracting State to apply its national law if it is more favourable to the arbitration. Such is the case with so-called modern laws, such as French law.

If a country is a member of the European Union this does not modify the facts. In the absence of European Union jurisdiction in the matter, the principle of procedural autonomy is in play. The national laws of Member States apply subject to compliance with the traditional principles of equivalence and of effectiveness. Three decisions of the Court of Justice applied this principle with regard to arbitration, the first in competition law, the *Eco Swiss* decision in 1999, the two others more recently in consumer law, the *Mostaza Claro* and *Asturcom* decisions.[123]

In the rare countries which do not accept the arbitrability of disputes in competition law, it is possible to bar an award by invoking the nullity of the arbitration agreement.[124] However, this hypothesis is exceptional, and we will be interested in the review of the sentence only in the majority countries where arbitrability is no longer discussed. There is, incidentally, a close link between the recognition of arbitrability and the existence of the state review. In some countries, such as the United States or France, the admission of the arbitrability was only allowed because a simultaneous review of the sentence was possible.[125]

Irrespective of the legal system of reference, the New York Convention, or national arbitration law, the attack on public policy is the sole reason allowing the opposition of the enforcement of an award, including to declare its nullity. This reason finds its full application in arbitration law, as has been specifically affirmed in the United States in the Supreme Court in the *Mitsubishi* decision and in the European Union, the Court of Justice in the *Eco Swiss* decision.

This existence of this ground for review immediately raises two interpretation problems.

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122 See for example, in French law, art. 1502 Code of Civil Procedure and more specifically, art. 1502.1 (null or expired arbitration agreement) and 1502.5 (contrary to international public order)

123 Op. cit.

124 See our study, in *Arbitration and Competition Law*, ICC, 1993, op. cit.

125 This is the doctrine known as "second look" affirmed in the Mitsubishi decision.

First problem: to what concept of public order must reference be made? As regards internal arbitration, there is no problem as competition law is a matter of public policy; on the other hand, the problems appear with regard to international arbitration. As specified in article V.2 sub b) of the New York Convention and article 36 of the UNCITRAL model law, public policy is that of the State addressed. The mention of the idea "of international public policy", which may be made in certain law, such as French law, does not have any practical consequence at this stage. The imperative nature of competition laws is deemed sufficiently strong to also be governed by international public policy, but it is then a matter of international public policy as it is conceived by the State addressed and not a "transnational" conception. For the Member States of the European Union, articles 101 and 102 TFUE are an undeniable part of the international public policy of the State addressed. The solution results from the application of the principle of equivalence reaffirmed with force in the *Eco Swiss* decision. On the other hand, the problems appear when the award is reviewed in a third State. If we reject the existence of a truly transnational public policy which would be imposed throughout the entire world, and would encompass, for example, the solutions universally established in competition law, such as the prohibition of cartels, it is not possible to control the arbiters' compliance with community law in a third State.

Second problem: what is to be understood by violation of public policy, knowing that the state court is bound by the principle of no review on the merits. On this point, French jurisprudence is by far the most developed, but a study of comparative law shows very diversified solutions.

(b) The use of the tool

It is possible to affirm that the subject has experienced an undeniable renewal of interest since 2004 and the occurrence in France of the *Thalès* decision by the Paris Court of Appeals[126] which revived the academic discussion on this point by adopting a liberal position. This decision was the subject of multiple commentaries to the contrary, which enabled Professor Radicati di Brozzolo to classify the doctrine in two categories:[127] the so-called maximalist thesis[128] and the so-called minimalist thesis.[129]

126 CA Paris, 18 November 2004, Revue de l'arbitrage, 2005.751. See for a list of numerous commentaries on the case, *Lamy Procédures communautaires, study 295-130*. This case concerns a cooperation agreement between Thalès and EADS for the manufacture of short-range air/ground missiles, an agreement encouraged by the German and French governments following the fall of the Berlin wall, which had considerably reduced the market... Prior to the agreement, Thalès, holder of the technology, had the missiles made by an American company. The objective of the agreement was to repatriate the manufacturing to Europe and to entrust it to EADS. Appended to the memorandum of agreement was a list of the national markets concerned, which were broken down into three categories: the markets so far obtained by Thalès, those of EADS, and the free markets The dispute arose when Thalès, having been awarded a bid in Greece, which was a free market, did not manage to have them made for EADS at a satisfactory price. Thalès then implemented the arbitration procedure in order to obtain the cancellation of the contracts, which included a technology agreement. In the first award, the arbitrators pronounced the cancellation of the licensing agreement, but at Thalès expense. A second award then occurred to determine the amount of damages allocated to EADS due to the cancellation deemed to be faulty. Thalès filed an action to annul against this second award for attack on public policy because damages in a very high amount had been calculated by the arbitrators on the basis of the sharing of markets clause and for the entire term of the licensing agreement which was 25 years. Although the competition law had never been discussed before the arbitrators, the Paris Court of Appeals considered that the violation had not been sufficiently "flagrant, effective and concrete".

127 We will refer to his writings (not., in French, "L'illicéité qui 'crève les yeux': critère du contrôle des sentences au regard de l'ordre public international", Revue de l'arbitrage, 2005.529) and specifically to the report presented for this conference and the bibliography indicated in it.

