ΕΛΛΗΝΙΚΗ ΔΗΜΟΚΡΑΤΙΑ
Εθνικόν και Καποδιστριακόν Πανεπιστήμιον Αθηνών

ΝΟΜΙΚΗ ΣΧΟΛΗ
ΕΝΙΑΙΟ ΠΡΟΓΡΑΜΜΑ ΜΕΤΑΠΤΥΧΙΑΚΩΝ ΣΠΟΥΔΩΝ
ΚΑΤΕΥΘΥΝΣΗ: ΙΔΙΩΤΙΚΟ ΔΙΕΘΝΕΣ ΔΙΚΑΙΟ ΚΑΙ ΔΙΚΑΙΟ ΔΙΕΘΝΩΝ ΣΥΝΑΛΛΑΓΩΝ
ΠΑΝΕΠΙΣΤΗΜΙΑΚΟ ΕΤΟΣ: 2016-2017

ΔΙΠΛΩΜΑΤΙΚΗ ΕΡΓΑΣΙΑ
της Μαρίας Γεωργίου Καμβύση
Α.Μ.: 7340012116006

International Commercial Arbitration in the context of EU Competition Law: Between Crossroads and *Vitae parallelae*

Επιβλέποντες:
Χαράλαμπος Π. Παμπούκης, Καθηγητής
Ελίνα Ν. Μουσταϊρα, Καθηγήτρια
Χρυσαφώ Τσούκα, Αναπληρώτρια Καθηγήτρια

Αθήνα, 2017

"I understand that there is no
straight road.
Only a giant labyrinth
of intersecting crossroads.

Constantly our feet
Are creating by walking"*

FEDERICO GARCIA LORCA, The floating bridges

---

* "Comprendo que no existe
el camino derecho.
Sólo un gran laberinto
de encucijadas multiples.

Constantamente crean
nuestros pies al andar"

FEDERICO GARCIA LORCA, Los puentes colgantes

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ECN	European Competition Network
EU	European Union
CJEU	Court of Justice of the European Union
Damages Directive	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, OJ L 349/1, 5.12.2014
ICC Rules of Arbitration	ICC International Court of Arbitration, Rules of Arbitration, ICC No. publication 80
NCAs	National Competition Authorities
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 October 1958, 330 UNTS 38
SCOTUS	Supreme Court of the United States
Swiss PIL	Swiss Federal Statute on Private International Law
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985)
1968 Brussels Convention	Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels, 1968, OJ L 299/32, 31.12.1972

I. INTRODUCTION

1. International commercial arbitration has always been highly esteemed and acclaimed by the private entities[1] for accelerating and facilitating the resolution of disputes in the course of international transactions in a smoother and more businesslike manner through the high level of expertise of the arbitrators, as well as for limiting the overall accrued costs of an otherwise traditional judicial procedure.[2] The same benefits render arbitration particularly popular when it comes to antirust claims.[3] The latter might arise in the course of arbitral proceedings for the resolution of contractual disputes between commercial partners or for the determination and reparation of damages due to harm incurred through anti-competitive behaviors.[4]

2. Responding to this reality, the modernization of the normative system established by art. 101 and 102 of the Treaty on the Functioning of the European Union[5] (hereinafter as "***EU competition law***" or "***EU competition rules***"), as rocketed by the adoption of Regulation 1/2003, [6] and the subsequent gradually developed emphasis on the private enforcement of competition rules,[7] have reinforced the debate on the role of arbitration in the decentralization and the enforcement of the EU competition law.[8] Although, arbitration has been welcomed by EU competition law as a monitoring tool for the implementation of behavioral commitments in the context of the EU merger control through the "*commitment arbitrations*",[9] the interplay between the private enforcement of the EU competition rules and the international commercial arbitration remains outside the

[1] Edward SHUMAKER III, "Why Arbitration is Tailor made for Professional Firms", *Dispute Resolution Journal*, Vol. 58, Issue 1, 43-44, 2003.

[2] The advantages of having recourse to arbitration include the neutrality of the arbitral tribunal, the international enforceability of the award resolving the dispute, the flexibility and the confidentiality, *see* Alan REDFERN, J. Martin HUNTER, Nigel BLACKABY, Constantine PARTASIDES, "An overview of international arbitration", in : Nigel BLACKABY, Constantine PARTASIDES, Alan REDFERN, J. Martin HUNTER (eds), *Redfern and Hunter on International Arbitration*, Oxford University Press, UK, 2009 p.p. 31-33.

[3] Assimakis KOMNINOS, "Arbitration and the Modernisation of European Competition Law Enforcement", World Competition, Vol. 24, Issue 2, 211-238, 2011, p.214.

[4] Assimakis KOMNINOS, "Arbitration and EU Competition Law", in : Jurgen BASEDOW, Stéphanie FRANC, Laurence IDOT (eds), *International Antitrust Litigation : Conflict of Laws and Coordination, Hart Publishing*, Oxford and Portland, Oregon, 2012, p. 194.

[5] *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47, 9.5.2008 (hereinafter as "***TFEU***").

[6] *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ L 1/1, 4.1.2003.

[7] Johannes LUBKING, "The European Commission's View of Arbitrating Competition Law Issues", *European Business Law Review*, Vol.19, Issue 1, 77-87, 2008.

[8] Gordon BLANKE, "EU Competition Arbitration", in : Luis ORTIZ BLANCO (ed), *EU Competition Procedure* (3rd Edition), Oxford University Press, UK, 2013, p. 1077.

[9] *Ibid*, p. 1077, 1106 seq.

spectrum of normative regulations and is developing in an independent and sometimes "rocky and labyrinthine" way.

3. The purpose of this thesis is to examine the meeting points and the points of departure during this interplay, *i.e.* to examine the relationship that is developed between international commercial arbitration and EU competition law both at a substantive (**II.**) as well as at a procedural (**III.**) level. Commencing from the substantive aspects of the application of EU competition law in international commercial arbitration, it will be examined whether the antitrust disputes can be validly arbitrable (**II.A.**), how the EU competition law is applied in the merits of a case brought before an arbitral tribunal (**II.B.**), and how this area of law could function as an impediment to the validity, the recognition and the enforcement of arbitral awards for reasons of public policy (**II.C.**). Moving to the procedural aspects of the relationship between international commercial arbitration and EU competition law, we will examine in which ways the arbitral tribunals can establish and develop a dialogue on issues pertaining to the interpretation and application of EU competition rules both with the EU judicature (**III.A.**), as well as with the European Commission and the National Competition Authorities of the EU Member States (**III.B.**).

II. SUBSTANTIVE ASPECTS OF THE APPLICATION OF EU COMPETITION LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

4. The substantive aspects of the relationship between international commercial arbitration and EU competition law can arise in all the different stages of the arbitration procedure, *i.e.* before the initiation of the arbitral proceedings, during the course of the dispute resolution by the arbitral tribunal as well as after the issuance of the arbitral award. With this observation in mind, the analysis performed hereby shall address the issues of arbitrability[10] of antitrust claims (**II.A.**), the issues of applicable law in arbitral proceedings which relate to the application of EU competition law (**II.B.**), and the issues of public policy (**II.C.**).

II.A. The arbitrability of EU competition law disputes Arbitrability

5. The arbitrability of antitrust disputes constituted an issue of controversy, before adhering to a trend *in favorem arbitrii*[11] and finally reaching a general acceptance in case law and doctrine. In the present chapter, remaining within the ambit of objective arbitrability[12], this matter will be approached by firstly defining the types of disputes which pertain to EU competition law and might be found in arbitral proceeding (I**I.A.1.**), and then by examining how the question of arbitrability can arise (**II.A.2.**) and how it is to be answered (**II.A.3.**).

