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The Role of the Arbitrator in Applying EU Competition Law under the Modernisation Process

Master's Thesis

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1. Introduction

1.1. International Commercial Arbitration and EU Competition Law

International Commercial Arbitration is an increasingly important method of adjudicating cross-border disputes between business actors¹ and 'is likely to become an increasingly important area for competition policy and enforcement.'² Even though arbitration as an appropriate forum is not under analysis, its characteristics may be helpful in understanding some of the shortcomings experienced in arbitral proceedings when applying European Union (hereinafter "EU") Competition Law.

The confidentiality of the arbitral proceedings, even if often seen as an advantage in the parties' perspective, may result in an impediment to the collaboration of the European Commission (hereinafter "Commission") or the National Competition Authorities (hereinafter "NCAs"), and in a broader context to the public enforcement of EU Competition Law. The wide scope of recognition and enforceability of the arbitral awards, in view of the success of the New York Convention³, is another important consideration which is, nevertheless, closely related to the arbitrators' expertise. Arguably, 'arbitration is only as good as its arbitrators'⁴ which means that the expertise of the arbitrator will be determinant when dealing with EU Competition Law issues, in light of the inherent complex factual and economic considerations required to reach a decision, not to mention a general duty to render an enforceable award. However, his expertise may not be sufficient to render an enforceable award if there is lack of support by the

¹ Even though arbitration can also be 'used in situations involving a state body and where there is no commercial relationship, between for example a company and a competition authority', it 'is usually adopted in cases involving commercial issues between the parties'. Competition Committee of the OECD, Hearing on Arbitration and Competition, Working Party N. 3, October 2010, p. 7.

² Competition Committee of the OECD, Hearing on Arbitration and Competition, Working Party N. 3, October 2010, p. 7.

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"). As of now, the New York Convention has been ratified by 156 Contracting States. 'The establishment of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provided the single most important advantage over international litigation through the establishment of a unique and effective enforcement mechanism.' See Waincymer, Jeff, 'Procedure and Evidence in International Arbitration', Kluwer Law International 2012, p. 4.

⁴ Hacking, L., 'Arbitration is Only as Good as its Arbitrators' in S. Kröll, L.A. Mistelis, P. Perales Viscasillas & V. Rogers (eds), *Liber Amicorum Eric Bergsten*, 'International Arbitration and International Commercial Law: Synergy, Convergence and Evolution', Kluwer Law International, 2011, Chapter 11, pp. 224. Quoting Jean Flavien Lalive.

Commission or the Court of Justice of the EU (hereinafter “CJEU”)⁵. It is precisely the fact that arbitration is a consent-based jurisdiction that tends to preclude arbitrators from submitting preliminary rulings to the CJEU⁶. Also, the fact that arbitration is expeditious, especially when compared to litigation, makes it a privileged forum for business actors. Nevertheless, the enunciated procedural shortcomings may ultimately lead to its inefficiency, especially if subject to review before national courts.

1.2. The Modernisation Process

The main features of the Modernisation process of EU Competition Law are the decentralization⁷ and direct applicability⁸ of the provisions contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union⁹ (hereinafter “TFEU”), which, respectively, refer to restrictive practices and abuse of dominance. In light of the recent rise of private enforcement of EU Competition Law, in particular cartel damages claims¹⁰, arbitrators are likely to be presented with some novel issues relating to EU Competition Law.

Whereas the Regulation 1/2003¹¹ (hereinafter “Regulation”) makes no reference to arbitration or to the role to be performed by arbitrators, the EU Damages Directive¹² (hereinafter

⁵ See Danov, M., ‘Jurisdiction and judgments in relation to EU competition law claims’, Hart Publishing Ltd. 2010, p. 248.

⁶ Case C-102/81 Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG [1982] ECR 1095.

⁷ See Commission Policy Document on proactive competition policy: Commission (EC) ‘A proactive Competition Policy for a Competitive Europe’ COM (2004) 293 final, 20 April 2004, p. 3. ‘The new system will allow the Commission to focus its resources on what competition authorities should be doing, for instance detecting hard core cartels (...) The reform will also enable us to focus on major abuses of dominant positions where our action can make a real difference.’

⁸ See Commission Policy Document on proactive competition policy: Commission (EC) ‘A proactive Competition Policy for a Competitive Europe’ COM (2004) 293 final, 20 April 2004, p. 6. ‘Another aspect of importance (...) is the possibility for private parties to ask national courts to grant damages resulting from illegal behaviour or to order the termination of illegal behaviour.’

⁹ Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 326, 26/10/2012.

¹⁰ See Davis, P., Lianos, I., Nebbia, P., ‘Damages Claims for the Infringement of EU Competition Law’, Oxford University Press, 2015, 1.04. Also, Geradin, D., Grelier, L., *Op. Cit.* (10), p.1. Even if these statistics refer to litigation, it is expectable that arbitration will also face a rise in these types of claims. However, due to the confidentiality of the arbitral proceedings, it is difficult to get an overview. Following the EU Damages Directive, “there is reason to expect that follow-on actions will become increasingly common throughout Europe”. See Goldsmith, A., *Op. Cit.* (10), pp. 10-11.

¹¹ Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

“Directive”) refers to ‘alternative avenues of redress, such as consensual dispute resolution’¹³ which serve as a complement to actions for damages brought before national courts and include arbitration¹⁴, so as to achieve the proper functioning of the internal market.

The absence of arbitration from the scope of the Regulation may be tied to a general distrust in arbitration as an appropriate forum of solving disputes involving EU Competition Law but it may, simultaneously, hamper competition in the internal market in light of the popularity of arbitration amongst economic operators.

Indeed the effectiveness and uniformity in the application of Articles 101 and 102 of the TFEU in the common market may be seriously undermined if arbitrators lack the necessary tools to apply these provisions in a consistent manner, on one hand, and, on the other hand, also the effectiveness of international arbitration if a flawed arbitral award is later subject to the national courts.

Against this background, the present study deals with the role of the arbitrator in the present legal framework, taking into account broader considerations inherent to a proper functioning of the internal market.

2. Preliminary issues

2.1. The well-established Arbitrability of EU Competition Law

In order to assume jurisdiction over a dispute involving EU Competition Law issues, the arbitrability of the subject matter under dispute needs to be ascertained. The arbitrability is thus a condition *sine qua non* to arbitration. In the words of the New York Convention, the subject matter shall be *capable of settlement by arbitration*, whose outcome ultimately depends on the law governing the arbitrability.

¹² Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union [2014] OJ L349/1.

¹³ EU Damages Directive, recital 5.

¹⁴ See Competition Directorate-General of the European Commission, ‘The Damages Directive – Towards more effective enforcement of the EU competition rules’, Competition policy brief, January 2015, Issue 2015-1, p. 3.

In order to reach a conclusion, 'two key questions must be considered', in particular whether 'an arbitrator (can) apply competition law' and, provided this is the case, 'which competition law will be applied and how will this be done'¹⁵.

The argument against the arbitrability of competition law seems to have been tied with the inability of a private adjudicator to apply public policy norms¹⁶. Nonetheless, this argument has no applicability in the current state of art. Even if the arbitrator is a private decision maker, he still has the duty to render an enforceable award, which translates into the application of matters of public policy. As a result, 'the relevance of public policy to the discussion of arbitrability is now considered very limited'¹⁷, and instead this should now be analysed by reference to the characteristics of arbitration, such as its consensual nature¹⁸. As a matter of fact, the contractual nature of arbitration means that the only affected people are also the parties to the dispute¹⁹ and thus the argument that the public policy of the forum of arbitration is at stake by the simple fact that arbitration takes place in that territory shall be rejected. In other words, a territorial link to that country is required so that one can confirm the relevance of public policy considerations inherent to that State.

After the *Eco Swiss case*, the arbitrability of EU Competition Law seems to have been resolved, whereby the CJEU concluded that the provisions of Art. 101 of the TFEU²⁰ are part of the public policy within the meaning of the New York Convention²¹ and thus an arbitral award

¹⁵ *Ibid* (2), p. 11.

¹⁶ See Kozubovska, B., 'Trends in Arbitrability', IALS Student Law Review, Volume 1, Issue 2, Spring 2014, p. 23. In this line of thought, Radicati di Brozolo, L. G., 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators', 1 March 2011, Volume 27, Issue 1, p. 32. '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 recognised, 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'.

¹⁷ Brekoulakis, S., 'Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori' in L. Mistelis, S. Brekoulakis, eds., 'Arbitrability: the International & Comparative Perspectives', Kluwer 2009, pp. 99-100. In a similar approach, Kozubovska, B., *Op. Cit. (16)*, 'Public policy doctrine is not entirely relevant to the concept of arbitrability.'

¹⁸ See Brekoulakis, S., *Op. Cit. (17)*, p. 100. 'The scope of arbitrability is better determined by reference to the inherent characteristics of arbitration, such as its consensual nature, rather than public policy considerations.' Also, Kozubovska, B., *Op. Cit. (16)*, 'The restrictions of arbitrability are more relevant and precisely described by the reference to the origin of arbitration.'

¹⁹ See Kozubovska, B., *Op. Cit. (16)*, p. 27. This can be seen as a pitfall in view of the usual considerable number of co-infringers. To solve this problem, the Directive states the need of national courts to take into account the amounts already paid in arbitration. See EU Damages Directive, Art. 19(4) and recital 48.

²⁰ The original reference was to Art. 81 of the Treaty. 'Upon the entry into force of the Treaty of Lisbon on 1 December 2009, Articles 81 and 82 of the Treaty establishing the European Community became Articles 101 and 102 TFEU, and they remain identical in substance.' Extracted from the EU Damages Directive, recital 2.

²¹ See C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, paras 36 and 39. This was accepted for the first time in Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477, para 23. See Biagioni, G., 'Chapter 13: Review by national courts of arbitral awards dealing

contrary to it can either be set aside or declared non-enforceable by the relevant national courts. One can thus safely conclude that antitrust claims are arbitrable, regardless if they are highly charged with domestic public policy considerations²².

The issue now resides in the particular provisions within EU Competition Law which may be settled by arbitration. In principle, the arbitrator may only play a part in the private enforcement, in particular determining the *ex post* civil law consequences resulting from the violation of competition law²³.

Outside the scope of arbitration are matters within the sphere of public enforcement²⁴ which are part of the exclusive competence of the Commission or, in light of the Modernisation process, the national competition authorities, such as the application of fines or even the acceptance of commitments.

Articles 101 and 102²⁵ of the TFEU are directly applicable²⁶, which means that these provisions are binding between individuals, on one hand, and in relation to the national competition authorities and courts, on the other hand²⁷. Although the Regulation 'does not mention arbitration anywhere'²⁸, the Directive does, as a means to guarantee the full effectiveness

with EU competition law' in Marquis, M., Cisotta, R., 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015, p. 288.

²² See *Mitsubishi Motors v. Soler Chrysler-Plymouth*, (1985) No. 83-1569, [1985] in the United States. This was only later acknowledged in Europe. 'The marginalisation of public policy, the growing trust in international arbitration and assimilation of arbitrators to judges have allowed the domain of arbitration to extend to areas of economic activity involving significant public interest.' See A Mistelis and S L Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, p. 52.