However, beyond doctrinal controversies, the French position in favour of a minimal review was reaffirmed by the Cour de Cassation in the *Cytec* case in 2008[130] and more recently, but with variations, for the Paris Court of Appeals late 2009 in a *Linde* decision.[131]

In these cases a new standard appeared.[132] The attack on public policy must be "flagrant, effective and concrete". The French courts considered that there had not been an attack on public policy, that the arbitrators had not discussed a competition problem, as in the *Linde* and again in the *Thalès* cases, that they had considered that it was not up to them to review the evaluation made by the arbitrators of the illegality of the contract, in the *Cytec* case.

For its part, the *Cytec* case held the attention, less on the French side than on the Belgian side. In this case, in an initial award, the arbitration court had pronounced the nullity of an exclusive supply contract between the two companies. A second award was made at the end of which damages had been allocated on the basis of what would have happened in the absence of the annulled contract. At the end of a detailed review, the Brussels court annulled the award,[133] but this solution was reversed by the Brussels Court of Appeals in 2009.[134] In this case, the contract deemed illegal having been annulled by the initial award, there had not been any attack on Community public policy, but it is interesting to note that the Belgian courts nevertheless did not waive performing any review.

A quick overview of comparative law makes it possible to establish a variety of solutions with regard to the extent of the review which may be performed by the state court. To summarize, we can compare the States which adopt a restricted review. At the top, we find France with the new criterion of "flagrant, effective and concrete" attack, but also, it seems, Italy,[135] even Sweden. Conversely, in other States, such as the Netherlands,[136] Germany,[137] Belgium, the review seems more extensive.

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128 Among the authors that we can classify in this category; Ch. Seraglini, "L'affaire Thalès et le non usage immodéré de l'exception d'ordre public", Cahiers de l'arbitrage, 2005-2, p. 5, by the same author, "Le contrôle de la sentence au regard de l'ordre public international par le juge étatique: mythes et réalités", Cahiers de de l'arbitrage, 2009-1, p. 5. See also, P. Mayer, "L'étendue du contrôle par le juge étatique de la conformité des sentences arbitrales aux lois de police", in *Vers de nouveaux équilibres entre ordres juridiques. Mélanges en l'honneur de H. Gaudemet-Tallon,* Paris, Dalloz, 2008, p. 459

129 See in particular, the various writings of A. Mourre, note on the decision, Journal du droit international, 2005, p. 357; also, E. Loquin, Revue trimestrielle de droit commercial, 2005.263

130 CA Paris, 23 March 2006, Revue de l'arbitrage, 2007.100, S. Bollée note, and on appeal, Cass. civ. 1st Cass civ., 4 June 2008, Revue de l'arbitrage 2008.473, I. Fadlallah note, Gazette du Palais, 20/21 February 2009, p. 32, F.X. Train note, Journal du droit international, 2008.1107, A. Mourre note

131 CA Paris, 22 October 2009, *Sté Linde*, Revue de l'arbitrage, 2010.124, F.X. Train note

132 As noted by Pierre Mayer (op. cit. article, p. 463), in the aftermath of the Labinal decision (1993), the Paris Court of Appeals had developed a more strict approach to review.

133 Court 1st instance, Brussels, 8 March 2007, Revue de l'arbitrage, 2007.303, A. Mourre and L. Radicati di Brozolo note

134 CA Brussels, 22 June 2009, Revue de l'arbitrage, 2009.574, A. Mourre note

135 See CA Florence, 21 March 2006, *Soc. Nuovo Pignone v/ Schlumberger*; CA Milan, 5 July 2006, *Terra Armata, v/ Tensacciai*, 25 Bull. ASA, 2007, p. 618

136 Gerechtshof's Gravenhage, 24 March 2005, *Marketing Displays International*; see. not., L. Idot, "Ordre public, concurrence et arbitrage. Etat de la rencontre", Concurrences, 2006-3, p. 12: L.-Ch. Delanoy, "Le contrôle de l'ordre public au fond par le juge de l'annulation: trois constats, trois propositions", Revue de l'arbitrage, 2007.177

Although this disparity of solutions may seem shocking, at least within the European Union, it is even more difficult to manage for the companies, which may find themselves faced with the ubu-esque situation in which the award, annulled in the Court in which it had been rendered, must be enforced in another State. This situation almost occurred in the *Terra Armata* and *Cytec* cases, but fortunately, the initial contradictions were eliminated by the higher courts.[138]

(c) Conclusions on the effectiveness of control

Without entering into the discussion of the merits of any particular thesis, it seems important, from a practical perspective, to clearly distinguish several scenarios.[139] We will reason out the hypothesis in which, in one case, article 101 TFUE was applicable. In practice, the effectiveness of the review depends on two facts.

The first is a geographic fact. The effectiveness of the award review depends, not on the place where the award was made, but on the place in which it is reviewed. To simplify, two situations must be singled out.