II.A.1. Types of EU competition law disputes in arbitral proceedings

6. When reference is made to competition law and antitrust disputes, one cannot but reflect on the administrative public enforcement procedures before the National Competition Authorities (hereinafter as "***NCAs***") or the European Commission seeking to trace anti-competitive behaviors of economic entities and impose fines on that occasion. However, antitrust claims are not at all estranged from the private enforcement, *i.e.* procedures where enforcement is effected through

[10] Arbitrability is not only a precondition for the valid introduction of a dispute in the arbitral proceedings, but also constitutes a ground for the annulment and/or the non recognition and enforcement of arbitral awards. For the purposes of the present thesis we concentrate on the determination of EU competition law issues as objectively arbitrable, and will not analyze in detail the possible annulment and/or non recognition and enforcement for this particular reason.

[11] Jean-Baptiste RACINE, *L' arbitrage commercial international et l' ordre public,* L.G.D.J. (Bibliothèque de droit privé), Paris, 1999, p.36.

[12] Arbitrability is further distinguished in arbitrability *rationae personae* and arbitrability *rationae materiae*, depending on whether the capacity of the dispute for settlement by arbitration relates to the capacity of the parties to agree on having their dispute settled through arbitration or to the very nature of the dispute respectively, *see* Νικόλαος ΠΑΠΠΑΣ, "Το διατητεύσιμο των διαφορών", *Δίκαιο Επιχειρήσεων και Εταιρειών,* Τεύχος 7/2002, 684 επ.

civil claims and counterclaims brought by private parties before national courts[13] - and in our case arbitral tribunals.[14]

7. These claims can reach the doorstep of arbitration through either a contractual or non-contractual ground; most usual, however, being the case of contractual liability, especially in the context of joint venture agreements, distribution agreements, license and know-how agreements[15]. In these cases, private parties are entrusting the resolution of disputes stemming from their contract to an arbitral tribunal, and in the course of the proceedings, issues pertaining to competition law might arise. In practice, it is most probable that the parties will request the arbitrators to decide on the validity of the underlying contract based on EU competition rules, as part of their defense to a claim brought by their contractual partners for breach of contract and reparation.[16]

8. In furtherance to the above, it is accepted that tort claims can be included in the ambit of the arbitration clause concluded by the parties. It is common in practice that such claims are presented as a ground of defense in the context of a contractual claim of the other party.[17] Thus, the arbitral tribunal is likely to decide on the damage incurred by a violation of the EU competition rules, as well as on its quantification, irrespective of whether a public authority has already issued an infringement decision on the matter or not. At this point it should be mentioned that the new Directive 2014/104/EU for damages by EU competition law infringements (hereinafter as "***Damages Directive***") does not specifically regulate the recourse to arbitration on these grounds; but, it does not exclude it either.[18] On the contrary, it encourages the use of consensual dispute resolution mechanisms for the determination of compensation for the harm caused a breach of EU competition law,[19] and should be perceived as a further step towards an institutional

---

[13] Assimakis KOMNINOS, *EC Private Antritrust Enforcement : decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, p.2.

[14] These proceedings pertain to mainly to a reparatory objective, while public enforcement proceedings serve more of an injunctive and punitive objective.

[15] Vivien ROSE, David BAILEY, *Bellamy and Child: European Union Law of Competition (7th Edition*), Oxford University Press, UK, 2013, p.1262.

[16] This refers to a "*shield litigation"* perspective, while a "*sword litigation"* perspective is based on injunction claims and the declaration of the nullity of the underlying contract, and is more rare in practice, *see* KOMNINOS, *EC Private Antritrust Enforcement, op.cit*.,, pp.2-3. *A maiore ad minus,* on the one hand this leads to the position that *"sword arbitration"* in these matters should be also considered rare, while on the other hand it reinforces the fact that defensive claims through *"shield arbitration"* constitute a most common scenario.

[17] In this regard, *see* ICC Cases 7357/1995, 8626/1998, 10704/2001, *ICC Bulletin*, Vol.14, Issue 2, 2003, p. 30seq, 66-67.

[18] *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*, OJ L 349/1, 5.12.2014.

[19] *Ibid*, Preamble, p. 48.

acknowledgment of the approximation between commercial arbitration and EU competition law.[20] The Damages Directive also provides for the suspension of the limitation period for bringing a damages action while a consensual dispute resolution procedure is pending, as well as for the suspension of the proceedings before national courts when the latter are seized of an action of damages if at the same time the parties are involved on a consensual dispute resolution procedure.[21] It also proposes that compensation offered as the outcome of the latter proceedings could be considered by the competition authorities as a mitigating factor,[22] as well as stipulates the way this compensation can affect the amount of supplementary damages claims against settling and non-settling co-infringers.[23]

9. The aforementioned inclusivity of EU competition issues in the material scope of an arbitration clause, even in the form of tort claims, seems desirable and coherent within the framework of the one-shop adjudication principle and its economic and procedural benefits for the parties.[24] It would be detrimental for their interests to have their cases split in different *fora* and procedures, losing important time and money, while there is a panel of (arbitral) adjudicators, most probably highly experienced and specialized in commercial matters and competition law, ready to be seized by all the matters arising under their contract. To this direction, the *Fiona Trust Case*[25] of the English House of Lords has been of great importance.[26] It introduced a rebuttable presumption in favor of the incorporation in the arbitration clause of all the disputes between the parties which arise out of the relationship into which they had entered, or purported to have entered; unless the language of the clause made it clear that certain questions were intended to be excluded from the arbitrators'

[20] Miriam DRIESSEN - REILLY, "Private damages in EU competition law and arbitration: a changing landscape", *Arbitration International*, Vol. 31, Issue 4, 567-587, 2015, p. 579.

[21] *Ibid*, Art. 18 par. 1-2.

[22] *Ibid*, Art. 18 par. 3.

[23] *Ibid*, Art. 19.

[24] Phillip LANDOLT, "Chapter 2: Arbitration Clauses and Competition Law", in : Gordon BLANKE, Phillip LANDOLT (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011, p. 80.

[25] House of Lords, *Premium Nafta Products Ltd v Fili Shipping Co Ltd*, 17 October 2007, [2007] 2 All E.R. (Comm) 1053.

[26] The *Fiona Trust Case* position in favor of the one-stop shop adjudication principle was later verified and reiterated in Queen's Bench Division (Commercial Court), *Monde Petroleum SA v Westernzagros Ltd*, [2015] EWHC 67 (Comm), where it was held that a dispute resolution clause which was concluded between the parties in the context of a termination agreement and established the exclusive jurisdiction of the courts of England superseded a previous arbitration clause concluded between the same parties in the consultancy services agreement between them which was later terminated. *Contra* England and Wales Court of Appeal (Civil Division), *Ryanair Ltd v Esso Italiana Srl* [2013] EWCA Civ 1450, where the court upheld the exclusion of a tortious cartel damage claim from a contractual non-exclusive jurisdiction clause in favor of the Courts of England, ruling that the presumption of a one-stop shop adjudication requires a successful parallel contractual claim.

jurisdiction. This position rests upon the primordial role of the parties' autonomy and expressed common will to refer their disputes to arbitral proceedings.

10. The absence of this expressed will is one of the reasons why extra-contractual obligations and, in particular, collective actions for damages for breach of EU competition law, claimed by third parties who were not included in the execution of the arbitration clause are harder to stand without an ex post contractual submission of the dispute to arbitral proceedings.[27] This exclusion of the collective antitrust damage claims from the arbitration clause could be also reinforced by the fact that the Damages Directive does not provide for collective damage actions, nor does it inquire Member States to introduce such mechanisms in their domestic legal order.[28] The EU competition law, unlike the US antitrust law[29], presents an extraneity towards an EU-wide collective antitrust damage claims.

II.A.2. The question of arbitrability

11. After having referred to the types of EU competition law disputes that might arise in the course of arbitral proceedings, and before examining whether these disputes are arbitrable, it is useful to approach the issue of arbitrability in a more general basis.