²³ *Ibid* (2), p. 11.

²⁴ See Cisotta, R., 'Chapter 11: Some considerations on arbitrability of competition law disputes and powers and duties of arbitrators in applying EU competition law' in Marquis, Mel; Cisotta, Roberto, 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015.

²⁵ In practice, the referral of cases involving abuse of dominance to arbitration is unlikely due to the fact that this entails 'a unilateral conduct of the enterprise', on one hand, and, on the other hand, 'this would imply the existence of an agreement between the dominant undertaking and the victim of the abusive behavior'. See Alija, M. N., 'To Arbitrate or Not To Arbitrate... Competition Law Disputes', *Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy*, Vol 5 No 1, January 2014, p. 641. Therefore, these cases are rare 'unless they are covered by an original or subsequent arbitration agreement.' See 'International Bar Association Private Enforcement – Arbitration', EU Private Litigation Order Civil Court, 23 September 2008.

²⁶ Articles 101(1) and 102 of the TFEU have direct effect by virtue of case law (Case C-453/99 *Courage v Crehan* [2001] ECR I-6297) and the exception provided for in Art. 101(3) by reason of Regulation 1/2003.

²⁷ EU Damages Directive, recital 3. Art. 101 of the TFEU shall be seen as a whole, otherwise, it would result in the fragmentation of this provision and thus lead to inconsistent outcomes, not to mention that this would undermine the effectiveness of arbitration. In other words, Art. 101(1) of the TFEU cannot be deemed applicable without considering the possibility of an exception provided for in paragraph 3. See Cisotta, R., *Op. Cit.* (23), p.255

²⁸ See Driessen-Reilly, M., 'Private damages in EU competition law and arbitration: a changing landscape', *Arbitration International*, 1 December 2015, Volume 31, Issue 4, p. 571.

and uniformity in claims for damages²⁹. As such, it can be argued that the role of arbitration comprehends both the *follow-on* and the *stand-alone* claims³⁰.

Regarding a possible application of Regulation 1/2003 to arbitral tribunals by analogy, this shall be denied as the drafting of this Regulation is quite clear, only addressing national courts and national competition authorities³¹. Furthermore, following the *Nordsee case*, the CJEU stated that arbitral tribunals are not to be considered courts in the meaning of Art. 267 of the TFEU³².

This discussion will not extend to the provisions concerning State aid and Merger control³³ as, on one hand, these provisions are highly embedded with public considerations for which the Commission and national competition authorities have exclusive competence, and, on the other hand, arbitration is dependent on consent of both parties which is unlikely to be obtained. In the context of a claim for damages in the case of State aid, it is highly unlikely that the State vested in its *ius imperii* will foresee a dispute with a recipient of State aid and agree to arbitration *ex ante* and, even more unlikely to do it after the dispute arises. Besides, there is no particular reference to these provisions, neither in the Regulation nor in the Directive.

2.1.1. An independent EU public policy?

Practice shows that arbitral tribunals tend to opt for the *lex fori* in order to determine whether the disputed subject matter is arbitrable, regardless of the parties' choice of law. This can be viewed as the obvious solution in view of the potential challenge of the arbitral award in the seat of arbitration³⁴ and is usually tied to public policy considerations.

Public policy entails fundamental mandatory rules whose aim is either to protect the interest of a particular State³⁵, reflected in its national laws, or the common market of the EU³⁶, which

²⁹ EU Damages Directive, recital 5.

³⁰ EU Damages Directive, recital 13. 'The right to compensation is recognised (...) regardless of whether or not there has been a prior finding of an infringement by a competition authority'.

³¹ See Driessen-Reilly, M., *Op. Cit.* (28), p. 577.

³² Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095, paras 10–12. This issue will be further analysed in the context of the referral to the CJEU.

³³ See Articles 106, 107 and 108 of the TFEU. '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)'. *Ibid* (2), p. 7.

³⁴ See, for example, UNCITRAL Model Law of Arbitration, Art. 34(2)(b)(i).

³⁵ 'Public policy (...) is always described as changing in different countries and over time (hence the description of public policy as a "chameleon of private international law"). Those characteristics are due to the fact that public policy reflects the fundamental values of a given legal system (or of more than one when some legal systems are

finds protection in the EU Competition Law and, by virtue of the supremacy of EU Law³⁷, is also part of the national order of the EU Member States. As a result, EU Competition Law's relevance is limited to the legal systems of EU Member States.

One can thereby assert that public policy serves a purpose of protection which is necessarily linked to a particular territory, without which these norms become superfluous. In light of these considerations, the State of the forum needs a jurisdictional link with the dispute submitted to arbitration so as to justify the application of its public policy.

Brekoulakis proposes a new approach to the choice of law governing arbitrability, in particular the application of the *lex fori* to the matter of arbitrability only where the national courts of the forum have exclusive jurisdiction over the dispute³⁸. Some jurisdictions resolved this issue by reference to the distinction between domestic public policy and international public policy, in particular by limiting the challenge of an *international* arbitral award 'only when it conflicts with international public policy'³⁹. However, this solution does not solve the cases where the seat of arbitration is in a third country and yet EU Competition Law is affected.

Arguably, the *lex fori* shall not interfere where there is no territorial connection to the dispute or, in other words, where the forum is neutral to both parties and to the dispute in general. This "detachment from a particular legal order"⁴⁰ is a characteristic of arbitration and can be used as an advantage so as to circumvent matters of public policy within the country of the forum. Nonetheless, this reasoning is not wrong *per se* but only provided there is a territorial link with that country, which is not affected in line with this reasoning.

closely intertwined, as in the case of European countries).' See Biagioni, G., 'Chapter 13: Review by national courts of arbitral awards dealing with EU competition law' in Marquis, M., Cisotta, R., 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015, p. 287.

³⁶ See *Taewoong Inc. v. AH Industries A/S*, Supreme Court of Denmark, Case No. H2016.142-2014, 28 January 2016, para. 19. Also, Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, para. 24.

³⁷ For the meaning of this principle, see Benedettelli, M. V., 'Communitarization of International Arbitration: A New Spectre Haunting Europe?', *Arbitration International*, Volume 27, Issue 4, 1 December 2011, pp. 598, 'whereby EU law prevails over any conflicting provision of State law'.

³⁸ See Brekoulakis, S., *Op. Cit. (17)*, p. 101. '(It) has been submitted that "in international situations the arbitrator takes the place of all the courts which might have had jurisdiction to determine the dispute in the absence of arbitration agreement."' See Danov, M., *Op. Cit. (5)*, p. 234 and literature cited therein.

³⁹ See Biagioni, G., 'Chapter 13: Review by national courts of arbitral awards dealing with EU competition law' in Marquis, M., Cisotta, R., 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015, p. 292. It is not clear 'whether EU competition law qualifies as part of their international public policy as well.' '(I)nternational public policy includes only the most fundamental principles reflecting the core values of a legal system'. *Ibid*, pp. 289-290.

⁴⁰ *Ibid (2)*, p. 8

Imagine the case where two companies incorporated in two different countries within the EU whose arbitration agreement selects Switzerland as the seat of arbitration. In such scenario, the EU Competition law would not be protected by the *lex fori* as the seat of the forum is not an EU Member State nor would it be protected by a transnational public policy, pursuant to the reasoning adopted in *Tensacciai case*⁴¹ by the Swiss Federal Court⁴².

Conversely, imagine the case where two companies are now incorporated in countries located outside the EU, and the choice of the seat is Portugal. Absent from considerations relating to the merits, there would be no reason to apply provisions relating to the EU public policy, as the seat is unrelated to any of the parties and no jurisdiction can be established in favour of the Portuguese national courts⁴³.

Where the forum of arbitration is also an EU Member State, it is expectable that Articles 101 and 102 of the TFEU are embedded in the domestic legal systems of the EU Member States and therefore applicable, provided there is a jurisdictional link to the dispute⁴⁴.

On the other hand, where the arbitration takes place in a third country⁴⁵, the proper functioning of the common market may still be at stake and, assuming that the arbitrator applies the *lex fori* in order to determine the arbitrability of the subject matter without a territorial basis in relation to the dispute, a difficulty is presented as the cited provisions are not part of the public policy of the forum⁴⁶, as illustrated above.

The preamble of the Directive⁴⁷ and several decisions⁴⁸ of the CJEU confirm the view that Articles 101 and 102 of the TFEU are part of the public policy. Even if this does not seem to add

⁴¹ *Tensacciai S.p.A. v. Freyssinet Terra Armata S.r.l.* 4P.278/2005, 24 ASA Bull 550 (2006).

⁴² The Swiss Federal Court reasoned that ‘competition law differs so greatly between States, depending on their economic system, that it cannot be conceived as part of a transnational public policy.’ Furthermore, other ‘national courts have not engaged in a thorough consideration of the issue’. See Biagioni, G., ‘Chapter 13: Review by national courts of arbitral awards dealing with EU competition law’ in Marquis, M., Cisotta, R., ‘Litigation and arbitration in EU competition law’, Edward Elgar Publishing, 2015, pp. 290-291.

⁴³ Nonetheless, similarly to most of the European jurisdictions, the Portuguese legislation purviews the possibility of vacation of the arbitral award in international arbitrations seated in Portugal in breach of Portuguese public policy, even if unrelated to its national legal order. See Art. 46(3)(b)(ii) *ex vi* Art. 54 of the Lei n.º 63/2011, de 14 de Dezembro.

⁴⁴ This is evidenced in Brekoulakis, S., *Op. Cit. (17)*, p. 105: ‘The fact that the arbitration takes place within the territory of a particular country does not mean that the national courts of that country have jurisdiction over the pending dispute, which has been exclusively submitted to arbitration.’

⁴⁵ In this context, third country shall be understood as a non-EU Member State.

⁴⁶ Even if the arbitral award may still be declared unenforceable at the enforcing State (EU Member State), there is still a possibility that the parties choose not to enforce it or that the enforcing State is not an EU Member State.

⁴⁷ See EU Damages Directive, recital 1.

⁴⁸ See *Eco Swiss and Taewoong Inc. v. AH Industries A/S*, Supreme Court of Denmark, Case No. H2016.142-2014, 28 January 2016, paras. 36 and 39.

significant value to the situations where the forum of arbitration is an EU Member State, it appears that these provisions constitute an independent body of rules aimed at protecting the proper functioning of the internal market⁴⁹. This was confirmed by the CJEU in *Eco Swiss* case, where it was stated that ‘Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.’⁵⁰

2.2. Does the arbitration agreement entail EU Competition Law issues?⁵¹

By virtue of its consensual nature, the arbitrator is limited to, not only the dispute between the contracting parties⁵², but also to the subject matter of the dispute, also referred to as the jurisdiction *ratione materiae*. Typically, the arbitrator will be bound by the scope of this agreement⁵³.