First situation: the review is performed by a foreign state court under the applicable competition law. For example, the review is performed by a Swiss court. In the state of positive law, everything depends on the conception of international public policy made by the court responsible for the case. Could it be considered that there is sufficient consensus on certain principles of competition law, such as the ban on cartels, for a foreign court under the European Union legal system to sanction an award which would violate article 101 TFEU? In 1992, the Swiss Federal Court had made a conspicuous decision which did not hesitate to annul an award because the arbitrators had not taken article 101 into consideration, although the contract was subject to the law of a Member State.[140] However, this situation does not correspond to positive law. At various times[141] and again, recently, the Federal Court considered in the *Terra Arnata* case that it was not its responsibility to review an award in relation to the Community public policy which was foreign to it.[142] In this particular case, the solution does not remove the conviction for different reasons, which stem from competition law as well as from arbitration law. Swiss competition law is however quite close to European Union law, which is proven by the special relations... We may consider that there are common values. Furthermore, in this case, the difficulty concerned the problem of consortium agreements for the creation of a high speed railway line in Italy. With regard to arbitration law, the applicability of Community law did not pose any problem and the arbitrators had, it seems, examined the question for a rather long time. Finally, that the Federal Court rejected the action for annulment seems sufficiently justified; it is the reasoning used which was criticised by the specialists of competition law.

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137 OLG Düsseldorf, 21 July 2004, v. e/Competitions, no. 21234, report by P. Linsmeier and M. Lichtenegger; OLG Thuringe, 8 August 2007, v. e/Competitions, no. 22882, report, S. Thomas

138 See in particular L. Idot, "The Role of Arbitration in Competition Disputes", in I. Lianos & I. Kokkoris (eds), *The Reform of EC Competition Law. New Challenges*, 2010, Kluwer Law International, pp. 75-94, sp. 93

139 For more detailed explanations of our position, L. Idot, "L'étendue du contrôle de la sentence", in *Arbitrage et droit de la concurrence*, colloque Cepani, December 2010, Bruylant, Bruxelles, 2010, actes du Cepani, vol. 13, p. 145-171

140 Federal Court, 28 April 1992, Bull. ASA, 1992.368, Revue de l'arbitrage, 1993.124, L. Idot note

141 Federal Court, 13 November 1998, Bull. ASA, 1999.529; Federal Court, 1st February 2002, Bull. ASA, 2002.337

142 Federal Court, 8 March 2006, Revue de l'arbitrage, 2006.763. For a presentation of the case, see the report, "Ordre public, concurrence et arbitrage", organized by Ch. Bovet, in Concurrences, no. 3-2006 with the points of view of C. Partasides and L. Burger, F. Knoepfler

Second situation: an award made in a third country is reviewed in a Community Member State. This hypothesis is the hypothesis examined by the Dutch judge in 2005 in the *Marketing Displays* case. The discussion concerned licensing agreements granted to a Dutch distributor by an American licenser and subject to the law of the State of Michigan. Proceeding with a review of the situation, the Hague court noted that the agreements contained territorial restrictions contrary to article 101, § 1 TFUE, and that they were not covered by a block exemption regulation.

Beyond the geographic criterion, another fundamental difference must be raised. In the *Terra Armata*, the question of competition had long been debated by the arbitrators. On the other hand, in the *Marketing Displays* case, the arbitration took place according to the rules of *the American Arbitration Association* and no discussion had taken place on the legality of the agreements as regards Community law.

The second fact is, in effect, material in nature. Even if competition law falls within the international public policy of the court addressed - which is the case for any state court of a Member State, when Union law is applicable-, another distinction must, in our view, be made as to whether or not the competition question was discussed before the arbitrators.

When the competition question was raised and discussed before the arbitrators, it is rather logical that the action for annulment be rejected. The state court is linked by the prohibition of the review on the merits which limits the control. It may be that the arbitrators had proceeded to misapply competition law, but in fact, the situation is often comparable before the state courts. In this case, the French solution which consists of requiring a "flagrant, concrete and actual" violation is not surprising. The decision of the Cour de Cassation in the *Cytec* case seems justified. Conversely, the extensive review made in this same case by the Brussels court is surprising given the current state of international competition law.

The facts are different when the competition question has not at all been considered by the arbitrators, either out of ignorance, or by deliberate desire to avoid the competition problem. It is specifically with regard to this second situation, which corresponds to the *Thalès, Marketing Displays* cases, and more recently, the *Linde* case, that the criterion of "flagrant, concrete and actual violation" appears inappropriate. It results in the paradox that the award in which the competition question was not been discussed had a greater chance of being enforced than the one in which the problem was examined at length by the arbitrators.[143]

It is true, however, that the arbitration laws do not make this distinction. In the countries where the review is "minimalist", the review concerns the award which is submitted to the state court. Although it is not only extrinsic and concerns all of the de facto and de jure elements which appear in this award, it nevertheless concerns an essentially formal review. The only operative criterion is that of the "flagrancy" of the violation, but which is never identified, including in the hypotheses where the competition law is not discussed.