12. Arbitrability is linked to the ability of disputes to be subject to arbitration and is independent from the will of the parties to have recourse to arbitration as a dispute resolution mechanism. On the contrary, it is closer to public policy restraints and relates to the State's will to retain certain issues under the national's courts exclusive jurisdiction. For this reason, the arbitrability of a dispute might be denied by the national courts in light of mandatory, public policy-based rules prohibiting the resolution of certain types of disputes through arbitration.[30] However, as will be further shown below, this is not the case of EU competition rules.[31]

---

[27] Σωτήρης ΔΕΜΠΕΓΙΩΤΗΣ, *Διεθνής Εμπορική Διαιτησία και εφαρμογή των κανόνων ανταγωνισμού*, Νομική Βιβλιοθήκη, Αθήνα, 2016, pp.129-131.

[28] *See* point 13 of the Preamble of the Damages Directive.

[29] James ATWOOD, Kelly FINLEY, "Chapter 34: The Arbitration of Antitrust Class Actions under United States Law", in : Gordon BLANKE, Phillip LANDOLT (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011, p. 1350 seq.

[30] UNITED NATIONS, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, New York, 2012, p. 40, available at

http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf (last access 04.11.2017).

[31] ROSE, BAILEY, *op.cit.*, p.1262 and in particular the references under footnote 372.

13. The examination of the arbitrability of an antitrust dispute can be effected in two different stages: ***(i)*** at the beginning of the arbitration procedure, as well as ***(ii)*** after the issuance of the arbitration award, when the parties seek either its annulment or its recognition and enforcement. At the beginning of the arbitration procedure, arbitrability might be examined either by the arbitral tribunal which is seized of the case or by a national court which is bound to refer the dispute to arbitration due to the existence of an arbitration clause excluding its own jurisdiction.[32] At this particular point of proceedings, the approach of the national judges is opposed to and distinguished from the approach followed by the arbitration . The national judges will traditionally apply the *lex fori* in order to define which law determines the arbitrability, but might be prone to consider concerns pertinent to the enforceability of the arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[33], especially if they are signatory parties thereto and bound by it.[34] On the other hand, the specificity of each case will guide the arbitrators to seek an *ad hoc* answer to the question of arbitrability, and to that effect they might have recourse either to the *lex loci arbitri* - a solution which is more usual in practice[35] - or to the *lex loci executionis* - whose identification might be harder in the cases where the parties have assets in various jurisdictions, but is more probable to ensure the future arbitrability of the award[36]. A mixture of the two, according to which the arbitrators take both laws under consideration and try to specify a meeting point with the aim of safeguarding the enforceability of the award might seem a hard balance, but a fairer and better solution, as well as closer and somehow analogous to the practice of national judges of jurisdictions which are bound by the New York Convention. The duty of arbitrators to issue enforceable awards is also dictating that the examination of the arbitrability of the dispute by the arbitrators should take place by their own initiative, in other words *ex officio*[37].

---

[32] ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.*, p. 101.

[33] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 October 1958, (hereinafter as "***New York Convention***"), 330 UNTS 38.

[34] Gary BORN, *International commercial arbitration - commentary and materials (2nd Edition)*, Kluwer Law International, The Netherlands, 2001, p. 244

[35] Bernard HANOTIAU, "The Law Applicable to Arbitrability", in : Albert Jan VAN DEN BERG, *ICCA Congress Series No 9-Improving the Efficiency of Arbitration and Awards: 40 years of application of the New York Convention*, Kluwer Law International, 1999, p. 158 as quoted in ΔΕΜΠΕΓΙΩΤΗΣ, p. 104.

[36] Examining the arbitrability of the dispute according to the law of the state where the award is to be executed guarantees that the award will be enforceable, *see* ICC Case No. 1100/1994, [1987] 3 Arb. Int. 282, note Gillis Wetter.

[37] *See* Alexis MOURRE, "Chapter 1: Arbitrability of Antitrust Law from the European and US Perspectives", in : Gordon BLANKE, Phillip LANDOLT (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011, pp.14-15, where he refers to the duty of equal treatment and the duty to render a valid award, as well as to the effects of the exclusion of the State court jurisdiction as arguments in favor of the *ex officio* examination of the arbitrability of the dispute.

14. After the issuance of the arbitral award, the arbitrability of the dispute might arise either during annulment proceedings or in the course of recognition and enforcement proceedings, where the national judge will be called to address this matter in light of the *lex fori*. This way of approaching arbitrability is indicated by both art. V par. 2a of the New York Convention[38], art. 36 par. 1b(i) [39] of the UNCITRAL Model Law on International Commercial Arbitration[40], on the law governing arbitrability at the recognition and enforcement proceedings, as well as art. 34 par. 2b of the UNCITRAL Model Law[41] as regards the same question at setting-aside annulment proceedings. The reference to these particular provisions is not accidental; the great success of the New York Convention and its vast adoption by States,[42] as well as the aim pursued by the drafting of the UNCITRAL Model Law in harmonizing the rules on international arbitration have both inspired many jurisdictions which chose to copy these provisions in their internal legal order.[43]

II.A.3. The answer to arbitrability

15. Moving to whether EU competition disputes could be perceived as arbitrable, it should be clarified, as an introductory remark, that the arbitrability of cases raising points of competition law cannot be excluded on the basis that the agreement within which the arbitration clause is found is to be declared void and null because of a breach of the applicable antitrust rules.[44] This follows from the principle of separability[45] of the arbitration clause, according to which the latter constitutes a

---

[38] "*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country*".

[39] *"Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:* [...] *(b) if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State".*

[40] *UNCITRAL Model Law on International Commercial Arbitration* (hereinafter as "***UNCITRAL Model Law***"), 24 ILM 1302 (1985), available at

https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last access 29.10.2017)

[41] "*An arbitral award may be set aside by the court specified in article 6 only if:* [...] *(b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State*".

[42] REDFERN et al., *An overview of international arbitration, op.cit*., pp.71-72.

[43] According to UNITED NATIONS, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, New York, 2012, p. 1-2, available at

http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf (last access 04.11.2017), until 2012 ninety jurisdictions have enacted legislation based on the UNCITRAL Model Law.

[44] Alan REDFERN, J. Martin HUNTER, Nigel BLACKABY, Constantine PARTASIDES, "The Agreement to Arbitrate", in : Nigel BLACKABY, Constantine PARTASIDES, Alan REDFERN, J. Martin HUNTER, *Redfern and Hunter on International Arbitration*, Oxford University Press, UK, 2009, pp. 124-125.

[45] Phillip LANDOLT, "The Inconvenience of Principle : Separability and Kompetenz-Kompetenz", Journal of International Arbitration, Vol. 30, Issue 5, 511-530, 2013, p. 513; Alan REDFERN, J. Martin HUNTER, Nigel BLACKABY, Constantine PARTASIDES, "Powers, Duties and Jurisdiction of an Arbitral Tribunal", in : Nigel

separate agreement compared to the contract to which it forms part, and its validity is not dependent upon the validity of the contract / main agreement.

16. Arguments against the arbitrability of antitrust claims can be established in the limited fact-finding wherewithal of the arbitral tribunals, which harshens the difficulty in detecting breaches of competition law, as well as to the wider public interest to be pursued by competition law which might found trapped between the prioritazion of private interests through arbitral proceedings.[46] These arguments might even lead to the finding of an anti-competitive character of the arbitration clause itself;[47] however the assumed specialization of arbitrators in complex economic and commercial matters could serve as a collateral that the competition law objectives and prerogatives will be dully taken under consideration and, therefore, any anti-competitive effect could not be supported.