Prior to assessing whether the subject matter is within the scope of the agreement to arbitrate, one shall determine the subject matter as such, or, in other words, the type of claim. This can either be a *follow-on* claim⁵⁴, if it follows the public enforcement of an infringement to EU Competition law and the victim wishes to pursue a claim for damages against the infringer with

⁴⁹ ‘(T)he general principles of EU competition law undoubtedly belong to “EU public policy”, meaning that a wide range of principles of public policy are now shared among all the Member States.’ See Biagioni, G., ‘Chapter 13: Review by national courts of arbitral awards dealing with EU competition law’ in Marquis, M., Cisotta, R., ‘Litigation and arbitration in EU competition law’, Edward Elgar Publishing, 2015, p. 288.

⁵⁰ See *Eco Swiss* case paras. 36 and 39. Article 85 is now Art. 101 of the TFEU.

⁵¹ The submission agreement does not present any issue in view of the arbitrability of the EU Competition Law.

⁵² Cf. *Provimi Limited v. Aventis Animal Nutrition and SA & Ors* [2003] EWHC 961 (Comm). It was held that, even if Aventis SA (parent company) was not the actual cartelist nor was aware of the cartel, it was still liable for implementing that infringement agreement, in breach of Art. 101(1) of the TFEU. This was based on the fact that it was part of the Aventis Group (Undertaking) alongside with the actual cartelist (Aventis Animal Nutrition SA).

⁵³ Going beyond the scope of the parties’ agreement may lead to the vacation or non-enforcement of the arbitral award for *ultra petita*, depending on the national jurisdictions.

⁵⁴ See Geradin, D., Grelier, L., *Op. Cit.* (10), p. 1. ““(F)ollow-on” litigation as private damage litigation that relies on an antitrust allegation that is identical to that investigated by a competition authority, or that is substantially similar to the alleged violation investigated by the competition authority but extends the scope of the violation to other markets, time periods or defendants.’ Although this definition refers to litigation, this shall be interpreted as also applying to claims submitted to arbitration. This type of claims constitute the majority of damages actions, according to Renda, A. *et al.*, ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios’ – Final Report for the European Commission, Centre for European Policy Studies (CEPS) (Brussels/Rome/Rotterdam, 2007) 40–41. Again, this data relates to litigation. Even so, presumably, arbitration shall reflect the same reality. This difficulty results from the lack of public record by virtue of the confidentiality of the arbitral proceedings.

whom the former has a pre-existing contractual relationship, or a *stand-alone* claim, whereby the victim of an infringement opts to pursue a direct action against the infringer, and contracting party to the agreement to arbitrate, so as to obtain compensation for damages⁵⁵.

Whether a claim is considered contractual or tortious in nature depends upon the applicable law⁵⁶ and is relevant to ascertain the jurisdiction of the arbitral tribunal.

Arguably, 'generally, the purpose of a broad agreement to arbitrate is to refer to arbitration any type of claim connected to a specific legal relationship, irrespective of whether any future claim can be anticipated at the time of contracting.'⁵⁷ Accordingly, should there be a broad agreement to arbitrate, the parties would be free to submit such claims to arbitration⁵⁸.

In contrast, recent case law in Europe has been taking a restrictive approach to these arbitration agreements in follow-on claims⁵⁹. Pursuant to this reasoning, ultimately, the solution lies on 'whether the parties, at the time of contracting, could have foreseen the conduct at issue in the subsequent dispute'⁶⁰ and, if so, the dispute should be referred to arbitration.

In light of the inconsistent jurisprudence on this matter, an agreement to arbitrate with a 'specific reference to damage claims based upon violations of competition law rules' would be prudent even if it is unlikely to succeed in practice⁶¹.

Assuming the arbitral tribunal declines jurisdiction over this type of claims, this may lead to the lack of private enforcement if the claimant is unwilling to pursue the claim before the national courts, not to mention that it may end up with no sanction by the public enforcers because, on one

⁵⁵ See Driessen-Reilly, M., *Op. Cit.* (28), pp. 570-571.

⁵⁶ See, in relation to follow-on claims, Goldsmith, *Op. Cit.* (10), pp. 18-19. As an example, the author refers to 'a follow-on claim related to a cartel infringement' whereby the victim of the infringement 'may wish to consider whether to invoke any agreement(s) to arbitrate found in supply contract(s) entered into with the follow-on claimant(s), insofar as such contracts relate to goods whose pricing is alleged to have been affected by the cartel.'

⁵⁷ See Goldsmith, A., 'Arbitrating Antitrust Follow-on Damages Claims: A European Perspective', Kluwer Arbitration Blog, September 22, 2015, Part 1.

⁵⁸ 'It seems that most of the more common forms of arbitration clause are sufficiently wide to give an arbitrator jurisdiction over EU antitrust tort claims.' See Danov, M., *Op. Cit.* (5), p. 234.

⁵⁹ Goldsmith, A., *Op. Cit.* (10), p. 20. Cf. examples of successful claims can be found in Sweden in Case T. 4487-12, *Systembolaget Aktiebolag v. The Absolut Company Aktiebolag*, Svea Court of Appeal (October 23, 2013) whereby the Svea Court of Appeal rejected the annulment of an arbitral award based on a stand-alone claim for damages of abuse of dominance. Also, in Denmark, the Danish railway case (GT-Linien), submitted to the Supreme Court.

⁶⁰ Goldsmith, A., *Op. Cit.* (10), p. 24. The CJEU missed the opportunity to give a clear solution in May 2015 judgment, *CDC v. Akzo Nobel et al.* whereby it only ruled on the forum selection clauses which, rightly pointed by Goldsmith, shall not be equated to the arbitration agreement which is in turn reserved to the national laws. The author justifies this approach with 'principled reasons justifying more favourable treatment for arbitration agreements, including obligations arising out of the New York Convention.'

⁶¹ Goldsmith, A., *Op. Cit.* (10), pp. 24 and 33. '(G)iven the uncertainties under European law today as to the scope of agreements to arbitrate in relation to follow-on claims, it would be worthwhile to consider making specific reference to antitrust damages claims in agreements to arbitrate.'

hand, the claimant is not willing to bring the infringement to the competent authorities and, on the other hand, the arbitrators are bound by the confidentiality of the arbitral proceedings. In a broader consideration, this is not in line with the principles governing the Directive, namely the full effectiveness and uniformity in claims for damages⁶².

2.2.1. The so-called Euro-Defence

Another possible scenario is the so-called *Euro-defence*⁶³ where the opposing party to the dispute invokes the infringement of Articles 101(1) or 102 of the TFEU as a ground for defence from a claim in arbitral proceedings.

If, in the past, the principle of party autonomy may have motivated the challenge of the arbitral award based on the breach of the principle *ne eat arbiter ultra petita partium* where issues of EU Competition Law were not comprehended in the agreement to arbitrate, this is no longer the case as, on one hand, matters of competition law are arbitrable, and, on the other hand, ‘arbitrators undoubtedly have a duty to apply competition law, and are expected to do so’⁶⁴.

This obligation follows from the fact that these provisions are part of public policy, which constitutes grounds for the review of the awards or, at least, to its non-enforcement, provided that these are courts of EU Member States⁶⁵ should these be disregarded in arbitration.

Hence, the problem no longer resides in the scope of the arbitration agreement but solely on the ability of the arbitrator to apply matters involving EU Competition Law. Settled an initial distrust in arbitrators, ‘unlike court systems, international arbitration offers parties the ability to select their own judges’⁶⁶. As a result, the parties may choose an arbitrator with a background on EU Competition Law, as well as the arbitrator has more comprehensive powers when dealing

⁶² EU Damages Directive, recital 5.

⁶³ See Weigand, F., ‘Evading EC Competition Law by Resorting to Arbitration?’, *Arbitration International*, Volume 9, Issue 3, 1 September 1993, pp. 249 – 258.

⁶⁴ *Ibid* (2), p. 12. This obligation entails, in the case of Art. 101(1) of the TFEU, also the application of the exception provided for in paragraph 3. See Driessen-Reilly, M., *Op. Cit.* (28), p. 575.

⁶⁵ ‘In practical terms, this would potentially apply to any case seated within the EU, as an award may be set aside under the terms of the NYC if found contrary to the public policy of the seat. It would also apply where the substantive law of the contract is of any EU Member State and, indeed, where the award is subject to enforcement within any part of the EU.’ See Miriam Driessen-Reilly, *Op. Cit.* (28), p. 574.

⁶⁶ See Goldsmith, A., *Op. Cit.* (10), p. 29. ‘If follow-on actions should begin to be pursued throughout the EU, which was one of the goals of the EU Damages Directive, the ability to nominate one's own judges through arbitration will become increasingly valuable. In particular, companies may increasingly face follow-on suits in jurisdictions in which they are not comfortable.’

with evidence⁶⁷. This constitutes a significant advantage in a field where technical considerations are predominant.

2.2.2. What if parties do not raise the issue?

Where the disputing parties do not invoke the infringement of the cited provisions, again, the arbitrator is nevertheless bound to apply those provisions.

Opinions vary so as to the source of the duty to apply EU Competition Law between a 'general *ex officio* obligation' and an 'obligation under national public order'⁶⁸.

It is difficult to acknowledge an *ex officio* duty to apply EU Competition Law in view of the characteristics of arbitration, namely its consensual basis. Further, even if arbitrators are considered to be well prepared to apply matters of public policy, these 'are not organs of any State', as well as 'their primary allegiance is to the parties'⁶⁹. Nonetheless, this does not mean that they are exempt from applying these provisions.

The solution shall be substantially the same even where the contracting parties expressly excluded the application of matters of EU Competition Law, provided that the arbitration agreement itself is not considered invalid.

Should there be a different outcome, arbitration could be seen as a venue empowering parties to circumvent matters of public policy with arbitrators becoming 'accomplices of a violation or circumvention of the law'⁷⁰. In other words, to source this duty on the will of the parties would ultimately render their costs and efforts useless.

If one is to pursue the view that this duty is tied to a duty to render an enforceable award, this is only relevant where the seat of arbitration or the arbitral award is potentially enforceable in the territory of a EU Member State, where Articles of 101 and 102 of the TFEU are part of public policy, either by virtue of the incorporation of these provisions in the respective national orders or the supremacy of EU law within the territory of EU Member States.

⁶⁷ These powers are without prejudice to the lack of powers of compulsion, as will be further explained in the dedicated section.

⁶⁸ 'International Bar Association Private Enforcement – Arbitration', EU Private Litigation Order Civil Court, 23 September 2008.

⁶⁹ *Ibid* (2), p. 45.

⁷⁰ *Ibid* (2), p. 46. 'It is a feature of public policy that it is not left to the disposition of the parties.' See Lew, J., Mistelis, L., Kröll, S., 'Comparative International Commercial Arbitration', Kluwer Law International 2003, 'Comparative International Commercial Arbitration', Kluwer Law International 2003, p. 488.