The authors are particularly interested in trying a midway path making it possible to reconcile the different theses. Different readings have been proposed. Thus P. Mayer suggests making a distinction based on whether there is a material attack on public policy, such as the perpetuation of an anti-competitive agreement, and an attack on the effectiveness of the public policy rule. For example, in the Thalès case, there was no material attack, since the arbitrators had in the first award pronounced the cancellation of the disputed contract and that, concretely, the discussion concerned the amount of damages allocated to one of the parties. However, one could maintain that there was an attack on the effectiveness of the public policy rule, since the amount of these damages was calculated on the basis of a sharing of markets clause. Other authors, like L. Radicati and A. Komninos suggest having the extent of the review vary based on the nature

143 See on this point the comments of F.X. Train under the *Linde* decision, op. cit.

of the competition law violation, which would lead to introducing the distinction between hard-core cartels and the other competition restrictions...

It seems necessary to reconcile the current criteria of the concrete, effective and flagrant attack, with the distinction of whether or not the question of competition law was discussed. For European Union law, this seems to be the only one able to ensure the effectiveness of the award review with regard to articles 101 and 102 TFEU. The partisans of the minimalist thesis continue to entrench themselves behind the principle of equivalence, but they forget the principle of effectiveness which is even more important and which was noted with force by the Court of Justice in the *Mostaza Claro* and *Asturcom*cases.[144] Thus, for example, in the *Thalès* case, the state court was able to note that the case had not been discussed by the arbitrators, while on the basis of the elements it had available, it was possible to identify the problem. In a second line of reasoning, the contract presumed to be illegal having been cancelled, it could have noted that the allocation of damages, even based on a sharing of markets clause, entailed only an attack on the effectiveness of the competition law, which was not sufficiently flagrant to justify the annulment of the award. Likewise, in the *Linde* case, it is possible to admit that the fact that the arbitrators did not raise the legality of an exclusivity clause in an industrial supply agreement does not constitute a sufficiently flagrant violation to justify the annulment. On the other hand, when the question of competition law is discussed in an open manner before the arbitrators, it is more difficult to identify a flagrant restriction. It must be noted that in practice, the situations are rarely black, but rather grey, the most current hypothesis being that of the exclusivity or non-competition clauses. We may perhaps accept a flagrant violation if the arbitrators refuse to describe anticompetitive restrictions of the restrictions characterized. But the sole indisputable situation is the one in which the arbitrators enforce a horizontal cartel. In this case, rather than the state court, it is the competition authorities who would intervene.

2.3.2. Review by the competition authorities

The facts we have available concern a possible review by the European Commission. The competition authority may first of all impose an obligation to communicate arbitration awards. In European Union law, the facts have evolved due to the move to a system of legal exception. Since 1st May 2004, the only issue discussed is that of application by the arbitrators of article 15, § 2 of regulation no. 1/2003. In fact it is easy to resolve. This transmission obligation does not weigh on the arbitrators who are not connected with the legal system of a Member State. On the other hand, it should be the responsibility of the state courts which review arbitration awards. It must be noted that the latter is not respected.

Thus, for example, the decision of the Dutch court in the *Marketing Displays* case was notified to the Commission, while the decisions of the Paris Court of Appeals and the Cour de Cassation in the *Thalès*, *Cytec* and *Linde* cases were not. This is only the most general illustration of the absence of effectiveness of article 15, § 2, indicated at the time of the first report on the application of regulation no. 1/2003.

On the other hand, once the award is made, nothing prevents a competition authority from intervening and instituting proceedings against the parties. The *res judicata* which is attached to an arbitration award is not binding on a competition authority. We traditionally cite the 1975 *Preflex* case in which the Commission had heard a complaint objecting to an award contrary to article 81 EC.[145] The Commission had undertaken a procedure which was completed by a filing after which the parties had agreed to modify

144 See also, in this sense, P. Mayer and F.X. Train

145 See in particular, V° Arbitrage, op. cit. no. 65 and the cited references

their conducts. Other examples may also be found with regard to the Commission[146] that the national authorities.[147]

3. The arbitrator, public enforcement *auxiliary*

Arbitration may be used in competition law under circumstances totally different from those of *private enforcement*. The competition authorities may, in fact, provide for the intervention of third parties to assist them in the implementation of commitments. For structural commitments regarding control of mergers, the practice developed the use of authorized representatives and trustees to control divisions. The technique is now carefully controlled, at least in European Community law. Subsequently, to the extent behavioural commitments are allowed, the need to use other third parties is clear. They are often called "arbitrators", but the term "arbitration" must then be taken in a broad sense, because the study of clauses reveals a great diversity and often these third-parties are only simple mediators.

However, the finality of the intervention of the arbitrator is completely different. It is no longer a matter of settling a dispute within the context of *private enforcement* but of assisting the competition authorities in the context of *public enforcement* in which the arbitrator is only an auxiliary. In fact, a procedure has already taken place before an authority and has resulted in a decision which allows behavioural commitments (delivery commitments, commitments to give access, to infrastructures, licenses...).