17. In the EU legal order, the matter is considered to be resolved after the judgment of the Court of Justice of the European Union (hereinafter as "***CJEU***") in *Eco Swiss*[48], which dissoluted any doubt as to ability of antitrust disputes to be brought before and adjudicated by an arbitral tribunal.[49]

18. The CJEU was seized of the matter by virtue of a preliminary reference sent by the Supreme Court of the Netherlands in proceedings brought for stay of enforcement of an arbitral award on damages for breach of a licensing agreement. The reference included five questions, variances of the originality of the quest whether the breach of EU competition rules could consist a public policy plea of setting aside an arbitral award, despite the fact that the national legal order might provide for concrete and limited grounds in that regard. Benetton International NV (hereinafter as "***Benetton***") had concluded the disputed licensing agreement with Eco Swiss, a company established in Hong Kong and the applicant in the domestic court proceedings, as well as with Bulova Watch Company Inc., a company established in New York, for the manufacture of Benetton watches for a period of eight years. The parties had also concluded an arbitration clause covering all disputes arising between them. When Benetton decided to terminate the agreement before the end of its agreed duration, the other parties launched arbitration proceedings seeking for the reparation of damages, and succeeded in receiving a favorable award. Benetton, then,

---

BLACKABY, Constantine PARTASIDES, Alan REDFERN, J. Martin HUNTER, *Redfern and Hunter on International Arbitration*, Oxford University Press, UK, 2009 p. 343-344.

[46] Phillip LANDOLT, *Modernised EC Competition Law in International Arbitration*, Kluwer Law International, The Hague, 2006, p.93.

[47] LANDOLT, *Arbitration Clauses and Competition Law, op.cit*., pp. 73-75.

[48] CJEU, Judgment of 1 June 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269.

[49] MOURRE, *op.cit.*, p. 15.

applied for the annulment of the arbitral award arguing that the licensing agreement was a market-sharing arrangement in breach of EU competition law; an argument that was presented for the first time at this particular stage of proceedings. Upon dismissal of Benetton's application, the latter successfully applied for stay of enforcement of the award arguing that the award of damages would lead to the enforcement of an agreement already void and invalid under the EU competition rules. Subsequently, Eco Swiss continued the proceedings in cassation, where the Supreme Court after verifying the limited scope of the public policy plea under Dutch law, pointed out the fact that the application of the EU law by arbitrators might lead to an assessment *ultra petita* as well as to the fact that the incompetence of the arbitral tribunal to refer a case to the CJEU deprived it of the power to apply EU competition law on its own motion.

19. The judgment in *Eco Swiss* did not directly address the contested issue of arbitrability, but rather established the presumption of its existence under former art. 81 EEC Treaty (nowadays art. 101 TFEU) by concentrating its analysis on the effectiveness of EU competition law and its qualification as an element of public policy blocking the recognition and enforcement of arbitral awards in light of the provisions of the New York Convention.[50] This judgment, by implicitly ruling on the arbitrability of the EU competition rules, is forming part of the international debate on the arbitrability of antitrust disputes and proves the openness of the CJEU in the relevant legal trends outside the EU normative bubble. In that regard, it should be highlighted that it was published after the Supreme Court of the United States (hereinafter as "***SCOTUS***") delivered its judgment in the *Mitsubishi* case[51], which recognized for the first time the arbitrability of such disputes in the US legal order and set the standard for the other legal orders to follow.

20. *Mitsubishi* constitutes the landmark case which establishes the close link between competition law and international commercial arbitration. The dispute arose in the context of a vehicles distribution agreement between Soler, a company incorporated in Puerto Rico, and a joint-venture (hereinafter as "***Mitsubishi JV***"), created by the Swiss company Chrysler International S.A. and the Japanese company Mitsubishi Heavy Industries Inc., which provided for an arbitration clause under the rules of the Japan Commercial Arbitration Association. Soler, encountering difficulties on reaching the desired sales target, requested that sales were permitted beyond the geographical scope of the agreement and denied receiving the ordered deliverables. Subsequently, Mitsubishi JV requested from the U.S. Federal District Court to uphold a motion to compel arbitration proceedings for the disputes regarding the alleged breach of contract by Soler, while the later

[50] BLANKE, *EU Competition Arbitration, op.cit.*, pp. 1082-1083.

[51] SCOTUS, *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 U.S. 614 (1985).

counterclaimed that the disputed contract was in breach of the US antitrust legislation, and therefore the dispute could not be referred to arbitration. The U.S. Federal District Court, following an analogy from the *Scherk*[52] case on the arbitrability of disputes pertaining to the application of the US Securities Exchange Act of 1934 and emphasizing on the international character of the disputed contract, ordered the commencement of arbitral proceedings. Before reaching the SCOTUS, the case was rejected in appeal in light of the US Court of Appeals for the Second Circuit judgment in *American Safety Equipment*[53] case, which ruled on the non-arbitrability of the antitrust claims because of "*the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases*", and which - until that moment - constituted the leading case in that matter.

21. In Mitsubishi, the SCOTUS favored the arbitrability of the antitrust claims, suggesting that the smooth operation of the international transactions and the international trade carve the importance of the arbitral proceedings as the appropriate dispute resolution mechanism, even in antitrust cases. In that regard the judgment also praised the arbitrators' expertise and impartiality. Aiming to remove any relevant doubts, the SCOTUS struck a balance between the subjection of antitrust claims to arbitration and the application of the relevant antitrust rules, by providing two specific safeguards: the one being the arbitrators' obligation to apply the US antitrust rules, and the other being the ex post control of the arbitral award through the recognition and enforcement proceedings according to the New York Convention provisions ("**S*econd Look Doctrine***").[54] The latter, in line with the minimal nature of the judicial substantive review of arbitral awards should be limited to the verification that "*the legitimate interest in the enforcement of the antitrust law has been addressed*" and that arbitrators took cognizance of the related issues and decided on them.[55]

22. Returning to the arbitrability of claims under the EU competition rules, it should be highlighted that, in view of the modernization of EU competition law instituted by Reg. 1/2003 and its underlying rationale, the positive stance on the arbitrability of the antitrust disputes should cover the entirety of art. 101 TFEU, including[56] the exceptional provisions of art. 101 par. 3 TFEU.[57] In

---

[52] SCOTUS, *Scherk v Alberto-Culver Co*., 417 U.S. 506 (1974).

[53] SCOTUS, *American Safety Equipment Corp. v J.P. McGuire & Co*, 391 F.2d 821(2d Cir. 1968).

[54] MOURRE, *op.cit.*, pp. 27-28, ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit*., p. 119.

[55] MOURRE, *ibid.*

[56] On the way the Commission has endorsed the arbitrability of disputes under art. 101 par. 3 TFEU *see* Johannes LÜBKING, *loc.cit*..

[57]The case law of the CJEU, from an early point has supported the fact that art. 101 TFEU should be regarded as an invisible whole, *see* Judgment of 6 April 1962, *De Geus en Uitdenbogerd v Bosch and Others*, C-13/61, ECLI:EU:C:1962:11, p.52; CJEU, Opinion of Advocate General Lagrange of 27 February 1962, *De Geus en*

this way, it is safeguarded that arbitration, as a dispute resolution mechanism, is not by any means underprivileged or lacking effectiveness compared to traditional litigation, especially regarding cases where an arbitrator would have to split the referred dispute and refer matters to the national judiciary in relation to the application of art. 101 par. 3 TFEU.[58] Following the same rationale, and keeping in mind that the national courts have turned into full enforcers of art. 101 and 102 TFEU,[59] disputes under art. 102 TFEU are also arbitrable, by analogy.[60]

23. Therefore, EU competition law disputes under both art. 101 and 102 TFEU are perceived as validly been brought to proceedings before arbitral tribunals.

II.B. The applicable law in arbitral proceedings

24. The purpose of the present chapter is to examine the power of the arbitrators to apply EU competition law in commercial arbitral proceedings depending on whether the *lex contractus* constitutes the law of an EU Member State (**II.B.1.**) or not (**II.B.2**.). In that regard, the use of mechanisms of private international law, and especially the theory of overriding mandatory provisions (hereinafter as "***overriding mandatory rules***" or "***overriding mandatory norms***")[61], is considered most contributory to the resolution of the disputes.

