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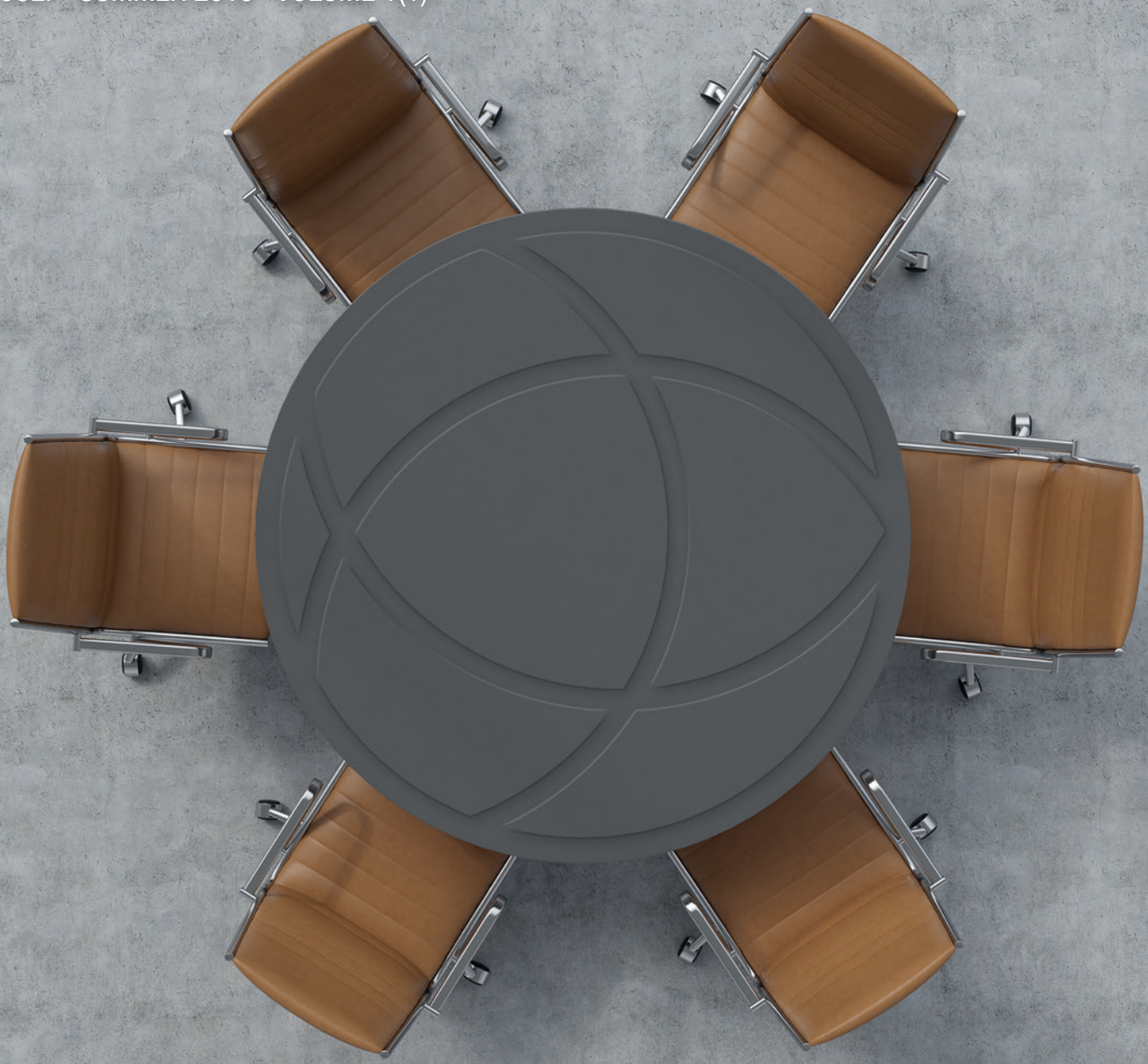

ARBITRATION & ANTITRUST

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

This month's Antitrust Chronicle looks at the intersection of arbitration and competition law in the EU and internationally. Over the recent few years, arbitration has developed into a means for private enforcement of EU competition law claims. Although some early case law showed a certain reluctance to make use of arbitration clauses in competition law damage claims, a few EU jurisdictions have recently moved towards more arbitration friendly solutions. But what are some of the conditions and limitations?

These articles provide a variety of insights into how and why arbitration may an apt tool for the private enforcement of competition law claims in the EU and internationally. But there may be some recent legislative developments that could change the legal landscape. We have a great group of authors who provide their perspectives on antitrust and arbitration in the EU, Switzerland, and internationally.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

SUMMARIES

International Arbitration and Domestic Antitrust: Natural Progression or Random Alliance?

By Vera Korzun

National courts and arbitration laws around the globe have long proclaimed that antitrust claims are arbitrable, that is they can be submitted to and resolved in arbitration. The number of antirust arbitrations has reportedly grown in recent years, providing a feasible route for private enforcement of antitrust laws. This paper focuses on arbitration of domestic antitrust claims in international commercial arbitration — arbitration that may arise from international business transactions. Apart from antitrust claims and defenses, the paper explores how parties in international arbitration invoke antitrust to challenge the tribunal's jurisdiction and arbitral awards in setting aside and enforcement proceedings. It also explores the issue of multiplicity of antitrust laws in international arbitration and how arbitral tribunals can address it. It concludes by analyzing the role of arbitrators and supervisory courts in the enforcement of antitrust laws, and the nature of the relationship between domestic antitrust and international arbitration.

Arbitration and Competition – A Swiss Perspective

By Dr. Hubert Orso Gilliéron & Jean Marguerat

This article discusses the possibility for parties to formulate competition law claims in arbitration proceedings in Switzerland. It confirms that competition law claims can be arbitrated and that arbitration may be a valid option available to the parties even if the parties to a dispute did not originally agree to subject their disputes to arbitration. Switzerland's pro-arbitration legislation, coupled with the liberal approach of Swiss state courts towards arbitration and Switzerland's neutrality, non-membership of the European Union, as well as a long tradition in international arbitration, make Switzerland a very attractive place for arbitrating disputes involving competition law arguments. Another argument in favor of arbitration in Switzerland is the possibility, not tested in practice yet, to ask to the Swiss Competition Commission to take position on the existence of a competition law breach. Limited possibilities of appeal and a favorable legislative context certainly plead in favor of such a dispute resolution mechanism.

The Private Enforcement Directive's Toolkit in Arbitration

By Emilio Paolo Villano

The Private Enforcement Directive, and the laws of EU Member States transposing it, have provided a set of instruments to make claims for the compensation of damages deriving from the infringement of competition law rules easier and more expedite. The Directive was, however, not drafted with arbitration in mind. Thus, it appears uncertain if, and to what extent, an injured party claiming for full compensation in arbitration may have access to that set of instruments. Certain alternative solutions may be envisaged to overcome the difficulties posed by the Directive and to allow the injured party to have partial access to those information, documents and assistance it would have at its disposal, should the case be brought in front of a national court of a EU Member State.

WHAT'S NEXT?

For August 2019, we will feature Chronicles focused on issues related to (1) **Editorial Board Antipasto**; and (2) **State AGs**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2019, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES SEPTEMBER 2019

For September 2019, we will feature Chronicles focused on issues related to (1) **LeadershIP**; and (2) **MFN, Loyalty Programs & Fidelity Rebates**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

EU COMPETITION ARBITRATION: A RELIABLE FORUM FOR PRIVATE ENFORCEMENT

BY DR. GORDON BLANKE[1]

1 LL.B. (LSE), LL.M. (Lux), PhD (Groningen); Founding Partner, Blanke Arbitration LLC, Dubai/London/Paris. This article draws in relevant part on the author's previous writings, including in particular G. Blanke, "EU Competition Arbitration" in L. Ortiz Blanco, EU Competition Procedure, Oxford, 2013, 3rd edition, 1075-1112. Comments on this article will be gratefully received at gb@blankearbitration.com.

I. INTRODUCTION

Following the adoption of the Modernization Regulation,[2] the development of arbitration as an adversarial forum for the private enforcement of EU competition law claims as an alternative to the courts has gained significant momentum. Even though the Regulation itself remains silent on arbitration as an alternative form of dispute resolution, the decentralization of the enforcement of EU competition law moving away from public authorities and towards private law enforcement agents, which lies at the heart of Modernization, has created new opportunities for arbitration as a specialist forum for the private enforcement of EU competition rules. In a similar vein, the more recent adoption of the EU Damages Directive[3] has further strengthened the role of arbitration as an alternative forum for EU private enforcement: More specifically, Recital 48 of the Directive expressly endorses the recourse to arbitration for private damages actions against EU competition law infringers.

In other areas, too, in particular within the context of EU commitment arbitrations, we have witnessed a steadily growing trend by the EU Commission to rely on arbitration for the enforcement of commitments given either by merging parties under the EUMR,[4] and or by potential competition infringers under Article 9 of Regulation 1/2003. More recent developments have shown that EU commitment arbitrations do have a role to play in EU private enforcement in this area and are here to stay.

Nowadays, arbitrators routinely deal with questions of EU competition law that arise from principal claims or that are incidental to a main commercial claim, usually for breach of contract by a contracting counterparty. Defensive competition law actions commonly arise in the form of the so-called "Euro-defense," which raises the invalidity of the underlying main contract under Article 101 TFEU[5] as a full defense to a claim for breach of contract. A variation on the theme are follow-on damages actions, based on a prior finding of infringement by the EU Commission or a competent NCA.[6] Such actions find particular endorsement in the EU Damages Directive.

Against this background, over the past twenty to twenty-five years, arbitration has evolved into a reliable forum for private enforcement within the context of EU competition law. In the following sections we will discuss in some further detail how and why this is so. This discussion will depart from the once vexed question of competition arbitrability and the nowadays proven fitness of arbitration as an ideal enforcement tool. Within that context, we will also discuss recent developments in relation to the proper scoping of the underlying arbitration agreement. The discussion will then continue with a focus on the arbitrator's typical powers in his/her capacity as a private enforcer of the EU competition law rules, the question of parallel proceedings pending before an arbitral tribunal and an EU Member State court or a competent competition authority (whether the EU Commission or an "NCA"), and the role (if any) played by the EU Commission in private enforcement actions before an arbitral forum. The discussion concludes with some considerations on the enforcement practices of the EU Member State courts when seized of an action for recognition and enforcement of an EU competition award.

II. THE PRESUMPTION OF EU COMPETITION ARBITRABILITY

Nowadays, there is a general presumption in favor of EU competition arbitrability across the EU Member States.[7] This follows in the wake of the ECJ's[8] seminal ruling in *Eco Swiss*,[9] which elevated EU competition law, and more specifically Article 101 TFEU in its former incarnation as Article 81 EC to a matter of public policy within the meaning of Article V.2.(b) of the New York Convention[10] without even discussing the question

2 Council Regulation ("EC") 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003], now Arts 101 and 102 (following the adoption of the Treaty of Lisbon in December 2009) (also commonly known as "Regulation 1/2003").

3 Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union OJ L349/1 5.12.2014.

4 Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p 1).

5 Treaty on the Functioning of the European Union.

6 National Competition Authority.

7 For a full discussion, see G. Blanke, "The Arbitrability of EU Competition Law: The Status Quo Revisited in the Light of Recent Developments (Part I)," 10(2) G.C.L.R. (2017), 85-101.

8 European Court of Justice, now the Court of Justice of the European Union ("ECJ").

9 Judgment of the ECJ of June 1, 1999 Case C-126/97 *Eco Swiss China Ltd and Benetton International NV* [1999] ECR I-3055.

10 On the recognition and enforcement of foreign arbitral awards, done at New York, 10 June 1958. The New York Convention is one of the key international enforcement instruments of arbitral awards worldwide, counting 159 Member States at the time of writing.

of competition arbitrability. Later case law precedent[11] also confirmed the qualification of Article 102 TFEU as public policy within the EU. As a result, arbitrators sitting in EU-seated arbitrations are generally considered to be under an implied obligation to raise EU competition law issues on their own in order to ensure that a resultant award does not violate EU competition law, and is as such enforceable in a prospective enforcement jurisdiction within the EU. Failure to do so might engage the arbitrator's liability as a service provider[12] for breach of EU competition rules (in particular in situations where e.g. their service might have assisted in the enforcement of an illegal cartel).[13]

To avoid doubt, at the latest since the adoption of Regulation 1/2003, the legal exception under Article 101(3) TFEU has been widely accepted as arbitrable. Arbitrators are in fact uniquely placed to consider the factors that feed into the proper application of the legal exception, given that they can be chosen from a specialist professional background with the required technical and industry knowledge to assist in a competition-compliant application of Article 101(3) TFEU.

Apart from Articles 101 and 102 TFEU, behavioral commitments under the EUMR[14] and under Regulation 1/2003[15] are also arbitrable. This facilitates the private enforcement of behavioral undertakings given by either merging entities to obtain conditional clearance under Articles 6.2(b) and 8.2(b) of the EU Merger Regulation or by potential competition infringers under Article 9 of Regulation 1/2003. Such undertakings are usually access obligations owed by the merging entity or the potential infringer to third party competitors. In practice, such access obligations are implemented through access agreements, which contain the access commitment as a private law obligation that, in turn, is enforceable through arbitration. Access obligations are arbitrable like any other commercia obligations in private law, albeit that the arbitrator in his/her determinations must give regard to the original competition objective pursued by the EU Commission's commitment decision. Importantly, the proper arbitrability of behavioral commitments stands confirmed both by the EU Commission Notice on Remedies[16] and by actual Commission practice.[17]

Under most Member State laws, arbitration agreements that submit "all disputes" arising from the main contract to arbitration will be considered sufficiently wide to accommodate actions for infringement of EU competition law, including related tortious actions for abuse of dominance. Such arbitration clauses will also routinely cover follow-on damages actions. That said, more recently, following the ECJ's ruling and the AG's Opinion in *CDC*,[18] the arbitrability of cartel damages actions has been called into question. The ECJ's approach to the subject has widely been interpreted as requiring an express submission of cartel damages actions to arbitration – whether by their explicit inclusion in the original arbitration clause or their deliberate submission to arbitration *ex post facto* by way of a submission agreement. Member State courts have taken divergent views, some adopting the strict interpretation derived from the AG's Opinion,[19] others taking a more liberal approach in support of the

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11 Judgment of the ECJ of July 13, 2006 in Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA, and Nicolò Tricarico, Pasqualina Murgolo v. Assitalia SpA* [2006] ECR I-6619.

12 Of a service that has an economic value and as such amounts to an economic activity: See., e.g. C-309/99 - *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] E.C.R. I-1577.

13 For case law precedent that may serve by analogy, see Judgment of the CFI of July 8, 2008 in Case T-99/04 *AC-Treuhand AG v. Commission of the European Communities*.

14 For a full discussion, see G. Blanke, "International Arbitration and ADR in Conditional EU Merger Clearance Decisions" in G. Blanke & P. Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, 1605-1724.

15 For a full discussion, see G. Blanke, "International Arbitration and ADR in Remedy Scenarios Arising under Articles 101 and 102 TFEU" in G. Blanke & P. Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, 1053-1250.

16 Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267/1. See in particular para. 66, which expressly envisages the use of arbitration for the enforcement of behavioral commitments under the EUMR.

17 For two most recent examples, see DIS-SV-KR-849-18 - *Drillisch v. Telefónica Deutschland*, arbitral reference under the DIS Rules, arising from arbitration commitments offered in Case Comp./M.7018 – *Telefónica Deutschland/E-Plus*; and DIS-SV-KR-833-18 – *mobilcom-debital v. Telefónica Deutschland*, arbitral reference under the DIS Rules, arising from arbitration commitments offered in Case Comp./M.7018 – *Telefónica Deutschland/E-Plus*. For an earlier example, see ICC Award No. 16974/FM/GZ, rendered with respect to an arbitration arising from commitments underlying the European Commission's decision in Comp./M.2876 - *Newscorp/Telepiù*, Commission decision of April 2, 2003.

18 Judgment of the ECJ of May 21, 2015 in Case C-352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel et al.* ECLI:EU:C:2015:335; and Opinion of Advocate General Jääskinen of December 11, 2014 in Case C-352/13 *CDC Cartel Damage Claims Hydrogen Peroxide SA v. Evonik Degussa GmbH et al.* ECLI:EU:C:2014:2443.

19 Judgment of the Court of Amsterdam of July 21, 2015 in Case No. C/13/500953/HA ZA 11-2560 *Kemira Chemicals OY v. CDC Project 13 SA*, reported in 8(4) (2015) GCLR 72-75. Some Member State courts found against in arbitrability of cartel damages actions even before the ECJ's Judgment in *CDC*: Judgment of the District Court of Utrecht of November 23, 2013 in Case No. C-16-338073—HA ZA 13-117 *East West Debt BV v. United Technologies Corporation, Otis BV, Schindler Holding Ltd, Schindler Liften BV, Thyssenkrupp AG, Thyssenkrupp Liften BV, Kone Corporation, Kone BV, Mitsubishi Elevator Europe BV*, reported in (2016) 9(2) GCLR R-18-R-21; Interlocutory Judgment of the District Court of Helsinki of July 4, 2013 in Case No. 36492 11/16750 *CDC Hydrogen Peroxide Cartel Damage SA v. Kemira Oyj*, reported in 9(1) (2016) GCLR R-18 – R-21; and Judgment of the Lisbon Court of Appeal of April 3, 2014 in Case No. 672/11.0YRLSB *Associação Nacional de Farmácias and Farminveste v. IMS Health*, reported in M Sousa Ferro, e-Competitions, N°67471.

wide, all-inclusive traditional take on the interpretation of arbitration agreements,[20] allowing the arbitration of both contractual and collateral tortious actions, such as for cartel damages, under widely-scoped arbitration agreements.[21] The debate about the proper arbitrability of cartel damages actions has also questioned the full effect of the EU Damages Directive, which, as stated above, expressly provides for arbitration of damages actions for EU competition law infringements.[22]

To conclude, a few words on the fitness of arbitration as an ideal enforcement tool within the context of EU competition law. Compared to litigation, arbitration provides greater procedural flexibility at the hands of both the arbitrators and the parties: Given that arbitration is a consensual dispute resolution mechanism based on the principle of party autonomy, each arbitration process can be adapted to the particular requirements of each individual reference. With this in mind, the arbitration process can be designed to meet specific requirements that assist in the swift resolution of competition disputes. For example, parties are free to appoint specialist arbitrators with relevant knowledge of the industry and of competition law. Any imbalances in the evidentiary position between the disputing parties can be addressed through a *prima facie* evidence rule, whereby the weaker party's evidence stands until disproven. Competition arbitrations can be concluded swiftly in order to preserve a competitive market environment. Finally, arbitral awards, as intimated above, benefit from almost universal enforceability under the New York Convention.

III. THE ARBITRATOR'S POWERS IN EU COMPETITION ENFORCEMENT

By virtue of the principle of *kompetenz-kompetenz*, which empowers an arbitration tribunal to decide upon its own jurisdiction in accordance with the governing arbitration law, an arbitrator seized of an EU competition law issue will be entitled to determine as a preliminary matter whether that issue falls within his/her proper jurisdiction. This, in turn, is essentially a question of the scope and construction of the underlying arbitration agreement, which has been discussed in some detail above.

Provided the EU competition issue falls within his/her proper jurisdiction, the arbitrator has the power to award various forms of declaratory relief depending on whether the claims before him/her are for illegality over breach of contract under Article 101 TFEU or for abuse of dominance under Article 102 TFEU. As regards claims for illegality under Article 101 TFEU in particular, the arbitrator has the power to declare:

- that the main contract is null and void pursuant to Article 101(2) TFEU;
- that the purportedly infringing main contract does not in fact violate Article 101(1) TFEU at all, and is hence not null and void under Article 101(2) TFEU;
- that the agreement subject to arbitration is block-exempted; or
- that the legal exception applies pursuant to Article 101(3) TFEU and that the agreement subject to arbitration is hence not null and void within the meaning of Article 101(2) TFEU.

Illegality claims can usually be considered by an arbitrator on the basis of the principle of separability, whereby the arbitration agreement is separable from the main contract in relation to which the claim for illegality has been brought (unless the illegality is of such a nature that it affects the arbitration agreement itself, which is only rarely the case).