The phenomenon appeared at the end of the 1990s in the Community control of mergers[148] and has since been an undeniable success.[149] For the competition authority, the use of this technique makes it possible to guarantee the fast and effective execution of the commitment by "delegating" them to a third party. On the other hand, in the "arbitration world", the reception was varied: some arbitration professionals encouraged it, perhaps seeing a new market,[150] conversely, other specialists greeted the appearance of the competition authorities in the process with great scepticism and feared a challenge both to their independence and to the general principles which govern arbitration.[151]

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146 Ph. Chevalier, "Clauses suspectes dans un accord de règlement à l'amiable", *EC Competition Policy Newsletter, 1997*, no. 3, p. 8

147 See for example, in Spain, the hypothesis of a proceeding by the competition authorities subsequent to an arbitration award, A.Montesa Lloreda, A. Givaza Sanz, e-Competitions/No.15105, March 2000

148 See the first studies, L. Idot, "Une innovation surprenante: l'introduction de l'arbitrage dans le contrôle communautaire des concentrations", Revue de l'arbitrage, 2000.591; Ch. Liebscher, "L'arbitrage dans le contrôle communautaire des concentrations: des perspectives", Gazette du Palais, 2003, I, doct., p. 24

149 See the comprehensive study by G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies*, Groningen, 2006, Europa Law Publishing. This work was followed by systematic publications, not., "The Use International Arbitration in EC Merge Control: Latest Developments", 28 ECLRev., 2007, p. 673, then, "Arbitration and ADR of Global Antitrust Disputes", Global Competition Litigation Review, 2008, p. 46, 78, 133 et 2009, p. 1. Adde, L. Radicati di Brozolo, "Arbitration in EC Merger Control: Old Wine in a New Bottle", 19 EBLR (2008), p. 17-41; J. Lübking, "The European Commission's View on Arbitrating Competition Law Issues", 19 EBLR (2008), p. 77-87

150 See in particular M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, Swiss commercial law series, Zürich, Helbing, 2003

151 See for example, Ch. Jarrosson, "Les frontières de l'arbitrage", Revue de l'arbitrage, 2001, p. 5; report on the colloquium of arbitrators of the Milan arbitration chamber, Revue de l'arbitrage, 2004, p. 163

Without reopening the discussion in its entirety,[152] from a practical perspective, we will attempt first to list the "acquis", which concern the actual principle of use of an "arbitrator" (3.1), then the pending problems which deal more with the terms for this intervention (3.2)

3.1. The "acquis" regarding the use of the process

The acquis concern the actual principle of the use of third parties in order to control behavioural or quasi-structural commitments, i.e. each time a difficulty may arise between one of the parties cited by the decision of the competition authority and a third party for the execution of the commitment. Two observations may be made: one of a practical nature regarding the extension of the scope (3.1.1), the other more theoretical regarding its legality (3.1.2).

3.1.1. Extension of the scope

From a practical perspective, in ten years we have witnessed an undeniable extension of the scope of use of the procedure, which may be identified both on the material and the geographical level.

(a) On the material level

It seems (but this point must be verified) that the Commission is the first competition authority to have made use of arbitration with regard to the control of mergers, since the first decisions date back to 1992. Completely exceptional at first, the practice developed somewhat during the 2000s, a turning point having occurred in 2003 with the *Newscorp/Telepiu* decision.[153] The practice now seems more accepted since in the most recent communication on corrective measures dated 22 October 2008, the Commission emphasised the importance of such clauses in the case of commitments concerning access rights.[154] This being the case, it is necessary to be aware of the fact that insofar as the commitments accepted by the Commission are most often of a structural nature, the phenomenon remains completely marginal compared with the total number of decisions containing commitments, which are themselves very limited compared with the bulk of final decisions.

Beyond the review of merger controls, the technique may also be used for the enforcement of antitrust laws, as the legal system recognizes a negotiated procedure. In European Union law, before regulation no. 1/2003, the Commission, in the context of the procedure for notifying agreements stipulated by regulation no. 17/62 was able to occasionally make use of arbitration.[155] One of the best-known cases concerns the analysis of rules relative to the transfer of footballers proposed by the FIFA and the UEFA.[156] At the time, in the absence of decisions, the procedure was not widely used. Regulation no. 1/2003 formalized the practice of commitments in article 9. Since the text entered into force, on 1st May 2004, at various times the Commission has accepted commitments stipulating recourse to a third-party, for example in the *Bundesliga*

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152 This subject engenders lively theoretical debates on the nature of arbitration. One author, G. Blanke, speaks of regulatory arbitration.

153 Comm. EU, decision dated 30 April 2003, case M.2876

154 Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJEU, n° C. 267, 22 October 2008, pt 66

155 See A. Komninos, *Decentralisation and Application of EC Competition Law by National Courts and Arbitrators. The Awakening of EC Private Enforcement*, thesis, Florence, 2006, p. 303

156 Commission, 31st report on the competition policy, 2001, p. 48

decision on the transfer of rights to rebroadcast football games[157] and the various decisions on the supplying of technical information by automobile manufacturers to independent repairers.[158]

This extension of scope is entirely logical, since with regard to anticompetitive practices, unlike the control of mergers, behavioural commitments are generally used and structural commitments are more exceptional.

(b) On the geographic level

From a European perspective, it should be noted that the practice was initially limited to the European Commission. However, over time other national authorities followed. The British and Spanish examples may specifically be mentioned.[159] In France, to our knowledge, the technique was used by the Ministry of Economy in merger control.[160] It does not yet seem to have been used, but there is no hostility to the principle on the part of the Competition Authority.

It still seems that the cases concern the control of mergers, but there is no theoretical obstacle to extending this to cover antitrust once national law adopts the commitment procedure.