25. As an introductory remark, and with reference to the use of these mechanisms of private international law by the arbitrators, it would be wise to bear in mind that this use is framed within the following particularity: arbitrators are not bound by a specific private international law whose conflict-of-laws rules and overriding mandatory norms they are to apply.[62] The latter is due to the fact that international commercial arbitration pertains to no forum and is bound by no *lex fori*, given that its seat cannot be properly considered a *forum*.[63] This particularity is clearly depicted in

---

Uitdenbogerd v Bosch and Others, C-13/61, ECLI:EU:C:1962:3, p.66. In the same direction, *see* the analysis at Mihail DANOV, "Jurisdiction and Judgments in Relation to EU Competition Law Claims", in : Paul BEAUMONT, Jonathan HARRIS (eds), *Studies in Private International Law Volume 3*, Oxford and Portland, Oregon, 2011, p.242 -246. *Contra* Maud PIERS, "How EU Law Affects Arbitration and the Treatment of Consumer Disputes The Belgian Example", *Dispute Resolution Journal*, Vol. 59, Issue 4, 76-85, 2005, p.80.

[58] Laurence IDOT, "Arbitration and the Reform of Regulation 17/62" in : Claus-Dieter EHLERMANN, Isabella ATANASIU (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oregon USA, 2003, p. 317 as quoted in BLANKE, *EU Competition Arbitration*, *op.cit.*, p.1083.

[59] KOMNINOS, *Arbitration and EU Competition Law*, *op.cit.*, p.198.

[60] BLANKE, *EU Competition Arbitration*, o*p.cit.*, p. 1084..

[61] *Infra* I.B.1.b. .

[62] Marc-André RENOLD, *Les conflits de lois en droit antitrust : contribution à l'étude de l'application internationale du droit économique,* Zürich: Schulthess, 1991, p. 102.

[63] IDOT, *Arbitration and the Reform of Regulation 17/62*, *op.cit.*, p. 313.

the way legal instruments on international commercial arbitration indicate to arbitrators how to determine the *lex contractus* in case of the absence of *lex voluntatis*;[64] the arbitrators are free to resort to the conflict-of-laws rules which they consider applicable for the determination of the *lex causae*. In that regard, the abritrators are expected to take into consideration both the expressed will of the parties, as portrayed in the arbitration clause, as well as the legitimate expectations[65] of the parties in the course of the arbitral proceedings. It is also depicted in the way foreign overriding mandatory rules are applied by the arbitral tribunal, as will be further analyzed below.

II.B.1. When the *lex contractus* is the law of an EU Member State

26. In the cases where the applicable law in the arbitration is that of an EU Member State, the application of the EU competition rules, as part thereof, seems to be imperative, or -better framed- unavoidable for the arbitrators on the basis of the principle of primacy of the EU law (**II.B.1.a.**), as well as in light of the overriding mandatory norms of the *lex contractus* (**II.B.1.b.**).

II.B.1.a. The principle of primacy and direct effect of EU law

27. As mentioned above, when the parties of the arbitration have chosen the law of an EU Member State as applicable law, EU law and its competition rules will automatically come into play by virtue of[66] the ***principles of primacy***[67] and of ***direct effect***[68], according to which EU law prevails over any conflicting national provision and EU law creates individual enforceable rights which can invoked before and enforced by national courts, respectively[69]. These principles generate a specific duty for the national judges to equip the EU law rights which are granted to individuals

[64] *See* art. 28 par.2, *UNCITRAL Model Law on International Commercial Arbitration*, art. 21 par. 2., ICC International Court of Arbitration, Rules of Arbitration (hereinafter as "***ICC Rules of Arbitration***"), ICC No. publication 808, available at

https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last access 29.10.2017).

[65] Charalambos PAMBOUKIS, "On Arbitrability: The Arbitrator as a Problem Solver", in : Loukas MISTELIS, Stavros BREKOULAKIS (eds.), *Arbitrability : International & Comparative Perspectives*, Wolters Kluwer Law and Business, Kluwer Law International. The Netherlands, 2009, p. 124-125.

[66] BLANKE, *EU Competition Arbitration*, *op.cit*, p. 1092.

[67] CJEU, Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1.

[68] CJEU, Judgment of 15 July 1964, *Costa v E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66; CJEU, Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA (II)*, C-106/77, ECLI:EU:C:1978:49.

[69] Koen LENAERTS, Tim CORTHAUT, "Of birds and hedges: the role of primacy in invoking norms of EU law", *European Law Review*, Vol.31, Issue 3, 287-315, 2006, pp. 289-290.

with full and effective judicial protection.[70] Therefore, by analogy, in the context of international commercial arbitration, the parties should by no means be deprived of the full and effective protection reserved to the rights which they acquire through EU law, and in particular through EU competition law. This analogy can be supported by the fact that notwithstanding the structural differences between litigation and arbitration[71], the arbitral tribunal remains an adjudicatory authority bound to provide an effective[72] resolution to the dispute to which the parties assigned it, *i.e.* to provide an enforceable award, the same way as the national courts are bound to provide full and effective judicial protection to the individuals. The individuals would have never confined the resolution of their dispute to an entity and a procedure which would not protect their rights.

28. In fact, EU competition rules are binding upon the Member States, granting rights which are to be enforceable by private entities, and from which derogation cannot be effected. These rights are equipped with direct effect[73], and require full and effective judicial protection. As early as 1974, the CJEU in *BRT v SABAM*[74] ruled that the prohibitions laid down in the current art. 101 and 102 TFEU "*by their very nature [are] to produce direct effects in relations between individuals",* and *"create direct rights in respect of the individuals concerned which the national courts must safeguard*".[75] Therefore, since the specific provisions of EU competition law grant rights to individuals, which are invoked and applied in judicial proceedings *vis-à-vis* other individuals, producing a horizontal direct effect[76], by analogy, these same rights should be also invoked and applied in arbitral proceedings, which also provide a resolution mechanism for disputes arising between individuals and refer to the latter's rights. Some years later, in *Alsthom Atlantique,* the

---

[70] Takis TRIDIMAS, "Liability for breach of community law: growing up and mellowing down?", *Common Market Law Review*, Vol. 38, Issue 2, 301-332, 2001, p.302. As regards the duty of the national courts to safeguard the effectiveness of EU competition rules *see* CJEU, Judgment of 24 January 1991, *Alsthom Atlantique SA v. Compagnie de construction Sulzer SA*, C-339/89, ECLI:EU:C:1991:28, p.11.

[71] The arbitral tribunals are by nature distinct from national courts, since they belong to no forum as already mentioned. As will be analysed further below, the arbitral tribunals cannot be considered as national courts competent to make a preliminary reference to the CJUE, *see* CJEU, Judgment of 23 March 1982, *Nordsee v Reederei Mond*, C-102/81, ECLI:EU:C:1982:107, p.10-13.

[72] In arbitral proceedings the effective resolution of the dispute is linked to the duty of the arbitrators to issue an award which can be enforceable, s*ee* Martin PLATTE, "An Arbitrator's Duty to Render Enforceable Awards", *Journal of International Arbitration*, Vol. 20, Issue 3, 307-312, 2003, p. 308. Also *see* art. 42, ICC Rules of Arbitration.

[73] On the horizontal and vertical direct effect of the EU competition law, *see* Lawrence IDOT, "Arbitration and EC Law", *International Business Law Journal*, Issue 5, 561-591, 1996, p. 566, as well as the point 3 of the Preamble the Damages Directive. The horizontal effect allows an individual to invoke and enforce the rules *vis-à-vis* other individuals, while the vertical effect permits the possibility to invoke and enforce the rules against the State.

[74] CJEU, Judgment of 30 January 1974, *BRT v SABAM*, C-127/73, ECLI:EU:C:1974:6.

[75] *BRT v SABAM*, p. 16.

[76] On the horizontality of the direct effect of EU Law *see* Bruno DE WITTE, "Direct effect, primacy and nature of the legal order", in : Paul CRAIG, Gráinne DE BURCA (eds), *The Evolution of EU Law (2nd Edition)*, Oxford University Press, Oxford, 2011, p. 363 seq; Takis TRIDIMAS, "Black, white and shades of grey : horizontality of directives revisited", *Yearbook of European Union Law*, Vol.21, Issue 1, 327-354, 2001.