As regards claims for abuse of dominance under Article 102 TFEU in particular, the arbitrator has the power to declare that a party has a dominant position and that an abuse of dominance has occurred.

In addition to the various powers to award declaratory relief, the arbitrator is empowered to award other civil law remedies, including, in particular, the following:

20 Judgment of the English High Court of February 28, 2017 in *Microsoft Mobile OY (Ltd) v. Sony Europe Ltd & Ors* [2017] EWCH 374 (CH); and Judgment of the Higher Regional Court of Dortmund of September 13, 2017 in Case No. 8 O 30/16 [Kart], reported in (2017) 10(4) GCLR 52-54.

21 Referring "all disputes arising from" the main contract to arbitration.

22a For a full discussion, see G. Blanke, "The Arbitrability of EU Competition Law: The Status Quo Revisited in the Light of Recent Developments (Part II)," 10(3) G.C.L.R. (2017), 153-166.

- *Specific performance* — The arbitrator may order specific performance of the main agreement once he/she has found against an infringement of Article 101 TFEU or that entry into the agreement does not constitute an abuse of dominance within the meaning of Article 102 TFEU.

- *Amendments/modifications to the main agreement* — The arbitrator may propose amendments and modifications to the purportedly infringing agreement to make it compliant with Article 101(1) TFEU or with the legal exception criteria set out in Article 101(3) TFEU.

- *Compensatory damages* — The arbitrator may award damages caused by a competition law infringement under the doctrine developed by the ECJ in *Courage*[23] and *Manfredi*[24]; issues of causation and the measure of damages, however, are determined by reference to the applicable substantive law, subject to the principles of equivalence and effectiveness (together referred to as the principle of procedural autonomy) within the meaning of the ECJ's jurisprudence in *Courage* and *Manfredi*. This said, the claimant's contributory negligence and unjust enrichment will be considered in the calculation of overall damages recoverable by the claimant, depending — *inter alia* — on the claimant's individual commercial power and the respondent's commercial standing. Finally, arbitrators — unlike a number of EU Member State courts — are prone to award compound interest.

- *Extra-compensatory damages* — By analogy to the award of compensatory damages, the arbitrator may award extra-compensatory damages for EU competition law infringements, again subject to the principle of procedural autonomy as applied in the ECJ's ruling in *Manfredi*. As a result, the exact level of extra-compensatory damages recoverable at the national level may vary from EU Member State to Member State, depending on their specific nature.

- *Injunctions* — The arbitrator may also pronounce various forms of injunctions, whether mandatory or prohibitive, to the extent that such relief measures are viable means of redress under the applicable substantive law.

The arbitrator's decision-making powers set out above also apply in EU commitment arbitrations *mutatis mutandis*. Most typically, the arbitrator will have to determine whether the owner of the underlying essential facility is in breach of the disputed access commitment, taking account of the competitive objective of the Commission's underlying commitment decision. In the event that there is a breach, the arbitrator will typically have to order specific performance and compensation measures in favor of the contracting counterparty, i.e. the party that has not been provided access on fair, reasonable and non-discriminatory ("FRAND") terms. The order for specific performance might also have to consider the terms that qualify for the FRAND standard in the event that these had not already been prescribed by the original access commitment.

IV. PARALLEL PROCEEDINGS AND PREVIOUS COMPETITION AUTHORITY DECISIONS

Parallel proceedings in EU competition law are generally permissible to the extent that they are complementary. This is particularly the case where proceedings before the competent competition authorities, including the Commission and relevant NCAs, are complemented by private enforcement actions before an arbitration tribunal or a competent EU Member State court.

Nevertheless, where the same EU competition law claims between the same parties are brought before competing jurisdictions, such as an arbitration tribunal and a Member State court, the question arises as to which of the two, the court or the tribunal, should stay its proceedings while the action before the competing jurisdiction is pending. To avoid doubt, in order to ensure the enforceability of a prospective award, a stay of arbitration proceedings may be desirable to await the outcome of a Commission decision on the same or similar subject matter, unless the situation is one of "*acte clair*."

Analogous considerations arguably apply in the context of parallel proceedings before an NCA.[25]

A related subject is the status of previous decisions by e.g. the EU Commission or a competent NCA, which is of particular importance in arbitrations that deal with follow-on damages actions. Even though there is no legislative text that binds a tribunal to accept a previous decision on liability on the same subject matter between the same parties in a claim for damages before it, the tribunal will take that previous decision into

23 Judgment of the ECJ of September 20, 2001 in Case C-453/99 *Courage Ltd v. Bernard Crehan* [2001] ECR I-6297.

24 Judgment of the ECJ of July 13, 2006 in Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA, and Nicolò Tricarico, Pasqualina Murgolo v. Assitalia SpA* [2006] ECR I-6619.

25 On parallel proceedings before the OFT and the Competition Appeal Tribunal, see G. Blanke, "The Application of EU Law to Arbitration in England" in J. Lew, H. Bor, G. Fullelove & J. Greenaway, *Arbitration in England*, Kluwer Law International, 2013, 239-266.

account as a matter of evidence. In light of the fact that EU Member State courts — in their supervisory capacity in enforcement and setting aside proceedings — are bound by the *Masterfoods*[26] decision and hence have to give priority to any previous Commission decision on an identical subject matter between the same parties over any contrary arbitration award (that does not comply with the terms of that Commission decision), a tribunal will have to give full effect to it in the evidentiary process in order to ensure the enforceability of its award. Like an EU Member State court, unless new facts that have not previously (and could have) been presented come to light that may change the outcome of the case, in follow-on arbitrations, a tribunal will rely on the liability found by the Commission in its decision as a proven point and only hear evidence on the necessary causal link between the established competition infringement and the damages claimed as well as quantum.

The same is, of course, equally true outside the context of strict follow-on arbitrations where a previous Commission decision carries compelling evidentiary weight on the basis of its factual similarities with the reference to arbitration, and may therefore strongly influence the decision-making of an EU Member State supervisory court in enforcement proceedings. By virtue of the principles of direct effect, supremacy, and loyal (or sincere) co-operation, a Member State court is arguably estopped from enforcing an award that runs counter to a previous Commission decision.

Analogous considerations apply in the context of previous NCA decisions,[27] subject to the precise legal status of the relevant NCA decisions under consideration.

V. THE ROLE OF THE EU COMMISSION[28]

It is common ground that arbitration tribunals are not authorized to make preliminary references to the ECJ pursuant to Article 267 TFEU.[29] This means that in complex, unresolved legal questions of EU competition law that require interpretation by the ECJ, tribunals may not avail themselves of the preliminary reference procedure. Equally, given their silence on the subject matter, the formal mechanisms for co-operation between the Commission and the EU Member State courts provided for under Regulation 1/2003 and the National Courts Cooperation Notice[30] are not officially applicable to the co-operation between tribunals and the Commission.

With this in mind, in EU competition arbitration more specifically, tribunals have identified viable alternatives to compensate for the inaccessibility of the ECJ and the unavailability of formal means of co-operation. Apart from indirect preliminary references, which may be of assistance in some EU jurisdictions,[31] requests for interpretation by the EU Commission and possibly other competent authorities, such as NCAs, in relation to discrete EU competition law issues may be available. Other means of co-operation, such as requests for information from the Commission or competent NCAs to obtain relevant market information for market definition purposes, for example, may also support the individual tribunal in rendering an enforceable, competition-compliant award. Importantly, the Commission has not, in principle, objected to any such involvement to date, and some attempts at co-operation have been made in the past.[32] Further, tentative best practice guidelines on the role of the Commission as *amicus arbitri* in EU competition arbitration[33] have been developed and debated within the former ICC Task Force for Arbitrating Competition Law Issues. Within the context of commitment arbitrations more specifically, the EU Commission has been seen to incorporate a regime for co-operation with the Commission into the underlying arbitration obligation. At least on two occasions to date,[34] the EU Commission has acted as *amicus* in commitment arbitrations under the EUMR.

26 Case C-344/98 *Masterfoods Ltd v. H.B. Ice Cream Ltd* [2000] ECR I-11369.

27 For a full typology of decisions adopted by Member State competition authorities and their impact on concurrent or subsequent arbitration proceedings, see G. Blanke, "Interaction between Arbitration and Public Enforcement: Clash or Harmony?" in M. Marquis & R. Cisotta (eds), *Litigation and Arbitration in EU Competition Law*, Elgar, 2015, 261-280.

28 For the most recent guidance, see G. Blanke, "The European Commission as Amicus Curiae in EU Competition Arbitration: Towards a Structured Approach," 12(2) G.C.L.R. (2019), 81-88.

29 Judgment of the ECJ of March 23, 1981 in 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, where the ECJ did not consider arbitrators as "a court or tribunal of a Member State" within the meaning of Art 234 EC (now Art 267 TFEU) and as a consequence found them incapable of making a preliminary reference to the EC (now EU) judiciary. To the same effect, see also most recently Judgment of the ECJ of January 27, 2005 in Case C-125/04 *Denuit v. Transorient* [2005] ECR I-923.

30 Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101.

31 For the English example, see *Bulk Oil Ltd v. Sun International Ltd* [1984] 1 All ER 386.

32 E.g. ICC Award No 7146.

33 See C. Nisser & G. Blanke, "ICC Draft Best Practice Note on the European Commission Acting as *Amicus Curiae* in International Arbitration Proceedings—The Text" in G. Blanke (ed.), *Arbitrating Competition Law Issues*, EBLR Special Edition 2008, 198.

34 See DIS-SV-KR-849-18 - *Drillisch v. Telefónica Deutschland*, arbitral reference under the DIS Rules, *cit. supra*; and DIS-SV-KR-833-18 – *mobilcom-debital v. Telefónica Deutschland*, *cit. supra*. Commission decision to submit observations dated September 28, 2018, C(2018)6408/F1 and C(2018)6408/1.

In any event, any co-operation between a tribunal and the Commission or a competent NCA should only take place with the approval and involvement of the arbitrating parties, given that the arbitral process is subject to strict requirements of party autonomy and due process.

VI. ENFORCEMENT BEFORE THE MEMBER STATE COURTS

As a result of the ECJ's ruling in *Eco Swiss*, Member State court reviews of EU competition law awards focus on the public policy exception under Article V.2.(b) of the New York Convention. Such awards will only be enforceable provided they do not violate EU competition law. Even though being procedurally autonomous, the Member State courts must ensure that their review of EU competition law awards is effective and does not endorse a competition non-compliant award. Failure to do so may engage the State's liability under the *Köbler*[35] and *Francovich*[36] doctrines. The Member State courts' enforcement practice to date has varied between a "maximalist" and a "minimalist" school of review. The maximalists advocate a detailed substantive review of the reasoning as well as the dispositive part of the underlying award in order to ascertain the absence of any violation of the EU competition law rules,[37] whereas the minimalists confine their review to an examination of the dispositive part only.[38]

Importantly, it has also recently been argued that on a literal reading, *Eco Swiss* itself requires a substantive review of the award in question and prescribes the annulment or setting aside of an award that is incompatible with relevant EU competition law provisions, irrespective of the type or degree of the infringement.[39] AG Wathelet of the ECJ has also more recently endorsed the maximalist school of review.[40]

In actual practice, the difference between the maximalists and minimalists may be more imagined than real. It has been argued that there may well be a "middle way" that allows a practical combination of the two schools of review, creating a workable balance between the principle of finality of arbitration awards on the one hand and the need for an effective review of EU competition law awards on the other.[41] Adopting the middle way, a supervisory court will essentially confine its review to an examination of the reasoning and the dispositive part of the award in light of the facts as presented and interpreted by the tribunal in the text of the award, without re-opening the proceedings or re-assessing the facts for that matter.[42]

That said, for as long as there is no consensus among EU Member State courts as to the required intensity of review of arbitration awards for compliance with EU competition law, arbitrators are advised to take EU competition law concerns seriously in order to avoid the nullification of a resultant award at the enforcement stage.

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35 Judgment of the ECJ of September 30, 2003 in Case C-224/01 *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.

36 Judgment of the ECJ of November 19, 1991 in Cases C-6 and C-9/90 *Francovich v. Italy* [1991] ECR I-5357.

37 Deutsche Bundesgerichtshof (German Federal Supreme Court), Judgment of October 25, 1966, Bghz 46, 365; *Sesam v. Betoncentrale*, Hof Amsterdam, October 12, 2000, (2002) Nederlandse Jurisprudentie (NJ), Case no 111; OLG Düsseldorf, Judgment of July 15, 2002, Az I-6 Sch 5/02; *Marketing Displays International Inc v. VR Van Raalte Reclame BV*, Judgment of the Court of Appeal of The Hague of March 24, 2005; OLG Dresden, Judgment of April 20, 2005; and *La SNF SAS c/La Cytec Industries*, Judgment of the Tribunal de Première Instance de Bruxelles of March 8, 2007, RG 2005/7721/A No 53 71ième Chambre, although subsequently set aside: RG No 2007/AR/1742, *Cytec Industries BV c/SNF SAS*, Cour d'appel de Bruxelles, 17ème chambre, June 22, 2009 (on grounds unrelated to the intensity of the CFI's supervisory review; see G. Blanke & R. Nazzini, (2009) 2(3) GCLR R-42).

38 Decision of the Paris Court of Appeal of November 18, 2004 in *Thalès v. Euromissile*; Judgment of the Paris Court of Appeal of March 23, 2006 in *SNF SAS c/Cytec Industries BV*, as recently affirmed by the French Supreme Court in Arrêt no 680, Cour de Cassation, June 4, 2008; Judgment of the Court of Appeal of Florence of March 21, 2006 in *Nuovo Pignone Spa c Schlumberger SA*; Judgment of the Court of Appeal in Milan of July 15, 2006 in *Terrarmata v. Tensacciai*; OLG Thüringen, Judgment of August 8, 2007, Az 4 Sch 03/06; Judgment of the Paris Court of Appeal of March 20, 2008 in *Jean-Louis Jacquetin c La Société Intercaves SA*, Cour d'Appel de Paris (1ère Ch, SC) RG 06/06860; see G. Blanke & R. Nazzini, (2008) 1(3) GCLR R-67-R-68; and *La Société Linde Aktiengesellschaft et al c La Société Halyvourgiki—AE*, Cour d'appel de Paris, Pôle 1 Chambre 1, Judgment of the Paris Court of Appeal of October 22, 2009, RG no 2008/21022, see G. Blanke & R. Nazzini (2010) 3(1) GCLR R-1–R-2. Most recently also *Taewoong Inc. v. AH Industries A/S* (142/2014), Judgment of the Danish Supreme Court (s.2) of January 28, 2016, reported in (2017) 10(2) GCLR R-17-R-21.

39 G. Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards—A Never-Ending Saga," (2007) 2 SIAR 51, at 61 et seq.

40 Opinion of AG Wathelet of March 17, 2016 in Case C-567/14 *Genentech Inc v. Hoechst GmbH* ECLI:EU:C:2016:177.

41 G. Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards—A Never-Ending Saga Revisited or the Middle Way at Last?," in D. Bray & H. Bray (eds), *Post-Hearing Issues in International Arbitration* (Juris 2013) 169–227. In recognition of the middle way, see also D. Wong, "The 'Middle Way' Review Standard of Arbitral Awards—Safeguarding Effective EU Competition Law Enforcement: Theoretical Appraisal, Practical Application and Potential Obstacles," (2016) 9(1) GCLR, 1-14.

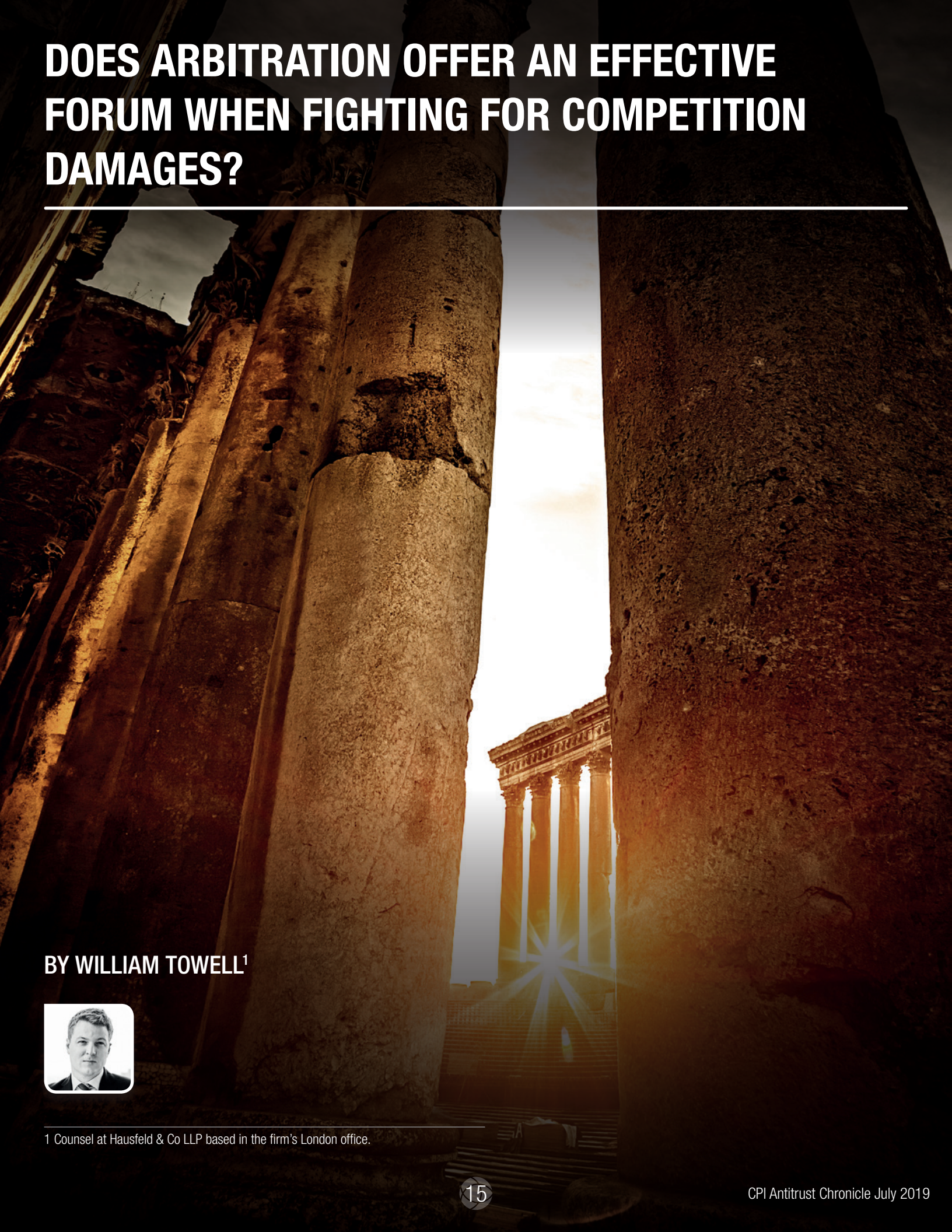
42 For an example of this approach, see Judgment of the Tribunal de Première Instance de Bruxelles of March 8, 2007 in *La SNF SAS c/La Cytec Industries* RG 2005/7721/A No 53 71ième Chambre; Tribunal Superior de Justicia del País Vasco, Sala de lo Civil y Penal, Auto of April 19, 2012, rec 5/2011; Judgment of the Svea Court of Appeal of October 23, 2013 in Case No. T 4487-12 *Systembolaget Aktiebolag v. The Absolut Company Aktiebolag*, reported in (2014) 7(1) GCLR R-11-R-14; and Judgment of the Austrian Supreme Court of February 18, 2015 in Case No. 2 OB 22/14W, reported in (2015) 8(2) GCLR R-26-R-27.

VII. CONCLUSION

By way of conclusion, arbitration has developed into a reliable tool for the private enforcement of competition law claims. Arbitrators are able to deal with such claims competently and swiftly, arguably more so than the EU Member State courts. Former concerns that arbitrators are not able to deal with competition law claims have been dispelled by actual arbitration practice. Arbitrators have proven that they will give due consideration to issues of competition law.[43] In addition, Modernization has contributed positively to arbitration as a forum of private enforcement. As such, arbitrators are competent to hear actions for violation of Articles 101 and 102 TFEU, including the legal exception under Article 101(3) TFEU, follow-on damages actions as well as actions for the private enforcement of access commitments under the EUMR and Article 9 of Regulation 1/2003. Despite more recent developments that have questioned the proper subject-matter scope of arbitration agreements, arbitrators are in principle competent to hear actions for cartel damages.