3.1.2. The legality of the procedure

The second issue concerns the legality of the use of arbitration. It is necessary to consider the question, both from the point of view of arbitration law and of competition law.

In arbitration law, the arbitrability does not seem to be called into question, insofar as these arbitrations are always stipulated in contractual matters. It may concern commitments not to break or modify existing contracts, for example, supply contracts,[161] or contracts concerning audiovisual rights, or conversely to conclude future contracts, as in granting a license, a right of access…[162] In practice, the problem does not arise as long as the competition authorities accept the procedure.

With regard to competition law, the facts are more complex. This "delegation" to a third party, or even more, to a simple private person, remains to be seen. To our knowledge, this question has only been discussed in Community law.

With regard to control of mergers, the Court of First Instance came to a decision while remaining very brief on two occasions in 2003 in the *ARD* case,[163] then in 2006 in the *EasyJet* case.[164] Far from

157 Comm. EU, dec. No. 2005/396 dated 19 January 2005, JOUE, no. L. 134, 27 May 2005, case 37.214

158 Comm. EU, dec. 13 September 2007, case 39.140, Daimler, JOUE, no. L. 317, 5 December 2007, case 39.143, Opel, JOUE, no. L. 330, 15 December 2007; case 39.142, Toyota, JOUE, no. L. 329, 14 December 2007; case 39.141, Fiat, JOUE, no. L. 332, 18 December 2007

159 See the examples cited by A. Komninos (thesis op. cit., p. 296) and G. Blanke and R. Nazzini, op. cit., Global Competition Litigation Review, 2008 and 2009

160 See for example, Ministry of Economy**,** dec. C-2007-14, CCIP/Unibail, 13 November 2007 ; Competition Council, opinion n° 07-A-10. The trustee could be appointed as a mediator, and if there is no solution, an arbitration can takes place.

161 See for example, Comm. EU, decision 25 January 2000, Carrefour/Promodès, M.1684

162 See for example, Comm. EU, decision 2 April 2003, Newscorp/Telepiu, M. 2876

163 CFI, 30 September 2003, *ARD v/Commission*, T-158/00, ECR-II-3825, point 203

164 CFI, 4 July 2006, *EasyJet c/Commission*, T-177/04, ECR-II-1931, point 186

questioning the technique, it had, on the contrary, insisted on the practical advantages of arbitration in order to ensure the execution of behavioural commitments.

Consequently the practice seemed to have been adopted until the Court's decision in the *Microsoft* case.[165] The fact that the only point in the decision annulled by the Court concerns the intervention of the authorized agent in the review of the execution of injunctions was cause for questioning. Certain practitioners questioned whether the position of the Court was reverting to condemning the use of arbitration in the matter of commitments.[166] The response seems negative for different reasons. The Court recognized that the Commission could legally monitor the implementation of injunctions and could be assisted by an outside expert. If it annulled this aspect of the decision, it is because the Commission had gone too far in conferring on this third party a right of access to all of the company's information with no time limitation, by furthermore stipulating that the costs of the intervention would be payable by *Microsoft*.[167] An additional argument may be put forward since the *Alrosa* decision of the Court of Justice which insisted on the difference between the injunctions and the commitments.[168] Even though the contents of injunctions and commitments may be very close, a fundamental difference resides in the fact that the commitment is proposed by the company unlike the injunction which is imposed by the Competition Authority. This is an additional reason to consider that the *Microsoft* decision does not call this practice of the Commission into question. However, the problems are not yet resolved.

3.2. Problems pending in the use of the procedure

While the principle of a possible recourse to a third party is established, it is still necessary to organize the terms of this intervention by reconciling the various diverse interests. The commitment is proposed by the company, but in order to eliminate the problem of competition which had been previously identified, it is essential for the competition authority which accepted it that it be effective. The various difficulties, both of a practical and theoretical order, concern both the organization of the arbitration (3.2.1) its conduct (3.2.2) and its review (3.2.3).

3.2.1. The organization of the arbitration

For the competition authority, the first issue to be settled is that of knowing what it expects from third parties. What are the tasks which will be entrusted to them? In this case it is determinant not to be mistaken about the legal qualification of the third party and provide powers corresponding to the assigned mission. A distinction should be made between the powers of a mediator which are limited to bringing the parties together, but without making an obligatory decision imposed on the parties, and those of an arbitrator in the strict sense, whose decision is imposed on the parties.

Between the two, the judicial arbitration and the mediation, there exists a whole serious of interim situations... The most interesting example is what is known as "contractual arbitration" in certain national laws. In this case, the mission of the arbitrator is not to settle a dispute, but to adopt a decision instead of

165 CFI, 17 September 2007, *Microsoft c/Commission*, T-121/04, Rec., p. II-3601

166 J. P. Gunther and D. Tayar, "L'arrêt Microsoft marque-t-il la fin de l'externalisation du contrôle des engagements en matière de concentrations", Revue Lamy de la concurrence, 2008/14, no. 1039, p. 139

167 For a complete analysis of this aspect of the decision, see F. Zivy note, Concurrences, no. 4-2007, p. 123

168 CJEU, 29 June 2010, Commission v/ Alrosa, case C-441/07 P

the parties, who have been unable to come to an agreement, for example on the price of the license. In the decision-making practice, we thus find recourse to so-called *pendulum arbitration* mechanisms.[169]

In any event, it is essential for the authority to take a position on the point of knowing if it wants a simple conciliation or mediation or if it wants the decision of the third party to be imposed on the parties.