CJEU referred to settled case law according to which the Treaties impose on Member States the obligation not to adopt or maintain in force any measure which would deprive the current art. 101 and 102 TFEU of their effectiveness, including the obligation of preventing national case law from "*favour*[ing] *the adoption of agreements, decisions or concerted practices contrary to art. 85* [current art. 101] *of the Treaty or to reinforce their effects*"[77]. Since this obligation is incumbent upon the courts of the Member States when they are also called to recognize and enforce an arbitral award, this could insinuate a duty from the part of the arbitrators to decide in light of this obligation *rationale* with the aim of preserving the efficiency of the arbitral proceedings.

29. Therefore, the granting of EU rights by EU competition law can advocate in favor of the application of EU competition rules in proceedings in international commercial arbitration.

II.B.1.b. Overriding mandatory rules of the *lex contractus*

30. Apart from granting enforceable rights to individuals in light of the principles of direct effect and primacy of EU law, EU competition rules are considered to qualify as overriding mandatory rules.[78] Norms protecting free competition are generally considered to pertain to the category of overriding mandatory rules.[79] This offers a new argument and a new possibility for their application in the merits of arbitral proceedings - still as an integral part of the *lex contractus,* if the latter is the law of an EU Member State.[80]

31. Overriding mandatory norms are defined to be the rules which determine their own scope of application and whose application in both domestic and foreign legal relationships - irrespective of the law that governs the relationship - is considered crucial for the protection of the political, social or economic order of the State.[81] They cannot be overstepped due to the parties' will to have

[77] *Alsthom Atlantique*, p.11.

[78] Julian LEW, "Competition Laws: Limits to Arbitrators' Authority", in : Loukas MISTELIS, Stavros BREKOULAKIS (eds.), *Arbitrability : International & Comparative Perspectives*, Wolters Kluwer Law and Business, Kluwer Law International, The Netherlands, 2009, p. 241-262; Marc FALLON, Stéphanie FRANCQ, "Private Enforcement of Antitrust provisions and the Rome I Regulation", in : Jurgen BASEDOW, Stéphanie FRANCQ, Laurence IDOT (eds), *International Antitrust Litigation : Conflict of Laws and Coordination, Hart Publishing*, Oxford and Portland, Oregon, 2012, p. 73; ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.,* p. 167.

[79] Laurence IDOT, "Le droit de la concurrence", in : Angelika FUCHS, Horatia MUIR WATT, Etienne PATAUT (eds), *Les Conflits de lois et le système juridique communautaire*, Dalloz, Paris, 2004, p. 278.

[80] Pavle FLERE, "Impact of EC Competition Law on Arbitration Proceedings", *Slovenian Law Review*, Vol. 3, Issue, 1, 155-175, 2006, p. 166.

[81] Phocion FRANCESKAKIS, *Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois*, Revue critique de droit international prive, Paris, 1966, p. 1-38; Σπυρίδων ΒΡΕΛΛΗΣ, *Ιδιωτικό Διεθνές Δίκαιο*, Νομική Βιβλιοθήκη, Αθήνα, 2008,p. 22; Rodolfo DE NOVA, "Conflits des lois et norms fixant leur proper domaine d' application",in : Jacques Maury (ed), *Mélanges offerts à Jacques Maury, Tome I Droit international privé et public*, Dalloz et Sirey, Paris, 1960, p. 391 seq; Thomas GUEDJ, "The theory of Lois De Police,

recourse to international arbitration. As Goldman stated, referring to the application of antitrust law in that context, "*l'arbitrage ne doit en effet pas être un moyen de se dérober à l'application de lois impératives*".[82]

32. Keeping in mind the above definition of overriding mandatory rules, the CJEU has been generously contributing and positively elaborative in promoting the qualification of EU competition rules as overriding mandatory norms, recognizing the service of particular and higher interests of the State as well as that the determination of the scope of application by the text of these rules itself. According to settled case law, EU competition law constitutes a fundamental set of rules, respect to which is perceived as necessary and essential for "*the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market*"[83] - the latter constituting one of the "*constitutional*"[84] objectives of the Treaties and impetus of the European integration as a whole.[85] In fact, the CJEU has recognized[86] that the need of protecting the operation of undistorted competition in the internal market leads to the creation of overriding mandatory rules, even outside the core of the EU competition rules.

33. Staying within the limits of the definition of overriding mandatory norms, EU competition rules define their own scope of application in an imperative manner.[87] They are to be applied and prohibit business agreements which could affect the trade between the Member States and which have as object or effect a restrictive, distortive or preventive appreciable impact on the competition

---

a functional trend in continental private international law : a comparative analysis with modern American theories", *The American journal of comparative law*, Vol.39, Issue 4, 661-697, 1991, as well as case law of CJEU, Judgment of 23 November 1999, *Joint Cases Jean-Claude Arblade, Arblade & Fils SARL, and Bernard Leloup, Serge Leloup, Sofrage SARL*, C-369/96 and C-376/96, ECLI:EU:C:1999:575, p. 30.

[82] Berthold GOLDMAN, "L'Arbitrage International et le Droit de la Concurrence", *ASA Bulletin*, Vol.7, Issue 3, 260-301, 1989, p.294.

[83] *Eco Swiss*, p. 36, CJEU, Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465, p.20.

[84] Ρεβέκκα-Εμμανουέλα ΠΑΠΑΔΟΠΟΥΛΟΥ, "Το καθεστώς ελεύθερου ανταγωνισμού στην Ευρωπαϊκή Κοινότητα υπό το φως της δημοκρατικής αρχής: Συγκλίσεις και αποκλίσεις", *Ευρωπαίων Πολιτεία*, 2/2009, pp. 373-393, where it is highlighted that the financial constitution of the EU, inspired by the theory of ordoliberalismus and enshrined in the creation of "*an open market economy with free competition*" presupposes and shapes the role of the EU competition law as a *sine qua non condition* for the establishment of the internal market. In the same regard, *see* Κοσμάς ΜΠΟΣΚΟΒΙΤΣ, «Κοινοτικός Δικαστής και οικονομικό σύνταγμα: η συμβολή του ΔΕΚ στη διαμορφωση του συντακτικού οικονομικού προτύπου της Ευρωπαϊκής Κοινότητας», *Το Σύνταγμα*, 2/2001, pp.235-247.

[85] *See* art. 3 par. 3 of the Treaty on the European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, OJ C 115/13, 9.5.2008 (hereinafter as "***TEU***"), as well as art. 26 TFEU, art. 120 TFEU.

[86] CJEU, Judgement of 9 November 2000, *Ingmar GB*, C- 381/98, ECLI:EU:C:2000:605, pp. 21-24, according to which certain provisions of the Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents qualify as overriding mandatory norms in light of the aim of this exact Directive to protect the freedom of establishment and the operation of undistorted competition in the internal market. The same rationale was followed also in CJEU, Judgment of 17 October 2013, *Unamar*, C-184/12, ECLI:EU:C:2013:663, pp. 37, 40-42, 47seq.

[87] FALLON, FRANCQ, *op.cit.*, p. 74.

within the internal market. As held by CJEU in *Société Technique Minière*[88],*"it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*". The same dictum and reasoning is found affirmed and reiterated in *Voelk v Vervaecke*[89], as well as in *Javico v Yves Saint Laurent Parfums*[90], and nowadays constitutes settled case law. In addition, a quantitative element is added to the effect of the anticompetitive agreement on trade and competition within the internal market, since it should be appreciable. This corresponds to the fact that the application of EU competition law is guided by the *de minimis principle*[91] and requires a certain sort of magnitude in the scale of transactions and businesses.[92] Therefore, EU competition law, serving the greater objective of the functioning of the internal market and setting its material scope on its own, is qualified as a set of overriding mandatory rules.