According to the view previously suggested, the potential vacation of the arbitral award follows the same lines in the sense that only where the seat of arbitration is in an EU Member State with a jurisdictional link to the dispute is there a need to apply EU Competition Law, without prejudice to the considerations relating to the jurisdiction of the affected market.

2.3. Concurrent proceedings

2.3.1. Commission

Where a dispute involving either a claim or a defence based on the infringement of Articles 101(1) or 102 of the TFEU and, simultaneously, there are investigations being carried out by the Commission on the same or identical conduct of the involved parties, one may wonder whether the arbitrator should stay or continue with the proceedings.

Arguments in favour of the stay of the proceedings relate to the fact that the Commission is 'better equipped' to determine a possible infringement, not only due to the privileged 'access to the relevant documents and materials', but also the 'understanding of competition law and the economic issues within the EU'⁷¹. On the other hand, when parties conclude an arbitration agreement, they accept the risk of a wrong decision which is nevertheless precluded from appeal⁷², not to mention that a stay of proceedings could result in an unreasonable delay for the parties⁷³. Further, the inexistence of a duty of cooperation between the arbitral tribunal and the Commission exempts the former from 'seek(ing) the advice of the Commission'⁷⁴ as this would also mean a breach of the confidentiality of the arbitral proceedings.

Therefore, in principle, the arbitrator should refrain from staying proceedings in view of the pending investigations by the Commission, even if this involves the risk of contradictory outcomes which may ultimately lead to the vacation or non-enforcement of the award in the national courts of an EU Member State⁷⁵.

⁷¹ See Lew, J., Mistelis, L., Kröll, S., *Op. Cit.* (68), pp. 486-487.

⁷² Without prejudice to a potential challenge of the award restricted to matters related to public policy.

⁷³ See Lew, J., Mistelis, L., Kröll, S., *Op. Cit.* (68), p. 487.

⁷⁴ See Lew, J., Mistelis, L., Kröll, S., *Op. Cit.* (68), p. 487.

⁷⁵ See Art. 16(1) of the Regulation.

In this context, 'a significant concern is that the potential accumulation of private and public liabilities in relation to the same conduct may lead to over-enforcement'⁷⁶. Nonetheless, this presents no novel issues in relation to the courts' system.

2.3.2. National Courts

The principle of *competence-competence*⁷⁷, also referred to as *Kompetenz-Kompetenz* after the German doctrine, is a 'universally-recognized principle of international arbitration law'⁷⁸ whereby arbitrators have 'the power to consider and decide jurisdictional objections' upon 'the exclusion of judicial authority to decide jurisdictional objections, at least until the arbitral tribunal has made a jurisdictional award'⁷⁹.

Even if 'the allocation of jurisdictional competence is relatively unusual in the field of international commercial arbitration'⁸⁰, where the arbitral tribunals are summoned, these will decide on their own jurisdiction.

Conversely, 'where one party has begun court proceedings the court will be asked to decline jurisdiction in favour of arbitration'⁸¹ by the defendant in the proceedings⁸². As a result, the court will then refer the parties to arbitration, unless the agreement is null and void, inoperative or incapable of being performed.

In light of these considerations, the integrity of the system of private damages is more or less secured from *lis pendens*, which could potentially lead to over-enforcement between these two

⁷⁶ Geradin, D., Grelier, L., *Op. Cit.* (10), pp. 1-2. See also recital 13 and Art. 3(3) of the Damages Directive which refers to the right to compensation.

⁷⁷ Despite 'the wide diversity of legislative and judicial approaches', several institutional arbitration rules codify this principle, such as the UNCITRAL Model Law (Art. 16), 2010 UNCITRAL Rules (Art. 23(1)), 2012 ICC Rules (Art. 6(5)). See Born, Gary B., 'International Commercial Arbitration' (Second Edition), Kluwer Law International, 2014, p. 1216.

⁷⁸ See Born, Gary B., *Op. Cit.* (75), pp. 1048, 1051. Examples of the codification of this principle are found in Articles 23(1) of the UNCITRAL Rules or 6(9) of the ICC Rules.

⁷⁹ This expresses the positive and negative effects of the principle of *competence-competence*. See Born, Gary B., *Op. Cit.* (75), pp. 1069-1070. This was confirmed in *Judgment of 3 November 2010, Alfredo De Jesus O., Astivenca Astilleros de Venezuela CA v. Oceanlink Offshore III AS*, Case No. 1067 (Venezuelan Tribunal Supremo de Justicia).

⁸⁰ See Born, Gary B., *Op. Cit.* (75), p. 1216.

⁸¹ This follows, for example, from Article II(3) of the New York Convention, recital 12 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351 or Art. 8(1) of the UNCITRAL Model Law. See Lew, J., Mistelis, L., Kröll, S., *Op. Cit.* (68), p. 330.

⁸² It should be noted that 'courts are not obliged *ex officio* to stay their proceedings' but it actually depends on the motion of one of the parties to the dispute. See Lew, J., Mistelis, L., Kröll, S., *Op. Cit.* (68), p. 340.

venues in parallel actions to seek compensation for damages flowing from an infringement of Articles 101(1) or 102 of the TFEU⁸³.

3. Into the Merits

3.1. The Effects doctrine applied to Arbitration

Having argued that the territorial reach of the *lex fori* is fundamental so as to apply Articles 101 and 102 of the TFEU, one is to turn in the opposite direction in order to fully apply EU Competition Law.

Should the arbitration take place in a third country with no connection with the laws of that State, there is no reason to apply mandatory provisions of that same State to the matter of arbitrability. Nonetheless, in the current state of practice, arbitrators still incur in a duty to apply the public policy of the forum, even if completely detached from the dispute.

The consequence of this assertion is the potential circumvention of EU Competition Law by a choice of the seat of a third country, made possible by the simple territory-based application of the public policy.

Nonetheless, mandatory provisions may still be applicable where a connection is to be established with an EU Member State, either by the choice of seat or choice of law of an EU Member State. Conversely, where neither the seat nor the applicable *lex causae*⁸⁴ are laws of an EU Member State, an extraterritorial reach of Articles 101 and 102 of the TFEU may be in order⁸⁵. In this context, the effects doctrine needs to be revisited, in particular where 'anti-competitive agreements and/or practices may potentially affect the market in several countries'⁸⁶.

⁸³ See Art. 3(3) and recital 52 of the EU Damages Directive. The latter further states that 'national courts should take account of the damages already paid under the consensual settlement' applying to the cases where co-infringers are involved.

⁸⁴ If the parties are free to choose any law in Europe, this is not the case in the United States where there must be a substantial relationship between the law and the parties or the transaction, or a reasonable basis for the parties' choice. See Moses, M. L., 'The Principles and Practice of International Commercial Arbitration', Cambridge University Press, 2008, pp. 70-71.

⁸⁵ See Danov, M., *Op. Cit.* (5), p. 234 where the author illustrates this scenario: 'For example, a French producer of gadgets and an English distributor of the same product may choose the law of New York as applicable to their agreement that is (allegedly) in conflict with Arts 101 and/or 102 TFEU and performed in England. If the arbitrator had to apply the mandatory rules of the chosen law, then it would not be EU competition law, but US Federal antitrust law which would determine the validity of the agreement in question (or of any term of it).' See also Lew,

Both Articles 101 and 102 of the TFEU make reference to the effect on trade between Member States as a condition for their applicability⁸⁷, which justifies an extraterritorial reach of the cited provisions⁸⁸. Benedettelli refers to the seat *lato sensu* in cases where the disputed subject matter is connected to a Member State or ‘the Member State is entitled to act as a *forum necessitatis*’⁸⁹, whereby the arbitrator would have to apply the EU Competition Law, by virtue of the supremacy of EU law⁹⁰.

The effect on trade needs to be interpreted in the context of the objectives of the EU, so as not to deprive EU laws from their *effet utile*⁹¹, namely “a system ensuring that competition is not distorted”⁹². According to the CJEU, ‘it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States’, whose influence shall also be appreciable⁹³.

After the *Gencor* case before the General Court of the EU⁹⁴, it has been generally accepted that the effects doctrine is ‘compatible with the EU legal order’⁹⁵, which means that the jurisdiction can extend to economic effects regardless of the territorial basis of the conduct infringing Articles 101(1) or 102 of the TFEU.

J., Mistelis, L., Kröll, S., *Op. Cit.* (68), pp. 19-42. ‘(...) the place of arbitration is not in a Member State nor is the law applicable to the merits that of a Member State. Nevertheless one of the parties relies on Articles 81 or 82.’

⁸⁶ See Danov, M., *Op. Cit.* (5), p. 234.

⁸⁷ See Art. 101(1): ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States’ and Art. 102: ‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.’ This means that ‘in the absence of such effect, the EU competition rules do not apply’. See Faull, J., Kjølbye, L., Leupold, H., Nikpay, A., ‘Part I General Principles, 3 Article 101, D Jurisdiction’, in Faull, J., Nikpay, A., ‘The EU Law of Competition (3rd Edition)’, Oxford Competition Law, 1 March 2014, 3.385.

⁸⁸ See Faull, J., Kjølbye, L., Leupold, H., Nikpay, A., ‘Part I General Principles, 3 Article 101, D Jurisdiction’, in Faull, J., Nikpay, A., ‘The EU Law of Competition (3rd Edition)’, Oxford Competition Law, 1 March 2014, 3.385.

⁸⁹ See Benedettelli, M. V., *Op. Cit.* (37), pp. 621-622.

⁹⁰ See Benedettelli, M. V., *Op. Cit.* (37), pp. 621-622.

⁹¹ This principle means that ‘Member States must exercise their powers so that the objectives of the EU are not, even indirectly, jeopardized’. See Benedettelli, M. V., *Op. Cit.* (37), pp. 598. ‘In interpreting the concept of trade, it is also necessary to take into account the fact that according to Article 3 TEU and Protocol 27 annexed to the TEU and the TFEU’. See Faull, J., Kjølbye, L., Leupold, H., Nikpay, A., *Op. Cit.* (66), 3.389.

⁹² See Protocol 27 annexed to the TEU and the TFEU.

⁹³ See Cases 172/80 Gerhard Züchner v Bayerische Vereinsbank AG [1981] ECR 2021 and C-22/71 Béguelin Import v G.L. Import Export [1971] ECR 00949, para. 16.

⁹⁴ T-102/96 Gencor v Commission [1999] ECR II-00753.

⁹⁵ Faull, J., Kjølbye, L., Leupold, H., Nikpay, A., *Op. Cit.* (66), 3.438. It is argued that even if the cited case law was delivered in the context of a merger case, this assertion extends to Articles 101 and 102 of the TFEU.

In the context of arbitration, this means that the principle of party autonomy cannot motivate the 'evasion of EU competition law'⁹⁶. As a result, arbitrators may have to enquire further on, not only the potential jurisdiction where the award may be sought for enforcement, but also the potential affected markets.

4. Procedural matters

4.1. Collaboration with the Commission and the NCAs

The 'lack of special institutional support by the Commission'⁹⁷, on one hand, and the NCAs, on the other hand, is tied to considerations which relate to the characteristics of arbitration.