43 See in particular the body of ICC awards on the subject: See G. Blanke, "Antitrust Arbitration under the ICC Rules," in G. Blanke & P. Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, 1763-1898.

DOES ARBITRATION OFFER AN EFFECTIVE FORUM WHEN FIGHTING FOR COMPETITION DAMAGES?



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I. INTRODUCTION

Competition damages claims have become increasingly prevalent in recent years, with businesses and individuals looking to recover losses suffered as a result of anticompetitive behavior. A series of high-profile claims, for example the "interchange" proceedings against *Mastercard/Visa*[2] and the current wave of trucks claims against *DAF/Iveco*[3] and others, has thrust this type of claim firmly into the spotlight.

In this article, I consider some of the forums available within the EU to pursue these claims and analyze the effectiveness of arbitration in such matters.

II. COMPETITION DAMAGES CLAIMS – WHAT THEY ARE AND WHAT ISSUES THEY RAISE

In simple terms, EU competition damages claims – also known as private enforcement actions – are claims by businesses or individuals to recover damages suffered due to anticompetitive behavior, for example price fixing cartels.

These claims are grounded in Articles 101 and 102 of the Treaty on the Functioning of the European Union and their domestic law equivalents. The same substantive law therefore applies in whichever EU country the claims are pursued.

The European Commission has the power to levy huge fines for anticompetitive conduct. The most significant example is probably the €2.93 billion fine levied against five truck manufacturers in 2016. These fines, large as they may be, do not however assist an entity which has been harmed by that anticompetitive behavior to recover damages. It therefore falls to harmed individuals/businesses to pursue their own claims.

A. Binding Regulatory Decision

Theoretically, competition damages claims can be brought without any prior finding of anticompetitive behavior in the marketplace. However, for the most part, they tend to follow a binding decision of a regulatory body such as the European Commission. To pursue a claim without the benefit of a binding finding from a regulatory body creates more risk. Critically, the big concern is whether civil disclosure – even in a jurisdiction such as England where the rules are favorable – would provide sufficient information regarding infringements such as a cartel. The European Commission clearly has far greater investigatory tools at its disposition, such as dawn raids and an ability to issue Requests for Information to which a suspected cartelist is compelled to respond. These are obviously of great assistance in establishing anticompetitive behavior.

In such occasions, where the existence of anticompetitive behavior is already established, these claims concentrate on proving that the behavior has caused damage to the claimant(s) rather than having to establish the unlawful behavior itself.

B. Follow-on or Standalone

In most cases, a private enforcement action will cover a "follow-on" aspect as well as a "standalone" element. Broadly speaking the "follow-on" aspect is an allegation based entirely on the findings of the regulatory body. For example, if it had been found that MasterCard's interchange fee was anticompetitive in certain years, a purely follow-on claim would only be able to recover damages for that period/jurisdiction. In most cases, the claimant will also advance "standalone" allegations to seek damages which go beyond the findings of the regulatory body. Continuing the above example, a claimant might allege on a standalone basis that different time periods or other forms of payment cards were impacted.

C. Financial and Tactical Considerations

Competition damages claims often require significant economies of scale to make them financially viable, as damages flowing from a competition breach available to any individual claimant are frequently very small. For example, the price of most capacitors (as found to be a cartelized by the EU's March 2018 decision) is less than £0.01. For this reason, such claims are often mainly pursued by claimants (or groups of claimants) with significant volumes of purchases and financed by professional litigation funders. Building such claim in a manner which makes financial sense requires careful thought.

2 Including *Deutsche Bahn AG & Others v. MasterCard Incorporated & Others.*

3 *E.g. Suez Groupe SAS & Others v. Fiat Chrysler Automobiles N.V & Others.*

A further tactical decision to be made is which jurisdiction to pursue the claim in. Recent judgments in the iiyama[4] and *Vattenfall*[5] litigations have shown the potential geographic scope (i.e. potentially covering transactions that did not occur in the UK/Europe) the UK courts could be willing to consider, and the *aircargo* decisions show the Netherlands' judiciary is willing to hear cases with limited connection to that country. Lawyers pursuing such claims have several options when deciding which European jurisdiction would best suit their clients' claim.

III. POTENTIAL FORUMS FOR COMPETITION DAMAGES CLAIMS

A. United Kingdom

The United Kingdom ("UK") has historically been regarded as a friendly forum for competition damages actions. Reasons for this include:

1. The English Courts have felt able to hear competition cases with a wide territorial scope, for example when the goods subject to a cartel were initially purchased in Asia (Court of Appeal decision in *iiyama*).

2. The UK limitation rules are helpful in dealing with cartel cases, as claimants are able to rely on section 32 of the Limitation Act 1980, which states that the standard (6 year) limitation period does not start to run until the cartel has (or could have) been uncovered.

3. The UK has a dedicated body, the Competition Appeal Tribunal (or "CAT"), specifically designed to deal with competition issues. The CAT is vastly experienced in competition matters and understands the complex economic issues such cases can bring.

It seems likely that the CAT will take an increasingly prominent role in competition damages cases following the introduction of the Consumer Rights Act 2015 ("CRA 2015"). That legislation transposed many of the provisions of the EU's Damages Directive into domestic law and also made the CAT a more attractive forum than previously:

1. The CAT has the ability to deal with "standalone" claims which, importantly, has retrospective application (i.e. a standalone allegation for anticompetitive behaviors pre-2015 can now be brought in the CAT). Previously, it was only able to deal with pure follow-on actions.

2. The limitation provisions have been altered to align with the standard provisions under English law. Previously, the CAT could only deal with claims issued within two years of a final regulatory decision. However, this new position only applies to claims arising after October 2015, whereas most of the competition infringements currently before the courts predate this period.

Collective Proceedings Order ("CPO")

The CRA 2015 also heralded a new expectation that "collective proceedings," similar to class actions frequently seen in the U.S., could become common place in the UK. This would involve a representative individual or organization bringing a claim on behalf of a specifically identified "class" of entities harmed by anticompetitive conduct.

Unlike a normal claim for competition damages, collective proceedings have to first be approved by the CAT by the granting of a CPO. A key first step in this respect is (i) certification that the "class representative" is a suitable individual; and (ii) that the claims are brought on behalf of an identifiable class of persons, raise common issues and are suitable to be brought in collective proceedings. Collective claims can be brought on an "opt-in" basis, where the individual/business has taken a step to progress its claim or "opt-out" whereby it is automatically included unless it notifies otherwise.

To date, no CPO has been approved. The current commentary is focused on Mr. Walker Merricks CBE's (the former chief ombudsman of the UK's Financial Ombudsman Service) claim against MasterCard seeking some £14billion in damages for individuals aged over 16 who used a MasterCard between 1992 and 2008. The CAT initially refused to approve Mr. Merricks' claim, primarily on the basis that (i) there was insufficient data to determine how the end users of MasterCards would have suffered loss and (ii) it was not clear how any damages ultimately awarded could be fairly distributed amongst the class of claimants Mr. Merricks proposed to represent.

4 *iiyama (UK) Ltd. & Others v. Samsung Electronic Co. Ltd. & Others*, [2018] EWCA Civ 220.

5 *Vattenfall v. Prysmian and NKT*, [2018] EWHC 1694 (Ch).

However, the matter was appealed and the Court of Appeal found that considerations identified by the CAT as needing to be determined at the initial "approval" stage (which simply decides whether the claim can/cannot go ahead) could be dealt with at a later point in the litigation. MasterCard has sought permission to appeal the judgment to the Supreme Court. Importantly, the CAT has recently made clear that it does not currently intend to deal with the aspects of the Trucks collective proceedings[6] which may be affected by MasterCard's potential appeal. Those interested in CPOs will be watching with interest whether any decision from the Supreme Court influences the future development of CPOs.

B. Netherlands

The Dutch Courts have been at the forefront of private damages decision in Europe for some time, dealing for example with consequences of aircargo, elevator, hydrogen peroxide, and paraffin wax cartels.

This jurisdiction offers a number of advantages:

1. A streamlined process avoiding some of the most cumbersome aspects of litigation (for example, there is no process for standard disclosure in the Netherlands).

2. Cost efficiency, in that legal costs tend to be lower and while a "loser pays" principle exists, the recoverable costs are comparatively small.

3. An experienced judiciary having dealt with numerous competition damages claims.

As in the UK, there are a number of potential avenues when proceeding with a damages claim in the Netherlands:

1. It is possible for claims to be assigned to a claim vehicle (usually a special purpose vehicle created for the purposes of that litigation) which can progress claims on behalf of claimants, including those outside the Netherlands. Claimants need to take an active step in order to be included within such claims by assigning their cause of action, unlike the collective proceedings dealt with below.

2. The Dutch law of "Wet Collectieve Afwikkeling Massaschade 2005" or "WCAM" empowers the Amsterdam court of appeal (*Gerechtshof Amsterdam*) to make a settlement (agreed by the relevant parties to a litigation) binding on parties which were not party to those proceedings (so long as they did not "opt out" of said settlement).

Collective proceedings

Collective proceedings appear to be very much at the forefront of lawmakers in the Netherlands. Recently enacted provisions[7] mean a foundation ("stichting") or association ("vereniging") can bring class actions (distinct from the claim vehicles outlined above). Given that the Netherlands is already accustomed to dealing with large scale litigation involving several parties by way of the claim vehicles, this expansion into collective action is perhaps a natural progression.

Anyone considering collective proceedings in the Netherlands should keep in mind the strict requirements on these foundations and associations with respect to governance, litigation funding and representation. Similar to the system in the U.S., there is a procedure for choosing at least one lead representative of a class in the event that multiple foundations or associations bring claims arising from the same harm, on behalf of the same class of victims. The type of considerations in this context are likely to include the size and claim value of the group represented and previous experience of those looking to bring the claim. Additionally, these collective proceedings only have prospective effect from 15 November 2016 onwards, meaning it would be difficult to bring such a claim for existing cartels decisions (which mainly occurred pre-2016). Thus, the beneficial impact of this regime may not be felt for some time.

In any case, given the experienced judiciary, that the Dutch system avoids many of the most expensive phases of litigation and has a very limited loser pays principle, these developments look likely to make the Netherlands an attractive proposition for litigating this type of claim.

6 *UK Trucks Claim Limited v. Fiat Chrysler Automobiles N.V & Others*, Case No. 1282/7/7/18; *Road Haulage Association Limited v. MAN SE & Others*, Case No. 1289/7/7/18.

7 The Act on the Resolution of Mass Claims in Collective Action (*Wet Afwikkeling Massaschade in Collectieve Actie*) (WAMCA).

C. Germany

Germany is another key jurisdiction historically involved in the competition damages process. Unlike the current approach in the UK and the Netherlands of generally dealing with similar claims by the same Court/Tribunal, Germany's court system is decentralized with regional courts free to make findings on the same subject matter, leading to differing judgments. Taking the example of the Trucks cartel, we've already seen several first instance judgments from courts such as Hannover, Stuttgart and Dortmund in which claimants took very different approaches to the evidence needed to underpin their claims.

A unified conclusion is often only found if the issue is subsequently dealt with by the Federal Court of Justice (equivalent of the UK's Supreme Court). This tends to occur in the majority of competition damages cases given that German competition law is frequently evolving – for example as a result of the Damages Directive implementation – meaning that permissions to appeal to the German Federal Court of Justice are regularly granted to resolve any inconsistent findings from lower courts.

Another distinction of the German system is that the submissions and filings tend to be far more "front loaded," with substantial information, including economic evidence and analysis, generally needed in the early stages of a claim. This is in contrast to the Dutch system, where claims are often able to be commenced before any substantial details are available, or the UK system where pleadings are often developed once the parties have had access to disclosure.

D. Other

Given the huge reach of some of these infringements, it is not surprising that many other European countries have been charged with considering such cases. Especially in the case of the Trucks cartel, which obviously had a huge geographical impact, a series of judgments have been issued in Spain – with very different results – from various courts such as those in Madrid, Murcia, Valencia, Zaragoza and Barcelona. The Hungarian Courts have also been charged with claims resulting from the truck cartel, making a reference to the ECJ for interpretation of the relevant EU law.[8]

IV. ARBITRATION – AN EFFECTIVE FORUM?

Comparatively few damages claims have been pursued through arbitration. This is perhaps surprising as, in theory, a lot of the benefits offered by arbitration could apply equally to competition damages claims. For example, arbitration would offer the opportunity to have claims dealt with by competition experts and allow for confidentiality which can be relevant if, as is often the case, the parties are trying to maintain normal commercial relations while simultaneously engaged in a formal dispute.

The lack of arbitration in the competition damages sphere is, however, less surprising considering arbitration is a private agreement between two contracting parties as to how their disputes will be resolved. Trying to fit competition damages into a pre-agreed mechanism as to how their disputes will be resolved could create obvious issues:

1. In many occasions, such claims are not against the party one has directly contracted with. Taking two recent examples of recent high-profile claims (i) in respect of interchange fees, no retailer or individual has a direct relationship with Visa/MasterCard regarding the processing of payments and (ii) many Trucks claimants procured their trucks through intermediaries (dealers or lessors) whereas they are now pursuing the manufacturers themselves.

2. Even when direct privity of contract exists, there is a risk in most competition damages claims that a claimant will also pursue other entities involved in the cartel (not just those they purchased from) or, when they do not, the defendant may seek to join those parties into the proceedings. As those other parties would not be a contracting entity which agreed the arbitration provision, they would not be bound by its terms, thus creating a risk for both defendants and claimants of having to deal with several (arbitration/non-arbitration) proceedings on the same subject matter.

8 *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF Trucks N.V.*, Case C-451/18, OJ C 319, 10.9.2018.

The appropriateness of arbitration in the competition damages context has been considered by several Courts. The Amsterdam Court of Appeal,[9] the Rotterdam Courts[10] as well as the ECJ in the CDC/Akzo proceedings showed a reluctance for these claims to be dealt with in arbitration (albeit the position has evolved to some extent following the ECJ's *Apple v. EBizcuss* decision). Conversely, the English[11] and Dortmund courts have shown themselves more willing to follow pre-agreed arbitration provisions.

The above "anti-arbitration" judgments took the approach that the parties were unlikely to have had in mind breaches of competition law when agreeing a wide-ranging arbitration clause, whereas the "pro-arbitration" decisions found that there was no reason to depart from the parties' contractual intention to resolve all disputes via arbitration. What is evident from the differing positions taken is the importance of (i) the national law of the country in which the litigation is being pursued and (ii) the specific contractual terms agreed by the parties and pre-contractual consideration that this type of claim would be dealt with in arbitration. How the latter point would play out in commercial negotiations is difficult to envisage, as a supplier would clearly be reluctant to suggest during negotiations that it may act anticompetitively and it may equally create commercial sensitives if a customer were to so allege.

Even if there was a way of overcoming some of the issues outlined above, there is a real question of whether it would be in the wider interest for these claims to be dealt behind arbitration's closed doors. Arbitration could lead to significant inefficiencies, as the relevant courts dealing with such claims would not have the benefit of seeing how other courts had approached similar issues involving the same anticompetitive conduct.

V. CONCLUSION

As this article shows, there are numerous options for pursuing competition damages claims. Each party will need to assess its own personal position to decide which forum is best for them, and whether they prefer to pursue their claims independently or as part of a collective action.

Defendants may try to push the parties and the court towards arbitration but, as is clear from the case law, the extent to which this will be accepted is difficult to determine. Even if it is accepted, a further question is whether it would be in the parties or the wider interest to do so.

9 *Kemira Chemicals Oy v. CDC Project*, 13 SA ECLI:NL:GHAMS:2015:3006.

10 *Stichting De Glazen Lift/Kone et al* ECLI:NL:RBROT:2016:4164.

11 *Microsoft Mobile OY Ltd. v. Sony Europe Ltd. & Others*, [2017] EWHC 374 (Ch).

ARBITRATION CLAUSES AND ANTITRUST DAMAGES IN THE EU: WHERE ARE WE NOW?

BY YVES BOTTEMAN & CAMILLE KERES[1]

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I. INTRODUCTION

On November 26, 2014, Directive 2014/104/EU on antitrust damages actions ("the Directive") was signed into law. While the Directive focuses primarily on judicial redress, it also encourages claimants to resort to alternative dispute resolution mechanisms, including arbitration, when seeking antitrust damages. Of particular interest is recital 48 of the Directive, which provides that:

> Achieving a 'once and for all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. **Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as […] arbitration […]**. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.

This was a welcome development, given that arbitration could offer, under certain circumstances, a number of advantages over civil litigation: confidentiality, quicker resolution of the case, better enforceability of awards, increased flexibility, the ability for parties to select arbitrators, etc.

However, the Directive did not address one threshold aspect relating to the arbitration route, namely: may claimants rely on arbitration clauses — contained in commercial contracts that they would have entered into with defendants — to bring antitrust damage claims against them? The question is not an easy one, given:

- The *prima facie* dichotomy between antitrust damage claims and arbitration clauses: the former are civil torts in nature, while the latter are typically included in commercial contracts and may only be applied in relation to contractual breaches; and

- That the application of an arbitration clause presents the risk of causing the fragmentation of the claim before multiple forums, thus making it more difficult for claimant(s) to recover their alleged loss from multiple cartelists (duplication of proceedings, inflated legal costs, risk of irreconcilable awards and judgments, etc.). This will typically be the case when the claimant files a cartel damage claim against multiple defendants located in several jurisdictions, some of which being subject to arbitration clauses in their contracts, while others not.

Over the past five years, the case law on this issue has evolved significantly and has progressively become more arbitration-friendly — although not without conditions and limitations. In short, the key parameter for applying an arbitration clause to an antitrust damage claim appears to be dictated by the foreseeability criterion, i.e. is it foreseeable for the parties to the commercial contract that the arbitration clause would apply in the context of an antitrust damage claim?

This contribution outlines the evolution of this case law and provides a roadmap for assessing whether an antitrust damage claim fits within the perimeter of a contractual arbitration clause.

II. THE EARLY DAYS: THE NARROW INTERPRETATION OF ARBITRATION CLAUSES

A. The CDC *Judgment*

The *CDC* judgment, from the European Court of Justice ("CoJ"), is the first ruling of relevance to the issue — albeit in the context of jurisdictional rather than arbitration clauses.[2]

By way of reminder, jurisdictional clauses are subject to Regulation 1215/2012, which recently recast Regulation 44/2011 on jurisdiction in civil and commercial matters (also known as Brussels 1 Regulation). The Recast Regulation states the general rule that the jurisdiction for bringing a civil or commercial claim is the court where the defendant is domiciled. However, in certain cases, applicants may deviate from this general rule and file their application in a different jurisdiction, notably where the parties have entered into a jurisdictional clause designating another court to settle any disputes that have arisen or that may arise in connection with a particular legal relationship (article 25).

2 Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, May 21, 2015.

In *CDC*, the Landgericht Dortmund (Germany) requested the CoJ, *inter alia*, to determine whether, under EU law, jurisdiction clauses inserted in supply contracts concluded between the defendants and the victims applied to a cartel damage claim. The CoJ replied that:

- A jurisdiction clause may only apply to disputes arising in connection with the contractual relationship at hand. This is "to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum"; in other words, to ensure foreseeability.
    - In the case at hand, this principle meant that a jurisdictional clause that merely refers in an abstract and unqualified way to all disputes arising from a contractual relationship is not capable of covering a dispute relating to the tortious liability of one party resulting from its participation in an unlawful cartel.
    - By contrast, **a jurisdictional clause that specifically and explicitly refers to disputes relating to the participation of one of the parties to a cartel** will indeed be applicable to a cartel damage claim.
- The fact that the application of the jurisdictional clause may cause the fragmentation of the claim before multiple forums does not conflict with the requirement of effective enforcement of the cartel prohibition. This is because, first, the substantive law applicable to the dispute may not justify denying effect to a jurisdiction clause. EU competition law does not allow departure from this rule. Second, the national court initially seized of the dispute must give effect to any jurisdictional clause that satisfies the requirements of the Recast Regulation because it must be considered that the system of legal remedies in the Member State designated by the clause is sufficient to protect the claimant's rights.