34. Another element which can reinforce and cement the characterization of EU competition rules as overriding mandatory norms is inferred from their extraterritorial application, as recognized and defined by the CJEU. Extraterritoriality[93] verifies that EU competition law applies both in domestic and (what would be qualified as) "*foreign*" to the EU legal order relationships indistinctively. However, this extraterritoriality is not clearly and explicitly based on the effects doctrine which is seen thriving in the US;[94] a reason for which could be found in the problems regarding the CJEU's jurisdiction,[95] if the latter was to declare the effects doctrine at that level. The CJEU endorses the extraterritoriality of EU competition law, but in various relevant cases invokes and applies different tests to that direction.

---

[88] CJEU, Judgment of 30 June 1966, *Société Technique Minière v Maschinenbau Ulm,* C-56/65, ECLI:EU:C:1966:38, p.49.

[89] CJEU, Judgement of 9 July 1969, *Voelk v Vervaecke,* C-5/69, ECLI:EU:C:1969:35, p. 5.

[90] CJEU, Judgment of 28 April 1998, *Javico v Yves Saint Laurent Parfums,* C-306/96, ECLI:EU:C:1998:173, p.16.

[91] Richard WHISH, David BAILEY, *Competition Law* (7th Edition), Oxford University Press, UK, 2008, pp.140-141, 144.

[92] What is crucial for the *de minimis* doctrine is the effect of the agreement; not the extent of the participation of a particular undertaking in the agreement and the latter's subsequent separate effect on trade and competition. In that regard, *Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ C 101/81, 27.4.2004, as well as *Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis),* OJ C 368/13, 22.12.2001 where the determination of the minor importance is quantified and defined in numbers.

[93] ROSE, BAILEY, *op.cit.*, p. 56 seq.

[94]Anestis PAPADOPOULOS, *The International Dimension of Competition Law and Policy*, Cambridge University Press, New York, 2010, pp. 67-68.

[95] WHISH, BAILEY, *op.cit.*, p. 495.

35. In *ICI v. Commission*[96], the CJEU chose to refer to the economic entity doctrine[97] instead of proclaiming the effects doctrine, declaring that the relationship between a subsidiary and a parent company can form one economic unity[98] with a common unified conduct on the market for the purposes of the extraterritorial application of the rules on competition.[99] In this case, the European Commission imposed fines for a concerted practice which aimed at fixing prices for dyestuffs, while the applicant and fined entity, Imperial Chemical Industries Ltd, was having its registered office outside the EU. The latter argued that the production of effects in the internal market by actions alleged to be undertaken outside the EU could not empower the Commission to impose a fine for anticompetitive practice. On the contrary, the CJEU ruled that the actions for which the fine was imposed constituted practices carried out directly within the internal market,[100] since "*by making use of its power to control its subsidiaries established in the Community, the applicant was able to ensure that its decision was implemented on that market*"[101]. It continued to state that the separate legal personality of the subsidiary was not sufficient to exclude the possibility of imputing its conduct to the parent company; especially in cases where the subsidiary does not enjoy real autonomy in determining its action, as was the case at hand with the applicant holding all or at any rate the majority of the subsidiaries' shares and being able to exercise decisive influence over the policies of the subsidiaries on the selling prices within the internal market.[102]

36. In *Wood Pulp*[103], the CJEU was closer at pronouncing the effects doctrine, but preferred to remain in safe jurisdictional waters, and established the implementation doctrine by invoking traditional public international law criteria. It ruled that the EU competition rules were applicable regarding a concerted practice between - amongst others - undertakings in the United States, Canada, Finland, Norway and Sweden, since the anticompetitive agreement was implemented within the EU and irrespective of the implementation of the agreement by subsidiaries, agents or branches

---

[96] CJEU, Judgment of 14 July 1972, *ICI v Commission*, C-48/69, ECLI:EU:C:1972:70.

[97] Nonetheless, recognition of the effects doctrine was supported by Advocate General Mayras in the same case, *see* CJEU, Opinion of Advocate General Mayras of 14 July 1972, *ICI v Commission*, C-48/69, ECLI:EU:C:1972:32, pp. 593-609.

[98] However, the economic entity doctrine was later eased off in *Viho* (CJEU, Judgment of 24 October 1996, *Viho v Commission*, C-73/95 P, ECLI:EU:C:1996:405, p.16-17), where the CJEU ruled that a formation of a single economic unity by a parent company and its subsidiaries, within which unity the latter do not enjoy autonomy in determining their course of action cannot render applicable the EU competition law.

[99] *ICI v Commission*, pp. 135, 140.

[100] *Ibid*, p. 128.

[101] *Ibid*, p.130.

[102] *Ibid*, pp.132 - 139.

[103] CJEU, Judgment of 31 March 1993, *Ahlström Osakeyhtiö and Others v Commission*, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85, ECLI:EU:C:1993:120, pp. 11-18.

within the EU. A few years later in *Gencor*[104], a merger control case in which both companies involved were registered in South Africa, the CJUE complemented the implementation doctrine by referring to the foreseeability "*that a proposed concentration will have an immediate and substantial effect in the Community*"[105]. Despite the fact that *Gencor* referred to a concentration, it is supported that the CJEU's reasoning on the effects of the anticompetitive conduct in the EU could be also used in relevant cases under art. 101 par. 1 TFEU.[106] Later, in *Intel*[107], it was clarified that the implementation and the effects doctrine are alternative and not cumulative approaches towards the establishment of the extraterritoriality of the EU competition law.

37. It is, therefore, deduced from the aforementioned that irrespective of the doctrine which the CJEU chooses to apply, settled case law takes a firm and positive stance in favor of the extraterritorial application of the EU.

38. However, despite the qualification of EU competition law as overriding mandatory norms of the *lex contractus*, this does not mean that EC competition law should be automatically applied once the applicable law identifies to the law of an EU Member State, and, by that, entails the application of EU Law. This particular choice of applicable law cannot *per se* lead to the fulfillment of the specific conditions laid down for the application of EU competition rules, which have to be reviewed separately; it simply indicates that the EU competition law is potentially applicable.[108] Therefore, it is the localizing effect of the anticompetitive conduct and its operation within the territory of the EU that define the material scope of the EU competition rules and render them applicable.

39. The fulfillment of the specific criteria for the application of EU competition law are attentively examined in the case of arbitral forums sitting outside the borders of the EU. Switzerland constitutes a characteristic example thereof; the arbitral tribunals are to apply art. 101 and 102 TFEU only when the following criteria are cumulatively satisfied, *i.e.* when the parties invoke their application, the conditions for their application are met, and the law of an EU Member State

---

[104] CJEU, Judgment of 25 March 1999, *Gencor v Commission*, T-102/96, ECLI:EU:T:1999:65.

[105] *Ibid*, p. 90.

[106] Jonathan FAULL, Lars KJOBYE, Henning LEUPOLD, Ali NIKPAY, "*Part I General Principles, 3 Article 101, D Jurisdiction*", in : Jonathan FAULL, Ali NIKPAY, Deirdre TAYLOR (eds), *Faull & Nikpay: The EU Law of Competition* (3rd Edition), Oxford University Press, Oxford, UK, 2014, p.305.

[107] CJEU, Judgment of 12 June 2014, *Intel Corp. v Commission*, T-286/09, ECLI:EU:T:2014:547, pp.236-237, upheld in CJEU, Judgment of 6 September 2017, *Intel Corporation Inc.. v Commission*, C-413/14 P, ECLI:EU:C:2017:632, pp.40-47.