It follows from the *Nordsee* case⁹⁸ that a non-statutory arbitral tribunal based on an arbitration agreement is not considered a "court or tribunal of a Member State" in the meaning of the current Art. 267 of the TFEU⁹⁹.

Therefore, the arbitral tribunals are not bound by a duty of loyal cooperation¹⁰⁰ which means that they are not under the same obligations as the national courts nor do they benefit from the assistance of the Commission or the NCAs.

Another potential constraint is the fact that arbitral tribunals have no forum¹⁰¹ whereas the reference is made to a "court or tribunal of a Member State". In light of this detachment of arbitral tribunals from a national legal order, only a mitigation of this requirement would make sense in the context of arbitration as, in practice, a tribunal may have its seat in a third country while adjudicating disputes involving the application of EU Competition Law.

⁹⁶ See Danov, M., *Op. Cit.* (5), p. 234.

⁹⁷ See Danov, M., *Op. Cit.* (5), p. 234.

⁹⁸ Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095.

⁹⁹ Cf. C-61/65 *Vaassen-Göbbels v Beamtenfonds voor het Mijnbedrijf* [1966] ECR 00377. The CJEU 'extended the right to refer questions for a preliminary ruling' to arbitral tribunals operating on a statutory basis. This case involved an arbitral tribunal of the miners' pension fund which 'was foreseen by and organized according to the law as the mandatory settlement mechanism: it had to apply the law in the same way as ordinary courts, and its members were appointed by the minister responsible for mining.' The decision on the meaning of "court or tribunal of a Member State" was later endorsed by the CJEU in the *Eco Swiss* case. See Lew, J., Mistelis, L., Kröll, S., *Op. Cit.* (63), pp. 477- 480.

¹⁰⁰ According to Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54, para. 36, 'the duty of loyal co-operation also implies that Member States' authorities assist the European institutions with a view to attaining the objectives of the EC Treaty'. However, arbitral tribunals do not qualify as Member States' authorities as they are private adjudicators detached from a legal order.

¹⁰¹ See Lew, J., Mistelis, L., Kröll, S., *Op. Cit.* (63), p. 477.

4.1.1. As *amicii curiae*: confidentiality as an impediment?

Under the Regulation, ‘there is finally a special category of “amicus curiae” cases’¹⁰², provided for in its Art. 15. The courts of a Member State may request for information or the opinion of the Commission on questions concerning the application of the EU Competition rules¹⁰³, on one hand, and the Commission or the NCAs may, acting on their own motion, submit written observations to the courts of a Member State or oral observations, upon the court’s permission¹⁰⁴.

In principle, these interventions are precluded in arbitration due to several obstacles. From an EU Law’s perspective, due to the fact that arbitral tribunals are not deemed to be courts within the meaning of Art. 267 of the TFEU and, on the other hand, reasons tied to the characteristics of arbitration may also preclude the possibility of assistance by these authorities.

In relation to the Commission's duty to transmit information or its opinion upon the request of an arbitral tribunal, even if this has been accepted in international investment arbitration¹⁰⁵, there is no public record of any instance where the Commission has intervened as *amicus curiae*¹⁰⁶ in international commercial arbitration¹⁰⁷.

It does not seem likely that the arbitrator will take the initiative to request for information or the position of the Commission due to constraints related to the parties’ consent. Assuming that the parties have not agreed on “evidentiary provisions”¹⁰⁸, to request the Commission’s assistance

¹⁰² See Parret, L., ‘Side effects of the modernisation of EU competition law: modernisation of EU competition law as a challenge to the enforcement system of EU competition law and EU law in general’, Wolf Legal Publishers, 2011, p. 19.

¹⁰³ See Art. 15(1) of the Regulation.

¹⁰⁴ See Art. 15(3) of the Regulation.

¹⁰⁵ See, for example, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, para. 22. ‘the European Commission applied to the Tribunal pursuant to ICSID Arbitration Rule 37(2) for permission to make a written submission as a non-disputing party. Having consulted the Parties, the Tribunal invited the European Commission to file a written submission’. Also, the controversial *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, where the role of the Commission ‘evolved from its mere participation as *amicus* to an active stance against the enforcement of the ICSID award.’ See González-Bueno, Carlos, Lozano, Laura, ‘More Than a Friend of the Court: The Evolving Role of the European Commission in Investor-State Arbitration’, *Kluwer Arbitration Blog*, January 26, 2011.

¹⁰⁶ According to Jeff Waincymer, an *amicus curiae* ‘is not a party to the arbitral proceeding’ but ‘an entity (...) that has an interest in the outcome of the dispute, and which also has expertise in an aspect of the subject matter related to the dispute. See Waincymer, Jeff, *Op. Cit.* (3), pp. 602-603.

¹⁰⁷ Despite the confidentiality of arbitration, this is ‘a practice that has been used in certain commercial arbitration proceedings.’ See Geradin, D., Grelier, L., ‘Cartel Damages Claims in the European Union: Have we only Seen the Tip of the Iceberg?’ December 2, 2013 (75).

¹⁰⁸ ‘It is rare for parties to expressly agree on evidentiary provisions in their arbitration agreements.’ See Waincymer, Jeff, *Op. Cit.* (3), p. 754. Also, ‘the acceptance of *amicus curiae* submissions is not generally explicitly countenanced within rules of arbitral procedure’. See Waincymer, Jeff, *Op. Cit.* (3), p. 603.

may signify the breach of the arbitrator's mandate¹⁰⁹. In other words, the arbitrator is still a private decision-maker even if bound to consider matters of public policy as a means of delivering a binding award.

Furthermore, the actual intervention of the Commission would mean an increased burden of proof to one of the disputing parties, not to mention potential delays¹¹⁰ and costs which the parties would have to bear¹¹¹ and which are contrary to the characteristics that make arbitration such an attractive forum amongst business actors.

It should also be noted that the Commission's intervention 'is part of its duty to defend the public interest'¹¹² whereas the arbitrator serves the private interests of the parties and is thus liable towards them. As a result, in principle, the arbitrator will be dissuaded to accept the Commission's assistance unless there is 'a strong public interest dimension'¹¹³ which may ultimately reflect on the arbitration outcome.

Another important aspect to be considered is the confidentiality of the arbitral proceedings. Although this is referred to as one of the key advantages of arbitration, this subject is often left unregulated in most arbitration legislation¹¹⁴ and in the parties' agreement to arbitrate. If, in case of institutional arbitration, there seems to be no issue in relation to the obligations impending on the arbitral tribunal and the institution itself¹¹⁵, this is not as clear in relation to the disputing parties.

¹⁰⁹ 'In considering third-party participation, a tribunal is also concerned with its general duty to promote arbitration and respect for that form of dispute settlement.' See Waincymer, Jeff, *Op. Cit.* (3), p. 603, 819.

¹¹⁰ The information or opinion requested shall be given by the Commission within one or four months from the date it receives the request, respectively. See Commission Notice (90), paras. 22,28.

¹¹¹ 'These consequences of amicus curiae involvement will increase costs for all parties involved, and may raise points of fact or law that are disadvantageous for one or more parties to the dispute.' See Waincymer, Jeff, *Op. Cit.* (3), p. 603. 'Because of these concerns, the first thing a tribunal should do when faced with unsolicited evidence is to seek the guidance of the parties as to their preferred process.' See Waincymer, Jeff, *Op. Cit.* (3), p. 818.

¹¹² See Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54, para. 19.

¹¹³ 'However, in certain circumstances tribunals may feel significant pressure, or consider that there is significant benefit, in at least considering the acceptance of amicus submissions. Specifically, amicus submissions have been accepted in disputes which have a strong public interest dimension, in particular investor-State and competition law disputes'. See Waincymer, Jeff, *Op. Cit.* (3), p. 603.

¹¹⁴ 'Despite the silence of most arbitration legislation on the general subject of confidentiality, it is well-settled in virtually all developed legal systems that the parties' autonomy with regard to the confidentiality of international arbitral proceedings will generally be recognized.' See Born, Gary B., *Op. Cit.* (70), p. 2787.

¹¹⁵ Whereas 'many institutional rules impose general confidentiality obligations on the parties (and arbitral tribunal and institution); other rules do not address the subject or contain only very limited confidentiality provisions (typically limited to publication of awards, the arbitrators' deliberations and the arbitral hearings)'. Born, Gary B., *Op. Cit.* (70), p. 2802.

Arguably, the parties' obligations shall be governed by the applicable law to the arbitration agreement¹¹⁶ regardless of an express inclusion of confidentiality provisions. English and Singaporean courts have identified an obligation incumbent on the parties not to 'disclose documents produced in, or in connection with, an international arbitration'¹¹⁷. As a result, the voluntary disclosure by the parties of such information is to be denied.

There might be cases where the Commission's assistance will not lead to a significant impact on the confidentiality inherent to arbitral proceedings. For example, where the arbitral tribunal asks for information in the Commission's possession, this might not unveil much besides what is already in the Commission's possession. On the other hand, this may result in valuable information to the proceedings so as to enable the arbitrators 'to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position.'¹¹⁸

Where the Commission is asked for an opinion¹¹⁹, it might in turn request for *further information* so as to provide a *useful opinion*¹²⁰. In this context, needless is to say that provisions on the matter of confidentiality are only binding upon the disputing parties, which means that the Commission is not thereby bound by the confidentiality of the arbitral proceedings. As a result, in the absence of an agreement by the parties, the arbitrator will ultimately decide on matters of confidentiality¹²¹ and is not likely to request for the Commission's assistance.

If an opinion on legal matters does not necessarily lead to a need on further information from the tribunal, this opinion may in practice be overridden by the CJEU, if summoned to give a preliminary ruling on the same issue. This scenario is tied to the character of the Commission's

¹¹⁶ See Born, Gary B., *Op. Cit.* (70), p. 2813.

¹¹⁷ See Born, Gary B., *Op. Cit.* (70), pp. 2792, 2812.

¹¹⁸ See Commission Notice (90), para. 21. This mechanism may be useful in the case of concurrent proceedings with the Commission, especially in view of the fact that the arbitrator only has access to this information if provided by one of the parties.

¹¹⁹ This opinion may be on economic, factual or legal matters. See Commission Notice (90), para. 27.

¹²⁰ See Commission Notice (90), paras. 27-29. Even if the Commission has to 'limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case', the information provided for the Commission will still be in its possession. Regarding 'the related question as to whether they should be given access to documents in the arbitration so that they can make meaningful submissions on key matters', '(B)asic principles of arbitration, consent and confidentiality would not allow for this, although some regimes offer more in the way of public access to documents.' See Waincymer, Jeff, *Op. Cit.* (3), p. 820.

¹²¹ This duty can either be sourced in express provisions contained in national laws or in the agreement to arbitrate. See Born, Gary B., *Op. Cit.* (70), p. 2814.

assistance as soft law¹²². In this context, it is pertinent to wonder if the arbitrator shall expose the parties to an intervention that may not mean much as it only constitutes soft law¹²³.