B. The Impact of CDC *on the Interpretation of Arbitration Clauses*

In *CDC*, the CoJ based its answers on the Brussels I Regulation, which is not applicable to arbitration clauses. However, the judgment had a ripple effect on the analysis of arbitration clauses, as national courts started applying the *CDC* case law by analogy, i.e. for an arbitration clause to apply to an antitrust claim, it must make express reference to such claims.

For instance, in *Kemira*,[3] the Court of Appeals of Amsterdam examined a follow-on damage claim relating to a cartel on the market for sodium chlorate. The defendant, Kemira, argued against the jurisdiction of the Amsterdam court, on the basis that the supply contracts it had entered into with the claimants included an arbitration clause. The Court of Appeals of Amsterdam rejected Kemira's argument, noting that the clause only referred to contractual disputes and did not encompass competition law violations. The Court further noted that there was "no good reason" to depart from the *CDC* case law when interpreting an arbitration clause drafted in general terms.

Similarly, the District Court of Rotterdam[4] ruled out the application of an arbitration clause in the context of an antitrust damage claim based on the EC decision in the elevator cartel case.[5] Referring to *CDC*, the Court noted that the clause applied to "every dispute arising between the parties"; hence, the claimants could not reasonably foresee that antitrust damage claims would fall within the scope of the clause. However, contrary to the CoJ in *CDC*, the Court also found that, even if such claims were to fall within the scope of the clause, the arbitration clause would have to be set aside, due to the risk of fragmentation of the claim. This was because application of the arbitration clause would force the claimants to verify, for each elevator, whether claims should be brought before a judge or before an arbitrator, which would in practice make it much more difficult for a claimant to recover their loss.

In sum, this initial line of case law applied the findings of the CoJ in *CDC* and interpreted it in a rather restrictive and formalistic manner: absent very specific wording in the arbitration clause itself referring to antitrust violations, arbitration clauses should not cover antitrust damages claims. This approach was arguably departing from the spirit of the Directive, which aimed at promoting arbitration as a means of settling antitrust claims. But this jurisprudence was also more protective for claimants: by limiting the application of arbitration clauses to antitrust claims, it limited the risk of fragmentation of the claim and therefore promoted the effective protection of the claimants' rights.

3 *Kemira v. CDC*, judgment of July 21, 2015, case no. ECLI:NL:GHAMS:2015:3006.

4 *Stichting De Glazen Lift/Kone et al.*, judgment of May 25, 2016, case no. ECLI:NL:RBROT:2016:4164.

5 Commission decision of February 21, 2007 in case COMP/38.823, *PO/Elevators and escalators*.

III. TOWARDS A BROADER APPLICATION OF ARBITRATION CLAUSES

The issue of arbitration clauses came back to the fore in February 2017, when the High Court of Justice adopted its judgment in the *Microsoft* case.[6] This judgment came as a surprise to many as, it — seemingly — put a stop to the *CDC* jurisprudence that required arbitration clauses to make explicit reference to antitrust claims.

The judgment came on the back of Microsoft Mobile, a manufacturer and distributor of mobile phones containing lithium ion batteries ("Li-ion Batteries") and the successor to Nokia as of 2013, filing a damage claim against six manufacturers of these batteries, who had allegedly engaged in cartel activity between August 1999 and May 2011. Microsoft Mobile filed its claim before the Courts of England and Wales. This was possible only because one of the defendants, Sony, had a subsidiary established in the UK (the remaining defendants being established in Asia). Put differently, Sony's UK subsidiary was the anchor defendant: absent the presence of this UK entity, the Courts of England and Wales would not have had jurisdiction over the case.[7]

Sony challenged the jurisdiction of the Courts of England and Wales on the basis that an arbitration clause subsisted between it and Nokia, and was unaffected by the assignment to Microsoft Mobile. According to Sony, Microsoft's claim fell within the scope of that arbitration clause. Microsoft, on the other hand, argued that (1) the claim did not fall in the scope of the arbitration clause, notably because the latter did not make express reference to antitrust claims, along the lines of the *CDC* case law, and (2) even if it did, it should not be applied because it would result in a fragmentation of the claim, which in turn would impede the effective protection of rights derived from competition law.

In response to these claims, the High Court found that:

- First, the starting point of the analysis should be that the parties, as rational businesspersons, must be able to foresee that the arbitration clause may apply to an antitrust damage claim.

- Second, in order to determine whether parties to the contract are able to foresee that an antitrust claim falls within the scope of an arbitration clause, one must show that the claim arises out of the contractual relationship entered into between the parties. This will be the case where **the tortious claims advanced by the claimant (that is, the damage caused by the breach of competition law) is sufficiently closely related to any potential pleadable contractual claims** so as to render rational businessmen likely to have intended such a dispute to be decided through arbitration.

    - The High Court reviewed the supply contract between Nokia and Sony containing the arbitration clause and found that it included an express duty of good faith when negotiating changes in prices. According to the High Court, "it is very difficult to see how a party to [the contract], like D1/Sony Europe, could knowingly engage in cartelist behaviour of the sort alleged by Microsoft Mobile without at the same time breaching [the express duty of good faith included in the contract]."

    - The High Court further highlighted that it did not matter that Microsoft had not pleaded the contractual claim. The claim only needed to be pleadable, so that rational businesspersons could expect the application of the arbitration clause.

    - Therefore, in that case, the claim did fall within the scope of the arbitration clause.

- Third and finally, the High Court examined Microsoft Mobile's argument that, even though applicable, the arbitration clause should be set aside to avoid the fragmentation of the claim across various jurisdictions.

    - In this regard, the High Court agreed with Microsoft Mobile that the application of the clause would indeed cause fragmentation, not least because Microsoft Mobile would lose its anchor defendant before the Courts of England and Wales and would therefore have to bring its claims against the other defendants in different forums.

    - However, the High Court found that such fragmentation should not lead to the non-application of the arbitration clause. The High Court reached this conclusion based on the *CDC* judgment, where the CoJ rejected a similar claim (see *supra*).

6 *Microsoft Mobile OY (Ltd) v. Sony Europe Limited & Ors* [2017]EWHC 374 (CH).

7 The High Court examined and eventually rejected alternative jurisdictional gateways aimed at showing that the High Court had jurisdiction over the five other defendants established in Asia.

Therefore, the High Court found that the arbitration clause incorporated in Sony's supply contract with Nokia was applicable — even though the clause did not explicitly refer to antitrust damage claims. The High Court therefore stayed the proceedings against Sony in favor of arbitration. This, in turn resulted in the collapse of the case before the Courts of England and Wales, since Microsoft Mobile had lost its anchor defendant — which provides a textbook example of how the application of an arbitration clause may lead to antitrust claim fragmentation.

A few months later, the Regional Court of Dortmund reached a similar conclusion in relation to a damage claim relating to the rail cartel case.[8] In that case, the German Court noted that, under well-settled case law in Germany, preference should be given to an interpretation that leads to the validity and application of arbitration clauses and, hence, such clauses should be interpreted broadly. Specifically, the German Court reached the conclusion that since the antitrust claim by the plaintiff, which is tortious in nature, coincided with a breach of contract, the arbitration clause should be applied. The German Court explicitly rejected the application of the *CDC* case law, by distinguishing it on the ground that CDC did not deal with an arbitration clause. In sum, the German court reached a similar conclusion as *Microsoft*.

These cases are in stark contrast with the *CDC* line of case law, as they do not require that arbitration clauses make express reference to antitrust claims. Instead, these cases go beyond the wording of the clause and examine whether the antitrust claim coincides with a potential contractual claim by looking at the contractual relationship as a whole. In practice, this approach is more arbitration friendly, as it is likely to lead to more antitrust claims falling within the scope of arbitration clauses. This is good news for businesses willing to arbitrate antitrust claims; less so for potential claimants, who face an increased risk of fragmentation of the claim and therefore a higher barrier to overcome to be compensated for their cartel losses.

IV. BRIDGING THE GAP BETWEEN *CDC* AND *MICROSOFT*: THE *APPLE SALES INTERNATIONAL* JUDGMENT

Last but not least: on October 24, 2018, the CoJ adopted its judgment in the *Apple Sales International* case.[9] Here again, the judgment addresses jurisdictional clauses, not arbitration clauses. However, the *Apple Sales International* judgment not only furthers the thinking on arbitration clauses, it also arguably reconciles the *CDC* and the *Microsoft* lines of case law.

The case originated in 2012, when one of Apple's authorized distributors in France, eBizcuss, accused Apple of unfairly abusing its dominant position as of 2009, in particular by favoring its own distribution network over its third-party resellers. Specifically, eBizcuss argued, *inter alia*, that third party resellers regularly suffered supply shortages that did not affect Apple's own distribution network. As a result, eBizcuss brought proceedings before the French Courts — a point that Apple criticized, since the distribution contract provided that "[the] agreement **and the corresponding relationship** between the parties shall be governed and construed in accordance with the laws of the Republic of Ireland and the parties shall submit to the jurisdiction of the courts of the Republic of Ireland." (emphasis added)

After five years of judicial procedure, the French Supreme Court (*Cour de Cassation*) referred the case to the CoJ. The referral focused on the following question: may a jurisdiction clause apply to an action for damages brought on the basis of Article 102 TFEU, even though such clause does not expressly refer to disputes relating to antitrust violations?

In its judgment, the CoJ reiterated a simple, foundational rule: a jurisdiction clause may only apply to disputes which have arisen or which may arise in connection with a given contract. This is to avoid a party being taken by surprise — a principle already asserted in *CDC* and applied in *Microsoft* (see *supra*). While the principle is clear, the CoJ nonetheless emphasized that its application may give rise to contrasting outcomes:

- A cartel will typically not materialize in the context of a contractual relationship. This is what happened in *CDC*: the alleged anticompetitive conduct was a cartel; hence, it had no connection with the contractual relationship embedding an abstract jurisdictional clause. In addition, the claimant had no prior knowledge of the unlawful cartel and could not reasonably foresee such litigation when it agreed to the jurisdiction clause. Therefore, in the absence of an explicit reference to antitrust violations in the jurisdictional clause, the alleged anti-competitive cartel is not directly linked to the contractual relationship between the parties to the dispute and, accordingly, an abstract jurisdiction clause is not applicable to the antitrust damage claim.

8 Landgericht Dortmund, judgment of September 13, 2017 – 8 O 30/16 Kart. This judgment is currently under appeal.

9 Case C-595/17, *Apple Sales International*, October 24, 2018.

- By contrast, an abuse of a dominant position may materialize in the context of a contractual relationship between a supplier and a distributor. This was the case in *Apple Sales International*, which involved an alleged abuse in the context of a supplier/distributor relationship (by way of reminder, eBizcuss alleged that Apple would favor its own distribution network over its third-party resellers). In such cases, the CoJ concluded that the application of a jurisdiction clause that explicitly refers to the "corresponding relationship" between the parties "cannot be regarded as surprising one of the parties" – even if the clause does not explicitly refer to competition infringements.

Importantly, the above does not mean that jurisdictional clauses have a different reach depending on whether the damage claim relates to a cartel infringement (as in *CDC*) or an abuse of dominance (as in *Apple Sales International*). Instead, and as explicitly stated in AG Wahl's conclusions, what matters is whether the conduct that triggers the dispute materializes in the contractual relationship to which the jurisdiction clause applies – in which case the jurisdiction clause should in all likelihood apply to the dispute. Further, it is not clear how the CoJ would have ruled on the matter if the jurisdiction clause did not include the phrase "corresponding relationship," which arguably opened the door for a wide interpretation of the clause.

It is too early to tell whether this judgment will have an impact on the assessment of arbitration clauses. But our best guess is that it will: by focusing on the requirement of foreseeability, which was at the core of the above national courts cases dealing with arbitration clauses, and by drawing the consequences of this requirement, the *Apple* judgment lays down a compelling roadmap for assessing whether an arbitration clause covers antitrust damage claims.

V. FINAL TAKE AWAY FOR BUSINESSES CONSIDERING ARBITRATING ANTITRUST CLAIMS

Based on the above, a number of leading private enforcement friendly Member States (or soon to be former Member States, in the case of the UK) have open the door to allowing the resolution of civil antitrust disputes through arbitration. But even arbitration friendly courts must ensure legal certainty. Therefore, they will only apply arbitration clauses to competition law claims provided that the latter fall within the perimeter of the contractual relationship, so that the application of the clause takes no party by surprise.

Practically speaking, this means that a party arguing in favor of the application of an arbitration clause will face a hurdle, namely: showing the existence of a sufficient nexus between the antitrust infringement and the contract. This nexus may take various forms. As of today, they have taken one of these three forms:

- The contractual arbitration clause makes explicit reference to antitrust claims, *à la CDC*.

- The breach of competition law necessarily results in a breach of contract, *à la Microsoft*.

- The breach of competition law stems from the contract and the corresponding contractual relationship, *à la Apple*.

Adding to this evidentiary challenge, pro-arbitration parties are likely to face, at least for now, a fragmented judicial practice across the EU. While the UK and Germany seem to have adopted an arbitration friendly approach, other jurisdictions have been more restrictive (the Netherlands) or have yet to take a position on the issue.

Bearing in mind these practical hurdles, a last practical tip for businesses would be to consider the issue of arbitration of potential antitrust claims early on, that is, when negotiating a contract and drafting arbitration clauses. To date, this seems to be the most efficient solution to ensure that arbitration tribunals are competent to review any potential antitrust claim.

BARRIERS TO ENTRY: ON EVIDENCE IN COMPETITION LAW ARBITRATION

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I. INTRODUCTION

Good lawyers focus on the elements of their claim, great lawyers also think about how they're going to prove it. The availability of evidence and ability to maintain confidentiality is an important consideration when bringing competition law claims. Although arbitrating competition law claims poses unique evidentiary challenges, doing so can be advantageous from a confidentiality perspective.

Competition claims suitable for resolution through arbitration generally emanate from a contractual dispute between parties.[2] For example, a party may make an argument based on competition law (e.g. alleging a conspiracy to fix prices in a dispute concerning a supply contract), or the arbitration may be the result of a successful competition claim brought by a regulator.[3] In either case, the party must have a private right of action to seek dispute resolution on the basis of the allegedly anticompetitive conduct. Given that questions of arbitrability of competition law claims are still unsettled in many jurisdictions, a potential claimant could have good arguments in favor of choosing either arbitration or court adjudication for such claims.

II. RELEVANT EVIDENCE

Identifying relevant sources of evidence in advance is particularly important when considering arbitrating a competition law claim, as the mechanisms for obtaining discovery and the available confidentiality protections will vary. A party considering bringing a competition law claim in arbitration will need to consider whether non-parties to the potential arbitration are likely to have necessary documents or information, and whether such evidence can be obtained in arbitration. Where sensitive commercial information is involved, parties may benefit from heightened confidentiality protections that may be available in arbitration.

Relevant evidence in a competition law arbitration will largely be the same as in a court proceeding, with the additional requirement that the party seeking to arbitrate must prove the existence of a binding arbitration agreement between the parties. By way of example, monopolization claims will generally require showing (1) market definition; (2) unlawful restraint of trade; (3) damages; and (4) causation. Most of this evidence will either the be in the public domain, or in the possession or control of one of the parties, but some helpful information may be held by others.[4] To establish market definition, testifying experts may compile evidence on price elasticity and the substitutability of products from public sources, but may not have access to sensitive sales data unless it is provided by a party. Likewise, the parties may have most of the relevant evidence regarding alleged conduct and causation (particularly where contract negotiations between the parties are at the heart of the dispute), but will not have access to internal discussions of their counterparty. Allegations of conspiracy may require evidence from one or more non-parties to the arbitration. The claimant is likely to have access to some evidence necessary to prove damages, but some relevant evidence may be held by third parties. In such cases, the potential claimant may prefer litigation to arbitration, as additional avenues for obtaining evidence may be available. However, as discussed below, there nevertheless are some opportunities in arbitration to compel disclosure from other parties or, in limited circumstances, from non-parties.

Potential defenses should also be considered, as well as any other non-competition law claims or counterclaims which may be brought in the same proceeding. When drafting an arbitration clause, or electing to pursue a claim in arbitration pursuant to a competition-law remedial measure, a party considering arbitration should carefully consider such claims and defenses, and determine whether necessary evidence will be available in arbitration. For example, evidence of "market" practices may be more difficult to obtain in arbitration, where disclosure from non-parties is severely restricted. Likewise, evidence that customers preferred one product over a competitor's due to certain qualitative attributes (i.e. the product was better than the competitor's) rather than any anticompetitive conduct of a market participant may benefit from third-party disclosure which may not be available in arbitration. However, depending on the nature of the claims, these evidentiary challenges may be overcome through the creative use of disclosure in arbitration.

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2 *Cf.* Alexis Mourre, *Arbitrability of Antitrust Law from European and US Perspectives*, in EU and US Antitrust Arbitration: A Handbook for Practitioners 6-8 (Gordon Blanke & Phillip Landolt eds., 2011) (describing various country's approaches to arbitration).

3 See, e.g. *FTC v. Qualcomm*, 5:17-cv-00220 (N.D. Cal 2019) (injunction requiring chipmaker to renegotiate SEP licenses obtained through coercive market practices, and absent agreement, to agree to litigate or arbitrate an appropriate FRAND rate); *Matter of Motorola Mobility LLC* and *Google Inc.*, No. C-4410 (U.S. Federal Trade Commission 2013) ("2013 Google Consent decree") (ordering licensor to offer to potential licensees to submit determination of royalty rate for Standards Essential Patents (SEPs) to arbitration); *In re Alleged Abuse of Market Dominance of Qualcomm Incorporated*, No. 2017-0-25, (Korea Fair Trade Commission 2017) (ordering licensor to renegotiate SEP licenses, potentially in arbitration).

4 William Blumenthal & James D. Hurwitz, *Chapter 42: Alternative Dispute Resolution and Federal Trade Comission Antitrust Enforcement*, in EU and US Antitrust Arbitration: A Handbook for Practitioners (Kluwer Law International 2011).

III. AVAILABILITY OF DISCLOSURE

Disclosure can be important in the context of competition law claims because the party initiating the proceeding may not have sufficient evidence to prove all elements of their claim, or may anticipate needing evidence held by others to defend against a counterclaim. Arbitration offers more restrictive avenues for obtaining disclosure, which may therefore present a barrier to entry for competition law arbitrations.

Unlike in court proceedings, where particularly in the U.S. judges and attorneys have broad subpoena powers to obtain evidence held by others, an arbitral tribunal or arbitration institution has more limited jurisdiction to compel disclosure of documentary evidence or witness testimony. However, arbitral tribunals nevertheless commonly have authority to order at least some disclosure of necessary evidence between the parties in the context of arbitration (See Table *below*). Competition law claims in arbitration should therefore account for the types of evidence that will likely be available to the parties. For example, a party seeking to resolve a claim of anticompetitive conduct may wish to limit its allegations in arbitration to conduct that directly affected the claimant, rather than alleging broader market effects that may be difficult to prove in arbitration.

Non-parties cannot be bound by an arbitration agreement, so parties must rely on authority outside the contract to obtain disclosure from those non-parties in arbitration. Where multiple market participants have similar claims against a contractual partner, one solution may be to wait to bring an arbitration claim until such time when the other party may be in possession of necessary third-party evidence. For example, in follow-on arbitration to a regulatory action, a Claimant may be able to obtain disclosure of evidence produced to the Respondent by third parties during the regulatory proceeding. Although some of that evidence may be subject to confidentiality orders and nevertheless not subject to disclosure, items such as public trial exhibits may be available for use in future proceedings. Parties should also consider whether relevant evidence might be obtained from government agencies through open records requests.[5]

For arbitrations seated in the U.S., parties may seek to enlist a federal district court to order third-party disclosure either under § 7 of the Federal Arbitration Act or § 1782 of 28 U.S.C. permitting orders for discovery "for use in a proceeding in a foreign or international tribunal." However, the availability of these means of obtaining document disclosure is limited. Only three U.S. federal circuits have held that the Federal Arbitration Act permits arbitrators to order document discovery from non-parties outside the context of a merits hearing.[6] Courts are likewise split on whether § 1782 is available for use in private party arbitrations.[7] While the authority to compel discovery may also be found under state law in some states, others (e.g. California) require that the parties agreed to non-party discovery in the underlying arbitration agreement.[8] Additionally, one major limitation of these rules is that courts only have authority to compel discovery located within their jurisdiction,[9] so they will be of little use where non-parties or evidence is located elsewhere.