A detailed examination of the clauses accepted by the Commission in the past shows a wide variety of situations.[170] Likewise, in antitrust, the most recent case of the supplying of technical information by automobile manufacturers leaves the outside observer unclear on this point. It is difficult to understand why in one case, that of Fiat, the Commission was content with a simple offer of mediation, while in the three other cases, it is actually arbitration which is proposed, while in the Toyota case, there is a classic two-step mechanism, first of mediation, then if that fails, arbitration.

Once the choice is made, the rules governing it emerge. It raises little specific difficulty in the case of a mediation particularly if the clause stipulates an ad hoc mediation.[171] The situation becomes more delicate when it is planned to entrust a decision-making power to third parties, thus if one is inclined towards arbitration. The distinction between judicial arbitration, where the arbitrator settles a dispute, and contractual arbitration, where the arbitrator for example decides on the price, or makes the decision instead of a board of directors,[172] is not generalized. Yet the issue is fundamental, since the application of the rules of civil procedure specific to State arbitration depends on the response.[173] Recourse to arbitration regulations from a major centre, such as ICC arbitration, is meaningless except for a judicial arbitration.

It is not clear upon reading certain clauses that the Commission has always been aware of the issues and even more of the diversity of national arbitration laws.

In each hypothesis, the stipulated mechanisms are binding on third parties only if they have given their consent. Of course, for the recipients of the Commission's decision, the recourse to arbitration is obligatory. In practice, it is rare for a clause to concern only these recipients. In the large majority of hypotheses, the arbitration is of interest only for the third parties (for example, the independent repairer in the case of manufacturers' technical information), who, at the time the commitment is proposed, are still undetermined. The commitment may thus contain only an offer of arbitration, which will then have to be accepted by the third party. It is possible to draw a parallel with the situation of arbitrations involving investments where the recourse to arbitration is stipulated by a treaty or a statute. The commitment is unilateral and does not require third parties to resort to arbitration without their agreement.

169 See for example, Comm.EU, decision 29 March 2003, Shell/BASF/JV Project Nicole, M.1751; decision 3 April 2000, Dow Chemical/Union Carbide, M.1671

170 See for an analysis of clauses, G. Blanke, op. cit.; in French, G. Decocq, "Arbitrage et droit communautaire du contrôle des concentrations", Revue des affaires européennes [Review of European Affairs], 2005.169

171 Considering the considerable development of ADRs (other than arbitration), large organisms such as the ICC, for example, are now proposing assistance to companies both in the matter of conciliation and of mediation with specific regulations.

172 See Comm. EU, decision 9 March 1999, Danish Crown/Vestjyske Slagterier, M.1313

173 Thus, for example, in French law where this distinction exists, the rules of the Code of Civil Procedure apply only to judicial arbitration. Contractual arbitration, such as that stipulated in article 1592 of the Civil Code for price fixing, complies solely with the rules of the law of obligations.

However, while this solution is imposed when the aim of the third party is to settle a dispute and is respected by the Commission,[174] it is different when the third party has been entrusted with the task of adopting a decision, specifically on a price. The arbitrations whose purpose is to determine the commercial conditions of a contract are sometimes statutory arbitrations.[175] It is true that this is not specific to competition law[176] and that the conduct of the arbitration is in principle favourable to third parties.

3.2.2. The conduct of the arbitration

The conduct of these arbitrations is specific to the extent that first of all we observe numerous deviations from the usual rules.

On the process level, the most current stipulations concern the distribution of costs, the latter often being made the responsibility of the parties making the commitment. If an institutional arbitration is stipulated, this is not insignificant on the practical level... Still more important, reference should be made of the modifications to the burden of proof. It is clear the Commission wishes to facilitate the procedural situation for third parties. One may also find affirmation of the need to comply with Community rules with regard to business secrets.

Other exceptions may concern the powers of the arbitrators and concern the content, such as the possibility of submitting to the arbitrators a single draft contract, or conversely several, or even of choosing between contracts without being able to amend them, of stopping the effective date of the contract.

Without entering into details, we will limit ourselves to two observations. First observation: the exceptions stipulated in the commitments, specifically on the procedural level, are sometimes in conflict with the choice of the arbitration regulations of a major arbitration institution. Rather than carve up an arbitration regulation, with all of the risks that it entails, perhaps it would be better to put an *ad hoc* arbitration in place. Such a solution seems to be relevant when the task given to the arbitrator is that of finalising the contract.

For the competition authority, the question then arises of knowing if it is necessary to internally review standard types, analogous to those that practice has allowed to develop for trustee mandates. The volume of cases must perhaps justify doing so. At this stage, in Europe, only the Commission seems concerned. One thing is certain. A single model is to be prohibited and it is necessary, on the basis of past experience, to clearly identify several situations in order to avoid different developments, as occurred in the automobile manufacturers' case.