Furthermore, the Commission will maintain a public record of the assistance provided¹²⁴ which is contrary to the confidentiality of arbitration, especially where it involves information transmitted by the arbitrator in the context of the arbitral proceedings.

Another possibility pursuant to Art. 15(3) of the Regulation is for, either the Commission or the NCAs, to submit observations to the arbitral tribunal, on their own initiative. In this context, the NCAs are the preferred *amicii curiae* as the Commission only steps in 'where the coherent application' of Articles 101 and 102 of the TFEU is at stake¹²⁵. In the latter scenario, 'the Commission will limit its observations to an economic and legal analysis of the facts underlying the case'¹²⁶ and may, for this purpose only, request the tribunal for the transmission of documents produced in the context of arbitration¹²⁷. Again, the confidentiality of the proceedings may bar this option as this implies the transmission of parties' documents to the relevant authorities and, even if these are limited for the preparation of their observations only, in the absence of a parties' agreement stating otherwise, the arbitrator is precluded from transmitting such information.

On the other hand, the submission of observations under analysis depends on the Commission or the NCA's own motion and therefore, these are unlikely to occur in practice as the confidential character of the arbitral proceedings preclude these authorities from becoming aware of disputes involving alleged infringements of Articles 101(1) or 102 of the TFEU¹²⁸.

From the arbitral tribunals' perspective, potential interventions are not independent from the former's reciprocity. As a matter of fact, the arbitrators would be under a duty to transmit the arbitral awards applying Articles 101 or 102 of the TFEU¹²⁹. If there were previous doubts on

¹²² See Wright, K., 'The Ambit of Judicial Competence after the EU Antitrust Damages Directive', *Legal Issues of Economic Integration*, Volume 43, Issue 1, 2016, p. 34. 'The Commission is careful to stipulate that its opinions are given without prejudice to the interpretation of the CJEU through the possibility or obligation of the court to have recourse to the preliminary reference procedure.'

¹²³ See Commission Notice (90), para. 19.

¹²⁴ 'The Commission will publish a summary concerning its co-operation with national courts pursuant to this notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.' See Commission Notice (90), para. 20.

¹²⁵ See Art. 15(3), second sentence, of the Regulation.

¹²⁶ See Commission Notice (90), para. 32.

¹²⁷ See Art. 15(3) *in fine* of the Regulation and Commission Notice (90), para. 33.

¹²⁸ 'Duties of confidentiality also impact upon the ability of amicus curiae to be aware of the key issues that would need to be addressed in their submissions.' See See Waincymer, Jeff, *Op. Cit.* (3), p. 818.

¹²⁹ See Art. 15(2) of the Regulation. Cf. Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament and the Council, 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives', COM(2014) 453 final, SWD(2014) 230, para. 247.

whether or not to accept this assistance, this duty functions as a deterrent of the inclusion of this mechanism in arbitration as this would undermine the confidentiality of the arbitral proceedings.

All in all, it should be reminded that the arbitrator's role is to decide the dispute whose scope is defined by the parties. In any instance shall the arbitrator be seen as a defender of the public interest or an assistant of the Commission in its role of public enforcer, otherwise, arbitration would lose one of its most important advantages as a preferred forum for business actors, the confidentiality of the arbitral proceedings, not to mention the losses in time and cost-efficiencies. Nevertheless, the arbitrator has no incentive to disregard matters of public policy as these would ultimately render the arbitral award invalid or non-enforceable¹³⁰. Even if these interventions would be valuable in the delivery of a binding award, the parties assume this risk when they opt for arbitration¹³¹.

4.2. Access to evidence

*Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim (...)*¹³²

In order to award damages to the defendant, the arbitrator needs to establish the infringement of Articles 101(1) or 102 of the TFEU for which the claimant is liable. As previously stated, there is also the possibility of the defendant relying on the infringement of the cited provisions by the claimant as a defence against damages for breach of the supply contract, for example. In this

¹³⁰ This obligation is, *inter alia*, intended to enable the Commission to become aware of cases for which it might be appropriate to submit (in the next instance) observations to national courts as *amicus curiae* pursuant to Article 15(3). Even though arbitral awards constitute *res judicata*, the Commission could still intervene should there be an action for annulment or the enforcement of the award before the national courts.

¹³¹ Unless the parties do not enforce the arbitral award or there is a 'spontaneous compliance with the award'. See Cisotta, R., 'Chapter 11: Some considerations on arbitrability of competition law disputes and powers and duties of arbitrators in applying EU competition law' in Marquis, M., Cisotta, R., 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015, p. 245.

¹³² See Lew, J., Mistelis, L., Kröll, S., *Op. Cit.* (68), p. 487.

¹³³ See EU Damages Directive, recital 15.

context, evidence will be determinant, in a first instance, to establish the infringement, and, once this is established, to further calculate damages¹³³.

Should it constitute a claim or defence which relies on a previous 'final decision of a national competition authority or by a review court', the liability for the infringement 'is deemed to be irrefutably established for the purposes of an action for damages'¹³⁴. Nonetheless, this provision applies where either the competition authority or the reviewing court belongs to that same EU Member State¹³⁵. Where this is not the case, the infringement is 'at least prima facie evidence'¹³⁶ and requires further evidence so as to be established.

In pursuing its purpose of rise in private enforcement, the Directive alleviates 'the burden of proof on the claimant, avoiding re-litigation of issues; and promoting consistent application of the competition rules'¹³⁷, in the context of *follow-on claims*¹³⁸.

The probative value of these decisions is not transposed into arbitration following the inexistence of a duty of loyal cooperation binding arbitral tribunals, in light of the characteristics of arbitration, on one hand, and their detachment of a national legal order, on the other hand, as previously stated. Indeed, the tribunal still retains broad discretionary powers regarding evidentiary matters, only subject to mandatory due process norms and party autonomy¹³⁹.

Furthermore, it is not evident that the party alleging an infringement will be in possession of *sufficient* evidence so as to fulfil his burden of proof¹⁴⁰. There will be cases where these documents¹⁴¹ will be either in the opposing party's, a co-infringer's or the competition authority's

¹³³ See Wright, K., 'The Ambit of Judicial Competence after the EU Antitrust Damages Directive', *Legal Issues of Economic Integration*, Volume 43, Issue 1, 2016, p. 31. 'What is central to the courts' ability to accurately calculate damages is access to evidence. In calculating harm, direct evidence, such as documents on agreed sales figures or price increases, would be helpful to the court.'

¹³⁴ See Art. 9(1) of the EU Damages Directive. This provision shall extend to decisions taken by the Commission, where it is the competent authority to adjudicate the case. By virtue of Art. 16 of the Regulation, neither national competition authorities nor national courts can take decisions running counter to the decisions adopted by the Commission.

¹³⁵ See Art. 9(1) of the Directive.

¹³⁶ See Art. 9(2) of the Directive.

¹³⁷ See Wright, K., 'The Ambit of Judicial Competence after the EU Antitrust Damages Directive', *Legal Issues of Economic Integration*, Volume 43, Issue 1, 2016, p. 23.

¹³⁸ For this purpose, *follow-on claims* extend to the decisions taken by the national courts in the process of review.

¹³⁹ '(D)iscretions must be exercised within the parameters of the rules granting the discretion and subject to mandatory due process norms' and 'notwithstanding any contrary agreement by the parties.' See Waincymer, J., *Op. Cit.* (3), pp. 752-754.

¹⁴⁰ 'Arbitral rules typically require parties to present all documents on which they intend to rely.' See Waincymer, J., *Op. Cit.* (3), p. 829.

¹⁴¹ 'In the field of competition law (...) (e)vidence is (thus) mostly made up of documents', such as 'documents drafted at anticompetitive meetings or shortly afterwards, such as formal agreements, minutes of meetings, results of meetings provided by a trade association, handwritten notes, agendas of employees involved, expense reports, letters

possession. In light of the often silent *lex arbitri* or arbitral rules and the rare party agreements on evidentiary issues¹⁴², the arbitrator is left in a difficult position.

Where one of the parties wishes to rely on a document within the sphere of the counter-party, the former needs to make a request for the production or disclosure of such document. Document requests from the party bearing the burden of proof shall be directed to both the arbitral tribunal and the opposing party, as the latter may voluntarily provide the requesting party with such document. According to the International Bar Association Rules of Evidence¹⁴³, such request must comply with some criteria, in particular stating 'a description in sufficient detail' of the documents, how these are 'relevant to the case and material to the outcome' and 'why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party'¹⁴⁴. Upon such request to produce, the opposing party may file an objection, which will be ultimately ruled on by the arbitrator¹⁴⁵. In considering such request, the arbitrator has a broad discretion, which extends to matters involving 'procedural economy, proportionality, fairness or equality' or if he determines that it constitutes an 'unreasonable burden' to the producing party¹⁴⁶. Should the party whose request has been made to fail or refuse to produce the document 'without a satisfactory explanation', the arbitral tribunal may draw adverse inferences¹⁴⁷ or, depending on the jurisdictions, request for the court assistance¹⁴⁸.

or e-mails exchanged between participants or even with third parties, and so on.' See Marquis, M., Cisotta, R., 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015, p. 115.

¹⁴² See Waincymer, J., *Op. Cit.* (3), pp. 750-754.

¹⁴³ International Bar Association Rules on the Taking of Evidence in International Arbitration (2010), adopted by a resolution of the IBA Council 29 May 2010. These rules constitute 'a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration' and have thereby 'gained wide acceptance within the international arbitral community'. Even so, it shall be noted that they shall be agreed upon by the parties to arbitration so as to bind the arbitral tribunal. See the foreword of the cited IBA Rules of Evidence, p. 2 and Art. 1(1).

¹⁴⁴ See Art. 3(3) of the IBA Rules of Evidence which enumerates these and other criteria.

¹⁴⁵ See Articles 3(5)-(7), 9(2) of the IBA Rules of Evidence. In practice, upon receipt of an objection, the Tribunal will invite the parties to consult, who may in turn request the Tribunal to rule on the objection.

¹⁴⁶ See Art. 9(2)(c),(g) of the IBA Rules of Evidence.

¹⁴⁷ See Art. 9(5) of the IBA Rules of Evidence. 'It is readily accepted that tribunals may draw adverse inferences from a party's failure to provide information and documents where it would be reasonable for them to do so.' 'An adverse inference is not a punitive action. It is an inference that can be reasonably and logically drawn in appropriate circumstances. This is a crucial distinction as a punitive measure is simply a response to the clear fact of non-production. See Waincymer, J., 'Procedure and Evidence in International Arbitration', Kluwer Law International 2012, p. 775. By virtue of the power to order disclosure attributed by the EU Damages Directive, national courts may impose penalties on parties, third parties and their legal representatives in case of refusal or failure to disclose a document, pursuant to its Art. 8(1)(a).

¹⁴⁸ In English law, for example, '(i)n a case where the parties are reluctant to co-operate, then an arbitrator can go through a peremptory order under s 41. If the party fails to comply with that order, then the English court could intervene under s 42 and make an order requiring a party to comply with the peremptory order made by the tribunal.

A necessarily different outcome follows from a request to produce a document directed to a third party. Firstly, the powers of the arbitrator are conferred to and also limited by the parties' agreement and thus third parties are, in principle, excluded from the arbitral proceedings¹⁴⁹. Secondly, under most jurisdictions, the arbitral tribunals do not have compulsion powers over third parties¹⁵⁰. And thirdly, the court assistance¹⁵¹, where possible, 'might be impractical in terms of delay and added cost'¹⁵². Consequently, and unless it is possible to establish control over the third party by the opposing party to the request to produce, the arbitrator may not draw adverse inferences against that party. There are cases where the parties have no influence over third parties¹⁵³ but they simply choose not to take part of the arbitral proceedings because the production of the requested documents may imply significant costs.

Where the third party in possession of relevant evidence is a competition authority, the arbitral tribunal still has no powers of compulsion. The Directive only attributed powers of ordering disclosure to national courts¹⁵⁴, leaving arbitral tribunals with limited means in a claim for damages where no evidence is found.

It is yet to be seen how EU Member States will transpose the Directive¹⁵⁵, namely the changes they will implement in the arbitral rules regarding the powers of the arbitrators, on the one hand, and 'existing laws providing for court support to arbitral tribunals'¹⁵⁶, on the other hand. Albeit a

It should be noted that s 42 does not provide the court with jurisdiction to order a discovery, but merely to order that a party complies with the arbitrator's order.' See Danov, M., *Op. Cit.* (5), p. 252.

¹⁴⁹ 'If there is no control over the third party, there is no primary obligation in relation to document production.' See Waincymer, J., *Op. Cit.* (3), p. 880. Also, 'an arbitration agreement is concerned just with the relationships between the parties. This will prevent an arbitral tribunal from issuing orders to third parties.' See Danov, M., *Op. Cit.* (5), p. 252 and literature cited therein.

¹⁵⁰ 'As a general rule, the tribunal has no power of compulsion over such persons.' See Waincymer, J., 'Procedure and Evidence in International Arbitration', Kluwer Law International 2012, p. 816.

¹⁵¹ 'The 1996 Act provides for assistance by the English court in obtaining third party evidence at the request of a party to arbitral proceedings, if arbitration hearings are held in England.' See Danov, M., 'Jurisdiction and judgments in relation to EU competition law claims', Hart Publishing Ltd., 2010, p. 253 and legislation cited therein.

¹⁵² See Waincymer, J., 'Procedure and Evidence in International Arbitration', Kluwer Law International 2012, p. 880.

¹⁵³ In the case of a co-infringer, there is no incentive to participate in the arbitral proceedings and 'since EU competition law claims often involve third parties', national courts 'of the country where the seat of arbitration is located would be the natural forum that should provide assistance in obtaining evidence from the third parties in antitrust claims.' See Danov, M., *Op. Cit.* (5), p. 253.

¹⁵⁴ See Art. 6(1) of the EU Damages Directive in relation to evidence included in the file of a competition authority. Art. 5(1) of the cited legal instrument also attributes powers of ordering disclosure in relation to the defendant or a third party, where, again, no reference is made to arbitrators. Notwithstanding this power regarding competition authorities, it shall be noted that courts shall only make use of it 'when that evidence cannot reasonably be obtained from another party or from a third party.' This follows from recital 29 of the Directive.

¹⁵⁵ Despite in force since 26 December 2014, EU Member States only need to have it implemented by 27 December 2016, pursuant to Art. 21(1) of the referred directive.

¹⁵⁶ See Goldsmith, A., *Op. Cit.* (10), p. 35.

purported desire for an increase in private enforcement which ‘implies by definition a more pronounced role for arbitration in the private enforcement of EU competition law’¹⁵⁷, there might be less of an incentive for parties to opt for arbitration if, in practice, arbitrators lack the means of delivering a binding outcome. In practice, the Directive steps into arbitration only in relation to the suspension of the limitation period before the involved parties go to court¹⁵⁸ and to limit the amounts paid by a co-infringer previously involved in arbitration¹⁵⁹. It thus follows from here that, even though the Directive acknowledges arbitration as part of an ‘effective system of private enforcement’¹⁶⁰, it seems that its role in the Directive is limited to arbitration as a prior consensual settlement¹⁶¹. As a result, the Directive itself does not attribute any novel powers to arbitrators, which are ultimately dependant on a legislative option left with the EU Member States when transposing the Directive.

4.3. Referrals

4.3.1. Preliminary Rulings

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose

¹⁵⁷ See Blanke, G., ‘Part VI Arbitration, 29 EU Competition Arbitration’ in Blanco, O. L., ‘EU Competition Procedure (3rd Edition)’, Oxford Competition Law, 2013, 29.10.

¹⁵⁸ See Art. 18(1) of the EU Damages Directive.

¹⁵⁹ See Art. 19(4) and recital 48 of the EU Damages Directive.

¹⁶⁰ See recital 5 of the EU Damages Directive.

¹⁶¹ This is arguably an appropriate definition. Even if it is generally accepted that arbitration is a consent-based jurisdiction, it is the arbitral tribunal who adjudicates the case. The concept of “consensual settlement” may wrongly imply what is a rare outcome in arbitration, namely a consent award. This is reserved to the cases where a settlement agreement is achieved during the proceedings and embodies the form of a consent award. For further reading, see Blackaby, N., Partasides, C., et al., ‘Redfern and Hunter on International Arbitration (Sixth Edition)’, 6th edition, Kluwer Law International, Oxford University Press, 9.34.

*decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. (...)*¹⁶²

It follows from the cited provision that a “court or a tribunal of a Member State” may, and in some instances shall, refer certain questions to the CJEU. If a national court is faced with the applicability of Art. 101(3) of the TFEU, for example, it may turn to the CJEU so as to preserve the uniformity of EU law as a whole¹⁶³.

In principle, this power does not extend to arbitral tribunals, by virtue of the *Nordsee case*¹⁶⁴ whereby the CJEU considered that an arbitral tribunal is not a “court or tribunal of a Member State” within the meaning of Art. 267 of the TFEU¹⁶⁵. As previously argued, several are the constraints that prevent arbitral tribunals from submitting preliminary rulings to the CJEU, namely the fact that they are not bound by a duty of loyal cooperation, as well as these are not part of a national legal order, let alone an EU Member State.

Despite ‘a gradual softening of the Court of Justice’s position on this matter’, this tends to be more directed to investment arbitration. The compromise adopted by the CJEU amounts to the enumeration of factors which would allow an arbitral tribunal to submit a preliminary ruling to the CJEU. However, these factors seem not to qualify most of the arbitral tribunals under international commercial arbitration and were enumerated by Basedow as including questions such as:

*(1) whether the body is established by law; (2) whether it is permanent; (3) whether its jurisdiction is compulsory; (4) whether its procedure is inter partes; (5) whether it applies rules of law; and (6) whether it is independent.*¹⁶⁶

¹⁶² See Art. 267 of the TFEU.

¹⁶³ ‘This mechanism is set to preserve the EU character of the law established by the Treaties and “has the object of ensuring that in all circumstances this law is the same in all States of the [EU].”’ See Danov, M., ‘Jurisdiction and judgments in relation to EU competition law claims’, Hart Publishing Ltd., 2010, p. 254 and case law cited therein.

¹⁶⁴ Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095.

¹⁶⁵ ‘An arbitrator who is called upon to decide a dispute between the parties to a contract under a clause inserted in that contract is not to be considered as a “court or tribunal of a member state” within the meaning of article 177 of the treaty where the contracting parties are under no obligation, in law or in fact, to refer their disputes to arbitration and where the public authorities in the Member State concerned are not involved in the decision to opt for arbitration and are not called upon to intervene automatically in the proceedings before the arbitrator.’ See Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095, p. 1095.

¹⁶⁶ See Basedow, J., ‘EU Law in International Arbitration: Referrals to the European Court of Justice’, *Journal of International Arbitration*, Vol. 32, No. 4, 2015, p. 371 and case law cited therein.

While denying this mechanism to arbitrators may have adverse implications in the desired uniformity of EU law¹⁶⁷, the parties accept the risk of having an award vacated or non-enforceable when opting for arbitration over courts. As a matter of fact, they may be against a referral to the CJEU as this implies additional costs and time¹⁶⁸, not to mention the disclosure of facts which would otherwise be covered by the veil of confidentiality of the arbitral proceedings.

Even if arbitration has party autonomy as its founding principle, there is a chance that parties may not be aware of the applicability of EU Competition Law or may not attribute enough importance to it so as to select the arbitrators according to their expertise in this field¹⁶⁹. Regardless of this, 'EU law is complex and growing fast', as well as 'many provisions show traces of difficult political compromises: vagueness, contradictions, gaps'¹⁷⁰ which means that, even judges sometimes lack the experience when dealing with Articles 101 or 102 of the TFEU¹⁷¹. As such, it might be unreasonable to expect arbitrators to know all the applicable law, especially in view of very limited institutional support.

In addition to this, the principle of finality of arbitral awards precludes parties from challenging the arbitral award based on the merits of the case¹⁷² which may pose serious concerns to the aimed uniformity of EU law. In this context, the Commission's assistance may be of limited relevance in view of its informality¹⁷³, especially when confronted with a binding interpretation of the CJEU.

¹⁶⁷ 'The fundamental aim of the preliminary reference procedure, which is to ensure the uniform application of EC (EU) law, was at stake and it may be said that, by concluding that an arbitrator is not to be considered a 'court or tribunal of a Member State', the Court decided to run the risk of undermining that system.' See Cisotta, R., 'Chapter 11: Some considerations on arbitrability of competition law disputes and powers and duties of arbitrators in applying EU competition law' in Marquis, M., Cisotta, R., 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015, p. 245. 'More generally, it is difficult to see why arbitrators who are expected to apply provisions of EU law should not have also the right, ex officio or upon the motion of a party, to seek the help of the ECJ'. See Benedettelli, M. V., *Op. Cit.* (37), pp. 615-616.

¹⁶⁸ 'Both the parties and the arbitrators will usually be deterred from a referral to the Court of Justice by the expectation that the referral procedure will cause a delay of up to two years in the overall proceedings.' See Basedow, J., *Op. Cit.* (163), p. 367.

¹⁶⁹ In other cases, 'the intent of the parties in submitting a dispute to arbitrators could be precisely to circumvent that kind of legislation.' See See Cisotta, R., 'Chapter 11: Some considerations on arbitrability of competition law disputes and powers and duties of arbitrators in applying EU competition law' in Marquis, M., Cisotta, R., 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015, p. 245.

¹⁷⁰ See Basedow, J., *Op. Cit.* (163), p. 367.

¹⁷¹ See Danov, M., *Op. Cit.* (5), p. 285.

¹⁷² 'Indeed, most institutional rules provide unequivocally that an arbitral award is final and binding.' See Blackaby, N., Partasides, C., et al., 'Redfern and Hunter on International Arbitration (Sixth Edition)', 6th edition, Kluwer Law International, Oxford University Press, 10.02.