Outside the U.S., options for obtaining non-party disclosure are severely limited. This may not necessarily put parties who chose arbitration at a disadvantage, however. Many non-U.S. jurisdictions do not allow comprehensive disclosure even in court proceedings, from parties or non-parties. In such cases, arbitration may put a party seeking disclosure in a *better* position than court litigation if the applicable arbitration rules permit the tribunal to order further disclosure than would be permitted under local court rules. In other cases, arbitration may put the party seeking disclosure in *at least as good* a position as litigation, and the decision whether to pursue arbitration or litigation may be driven by other considerations, such as confidentiality.

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5 See, e.g. CFR Art. 42 and TFEU Art. 15 (EU); 5 U.S.C. 552 ("Freedom of Information Act") (U.S.).

6 *Stolt-Nielsen Transp. Group v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005) (third-party discovery available by holding a special hearing for purposes of obtaining documents or testimony from such third-party); *COMSAT Corp. v. NSF*, 190 F.3d 269, 276 (4th Cir. 1999) (third-party discovery is available in "unusual circumstances" and upon "a showing of special need or hardship."); *Security. Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865, 870-71 (8th Cir. 2000) (permitting arbitrator to order third-party discovery in advance of a hearing); *but see Vividus LLC v. Express Scripts, Inc.*, Civ. No. 16-16187 (9th Cir. 2017) (holding that the Federal Arbitration Act does not permit arbitrators to issue subpoenas for documents outside the context of a hearing).

7 *Compare In re Children's Inv. Fund Found. (UK)*, 363 F. Supp. 3d 361, 370 (S.D.N.Y. 2019) (holding that § 1782 could be employed to obtain disclosure for use in arbitrations convened under the auspices of the London Court of International Arbitration) (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258, 124 S. Ct. 2466, 2479 (2004)) *with In re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782*, No. 18-MC-561 (JMF), 2019 WL 917076, at *1 (S.D.N.Y. Feb. 25, 2019) (concluding that the legislative history did not support making discovery available in arbitration, and doing so would undermine one of the advantages of arbitration) (citing *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999)).

8 See, e.g. New York Civil Practice Law Rules § 7505 ("An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas"); *but see* California Code of Civil Procedure § 1283.1(b) (third-party discovery in arbitration is unavailable unless included in the arbitration agreement).

9 See *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89 (2d Cir. 2006).

IV. CONFIDENTIALITY

Parties entering into commercial contracts containing an arbitration provision should consider whether commercially sensitive information is likely to be implicated, and whether the selected arbitration rules offer adequate protections in the event of a dispute. Arbitration potentially offers greater confidentiality protections than litigation, and may create a barrier to entry for other parties interested in intervening in the dispute.

Confidentiality is particularly important in the context of competition law claims for three reasons: (1) such claims often involve sensitive commercial information including financial and other commercial terms, sales figures, and details of a company's business model, which could be valuable to competitors; (2) regulators or other market participants may bring additional challenges based on the same conduct; and (3) in some of those cases, regulators or one of the parties may seek to stay the arbitral proceedings pending resolution of a parallel case — even if that case was commenced after the initial arbitration,[10] thus depriving the initial Claimant of a speedy resolution of their claim. Thus, maintaining confidentiality of both the fact of and contents of the dispute, as well as related evidence, are important issues in competition law arbitrations.

Courts in both Europe and the U.S. value transparency in court proceedings, and therefore it is more difficult to maintain confidentiality in those forums. Even where protective measures are available, the risk of accidental disclosure endures any time a portion of the court record remains public.[11]

A. General Protections in Arbitration

In some jurisdictions, local law[12] protects the confidentiality of documents and evidence produced or introduced in arbitration.[13] Where confidentiality provisions are not included in domestic arbitration acts, some courts have nevertheless read in an implied right of confidentiality in arbitration.[14]

In many jurisdictions, parties can agree to additional confidentiality protections either in their arbitration clause or by selecting one of several institutional rules governing confidentiality (*See* Table *below*). Arbitral tribunals may also have authority to issue protective orders specifying what, if anything, may be discussed publicly regarding the arbitration and even identifying specific business people who can look at certain documents.[15] In a competition law claim between two competitors, a protective order might be used, for example, to limit the number of people who can view commercially sensitive sales data or to designate certain documents "attorney's eyes only."

10 *Cf.* Don Baker, Ch. 40: Parallel Proceedings before the Arbitral Tribunal and the Courts, EU AND US ANTITRUST ARBITRATION (Gordon Blanke, Phillip Landolt, eds. 2011); *see also* Julian D. M. Lew, *Does National Court Involvement Undermine the International Arbitration Process*, AM. U. INT'L L. REV. Vol. 24 at 499-500 (noting that common law jurisdictions are more likely to enjoin parallel arbitral proceedings, whereas civil law jurisdictions are more likely to follow the *lis alibi pendens* (first to file) rule).

11 See, e.g. *FTC v. Qualcomm*, No. C-17-00220 LHK (N.D. Cal.), trial transcript at 863:17-24 (discussing the accidental unsealing of the financial terms of an exclusivity agreement). While regulatory actions are not suitable for arbitration, the same sensitive commercial terms could also be relevant in a private dispute between parties.

12 Cross-border arbitrations can involve complicate choice of law issues, which are beyond the scope of this article. In general, the domestic laws of the arbitral seat, the law of the contract, and the law of any jurisdiction where evidence may be located may be relevant.

13 See, e.g. Quebec Civil Code of Procedure, 2014, c. 1, a. 4.; Spanish Arbitration Act 24.2.

14 See, e.g. *Emmott v. Michael Wilson & Partners*, [2008] EWCA (Civ) 184 (C.A.) (recognizing an "[a]n implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration" [interpreting English Arbitration Act of 1996]); *but see* Boris Kasolowsky and Carsten Wendler, *Commercial Arbitration: Germany, Global Arbitration Review* (April 2018) ("German commentators are still divided on whether a duty of confidentiality can be implied into an arbitration agreement.").

15 See, e.g. UNCITRAL Art. 3.4; AAA R. 23.

COMMON ARBITRATION RULES	
AAA	**LCIA**
1. Tribunal can order exchange of confidential documents, and allocate costs or issue interim awards for non-compliance with procedural orders. 2. Pre-hearing checklist includes confidentiality measures. 3. AAA "takes no position on whether parties should or should not agree to keep the proceeding and award confidential."	1. Emergency arbitrator may be appointed to decide urgent issues — including potential impact on document preservation. 2. Tribunal can order production of relevant documents and order compliance with any legal obligation. 3. Parties agree to keep awards and arbitration documents confidential; LCIA does not publish awards.
UNCITRAL	**ICC**
1. Tribunal can order production of documents, including confidentiality measures. 2. Hearings shall be held in camera unless the parties agree otherwise. 3. Subject to confidentiality provisions, written submissions, transcripts and the award are made available to the public.	1. Tribunal can require or limit production of documents. 2. Tribunal can make orders concerning the confidentiality of the proceedings or make measures for protecting trade secrets or confidential information. 3. Work of the Court of Arbitration is generally confidential, though some awards may be made available to researchers.

While these types of orders can be effective, particularly where both parties have an equal interest in preserving confidentiality, available remedies for breach may be more limited and more difficult to obtain in arbitration than recourse for violation of a protective order issued by a court. For example, if a protective order issued in arbitration is breached, and the other party becomes aware of the breach during the course of the arbitration, the arbitral tribunal may impose monetary or other penalties — but could not order the breaching party to be jailed, as a judge could do when finding a party in contempt of court for breaches of a confidentiality order. Additionally, a party may need to apply to a court to enforce an order issued by an arbitral tribunal, thus adding to the complexity of obtaining relief. If a party does not become aware of the breach until *after* the arbitration has concluded and the tribunal has been dissolved, the remedies may be even more limited. In such a case the aggrieved party may be able to bring a claim for breach of contract, but damages may be difficult to quantify and the enforcement proceeding itself may pose confidentiality challenges. Moreover, the aggrieved party could not bring its claim in front of the same adjudicator who issued the protective order, and thus may face an authority less sympathetic to the protection of confidentiality.

B. Confidentiality Involving Third-Party Disclosure

One difficulty with non-party disclosure in arbitration is that, although there may be authority to obtain disclosure, the basis for enforcing confidentiality on those documents can be somewhat challenging. In a court proceeding, an interested party may apply directly to the presiding court requesting confidential treatment of sensitive documents and information. Some contracts even specify that one party must notify the other party of an impending disclosure of the agreement or related information so that the other party can seek the necessary confidentiality protections.

In arbitration, the non-party may not recognize the authority of the arbitral tribunal or arbitral institution, and may not even know the identity of the arbitrators, and therefore may be unable or unwilling to obtain relief within the auspices of the arbitration. In such a case, the non-party may nevertheless seek protection from a court. There are two challenges to non-parties to arbitration seeking heightened confidentiality protections from a court: (1) the confidentiality rules in court may differ from those applied in arbitration; and (2) the public nature of the court proceeding on confidentiality may be detrimental to the arbitration.

Common bases for requesting confidential treatment that may be relevant in the context of competition include trade secret protections and contractual agreements such as NDA's, both of which could equally apply in arbitration. The tension here is that a court may apply a different — and potentially higher — threshold for designating information confidential than the arbitral tribunal. This is not only administratively burdensome for the parties, but also risks conflicting orders regarding the level of confidential treatment of the same or similar evidence. This

is particularly relevant where the non-party is a competitor, and may be unwilling to forego legally binding confidentiality protections before disclosing documents. In such a case, the parties to the arbitration may consider offering to enter a binding non-disclosure agreement with the non-party, so as to avoid the need for a protective order.

Court proceedings related to confidential matters in arbitration are problematic, because in many cases the fact of the arbitration is itself confidential. A public filing seeking confidentiality protection for documents disclosed in an arbitration may reveal facts related to the arbitration, thereby undermining the expectation of confidentiality of the parties to the arbitration. In the U.S., a non-party to an arbitration seeking to protect confidentiality of certain documents could ask for leave to file their request for a protective order under seal so as not to reveal the existence of the arbitration. However, this puts the onus on a party that is *not* party to the arbitration, and therefore may be less concerned about maintaining the confidentiality thereof. Furthermore, it is not clear that all courts would accept such a request. Courts have in the past required that filings related to arbitrations be filed publicly, even where doing so would reveal the existence of an otherwise confidential arbitration. For example, enforcement proceedings for arbitral awards are usually public[16] (though parties may apply for protective orders for particularly sensitive information contained in the award).

C. Emerging Issues

In recent years, there have been efforts to improve transparency in arbitration.[17] For example, U.S. patent law mandates that notices of arbitral decisions pursuant to a "contract involving a patent or any right under a patent" be filed with the Patent and Trademark Office for inclusion in the prosecution history.[18] 35 U.S.C. 294; 37 CFR 1.335. Some have called for similar publication requirements of arbitral decisions in FRAND rate arbitrations, arguing that the information is of critical importance to other market participants.[19] Similar arguments could be made concerning the arbitration of competition law claims. However, efforts to promote transparency have generally recognized the need to protect confidential business information from public disclosure.[20] In any case, arbitration still offers greater opportunities to preserve confidentiality than court litigation because generally only the award must be filed, rather than large portions of the pleadings or evidence presented in the proceedings.

V. CONCLUSION

Decisions about dispute resolution forums are not just about the applicable law or the fairness of the adjudicator: there can be serious consequences regarding the evidence necessary to prove a claim. Disclosure from non-parties may be more difficult to obtain in arbitration, whereas the confidentiality of evidence exchanged between the parties may be protected more easily. In any case, evidentiary issues should be considered by parties weighing entering into an arbitration agreement, or considering dispute resolution strategies for competition law claims. Arbitration of competition law claims is still a fairly recent development, and as more such arbitrations occur, parties and practitioners will discover new challenges, and hopefully — solutions.

16 See New York Convention Art. IV.

17 UNCITRAL, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective Apr. 1, 2014).

18 In practice, these notices are rarely filed. See Mark R. Patterson, *Confidentiality in Patent Dispute Resolution: Antitrust Implications*, 93 Wash. L. Rev. 827, n. 50 (2018) (noting an informal inquiry found less than a handful of such filings per year). U.S. federal law does not establish a deadline for filing the notice, and currently the only consequence is that the award is unenforceable *until* such notice is filed. 37 CFR 1.335. Thus, the practical impact of the notice requirement is minimal, given that parties could theoretically wait to file the notice with the PTO if and until enforcement proceedings are filed — at which point the decision would already become public record.

19 Jorge L. Contreras & David L. Newman, *Developing a Framework for Arbitrating Standards-Essential Patent Disputes*, 2014 J. DISP. RESOL. 23, 39-41, at 41; Mark Patterson, *Confidentiality in Patent Dispute Resolution*, at 833.

20 *Id.*

INTERNATIONAL ARBITRATION AND DOMESTIC ANTITRUST: NATURAL PROGRESSION OR RANDOM ALLIANCE?

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I. INTRODUCTION

Arbitration of antitrust disputes remains a viable but largely unknown possibility for antitrust and arbitration practitioners alike. For a small group of initiated lawyers and economists, the possibility of encountering and making antitrust arguments in arbitration comes as no surprise. They have seen antitrust defenses and claims in arbitration and know of antitrust-related arbitration awards. For most antitrust and arbitration practitioners, the story is entirely different. They are either bluntly unaware of antitrust arguments being raised in arbitration, or do not see arbitration as a proper forum for enforcement of antitrust laws. And it is easy to understand why.

Antitrust seeks to protect public interest by preserving free competition in the markets. Globally antitrust relies largely on public enforcement by state's authorities designated to investigate and prosecute violations of antitrust laws. Only a few countries, such as the United States, rely extensively on private enforcement of antitrust laws — lawsuits by businesses and individuals seeking damages for violations of antitrust laws. In turn, arbitration is a private dispute resolution method, which derives its jurisdiction from the arbitration agreement between the parties and calls upon private individuals — instead of public courts — to resolve their dispute.

As a private forum of dispute resolution, arbitration simply does not fit into the predominantly public enforcement framework of domestic antitrust laws. After all, if there is an antitrust violation, a victim of such violation would normally bring it to the attention of public antitrust authorities, instead of bringing a claim for damages in court or arbitration. It is only *if* private antitrust enforcement is available, a victim of antitrust violation can find itself in arbitration instead of litigating in court. And it can only happen *if* there is a valid arbitration agreement between the victim and the alleged antitrust law violator, which is broad enough to allow antitrust claims to be submitted in arbitration. When these conditions are met, antitrust *claims* — such as those under Article 102 of the Treaty on the Functioning of the European Union ("TFEU") or Section 2 of the Sherman Act — can be brought in arbitration. Claimants can bring these claims individually or jointly with others. For instance, U.S. courts have allowed class-action arbitrations against an alleged monopolist even where the arbitration agreement prohibited treble damages, class-action arbitration, and fee-shifting.[2]

More commonly, however, antitrust is raised in arbitration as a *defense* by a party in breach of its contractual obligations. Under this scenario, once an arbitration is commenced and a claim is brought in arbitration for a breach of contract, a defendant raises an antitrust defense, seeking to invalidate a contract as incompatible with antitrust laws. Naturally, most of these disputes involve anti-competitive agreements, such as vertical agreements with restrictions of competition between a supplier of goods and its distributor, or a franchisor and its franchisee. Depending on the applicable antitrust law, defendants in these arbitrations frequently rely on Article 101(2) of the TFEU or Section 1 of the Sherman Act.

Apart from bringing antitrust claims or defenses, parties invoke antitrust in arbitration to challenge arbitral jurisdiction or to challenge arbitral awards in setting aside or enforcement proceedings. These are distinctly arbitration-related purposes. Jurisdictional challenges reflect parties' disagreement as to whether a dispute should be resolved in court or in arbitration. Post-award challenges may represent a losing party's attempt to revisit the outcome of arbitration in courts. The resultant arbitration-related litigation is perhaps more interesting for arbitration than antitrust practitioners. It fuels the debate about the jurisdictional divide between courts and arbitral tribunals and the role of domestic courts in supporting international arbitration. But it also raises important questions for the antitrust community and enforcement authorities: *Is arbitration a proper forum for enforcing antitrust laws? What role should arbitral tribunals play in the enforcement of domestic antitrust laws? Should the courts which are called upon to review arbitral awards in setting aside and enforcement proceedings go a step further to ensure that antitrust laws are properly considered and applied in arbitration?* These concerns are particularly acute in cases of international commercial arbitration, which by contrast to domestic arbitration involves choice-of-law determinations and competing interests of national antitrust authorities in enforcement of their antitrust laws.

2 See, e.g. *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

II. ARBITRATION: DOMESTIC AND INTERNATIONAL

Arbitration is an alternative to litigation, private and binding method of dispute resolution. The cornerstone of arbitration is the arbitration agreement — an agreement between the parties to submit their dispute to arbitration. The parties can limit the scope of their submission to a particular type of disputes (e.g. disputes about the price of the goods), or agree on arbitration of all disputes arising out of or in connection with their contract.

Antitrust issues can arise both in purely national — or domestic — arbitration and international commercial arbitration. Domestic arbitration involves disputing parties coming from the same jurisdiction and, as a rule, no choice-of-law determinations. Take, for instance, a sale of goods contract between a Dutch seller and a Dutch buyer that conduct business primarily in the Netherlands. Assume that the contract provides for arbitration under the rules of the Netherlands Arbitration Institute. If a dispute arises out of such contract, the tribunal will apply Dutch law to the substance of the parties' dispute, including its mandatory law provisions (such as EU and Dutch competition law). In essence, arguing antitrust in domestic arbitration is no different than litigating in courts, although arbitration offers their participants the flexibility and confidentiality of the arbitration process.

International arbitration — more specifically, international commercial arbitration which is an arbitration that derives from international business transactions — adds complications to resolution of antitrust disputes in arbitration. Generally, arbitration is international if it involves a dispute between two parties that are foreign to each other, or the nature of a dispute is international, although both parties share the same nationality. For instance, it is an international commercial arbitration if it involves a contractual dispute between a U.S. seller and a Dutch buyer which arose out of their international sale of goods contract.

International commercial arbitration involves a complex interaction of laws. In every international commercial arbitration, at least five different systems of law play a role in the arbitration process: (1) the law governing the parties' capacity to enter into an arbitration agreement; (2) the law governing the arbitration agreement; (3) the law governing the arbitration (most commonly, the law of the seat of arbitration, i.e. the *lex arbitri*); (4) the law governing the substance of the parties' dispute; (5) the law governing the recognition and enforcement of arbitral awards.[3]

The need to consider several systems of law in international arbitration renders the process of applying antitrust laws more complex. At least *four* domestic systems of law — not all of them identified in the list above — might have a bearing on application of antitrust law in international arbitration. They are (i) the governing law; (ii) the law that would apply in the absence of the choice of law by the parties; (iii) the law of the seat of arbitration; and (iv) the law of every jurisdiction where recognition and enforcement of the award might be sought. Each of these systems of law might have its own antitrust laws with competing interests in their application. The task of choosing which antitrust laws to apply ultimately rests with the arbitrators. Their ability to conduct an antitrust analysis and anticipate the place of enforcement of an award will determine whether such award is able to survive any challenges in setting aside and enforcement proceedings.

III. INTERNATIONAL COMMERCIAL ARBITRATION: BEYOND ANTITRUST CLAIMS AND DEFENSES

Apart from bringing antitrust claims — a feasible but random possibility — and raising antitrust defenses — to invalidate a contract and avoid contractual obligations — how and why do the parties invoke domestic antitrust in international commercial arbitration?

International commercial arbitration does not exist in isolation from litigation in domestic courts. As the empirical data suggest, international arbitration increasingly relies on assistance of national courts at the three stages of the arbitration process — before an arbitration is commenced, during the arbitration, and after the arbitration is complete.[4] What is relevant for our purposes is that parties use courts to compel arbitration or to challenge the jurisdiction of arbitral tribunals. They also rely on courts to set aside or enforce arbitral awards. In this arbitration-related litigation, parties invoke antitrust laws to make non-arbitrability, mandatory law, and public policy arguments. In doing so, they essentially argue that arbitration is not a proper forum for antitrust disputes (arbitrability), or seek to persuade the tribunal or the court to apply some other antitrust law (not the antitrust law of the governing law), or argue in court that an arbitral award has to be reviewed, cancelled, or refused enforcement because antitrust law was not raised or (properly) considered in arbitration.

3 Nigel Blackaby et al., Redfern and Hunter on International Arbitration ¶ 3-07 (6th ed. 2015).

4 See generally Vera Korzun & Thomas H. Lee, *An Empirical Survey of International Commercial Arbitration Cases in the U.S. District Court for the Southern District of New York, 1970-2014*, 39 Fordham Int'l L.J. 2 (2015).

The doctrine of ***arbitrability***, in its narrow sense, limits the subject matter of disputes that can be resolved in arbitration. In the past, antitrust claims were non-arbitrable because they involve public interest and public policy concerns. To challenge the tribunal's jurisdiction, it was sufficient to argue non-arbitrability of antitrust claims, whereupon the parties could proceed in arbitration only on their contractual claims. Antitrust claims would have to be submitted in court.

Things have long changed. Both the EU and U.S. courts have since stated that antitrust laws can be argued in arbitration, i.e. they are arbitrable. The groundbreaking decision came from the U.S. Supreme Court, which in its 1985 decision in *Mitsubishi*[5] expanded the arbitrability to federal antitrust claims. The U.S. Supreme Court thus expressed its trust in the ability of arbitral tribunals to recognize antitrust violations and to apply U.S. antitrust law, even in cases where U.S. courts do not have supervisory power over an arbitration because it has its seat outside of the United States.[6]

Competition law issues are also generally arbitrable in the European Union and most of its Member States, where it is no longer disputed that private parties may address in arbitration the civil law consequences of violations of EU competition law. The European Court of Justice ("ECJ") has never expressly dealt with the issue of arbitrability of EU competition law in a case equivalent to *Mitsubishi*.[7] However, such inference is commonly drawn from the ECJ's decision in *Eco Swiss*.[8]

At the national level, courts of EU Member States have also recognized the arbitrability of antitrust law. For instance, in France the arbitrability of antitrust issues was recognized in the decision of the Court of Appeal of Paris of 1993.[9] In Sweden, the arbitrability of competition law claims was established by statute: the 1999 Arbitration Act, as amended, provides that "arbitrators may rule on the civil law effects of competition law as between the parties."[10] The Law on Commercial Arbitration of Lithuania defines a "commercial dispute" that can be submitted to arbitration as "any disagreement of the parties over a fact and/or matters of law arising out of contractual or non-contractual legal relations, including but not limited to . . . payment of damages caused by breach of rule of competition law."[11]

Notwithstanding the importance of the doctrine of arbitrability which opened the doors of arbitration to antitrust, arbitrability is likely the least problematic issue for antitrust arbitration today. With a few exceptions, most major arbitral jurisdictions recognize the arbitrability of antitrust claims. In a purely domestic arbitration in these countries, parties can submit their claims or raise antitrust defenses in arbitration, and the courts will recognize the resultant awards. However, the power of arbitral tribunals to make antitrust determinations may still be questioned in international commercial arbitration, *if* the arbitration finds itself under the supervisory power of domestic courts whose law does not yet recognize the arbitrability of antitrust claims. This may happen if the law governing the arbitrability (likely, the law governing the arbitration agreement), the law of the seat, or the place of recognition and enforcement does not recognize the arbitrability of antitrust claims. In this case the court may prevent arbitration from going forward on antitrust issues, or the award may be set aside or refused enforcement due to non-arbitrability of antitrust claims.

The doctrine of ***mandatory law*** raises more pressing issues for antitrust arbitration today. Commonly, it is application of the governing law — the law that applies to the merits of the parties' dispute — that leads to the mandatory law discussion. Recall that international commercial arbitration results from international business transactions. According to the principle of party autonomy, the parties in international business contracts have the freedom to choose the law for themselves. Such law — known as "the governing law," or "the applicable law" — governs the formation, validity and interpretation of the international business contract, the rights and obligations of the parties, as well as performance and the consequences of breach of contract. In the absence of the choice, the court or the arbitral tribunal will determine the governing law before applying it to the facts of the case. To make such choice-of-law determinations, an international tribunal with the seat in the European Union will likely apply the Rome I Regulation on the law applicable to contractual obligations.[12]

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5 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

6 Vera Korzun, *Arbitrating Antitrust Claims: From Suspicion to Trust*, 48 N.Y.U. J. Int'l L. & Pol. 867, 903 (2016).

7 Phillip Landolt, *Arbitration and Antitrust: An Overview of EU and National Case Law, in* 2013 Competition Case Law Digest - A Synthesis of EU and National Leading Cases, 231, 233 (Nicolas Charbit et al. eds.).

8 Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, 1999 E.C.R. I-3055.

9 See Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., May 19, 1993, 1993 Revue De L'Arbitrage [Rev. Arb.] 645, note Jarrosson (Fr.).

10 1 § Swedish Arbitration Act (SFS 1999:116, as amended by SFS 2018:1954) (Swed.).

11 Republic of Lithuania Law on Commercial Arbitration, June 21, 2012, No. I-1274 (as last amended on June 21, 2012, No. XI-2089), art. 3(11).

12 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).

However, party autonomy is not absolute. Generally, the law chosen by the parties to govern the merits of their dispute cannot override mandatory law provisions otherwise applicable to the parties or their transaction. In international commercial arbitration, arbitral tribunals may apply such mandatory law provisions even if they contradict to the governing law. The tribunal may also need to consider mandatory law of the governing law chosen by the parties or the law determined by the tribunal itself. After all, if the parties have selected the governing law, they probably want this law, including its mandatory law (such as antitrust), to govern their transaction. The same argument applies to the governing law determined by the arbitral tribunal.

Additional layer of mandatory law provisions may come from domestic law of the courts that would have jurisdiction over a dispute in the absence of the arbitration agreement. The facts of *Mitsubishi* illustrate this scenario. There, a U.S. court had jurisdiction to hear a contractual dispute between a Puerto Rican company and a Japanese and a Swiss entities. If the dispute would wind up in court, the court would apply Section 1 of the Sherman Act raised by the defendant (U.S. mandatory law) in addition to applying Swiss law chosen by the parties. Assume now that a dispute like this proceeds to international arbitration. Also assume that the seat of arbitration is not in the United States, but in Japan (as it was in *Mitsubishi*). Does the arbitral tribunal in Japan have to ensure compliance with U.S. antitrust law while resolving a parties' dispute?

The answer to this question is not as clear cut as expected. National antitrust authorities have vested interest in the enforcement of their antitrust laws in international arbitration. The U.S. Supreme Court warned in *Mitsubishi* against agreements where the choice-of-law and choice-of-forum provisions work in tandem to remove a transaction from otherwise applicable mandatory laws.[13] It also reserved for U.S. courts the right to have a "second look" at the award at the enforcement stage to ensure compliance with U.S. antitrust laws.[14] But many relevant arbitral awards never end up in U.S. courts because they are either complied with voluntarily or are enforced outside of the United States. Not surprisingly, in the period of nearly thirty-five years since *Mitsubishi*, the second look doctrine has hardly been invoked in U.S. courts.[15]

However, the role of international arbitral tribunals is different from the role of domestic antitrust authorities. Parties select and appoint arbitrators to resolve their disputes, not to ensure compliance with mandatory laws. But failure to apply antitrust law in arbitration may invalidate the award in setting aside proceedings, or allow the courts to refuse its recognition or enforcement based on the New York Convention.[16] This may also be a breach of the arbitrator's fundamental duty to the parties — the duty to produce an enforceable award. In turn, it may negatively impact the reputation of arbitrators and reduce their future appointments. And so, as I have previously argued, it may be in the best interest of arbitrators to ensure compliance of the award with relevant antitrust laws, even on their own motion in cases where the parties do not address antitrust implications of their dispute in arbitration.[17] Relevant laws in this respect include antitrust laws of the seat of arbitration and antitrust laws of anticipated places of enforcement of an award.

Recall here that antitrust laws have their own rules of application, commonly determined by the object or effect of the allegedly anticompetitive agreements or practices on trade or competition in the markets.[18] In addition, both EU competition law (Articles 101 and 102 of the TFEU) and U.S. antitrust law (in particular, Sections 1 and 2 of the Sherman Act) are of extraterritorial application. In the case of EU competition law, such extraterritoriality requires, for instance, application of EU competition law to an international business contract between two non-EU businesses, if their contract in its effect restricts competition within the internal market. EU competition law should apply even if the parties submit their dispute to international arbitration with the seat outside of the EU and choose the law of the third country as the governing law. Of course, if the parties willingly proceed to arbitration and comply with an arbitral award, they may escape the supervisory power of EU courts and avoid the application of EU competition law all together.

Antitrust law is also deemed so fundamental that it is often considered to be part of the ***public policy*** of a given jurisdiction. In the world of international commercial arbitration, the doctrine of the public policy holds a special place. Public policy is one of the few grounds of the New York Convention which allows a court to refuse recognition and enforcement of an arbitral award. To constitute a public policy violation, an award must go against fundamental notions of a legal system, its "most basic notions of morality and justice."[19] Losing parties in arbitration regularly invoke public policy arguments in the enforcement proceedings, but rarely succeed. Their chances of winning on the public policy ground are

13 See *Mitsubishi*, 473 U.S. 636-37 n.19.

14 *Id.* at 638.

15 See Korzun, *supra* note 6, at 926.

16 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

17 See Korzun, *supra* note 6, at 925.

18 See Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Oct. 26, 2012, 2012 O.J. (C 326) 1. See also Sherman Act § 1, 15 U.S.C. §§ 1–7.

19 *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

much higher in the EU, where after the ECJ's decision in *Eco Swiss*[20] courts and commentators generally agree that EU competition law is an integral part of the public policy of the European Union.[21] And so, courts in the EU will likely refuse to enforce an arbitral award under the New York Convention if a violation of EU competition law was not recognized and properly dealt with in international arbitration.

In view of the mandatory and (arguably) public policy nature of domestic antitrust law, the question arises how to deal with the multiplicity of antitrust laws in international commercial arbitration. Where multiple mandatory laws come into the discussion, the arbitrator will have to choose which mandatory law to apply. The duty to produce an enforceable award may require the tribunal to apply antitrust law of the seat of arbitration and/or anticipated place(s) of enforcement. This task may be difficult to achieve where antitrust laws of relevant jurisdictions take diverging or opposing views on the antitrust issue at stake.[22] Ultimately, arbitrators may need to consider the consequences of choosing one antitrust law over another, and the resultant non-application of relevant mandatory law in light of particular circumstances of the case and anticipated place(s) of enforcement.

In international commercial arbitration with the seat in the European Union, arbitral tribunals will have to apply EU competition law as part of the public policy of the EU Member State to avoid setting aside of the award at the seat as contrary to the state's public policy. By contrast, in international commercial arbitration with the seat outside of the European Union, failure to apply EU competition law will generally not result in setting aside of the award on the public policy ground. Nevertheless, arbitral tribunals sitting outside the European Union may apply EU competition law when it is the law of the contract.[23] They may also apply EU competition law to ensure enforcement of the award in the European Union, where failure to assess questions of EU competition law may result in denial of enforcement of an award based on the New York Convention's public policy ground.

IV. ANTITRUST ARBITRATION: THE ROLE OF ARBITRATORS AND SUPERVISORY COURTS

A look inside international commercial arbitration provides a mixed picture of the role of arbitration in the enforcement of antitrust laws. On the one hand, since the expansion of arbitrability, arbitration has seen a growing number of antitrust claims. Because of its private nature and flexibility, arbitration may even be a better forum than courts for resolution of antitrust disputes. After all, arbitration allows the parties to appoint arbitrators with expertise and prior experience in antitrust, as well as to tailor arbitration procedure and evidence submission to the needs of antitrust dispute resolution. However, one should not forget that as a binding dispute resolution method arbitration serves as an alternative to litigation in courts. Hence, an increase of antitrust arbitrations often means a decrease of private antitrust litigation, in particular, where parties use antitrust as a "sword" to bring antitrust claims for damages in arbitration.

From the arbitration point of view, this may be a welcome development as it attracts more cases to arbitration removing them from courts. However, the impact of arbitration on the volume of private antitrust enforcement actions is ambivalent as it may also foreclose some antitrust claims from binding dispute resolution. For instance, it is unclear whether arbitration provides a meaningful option for consumers who are considering whether to challenge the conduct of the alleged monopolist. The cost for arbitrating for these consumers may well outweigh any damages from the alleged antitrust violation. In the United States, where private antitrust enforcement is common, the issue is addressed with respect to litigation by means of class actions. However, in case of arbitration, U.S. courts have generally been supportive of class-action waivers. Consequently, the victims of antitrust violation may be prevented from going into arbitration as a class but required to arbitrate individually. At least for some antitrust disputes, an arbitration agreement with a class-action waiver may prevent consumers from going into arbitration, but also deprive them of the right to file their lawsuit in court (because of a valid arbitration agreement requiring consumers to submit their dispute to arbitration). As a result, with the expansion of arbitrability to antitrust claims we might have contributed to the overall decrease of private antitrust enforcement.

On the other hand, the role of arbitration in the enforcement of antitrust laws is generally positive where parties use antitrust as a "shield" to bring contractual defenses in arbitration. Adding to the efficiency, the expansion of arbitrability to antitrust issues allows raising antitrust defenses in arbitration itself (instead of arbitrating contractual claims and separately litigating antitrust issues). Antitrust defenses also add to the enforcement of antitrust laws, albeit indirectly by invaliding anti-competitive agreements and practices in arbitration as part of contractual dispute resolution.

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20 See Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int'l*, 1999 E.C.R. I-3093 at ¶ 39 (holding that "provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention").

21 See, e.g. Laurence Idot, *The Role of Arbitration in Competition Disputes*, *in* The Reform of Competition Law: New Challenges 75, 91 (Ioannis Lianos & Ioannis Kokkoris eds., 2010).

22 For instance, under U.S. federal antitrust law vertical minimum resale price maintenance ("RPM") is no longer *per se* illegal. By contrast, EU competition law still views such arrangements as hard-core restrictions of competition prohibited under Article 101 of the TFEU.

23 Hans van Houtte, *The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission*, 19 Eur. Bus. L. Rev. 63, 66-68 (2008).

In international commercial arbitration, the enforcement of domestic antitrust laws is also impacted by international nature of dispute resolution and choice-of-law determinations. As the critics of antitrust arbitration have pointed out, the parties to international commercial contracts can avoid some antitrust enforcement by submitting their dispute to arbitration. In doing so, such parties can effectively remove their dispute from application of domestic antitrust laws (otherwise applicable to them) by choosing the governing law and arbitrating abroad. They can also keep their dispute private and confidential and avoid raising in arbitration any antitrust implications of their contract. If the parties then comply with an award voluntarily, such arbitrations have the potential to escape the supervisory power of courts, including any screening as to the compliance with relevant antitrust laws.

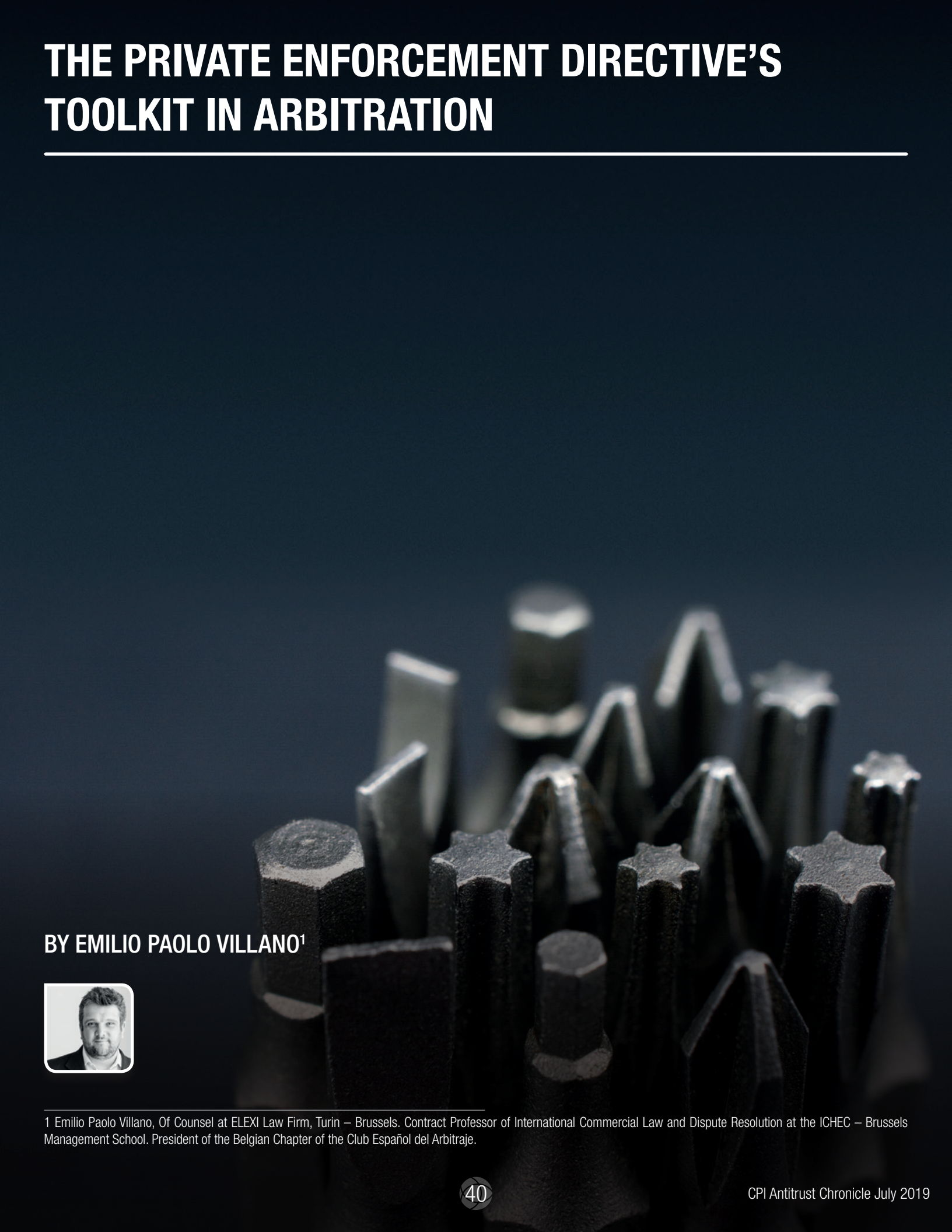
The arbitral tribunals shall step up in these cases to ensure that mandatory laws are properly applied in international commercial arbitration. The duty to produce an enforceable award and reputational concerns should provide sufficient incentive for arbitrators to enforce domestic antitrust laws, even where the parties are silent about the antitrust implications of their dispute. After all, the arbitrability of antitrust claims is based on the premise that arbitral tribunals are capable of recognizing and applying antitrust laws in arbitration. In turn, the courts are willing to step aside in private antitrust enforcement. To preserve the finality of arbitral awards, the court are also willing to rely on limited review in setting aside and enforcement proceedings, even for antitrust-related awards. If arbitral tribunals are not able or willing to keep their side of the bargain, the courts might be required to step up in their supervisory role to ensure that antitrust laws are complied with in arbitration.

Finally, one should also recognize that the parties to an international contractual dispute often invoke antitrust in arbitration to make mandatory law and public policy arguments. In these cases, they do not go into arbitration because of antitrust — to seek damages for antitrust violations — but having found themselves in arbitration might find it useful to make antitrust-related arguments. They do this to alter the law to be applied to the merits or to revisit the outcome of arbitration in setting aside or enforcement proceedings. Perhaps, this is not traditional antitrust enforcement that antitrust community and authorities have in mind, but the process certainly implicates how antitrust laws are enforced globally as part of private dispute resolution.

V. CONCLUSION

Arbitration of antitrust claims has never been the result of natural progression. Divided along the public-private dichotomy, the goals of antitrust and arbitration policies are too diverse to reconcile entirely. But if the circumstances and the arbitration agreement permit, domestic antitrust and international commercial arbitration may find themselves in a random alliance. Indeed, international arbitral tribunals are well capable of resolving antitrust disputes in arbitration. They may also be better equipped than public courts to address antitrust concerns. But the nature of arbitration is ultimately contractual and arbitrators in international commercial arbitration may consider themselves accountable only to the parties themselves. As such, arbitrators might not see it as their duty to enforce domestic antitrust laws as part of private dispute resolution. Imposing such a duty on arbitrators may lead to mixed allegiances and conflicting awards. And so, until antitrust relies primarily on private antitrust enforcement and the international commercial arbitration embraces transparency, we will have to rely on this random alliance which seeks to satisfy the goals of both private dispute resolution and antitrust laws.

THE PRIVATE ENFORCEMENT DIRECTIVE'S TOOLKIT IN ARBITRATION



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I. INTRODUCTION

The so-called EU private enforcement directive[2] (the "Directive") and the laws of the EU Member States transposing it[3] have provided an extensive set of tools aimed at making claims for the compensation of damages deriving from the infringement of competition laws easier and more expedite.

Ever since *Courage*[4] the right to a full compensation for damages suffered as a consequence of the infringement of competition law has become part of the *acquis*. In particular, "A party to a contract liable to restrict or distort competition within the meaning of Article [101 TFEU] can rely on the breach of that provision to obtain relief from the other contracting party."

Also, "Article [101 TFEU] precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract."[5]

Moreover, since 2001 and its famous *Eco Swiss* judgment[6] the European Court of Justice (now Court of Justice of the European Union or CJEU) has clarified that arbitral tribunals are not only allowed to apply EU competition law rules (in particular article 101 TFEU), they are under an obligation to apply such rules in order to ensure their uniform and consistent application and enforcement across EU Member States.

In this respect, the opinion of AG Wathelet in the recent *Genentech* case seem to confirm that arbitral tribunals need to apply EU competition law rules in order to ensure their enforceability within the territory of the EU, since the prohibition laid down in Article 101 TFU is a matter of economic public policy and "it makes no difference whether the infringement of the public policy rule was flagrant or not. No system can accept infringements of its most fundamental rules making up its public policy, irrespective of whether or not those infringements are flagrant or obvious."[7]

Notwithstanding the clear existence of a substantive right to compensation for damages suffered as a consequence of the infringement of competition law, claimants had traditionally faced several difficulties:

i. It was unclear whether a decision by competition authorities (the Commission or the National Competition Authorities of EU Member States - NCAs) constitutes sufficient evidence of the existence of an infringement for the purposes of starting a civil claim for compensation of damages;

ii. The nature of the damages to be potentially compensated was undefined (only direct damages and loss of profits or also indirect damages and punitive damages);

iii. To what extent the claimant is entitled to access the documents and information contained in the casefile of the competition authorities?

iv. How can the claimant quantify the amount of the damages suffered and prove such damages?

The Directive aims at addressing these issues while creating a harmonized framework for competition-law damages claims across Europe. For the specific purposes of this paper, four mayor provisions of the Directive deserve a closer look.

2 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, in OJ L 349, 5.12.2014, p. 1–19.

3 For a comprehensive overview of the laws of the EU Member States transposing the Directive, see http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

4 ECJ, Case C-453/99, *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and Others*, OJ C 317, 10.11.2001, p. 4–4.

5 *Id.* at para. 37.

6 ECJ, Case C-126/97, *Eco Swiss China Time Ltd. V. Benetton International NV*, in ECR 1999 I-03055. The *Eco Swiss* approach was also confirmed in the case confirmed by the judgment in *Gazprom*, C-536/13, in EU:C:2015:316.

7 *Id.* at para. 67.

First, the Directive reaffirms the right of "any natural or legal person who has suffered harm caused by an infringement of competition law […] to claim and to obtain full compensation for that harm" and that such compensation shall cover the actual loss and loss of profits, plus the payment of interest, to the exclusion of any form of overcompensation, whether by means of punitive, multiple or other types of damages.

Second, the Directive establishes some specific powers held by the courts of the Members States to request the parties to the proceeding (and any third party), as well as the EU and national competition authorities, to disclose any evidence in their possession that is relevant to the outcome of the damages claim, and the evidence included in the file of a competition authority respectively.

Third, the Directive requests Member States to ensure that an infringement of competition law confirmed by a final decision of a national competition authority or review court is deemed to be irrefutably established for the purposes of damages actions brought before national courts under Article 101 or 102 TFEU or under national competition laws.

Fourth, the NCA's may, upon request of a national court, assist with the quantification of damages, where said NCA considers such assistance to be appropriate.

Those who have some familiarity with ADR and, more specifically, with arbitration, may have already noticed that the Directive only applies to "damages actions before national courts" and confers the powers referred in the four previous paragraphs only to "national courts." For a definition of what "national courts" actually are, within the framework of EU law, we still need to refer to the judgment of the ECJ in the *Nordsee* case: "the link between the arbitration procedure […] and the organization of legal remedies through the courts in the Member State in question **is not sufficiently close for the arbitrator to be considered as a "court or tribunal of a Member State" within the meaning of article 177** [now Article 267 TFEU]."[8]

It appears, then, that when arbitral tribunals are vested with the power to adjudicate claims for the compensation of damages deriving from an infringement of EU or national competition law, such tribunals may not have direct access to the Directive's toolbox, at the very least in a direct way.

It is, in fact, not uncommon to find clauses in commercial contracts attributing to arbitral tribunals the jurisdiction on any possible claim (including those of an extra-contractual nature such as for infringement of competition law rules) deriving, either directly or indirectly, from the execution of those contracts. Let's, for example, consider a contract between a seller and its retailer containing anticompetitive vertical restrictions that are considered null and void on the basis of Article 101(2) TFEU: if this contract contains a properly drafted arbitration clause, the retailer will have to start an arbitration proceeding in order to claim for the compensation of the damages it suffered as a consequence of the anticompetitive restrictions.

How can distributors benefit from the tools made available by the directive?

II. TWO ALTERNATIVE STRATEGIES COULD BE IMPLEMENTED

1. Attempt to have a national court of a Member State declaring that the arbitration agreement is not enforceable to damages claims deriving from the infringement of competition law, following the reasoning of the AG Jääskinen in his controversial Opinion in the case *CDC Hydrogen Peroxide*;[9] or

2. Use alternative approaches to obtain from the national competition authorities the evidentiary elements and the assistance needed in the arbitral proceeding.

A. The First Strategy

As for the first strategy (1), the AG Jääskinen considers that "the application of national rules may not allow the jurisdiction and/or arbitration clauses at issue to prejudice [the] full effectiveness" of "the right to compensation for damage resulting from an agreement, decision or concerted practice prohibited under Article 101 TFEU."

8 ECJ, Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, ECR 1982 -01095.

9 CJEU Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and others*, Opinion of the AG Jääskinen, of December 11, 2014, in ECLI:EU:C:2014:2443.

The AG also considers that:

> As a general rule, when faced with an arbitration clause, a court of a Member State should decline jurisdiction and refer the parties to arbitration, at the request of one of the parties". "However, the principle requiring effective implementation of the prohibition under EU law of agreements, decisions and concerted practices […] can, in my view, be invoked vis-à-vis the jurisdiction or arbitration clauses at issue for the purpose, in particular, of ensuring that all persons have the right to seek full compensation for losses resulting from a prohibited agreement, such as those alleged in the main proceedings.[10]

From a different standpoint, the AG considers that jurisdiction or arbitration clauses shall satisfy the requirements laid down by the Court in the *Powell Duffryn* case[11]: they shall specifically "refer to disputes concerning liability incurred as a result of an infringement of competition law." Thus, unless the parties envisaged the possibility of damages arising out of the infringement of competition laws and specifically mentioned them in their jurisdiction or arbitration clauses, such clauses should be deemed not to cover competition law damages claims.

We know that, in its preliminary ruling in the *CDC* case, the Court has not dealt with any matter related to arbitration, limiting its decision to those questions concerning the choice of court agreements governed by Council Regulation (EC) No 44/2001 (now Regulation (EU) 1215/2012). This has not, however, prevented national courts of Member States from applying, *mutatis mutandis*, the *CDC* judgement rationale to arbitration clauses,[12] considering that both jurisdiction and arbitration clauses can be seen as non-enforceable in competition law damages claims.

Since the *CDC* judgement, the Court seems to have taken a more restrictive approach while evaluating the enforceability of choice of court agreements (see, in particular, the judgment of the ECJ in case C-595/17 *Apple Sales International et al. v. EBizcuss.com*). Nonetheless, the possibility of obtaining a judgment of non-enforceability of arbitration clauses from a national court in relation to claims for compensation of competition law damages does not seem entirely precluded.

From a different standpoint, I believe that the European Commission and the national competition authorities of the Member Stats shall, despite the existence of an unequivocal definition of "national courts" not encompassing arbitral tribunals, make the Directive's toolbox fully accessible to said tribunals, for the following reasons: first, the EU Institutions (and the Commission in particular) have, on countless occasions, remembered the importance of ensuring a consistent and uniform application of EU competition law within the territory of the EU. Second, the Directive itself points out that the right to full compensation must be effective and accessible to all individuals or legal entities (see, for instance, the Recitals of the Directive).

This implies, in my view, that all those instruments aiming at ensuring that judgements or awards having effect within the EU are consistent (or, at the very least, are not incompatible) with EU competition laws and with their application by competition authorities (i.e. final and binding decisions of the Commission or of an NCA) should be made available to arbitral tribunals. Similarly, the instruments provided in the Directive that aim at ensuring that those who suffered harm from the infringement of competition laws can obtain full compensation for such harm, and that the exercise of such right to full compensation is not precluded or made excessively difficult due to a lack of access to information by the claimant, should be made accessible to parties in arbitration.

B. The Second Strategy

As for the second strategy (2), should the instruments provided by the Directive turn out to be inaccessible to arbitral tribunals, the parties to an arbitration can, in my view, rely on other instruments in order to have access, in whole or in part, to the information, documentation and assistance offered to court-litigants under the Directive:

1. The national and EU provisions on access to documents;

2. The national provisions on the assistance of state courts to arbitral tribunals seated in their jurisdiction in the taking of evidence and, more generally, in accessing those legal instruments reserved to state courts.

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10 *Id.* at paraa. 121 and 122.

11 ECJ, Case C-214/89, *Powell Duffryn plc v. Wolfgang Petereit*, in ECLI:EU:C:1992:115, at para. 31.

12 Gerechtshof Amsterdam, July 21, 2015, No. 200.156.295/01. See also, Geradin, D. & Villano, E., *Arbitrability of EU Competition Law-Based Claims: Where Do We Stand after the CDC Hydrogen Peroxide Case?*, TILEC Discussion Paper No. 2016-033.

1. Public enforcement proceeding carried out by the EU and NCAs are, in essence, a particular form of administrative proceeding. For this reason, the general rules on access to documents apply to such proceedings. As regards the proceedings in front of the EU Commission, the rules laid down in Article 15 TFEU and in the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents shall apply. Thus, "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation."[13]

Similar provisions usually exist at the national level and can be used for accessing the casefiles of NCAs.[14]

The claimant in an arbitral proceeding for compensation of damages suffered as a consequence of the infringement of competition law that has already been established by a decision of a competition authority (so-called "follow-on action") may attempt to obtain the information and documents contained in the casefile of the competition authorities through the EU or national provisions on access to documents, and subsequently use such information and documents in the arbitration proceeding.

It must be remembered, however, that the right of access to documents has some limits, and competition authorities are entitled to refuse access to casefile in all cases where the request of the claimant exceeds said limits.[15]

2. The claimant may also rely on the rules of the jurisdiction of the seat of the arbitration concerning the assistance of State Courts to the parties or to the arbitral tribunal for the taking and preservation of evidence. In many Member States,[16] State Courts may be requested by the parties or by the arbitral tribunal to provide assistance in the taking of evidence, either before the commencement of arbitration (and, in this case, assistance will be provided at the request of the parties) or after the arbitral tribunal has been appointed (in this latter case the request for assistance can be made either by the parties or by the arbitral tribunal). The combined application of national rules on assistance of state courts to arbitral tribunals and of the rules transposing the Directive in the Member States should allow the injured party to legitimately expect the same results, in arbitration, as from bringing a follow-on action in front of a "national court" of a Member State.

III. CONCLUSION

The 2014 Directive on private enforcement was certainly not drafted with arbitration in mind. In some cases, the EU legislator doesn't even seem to have an accurate perception of what arbitration really is.[17] This generates uncertainty about if, and to what extent, the parties and arbitral tribunals may have direct access to the Directive's toolkit. Until the Commission and the NCAs have clarified their approach to requests of information, documentation and assistance in follow-on actions under the jurisdiction of arbitral tribunals, the parties (and their counsels) may need to use some creativity in order to acquire from competition authorities the necessary elements to effectively vindicate the right to full compensation of harm suffered due to the infringement of competition laws.

13 Article 2(1) of Regulation (EC) No 1049/2001.

14 See, for instance, the French "*Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal.*" In Italy, "*Legge 7 agosto 1990, n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*," in GU n.192 del 18-8-1990.

15 In particular, the limits and exceptions set in Article 4 of Regulation (EC) No 1049/2001.

16 See, for instance, the functions of the "juge d'appui" under the French rules on arbitration as modified by the "*Décret n° 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage*," in JORF n°0011 du 14/01/2011, p.777. Or the Spanish "*Ley 60/2003, de 23 de diciembre, de Arbitraje*," in BOE n. 309, of 26/12/2003.

17 In Recital 48 and Article 18 of the Directive, arbitration is considered to be "consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), **arbitration**, mediation or conciliation." Arbitration is, indeed, a contentious dispute resolution mechanism where an arbitral tribunal adjudicates the dispute while regardless of the agreement of the disputing parties on the decision adopted by the arbitral tribunal. On the contrary, out-of-court settlements, mediation and conciliation presuppose an agreement between the disputing parties to put an end to the dispute according to agreed terms and conditions.

ARBITRATION AND COMPETITION – A SWISS PERSPECTIVE

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I. INTRODUCTION

After decades of development, a large number of countries and jurisdictions have integrated competition rules into their legal system. In Europe, competition law has been part of the legal landscape for years, playing an important role in the creation of a single market and, as a consequence, of the European Union. Switzerland followed the European path, despite its tradition of collective decision-making and the wide-spread presence of "official" cartels in the country.

Awareness about competition law has increased significantly among lawyers. The number of fines imposed by national authorities and by the European Commission certainly contributed to such awareness. The possibility to claim damages following decisions by enforcement agencies also played a role. However, daily routine is largely made of commercial disputes, where competition rules may be used as a legal argument to defend a position in court or as a means to facilitate the settlement of a dispute.

While international commercial disputes are increasingly handled by arbitral tribunals instead of state courts, arbitration may also be a valid option to resolve disputes involving arguments based on competition law. This is particularly true in Switzerland, where laws are deliberately designed to promote arbitration as an efficient dispute resolution mechanism. While not exclusively limited to Switzerland, this contribution will focus on the specificities of arbitration in that country and the possibility to arbitrate disputes involving competition law arguments. As we will show, Switzerland's favorable legislation for arbitration, coupled with the liberal approach of Swiss state courts towards arbitration and Switzerland's neutrality, non-membership of the European Union, and long tradition in international arbitration, make Switzerland a very attractive place for arbitrating disputes involving competition law arguments.

II. COMPETITION LAW DISPUTES

A. Competition Law as an Argument in a Commercial Dispute

It is not our intention to present competition regulations to competition lawyers. A short reminder of some basic situations where competition law arguments may be of relevance in the daily routine of a commercial lawyer seems, however, opportune. Indeed, the bulk of effective or potential competition law disputes pertain to ordinary business relationships and usual business matters.

All competition rules may be envisaged as powerful arguments in the context of a commercial dispute, notably:

- Arguments based on alleged abuse of a dominant position may be used to obtain better commercial terms (unfair or excessive commercial conditions), to force a dominant player to contract (or not to terminate a business relationship) (refusal to deal), to avoid buying a product or a service which is not necessary or desired (tying), etc.

- Rules prohibiting restrictive agreements may be used to defend a party's commercial freedom, notably in terms of the geographical scope of activity, pricing, output, sourcing, customers, etc.

Competition law arguments should not be underestimated. Firms and their advisors nowadays know how long, costly, and disruptive an investigation can be. If the argument is valid, amicably settling a dispute may well be a valid option for both parties.

It may however be that the parties do not appreciate the situation in the same manner, or that the argument is only raised as a defense or at a later stage in the proceedings.

In such case, one must determine if and to what extent competition claims can be resolved through arbitration, either in the application of an existing arbitration clause in a contract ("*clause compromissoire*") or by way of a submission agreement ("*compromis*") concluded by the parties once the dispute has arisen.

B. Arbitrability of Competition Law Disputes and Public Policy

1. In General

For a long time, the arbitrability of competition law disputes was in doubt because of its public policy nature and the fundamental importance of the legislations governing this field: be it for their impact on the market or their policy dimension, the limitation imposed on economic freedom, both in the United States and in the European Union.

Nonetheless, arbitrability has gradually been accepted as a result of increased awareness of the fundamental distinction between the subject matter of the dispute and the nature of the rules in question.[2] In Switzerland, a second instance court, the *Tribunal cantonal vaudois* had already perfectly understood this distinction in 1975: the court observed that it was necessary to distinguish "between the subject matter of the arbitration, which is a dispute concerning a right of which the parties may freely dispose [such as dispute pertaining to the validity of a contract], and the legal rules which are applicable to the solution of the dispute."[3] The Swiss Supreme Court has confirmed this solution more recently under the Private International Law Act ("PILA"), where Chapter 12 contains Switzerland's International Arbitration Law or *lex arbitri*.[4]

Ten years after the *Tribunal cantonal vaudois*, the U.S. Supreme Court also recognized the arbitrability of disputes which might involve the application of U.S. antitrust legislation in its famous *Mitsubishi v. Soler Chrysler-Plymouth* case.[5] Also, in most European countries, the arbitrability of disputes raising questions of European competition law has been progressively recognized by the courts and legal commentators.[6]

Nowadays, not only can disputes involving competition law arguments be arbitrated, arbitral tribunals simply cannot ignore competition law rules pertaining to public policy, and must address them in their award, failing which the validity of its enforcement could be compromised. This restriction to the powers of an arbitral tribunal was set out by the U.S. Supreme Court in "footnote 19" of its *Mitsubishi* judgement.[7] In the same line, the ECJ's *Eco Swiss v. Benetton* decision also reserved the control of the courts over the application of competition law by an arbitral tribunal in the European Economic Community.[8]

This conception of the respective powers of the arbitral tribunal and the court has been called the "second look doctrine." It allows the court to review the contents of the arbitral award from the point of view of public policy so as to ensure respect for those rules of competition law which are characterized as forming part of public policy. This is not a limit to the arbitrability of disputes involving competition law, but a control over the content of the arbitral award.[9] While this approach prevails in the United States and in the European Union, this is not necessarily the case elsewhere, such as in Switzerland.

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2 J.-F. Poudret & S. Besson, Comparative Law of International Arbitration, 2nd ed., 2007, London, Sweet&Maxwell, p. 296 N. 347.

3 JdT 1981 III 71.

4 ATF 118 II 193.

5 473 U.S. 614 (1985). In this case, where the parties had agreed to submit their disputes to Swiss law and to arbitration in Japan under the rules of the "Japan Commercial Arbitration Association" the U.S. Supreme Court underlined the specific character of international disputes and recognised the validity of the parties' arbitration agreement as follows: "We conclude that concerns of International Comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the International commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." (473 U.S. 629).

6 A. Rigozzi, Arbitrage, ordre public et droit communautaire de la concurrence, ASA Bul. 1999, pp. 455-487. For more details see Poudret & Besson, *op. cit.*, p. 297 N. 349.