This question is distinct but may be dealt with at the same time as another question, which is that of the organisation of relations between the arbitrator and the Commission. It is at this stage that we find the *Nisser/Blanke* project[177] in one of its only provisions concerning what the authors call "remedy-related

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174 See the analysis proposed by G. Decocq, who identifies several scenarios: the case where in the event the conciliation fails, the third party may resort to arbitration, the case in which the commitments stipulate the distribution to third parties of the general terms and conditions or other documents describing the principles and the functioning of the procedure, the case where the commitment contains the arbitration clause which will be proposed to third parties.

175 See for example, Comm. EU, decision 21 March 2000, JV 37, B Sky B/Kirch Pay TV

176 See for example, in French corporate law, the mechanism stipulated in article 1843-4 Commercial Code, for the assignment of ownership interests

177 Op. cit.

arbitration". Considering the specificity of the arbitration, of the general context in which it is inserted, the principle of a communication dealing with a subject does not seem surprising to us.

Two points are capable of being stipulated not only in the communication, but also in the commitments themselves in order to give these stipulations a legal force.

It seems entirely logical and in no way surprising that the competition authority be informed of the use of the mechanism stipulated by the commitment. This implies a double obligation of notification for the parties: an obligation of notification at the start of the procedure, of the recourse to the mechanism stipulated in the commitment,[178] an obligation of notification at the end of the procedures of the results of the arbitration.[179]

To this obligation of notification must be added a possibility of reciprocal information. It seems logical that, if it wishes to do so, the competition authority asks the arbitrator for information, if only to know where things stand. Conversely, it is not surprising for the arbitrator to request information from the competition authority, with full respect for the contrary, if it concerns a judicial arbitration.

In conclusion on this point, the transposition to arbitration of the communication on cooperation with national courts does not seem the best solution. Beyond the calling into question of the very foundations of the arbitration,[180] it is inappropriate because it would have meaning only for the judicial arbitration. However, with regard to commitments, this is not the most frequent problem. It seems to us more appropriate to build on the experience acquired regarding structural commitments and recourse to authorized agents.

3.2.3. The review of the mechanism

As for classic arbitration within the context of *private enforcement*, the issue of review is diverse: review by whom and of what?

The review may concern the respect by the parties for the commitment, or the fact of accepting the mechanism and compliance with its terms and conditions (ex. payment of expenses...). Since arbitration originates in a commitment. It thus seems logical that the competition authority be able to use the complete standard arsenal available to it in order to ensure respect for this commitment.

Incidentally, the question arises of knowing if the third parties may also bring a case of non-respect for the commitment before the ordinary court, but it is not specific.

The question arises differently if the review concerns the contents of the arbitrator's final decision. Two scenarios may occur.

First scenario: the decision of the arbitrator is not respected. If the violation comes from the party who made the commitment, we return to the previous hypothesis and the competition authority may use its "arsenal" with regard to execution of commitments. At the same time, as for the third party, it may use the

178 It does not seem useful to draw up a list as strict as that stipulated in the Nisser/Blanke project, which is very formal and which is appropriate only for judicial arbitration.

179 In the initial commitments, this point was sorely lacking. For example, in the Carrefour/Promodès case, it was at a colloquy that a lawyer appointed as an arbitrator on the basis of this engagement informed us of the actual functioning of the clause. The Commission was not informed...

180 See on this point the critiques of A. Mourre, op. cit.

remedies offered by the national arbitration law, which will depend on the mission entrusted to the arbitrator.[181]

Second scenario, incidentally highly unlikely: despite all the preventive mechanisms, the arbitrator has given an unfeasible solution. It does not seem to us that the review authority can use its "arsenal" with regard to respect for commitments against third parties, and it is questionable whether there would be a possible action for damages. It is up to the party "aggrieved by the decision" to use the legal means stipulated by the applicable national legislation in order to object to its execution.

In conclusion, beyond the theoretical debates on the real nature of these arbitrations, it is essential that the competition authorities become aware of the difficulties specifically connected with the diversity of national arbitration laws and not accept, as could be seen in the past, pathological clauses proposed by the parties to the concentration.[182]

4. General conclusions

- There is no doubt that arbitration has a role to play in competition law, but it is essential to distinguish the legal context in which the arbitration is used. As we have tried to show, the problems encountered in *private enforcement* are not those appearing more recently with regard to recourse to arbitration for the enforcement of commitments.

- The diversity of national arbitration laws raises real difficulties which the competition authorities must incorporate. Considering very different institutional models it is, for example, very difficult to compare the situation in the United States and in the European Union.

- In the first situation (arbitrator as a "private enforcement agent"), the main present issue in the European Union is the extent of the control exercised by courts on the award.

- In the second situation (arbitrator as "public enforcement" assistant"), it is necessary to clearly define the mission of the "expert" to be sure that the arbitration clause will work and to organize the relations between the arbitrator and the Competition Authority.

181 In French law, if the arbitration is contractual, it will be necessary to initiate a proceeding based on article 1134 Civil Code for non-compliance with the contract. The exequatur may only be requested in the context of a judicial arbitration.

182 Without presuming the desire of certain companies to cause the mechanism to fail, we will note that these pathological clauses are often explained by the fact that the negotiation of commitments takes place in a tight schedule, which prevents the specialists in competition law from seeking the opinions of specialized arbitration teams.