¹⁷³ Goldsmith, A., *Op. Cit.* (10), p. 35.

4.3.2. Court Assistance

The assistance of national courts may figure as an alternative in view of the preclusion of the arbitral tribunals from the right to submit preliminary rulings to the CJEU. As a matter of fact, this was the solution presented by the CJEU in the context of the *Nordsee case* while denying access to the direct referral to it, which reads as follows:

(...) if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them (either) in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable (...)

*It is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 177 of the Treaty in order to obtain the interpretation or assessment of the validity of provisions of Community law which they may need to apply when exercising such auxiliary or supervisory functions.*¹⁷⁴

Depending on the jurisdictions, it might be open to arbitrators to request the assistance of national courts, provided that the seat of arbitration is within an EU Member State. Arbitral tribunals seated in a third country are thereby precluded from this assistance which may undermine the EU common market, in light of the arbitration's detachment from a particular jurisdiction. Nonetheless, the referral to the CJEU for an interpretative ruling still lies within the national court's discretion¹⁷⁵.

In some jurisdictions, national court's support may still be important in the context of *evidence gathering*¹⁷⁶, in view of the referred limited powers of arbitrators. However, in line of what was previously argued, this 'might be impractical in terms of delay and added cost'¹⁷⁷.

¹⁷⁴ Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095, paras 14-15.

¹⁷⁵ Benedettelli refers to this as 'an intermediate solution (...) by giving to the arbitral tribunal the power to refer questions of EU law to State courts, who would then be in charge of deciding whether or not the question satisfies the requirements for a preliminary ruling under Article 267 TFEU (also in light of the *acte clair* doctrine) and, if the assessment is positive, send the question to the ECJ.' See Benedettelli, M. V., *Op. Cit.* (37), p. 616.

¹⁷⁶ Goldsmith, A., *Op. Cit.* (10), p. 35.

¹⁷⁷ See Waincymer, J., *Op. Cit.* (3), p. 880.

4.3.3. Review

*(...) if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them (either) (...) in the course of a review of an arbitration award — which may be more or less extensive depending on the circumstances — and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation (...)*¹⁷⁸

It is widely accepted that ‘an arbitral award is final and binding’¹⁷⁹, which means it can be challenged before national courts on very limited grounds¹⁸⁰. Typically these grounds entail the breach of public policy or the inarbitrability of the subject matter, either before the national courts of the seat of arbitration or the national courts before which enforcement is sought¹⁸¹.

In light of the well-established arbitrability of EU Competition Law and taking into account the fact that Articles 101 and 102 of the TFEU are part of public policy¹⁸², it is imperative to analyse the level of judicial review of the arbitral award applying those provisions. Given the fact that this remains unclear, it urges to distinguish between domestic and international public policy¹⁸³. As earlier pointed out, ‘national courts have not engaged in a thorough consideration of the issue’ and thus the only reference seems to be the *Tensacciai case*¹⁸⁴ before the Swiss Federal Court whereby it was stated that EU Competition Law ‘cannot be conceived as part of a transnational public policy’¹⁸⁵.

¹⁷⁸ Case C-102/81 Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG [1982] ECR 1095, paras 14-15.

¹⁷⁹ See Blackaby, N., Partasides, C., et al., ‘Redfern and Hunter on International Arbitration (Sixth Edition)’, 6th edition, Kluwer Law International, Oxford University Press, 10.02.

¹⁸⁰ ‘(W)hilst it may be possible to challenge an arbitral award, the available options are likely to be limited—and intentionally so.’ See Blackaby, N., Partasides, C., et al., ‘Redfern and Hunter on International Arbitration (Sixth Edition)’, 6th edition, Kluwer Law International, Oxford University Press, 10.03.

¹⁸¹ See Articles V(1)(e), (2) of the New York Convention and 36(1)(a)(v), (b) of the UNCITRAL Model Law.

¹⁸² ‘Increasingly important for arbitrations with a seat within the European Union is the notion of “EU public policy”.’ See Blackaby, N., Partasides, C., et al., ‘Redfern and Hunter on International Arbitration (Sixth Edition)’, 6th edition, Kluwer Law International, Oxford University Press, 10.86.

¹⁸³ See Biagioni, G., ‘Chapter 13: Review by national courts of arbitral awards dealing with EU competition law’ in Marquis, M., Cisotta, R., ‘Litigation and arbitration in EU competition law’, Edward Elgar Publishing, 2015, p. 289.

¹⁸⁴ *Tensacciai S.p.A. v. Freyssinet Terra Armata S.r.l.* 4P.278/2005, 24 ASA Bull 550 (2006).

¹⁸⁵ See Biagioni, G., ‘Chapter 13: Review by national courts of arbitral awards dealing with EU competition law’ in Marquis, M., Cisotta, R., ‘Litigation and arbitration in EU competition law’, Edward Elgar Publishing, 2015, pp. 290-291.

The threshold is higher in the context of international public policy when compared to the domestic public policy, from the perspective of the party seeking the annulment or non-enforcement of the arbitral award. In other words, an arbitral award can be challenged 'only in exceptional circumstances where (the arbitral award) embodies a flagrant violation of fundamental principles of international public policy'¹⁸⁶. If one were to consider EU Competition Law as part of the domestic public policy, it may be argued that, as an international arbitral award is intended to apply in international settings¹⁸⁷, it makes no sense to apply the domestic public policy of a particular State. On the other hand, Articles 101 and 102 of the TFEU tend to be embodied in national legal orders of EU Member States and, even if these provisions may be part of domestic public policy, they are applicable where trade between EU Member States is affected. Therefore, a limited review is to be established.

¹⁸⁶ See Biagioni, G., 'Chapter 13: Review by national courts of arbitral awards dealing with EU competition law' in Marquis, M., Cisotta, R., 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015, p. 291. '(T)he narrower category of international public policy (*ordre public externe*, or *ordre public international*) is confined to the violation of really fundamental conceptions of the legal order in the country concerned.' See Blackaby, N., Partasides, C., et al., 'Redfern and Hunter on International Arbitration (Sixth Edition)', 6th edition, Kluwer Law International, Oxford University Press, 10.87.

¹⁸⁷ See Biagioni, G., 'Chapter 13: Review by national courts of arbitral awards dealing with EU competition law' in Marquis, M., Cisotta, R., 'Litigation and arbitration in EU competition law', Edward Elgar Publishing, 2015, p. 293.

5. Conclusions

The purported rise in private enforcement of EU Competition Law, read in conjunction with the decentralisation and direct applicability of Articles 101 and 102 of the TFEU, implies a rise in arbitration in view of its popularity among business actors. In light of the well-established arbitrability of EU Competition Law, the issue no longer resides on whether a claim or a defence based on EU Competition Law may be subject to arbitration but on the role of the arbitrator in dealing with such matters, especially given the lack of support by the EU institutions.

Unlike in the past, arbitrators are now believed to be well-prepared in applying EU Competition Law, not to mention an inherent duty to render an enforceable award which further translates into a duty to apply matters of public policy. After the *Eco Swiss case*, the CJEU stated that Art. 101 of the TFEU is part of public policy. However, matters of public policy shall be interpreted in combination with the consensual nature of arbitration, which means that its relevance in the discussion of the applicable law governing the arbitrability shall be limited to the jurisdictions with a territorial connection to the seat of arbitration. This seems to be the better view in light of the characteristic detachment of arbitration from a national legal order, let alone an EU Member State, while preventing parties from taking advantage of party autonomy as a means of circumventing the application of EU Competition Law where it should be applicable.

Regarding the cases where arbitration takes place in a third country and thus EU Competition Law is not embedded in the domestic legal system of the seat, or where the *lex causae* is not the law of an EU Member State, the proper functioning of the internal market may still be at stake. In this context, Articles 101 and 102 of the TFEU are applicable provided a significant effect on trade between EU Member States is to be established. As a matter of fact, this is a condition for their applicability so as to ensure that competition is not distorted within the EU.

In light of the inconsistent jurisprudence in relation to the jurisdiction *ratione materiae* of arbitral tribunals in relation to EU Competition Law claims, it would be prudent to include an express reference to claims involving EU Competition Law in the arbitration clause. On the other hand, where EU Competition Law arises as a defence in the context of arbitration, the issue no longer resides on the arbitration agreement but on the ability of the arbitrator to apply these provisions. The possibility of parties choosing arbitrators may figure as an advantage, especially in a field where technical considerations are predominant. In any instance and provided that EU Competition Law is applicable, not only is the arbitrator bound to apply these provisions, as he is

expected to do so. This solution prevents the recourse to arbitration as a potential forum to circumvent the law.

Another concern is the potential concurrence of proceedings between arbitral tribunals, on the one hand, and investigations being carried out by the Commission, or the national courts, on the other hand. If it is true that the Commission is *better equipped*, as well as it benefits from privileged access to evidence, parties to arbitration accept the risk of having an unenforceable award when they resort to arbitration and thus the arbitrator shall refrain from staying the proceedings. A similar solution is to be adopted when the same or identical dispute is also submitted to the national courts. In particular, the principle of competence-competence empowers the arbitrator to decide on its own jurisdiction, as well as the court shall refer the parties to arbitration, provided that the arbitration agreement is not invalid *lato sensu*. In principle, this prevents the over-enforcement of EU Competition Law, as purported by the Directive, and is compliant with party autonomy.

After the landmark *Nordsee case*, the CJEU rejected the view that an arbitral tribunal is a “court or tribunal of a Member State” in the meaning of the current Art. 267 of the TFEU which means that arbitrators are not under a duty of loyal cooperation, nor do they benefit from the support of the EU institutions. Further, the fact that arbitral tribunals are a neutral forum implies that they cannot be associated with any country, let alone an EU Member State. This not only impacts in the competition authorities’ interventions as *amicii curiae*, as it has an impact on the probative value of their decisions regarding an infringement of EU Competition Law, usually referred to as follow-on claims in the context of arbitration.

If it is true that party autonomy sets the framework of the arbitrator, it is also true that the latter has wide discretion within that framework in relation to evidence. Nonetheless, being a private adjudicator, he has no powers of compulsion over third parties, including competition authorities, which limits the scope of the Directive in its purported full effectiveness and uniformity of EU Competition Law.

Not only do arbitral tribunals lack assistance from the competition authorities, but also from the CJEU and, in some jurisdictions, from the national courts. This may reflect in the ability of the arbitrators of delivering a binding award, which may ultimately render all the efforts and costs useless if it is later subject to judicial review in an EU Member State.

In light of these considerations, it seems that the Directive, while acknowledging the role of arbitration in the context of private enforcement, does not attribute significant powers to arbitrators so as to comply with the full effectiveness and uniformity of EU Competition Law. Even if it is ultimately a political option left with EU Member States when transposing the Directive, the European legislator missed the chance of clarifying the role of arbitrators in the Regulation. Against this legal framework and given the characteristics of arbitration, the Modernisation Process does not seem to have brought much novelty in the context of arbitration as a forum of solving disputes involving EU Competition Law.

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