7 Having found that the parties' agreement contained a choice of Swiss law which gave rise to the fear that U.S. antitrust law might not be applied in a way it requires, the court stated at footnote 19 of its judgement: "We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that in that in the event of the choice of forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."

8 *Eco Swiss China Ltd. v. Benetton International NV* (1991) ECR I-3055 Case C 126/97 p. 3055.

9 Poudret & Besson, *op. cit.*, pp. 300-301 N. 352.

2. In Switzerland

Competition claims that are raised defensively ("competition claims as a shield"), e.g. by a respondent seeking to invalidate contractual provisions, are fully arbitrable under Swiss law.[10] Affirmative competition claims ("competition claims as a sword"), e.g. claims seeking relief for alleged violations of competition law, are "arbitrable provided that they entail a financial interest," which is the criterion for arbitrability according to the PILA, the Swiss *lex arbitri*.[11]

The Swiss Supreme Court has held that arbitrability may only be denied in the case of a dispute whose judicial handling is exclusively entrusted to state court judges pursuant to provisions that are mandatory in light of public policy,[12] such questions being solely assessed in light of the public policy to be respected by the arbitral tribunal, pursuant to Art. 190 para. 2 let. e PILA, and not to any foreign concept of public policy.[13]

The Swiss Supreme Court favors a pragmatic approach to this notion on a case-by-case basis, considering that the rather vague term of "public policy" may not be defined to suit an unlimited number of circumstances.[14] However, the Swiss Supreme Court usually defines the term by giving a general definition and by listing non-exhaustive examples.[15] Regarding competition law, the Swiss Supreme Court held in a decision of 2006 that there was "no longer room for doubt," and that the provisions of competition law are not part of public policy as they "do not pertain to the essential and broadly recognized values which, according to the prevailing opinion in Switzerland, should be the basis for any legal system."[16]

The approach followed by the Swiss Supreme Court therefore diverges from the position adopted by the European Court of Justice, according to which EU competition law must be regarded as a matter of public policy within the meaning of the New York Convention.[17]

The question of arbitrability must be distinguished from the question of the law applicable to the merits of a dispute. If such law contains any mandatory provisions with respect to the dispute's merits, the arbitral tribunal must naturally apply these provisions in its reasoning.[18]

C. Agreement to Arbitrate (Pre-Dispute)

In order for a dispute pertaining to a competition law issue to be resolved by arbitration, an agreement to arbitrate must exist.

In most instances, the agreement to arbitrate is included in the form of an arbitration clause contained in the commercial agreement to which the dispute relates ("*clause compromissoire*").

The parties may, however, elect to arbitrate their dispute after it has arisen, by way of a submission agreement ("*compromis*").

1. Arbitration Clause in a Commercial Agreement (Pre-Dispute)

In order for competition claims to be addressed by arbitral tribunals, they must fall within the scope of the relevant arbitration clause (*ratione materiae*).

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10 ATF 118 II 193; ATF 132 III 389.

11 Article 177 para. 1 of the Swiss Private International Law Act (PILA).

12 ATF 118 II 353 at 3.

13 D. Girsberger, A. Heini, M. Keller, J. Kren Kostkiewicz, Kurt Siehr, F. Vischer & P. Volken in: Zürcher Kommentar zum IPRG, ZK – Zürcher Kommentar, 2nd ed., Zurich, 2004, ad Art. 177 N 25.

14 ATF 120 II 155 at 6a.

15 Swiss Supreme Court Decision 4A_116/2016 of December 13, 2016 at 4.1: "An award is incompatible with public policy if it disregards some essential values which, according to the prevailing views in Switzerland, should represent the grounds of a legal order (ATF 132 III 389 at 2.2.3). Procedural public policy is distinguished from substantive public policy. An award is inconsistent with substantive public policy when it violates some fundamental principles of law to such a degree that it is no longer consistent with the governing legal order and system of values; among such principles are, in particular, the principle of contractual fidelity, compliance with the rules of good faith, the prohibition of the abuse of rights, the prohibition on discriminatory or confiscatory measures, and the protection of legally incapable persons."

16 ATF 132 III 389 = ASA Bull. 2006, p. 231.

17 See e.g. *Eco Swiss China Ltd v. Benetton International NV* (1991) ECR I-3055 Case C 126/97.

18 ATF 132 III 389 at 3.3.

Once it is determined that the parties have consented to arbitration in the first place, the scope of their agreement to arbitrate will be interpreted extensively, in an all-embracing manner.[19] A broadly drafted arbitration clause, such as one containing words like "arising out of or in connection with" will cover extra-contractual matter, and thus also competition claims.[20] In such a case, the arbitral tribunal has a *duty* under Swiss law to take jurisdiction over the competition claims.[21]

2. Submission Agreements (Post-Dispute)

The parties may have an interest in agreeing to subject their dispute to arbitration even if their original contract did not foresee this possibility, and they are free to opt for arbitration *after* the dispute arises.

Not only do all jurisdictions not have specialized courts and experts able to handle such complex matters, but arbitration also allows the parties to preserve confidentiality, which may serve the interests of both.

Arbitrators may be chosen specifically for their expertise in areas which are considered predominantly important for the handling of a case. Arbitrators may be selected for their knowledge in competition law or economic matters, in addition to arbitration as such. Moreover, arbitration proceedings allow flexibility regarding the appointment of experts by the parties or the arbitral tribunal. In addition, the proceedings may more easily be arranged to favor a prompt resolution of the dispute, based on the legal and practical priorities of the case and the interconnection between economics and law.

Independently from purely competition law disputes, the preference for arbitration when it comes to large scale cross-border disputes is undeniable. Disputes involving competition law issues almost invariably arise in an international context, whereby international arbitration has been by far the preferred means of resolving cross-border disputes. The traditional arguments in favor of arbitration remain valid in respect of competition law disputes, namely confidentiality, expertise of the decision makers, flexibility, and enforcement of awards abroad.

The parties involved in a potentially complex dispute, including arguments pertaining to competition law, would therefore be well-advised to consider the possibility of agreeing to arbitration *ex post*, even if said dispute resolution mechanism was not included at first in their contractual arrangements.

III. HANDLING OF THE DISPUTE

A. Preliminary Assessment of the Existence of a Competition Law Offense

The assessment of a dispute which concerns financial interests may also involve the assessment of a preliminary question that does not relate to a financial interest (e.g. the existence of criminal actions compromising a contract's validity, the valid existence of a legal entity, the validity of a foreign intellectual property right, etc.). In such cases, the arbitral tribunal is also competent to assess these preliminary questions. Its judgement may include these additional issues as part of the determination of the dispute over a financial interest; however, it does not modify any legal relationship or legal status.[22] The Swiss Supreme Court recently confirmed that arbitral tribunals have jurisdiction to deal with the alleged existence of a crime as a preliminary issue.[23] The same principle would apply regarding the preliminary assessment of the existence of a competition law offense.

As we know, assessing the existence of a competition law offense may entail complex legal and economic analysis, as well as particularly intense fact findings by the parties.

Regarding the economic analysis, the recourse to experts appears as a natural solution. Such experts can be involved both as party-appointed experts and as experts appointed by the arbitral tribunal. Fact finding, on the other hand, mainly relies on the parties. Arbitration may be

19 Swiss Supreme Court Decision 4C.40/2003 of May 19, 2003; Swiss Supreme Court Decision 4A_103/2011 of September 20, 2011.

20 The Swiss Supreme Court has interpreted "in connection with" as implying a "broad and comprehensive arbitration clause covering not only contractual claims but also extra-contractual ones." (Swiss Supreme Court Decision 4A_119/2012 of August 6, 2012 at 4.3).

21 An arbitral award can be set aside under Article 190 para. 2 let. b PILA if the arbitral tribunal has wrongly declined jurisdiction to hear antitrust claims: ATF 118 II 193.

22 ATF 133 III 139 at 5.

23 Swiss Supreme Court Decision 4A_597/2013 of June 19, 2014 at 4.2 with reference to ATF 133 III 139 at 5; see ASA Bul. 2014 pp. 775/777 and 779.

advantageous in the sense that, while not going as far as a fully-fledged discovery mechanism, most arbitration rules allow parties and arbitrators to order the production of documents, with more flexibility than a number of national jurisdictions, the IBA Rules on the Taking of Evidence in International Arbitration of 2010 being often referred to as an applicable standard. Another complexity of the preliminary assessment may pertain to the interpretation of the rules of law, in particular competition rules. The possibility to request the support of the competition authorities must therefore be envisaged.

B. Prejudicial Questions/Opinion from Competition Authorities

Under European law, a civil procedure can be stayed at first instance, and a national court can refer a question to the European Court of Justice for preliminary Judgement, to promote the uniform application of European law. This procedure is not open to arbitrators, according to the case law set by the European Court of Justice.[24]

It is uncertain whether Article 15 of Council Regulation 1/2003[25] on the cooperation between national courts and the Commission applies in arbitral proceedings, in particular whether arbitrators can benefit from the support of the Commission under Article 15 para. 1 Reg. 1/2003 or whether the Commission and national competition authorities can intervene in an arbitration as *amicus curiae* under Article 15 para. 3. Reg. 1/2003.

In Switzerland, Article 15 of the Cartel Act ("CartA") provides that "If the legality of a restraint of competition is questioned in the course of civil proceedings, the case shall be referred to the Competition Commission for an expert report."[26] Though the legal provision does not explicitly deal with the question, the prevailing opinion of authors is that arbitrators can request the opinion of the national competition authority pursuant to Article 15 al. 1 CartA, but have no duty to do so.[27] To date, to our knowledge no Swiss arbitral tribunal has involved the Swiss competition authorities.

As Switzerland is not a member of the European Union, the decisions of arbitral tribunals seated in Switzerland are not subject to the review of EU courts and competition authorities, meaning that they may follow their own interpretation of EU competition rules. This being said, an arbitral award rendered in Switzerland that would contravene EU public order would be unenforceable in the territory of the European Union, which imposes a degree of self-discipline to arbitral tribunals in charge of interpreting EU competition rules.

C. Award

Arbitral tribunals may not only decide on the payment of monies, but can also issue injunctive orders.

Arbitral tribunals may therefore, on the merits of a case or as an interim measure:

- prevent a party from terminating a contract;
- extend the temporal validity of a contract;
- order a party to enter into a contract.

While the award on financial claims will most often be issued at the end of the procedure with the judgement based on the merits of the case, provisional measures aiming at preserving the situation and avoiding irreparable harm may include the measures listed above, which may be particularly relevant in connection with competition issues. Sometimes, monetary compensation does not suffice to prevent the disappearance of a competitor or business partner.

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24 *Nordsee Deutsche Hochseefischerei Gmbh v. Reederei Mond Hochseefischerei Nordstern AG* (1982) ECR 1905 Case 102/81.

25 Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), *OJ L 1, 4.1.2003, pp. 1-25* (Reg. 1/2003).

26 Article 15 Cartel Act (CartA).

27 J.-M. Reymond in: Commentaire Romand, Droit de la concurrence, V. Martenet, P. Tercier & Ch. Bovet (eds), 2nd ed., Basel, 2013, Art. 15 LCart N. 141ff.; P. Krauskopf & S. Roth, SJ 2002 II p. 43 para. 22d.

IV. DAMAGES

A. Award of Damages

Switzerland is no exception to the rule. Damages for breach of contract or tort may be awarded by courts, including arbitral tribunals.

While damages for breach of contract are governed by principles of liability which can be considered quite standard, so that we will not further develop this point, it is worth mentioning the rules governing extra-contractual liability, namely Articles 41 *et seq.* of the Swiss Code of Obligations ("SCO").

According to Article 42 para. 1 SCO, "a person claiming damages must prove that loss or damage occurred." Nevertheless, according to Article 42 para. 2 SCO, "where the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party."

Swiss law does not allow a claimant to merely allege a damage. The burden of proving the damage remains. However, the burden is somewhat alleviated by the possibility for the judge or arbitrator to substitute its own appreciation to the proof of the "exact value" of the loss or damage.

Switzerland may therefore appear as a jurisdiction that does not go as far as including lump sum calculations of the damages or requiring strict evidence of the exact amount of the damage claimed. As often occurs, Swiss law sets forth an intermediate and reasonable solution, with the possibility of mitigating the risks of both parties, in one sense or the other.

It is to be noted that the EU Directive on competition law damages actions[28] would not have to be taken into account in an arbitration seated in Switzerland in case the applicable law on the merits is not the law of an EU country (e.g. Swiss law).

B. Award of Punitive/Treble Damages

Swiss law does not provide for punitive/treble damages. However, there might be situations where such damages could be awarded by an arbitral tribunal seated in Switzerland, if substantive laws governing the dispute provide for such damages.

In such case, an arbitral tribunal seated in Switzerland does not, in principle, violate public policy by awarding punitive/treble damages, if the tribunal deems it appropriate to award such damages and the applicable foreign law provides for such damages, according to the case law of the Swiss Supreme Court.[29]

The above implies that arbitration in Switzerland may also appear attractive for claimants seeking to obtain punitive/treble damages.

V. AWARD SET ASIDE/REVIEW OF FOREIGN LAW

In Switzerland, the grounds for annulment of an arbitral award are particularly limited.

Arbitral awards are subject to a direct action for annulment to the Swiss Supreme Court (provided such possibility was not excluded in the agreement to arbitrate by the parties)[30] and the grounds that may be invoked by the parties to annul the award are limited to the following:[31]

a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;

b) if the arbitral tribunal has wrongly accepted or declined jurisdiction;

28 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, pp. 1-19 (EU Directive on damages).

29 Swiss Supreme Court Decision 4P.7/1998 of September 17, 1998 at 3c.

30 Article 192 PILA. Parties may avail themselves of this option, however, only where none of the parties has its domicile in Switzerland and the waiver is clear and specific.

31 Article 190 para. 2 PILA.

c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;

d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;

e) if the award is incompatible with public policy.

The standard of review applied by the Swiss Supreme Court to annulment actions is deferential. Challenges are successful only in extreme cases, approximately 7 percent of the time, and only two arbitral awards were considered contrary to public policy from the entry into force of the PILA in 1989 to date, both issued by the Court of Arbitration for Sport and not concerning commercial matters. The Swiss Supreme Court is swift in dealing with annulment actions, rendering its decision usually within 4 to 6 months.[32]

As mentioned, an arbitral tribunal examining the performance of a contract may also review such contract's compatibility with EU competition law applying to the parties involved.[33] However, an arbitral award cannot be set aside for the mere misapplication of a foreign competition statute by the arbitral tribunal. Indeed, misapplication of the law would fall within the realm of determining the merits of the case, and the only possibility for an award to be set aside in such context is when it violates public policy.[34] As previously explained, non-application or incorrect application of a foreign competition statute does not constitute a violation of public policy, so that the possibility to challenge the award for such grounds before the Swiss Supreme Court is excluded.[35]

VI. ENFORCEABILITY OF THE AWARD

As arbitrators have a duty to render an enforceable award, they may find themselves in a situation where they need to raise competition law issues *ex officio*, a rather unusual way to proceed in arbitration, given the consensual nature of the procedure.

As seen, competition laws were not considered to be public policy issues by the Swiss Supreme Court.[36] In such a context, the potential risk that an arbitral award may not be subsequently enforced abroad was deliberately accepted by the Swiss legislator and rests solely upon the parties.[37] However, the risk of non-recognition abroad is not a sufficient reason to take into account a more restrictive rule than Article 177 para. 1 PILA, according to the case law cited by the Swiss Supreme Court.[38]

VII. CONCLUSION

Switzerland is a very attractive place for arbitrating competition matters, both when raised defensively and for affirming competition claims. Ranked among the top three countries in the ICC statistics both for the seat of the arbitration and for the nationality of arbitrators, Switzerland benefits from its political neutrality and arbitration-friendly legislation and courts, which ensure that the review of the award by Swiss state courts will be strictly limited.

Considering the nature and object of disputes involving competition law arguments, the parties should carefully consider the possibility to agree to arbitrate their dispute, thus benefiting from the advantages of this type of dispute resolution mechanisms.

32 F. Dasser, International Arbitration and Setting Aside Proceedings in Switzerland – An Updated Statistical Analysis, ASA Bul. 2010, N 28, Issue 1, pp. 82-100.

33 ATF 118 II 193 at 5c/bb.

34 Article 190 para. 2 let. e PILA.

35 ATF 132 III 389.

36 See Section 2.2.2.

37 Swiss Supreme Court Decision 4A_388/2012 of March 18, 2013 at 3.3; ATF 118 II 353 at 3c.

38 ATF 118 II 387 at 3d.

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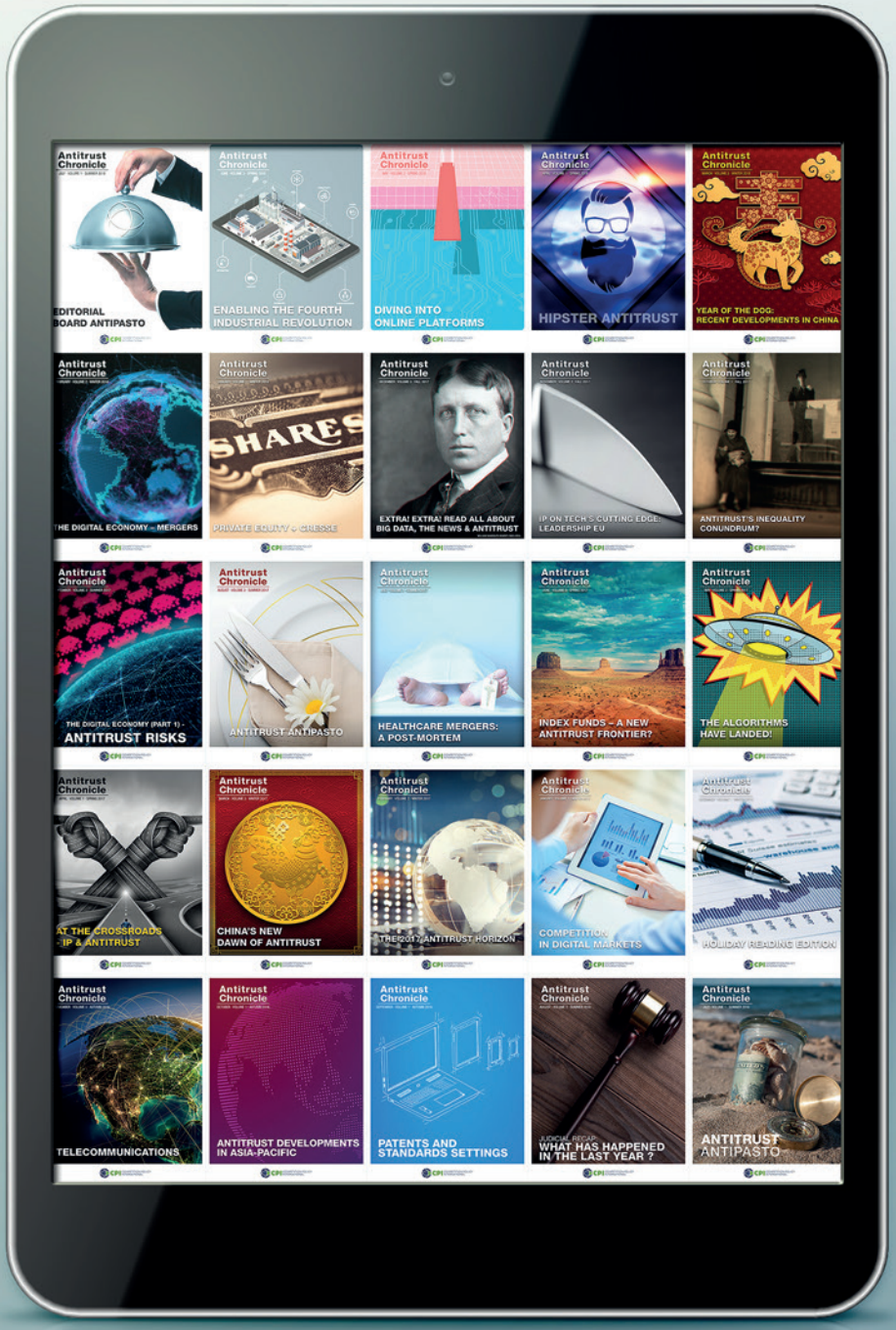

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