[108] KOMNINOS, *Arbitration and EU Competition Law*, *op.cit.*, p. 201; Philippe PINSOLLE, "Private enforcement of European Community competition rules by arbitrators", *International Arbitration Law Review*, Vol. 7, Issue 1, 14-22, 2004, p. 19; ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.*, p.150.

is determined as the *lex contractus*.[109] Reviewing compliance with the same criteria is also the case in arbitral proceedings which are more closely linked to the EU legal order; not only through the *lex contractus* but also through the *locus arbitri*, when the latter is found within the EU. Notably, the combination of both shows a closer affinity to EU law, and might be an important indication of the localizing effect for the implementation of EU competition law. Therefore, its application should be effected in an easier and less doubtful way, since, given the facts above, the arbitrators might commence their examination with a subtle "presumption" and an underlying "predisposition" that EU competition law applies.

II.B.2. When the *lex contractus* is not the law of an EU Member State

40. The issue of the application of EU competition rules in the merits of a case brought before an arbitral tribunal can also arise in cases where the law of a non - EU Member State is determined as the applicable law in the arbitral proceedings. This can be due to the express choice of the parties or, in the case of absence of *lex contractus*, it can result from the arbitrators' reasoning in determining the applicable law through the instruments provided for by private international law. However, in both cases, despite the fact that EU law and its provisions on competition cannot be applied as part of the *lex contractus*, there are still ways of opening the door to EU competition rules and render them applicable in the arbitral proceedings via their qualification as overriding mandatory norms.

41. In that regard, the importance of distinguishing between the cases where the *locus arbitri* is within the EU and those where the seat of arbitration is found outside the EU could be debated. This is due to the fact that unkile the procedural overriding mandatory rules of the *lex loci arbitri*, which are considered to bind the arbitration tribunal irrespective of the applicable law,[110] there is no concrete answer regarding the substantive overriding mandatory rules of the seat of the arbitration, *i.e.* the EU competition rules as overriding mandatory rules of a *locus arbitri* within the EU. It is pointed that there is no actual consensus as to whether a nexus stronger than the mere seat of the

[109] ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.,* p. 151. *Contra* Marc BLESSING, "Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts", in : Nedim Peter VOGT (ed), *Swiss Commercial Law Series Volume 9,* Helbing & Lichtenhahn, Frankfurt, 1999, p. 34-39, with specific reference to the cases *Ampaglas v. Sofia* and *G. SA v. V. SpA,* as cited therein. According to BLESSING Swiss arbitral tribunals are to have regard and directly apply competition rules even if the latter belong to a foreign legal order and irrespective of the applicable law chosen by the parties.

[110] Roy GOODE, "The role of the lex loci arbitri in international arbitration", *Arbitration International,* Vol. 17, Issue 1, 19-39, 2001, as quoted in George BERMANN, "Mandatory rules of law in international arbitration", in : Franco FERRARI, Stefan KROLL (eds), *Conflict of Laws in International Arbitration,* Sellier European Law Publishers, Munich, 2011, p.330.

arbitration is required for the application of these substantive provisions, or as to how compelling the underlying values of the State of the seat of arbitration must be.[111] This reticence on meeting consensus - or, otherwise, absence of concrete answer - is linked to the fact that international commercial arbitration pertains to no forum and is bound by no *lex fori*,[112] given that its seat cannot be properly considered a *forum*.[113]

42. Nonetheless, under EU law, the fact that the seat of the arbitration is found within the EU can truly constitute a determining factor for the application of EU competition law[114]. In *Nordsee*[115], the CJEU affirmed that EU law should be observed and applied in its entirety throughout the territory of Member States, preventing parties to a contact from circumventing it through recourse to arbitration, since at some point the national judge will be called to reply to raised questions of EU law and apply it. This is most obvious at the point of the judicial review of the issued award, especially in the course of its annulment before the courts of the *locus arbitri*. Taking into account the high probability that the losing party seeking to annul the arbitral award for reasons of public policy pertaining to EU competition law, the arbitral tribunal is prone to safeguard the enforceability[116] of the award by applying EU competition rules and excluding the possibility of having it set aside for this exact reason.[117] The significance of this findings relates to the fact that EU competition law, as part of the *lex loci arbitrii*, is to be applied not only when the *lex contractus* is the law of an EU Member State, but also when the arbitrators are to decide[118] either as amiable compositeurs *ex aequo et bono* or based on the *lex mercatoria*[119].

---

[111] George A. BERMANN, "Mandatory rules of law in international arbitration", in : Franco FERRARI, Stefan KROLL (eds), *Conflict of Laws in International Arbitration*, Sellier European Law Publishers, Munich, 2011, p.331.

[112] Pierre LALIVE, "Transnational (or Truly International) Public Policy and International Arbitration" in : Pieter SANDERS (ed), *Comparative Arbitration Practice and Public Policy in Arbitration*, Kluwer Law and Taxation, Deventer, 1987, p.270-271.

[113] IDOT, *Arbitration and the Reform of Regulation 17/62*, *op.cit.*, p. 313.

[114] ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.*, p.152.

[115] *Nordsee*, p.14. This has been further verified in *Eco Swiss*, p. 32-34.

[116] As regards the duty of arbitrators to render an enforceable award *see* PLATTE, *loc.cit.*.

[117] PINSOLLE, *op.cit.* , p.22.

[118] ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.*, p.154.

[119] For a detailed analysis of the role of the *lex mercatoria* in international transactions *see* Χαράλαμπος ΠΑΜΠΟΥΚΗΣ, *Η Lex mercatoria ως εφαρμοστέο δίκαιο στις διεθνείς συμβατικές ενοχές : συμβολή στη γενική θεωρία του δικαίου των διεθνών συναλλαγών*, Εκδ. Αντ. Ν. Σάκκουλα, Αθήνα, 1996; Berthold GOLDMAN, "Frontières du Droit et Lex Mercatoria", *Archives de Philosophie du Droit*, T. IX, 177-192, 1964. In addition, Ole LANDO, "The Lex Mercatoria in International Commercial Arbitration", *International and Comparative Law Quarterly*, Vol. 34, Issue 4, 747-768, 1985; Harold BERMAN, Felix DASSER "The "new" law merchant and the old sources, content and legitimacy", in : Thomas CARBONNEAU (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Merchant Law*, Dobbs Ferry, New York, 1990, p.34.

43. Besides, practice of the ICC has shown that, even when the *locus arbitri* is not within the EU, and the *lex contractus* is not the law of an EU Member State, EU competition rules could still be applied. This application is linked to the extraterritoriality of EU competitition law, as has been elaborated above.[120] In *ICC Case 8626/1996*[121], an arbitral tribunal sitting in Switzerland ruled as illegal a non-competition clause by applying art. 101 TFEU and the block-exemption Regulation on know-how licensing agreements in force at that time, despite the fact that the New York law which was defined by the parties as l*ex contractus* might not have led to this result. The reasoning of the arbitral tribunal was based on the fact that the disputed matter of the anti-competitive clause would have an effect on the EU Member States, and that the arbitrators should have due regard to issue an award that is in fact enforceable. The same has been decided in *ICC Case 10246/2000*[122] where the *locus arbitri* was in Switzerland and the *lex contractus* was the Swiss law, but the arbitral tribunal ruled on the application of the EU competition rules on the basis of the effects that the disputed agreements brought in the internal market. The extraterritoriality of the EU competition law in light of the effects produced in the internal market has also been affirmed in *ICC Case 731/1992*[123] and *ICC Case 7181/1992*[124].

44. Therefore, as indicated by the previous ICC case law and as will be further analyzed, irrespective of the *lex contractus* and the *lex loci arbitrii*, EU competition rules might still be applicable in arbitral proceedings as foreign overriding mandatory norms[125].

45. However, this application of foreign overriding mandatory norms in international commercial arbitration was not always well accepted; it was rather fiercely denied by arbitration doctrine and practice on the basis of the parties' autonomy of will and the arbitrator's obligation to comply with the latter when there was an expressed choice of law.[126] In addition, the strict territoriality of public

---

[120] *Supra* II.B.1.b, par. 34-37.

[121] ICC Case No 8626/1996, *ICC Bulletin,* Vol.14, Issue 2, 2003, p. 55-59.

[122] ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.*, pp.161-162.

[123] