

EU COMPETITION ARBITRATION: A RELIABLE FORUM FOR PRIVATE ENFORCEMENT



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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 Directive³ 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 TFEU⁵ 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

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.

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in some further detail how and why this is so. This discussion will depart from the once vexed question of competition arbitrability and the now-days 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's⁸ 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 Convention¹⁰ without even discussing the question of competition arbitrability. Later case law precedent¹¹ 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 provider¹² 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 EUMR¹⁴ and under Regulation 1/2003¹⁵ 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 commercial 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

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.

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.

of behavioral commitments stands confirmed both by the EU Commission Notice on Remedies¹⁶ 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 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.

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-debitel 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.

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.

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:

- *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.

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.

- *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 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.

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.

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

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 COMMISSION²⁸

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 Notice³⁰ 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 arbitration³³ 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.

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.

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.

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.

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 71ème 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 *Terramata 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 71ème 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.

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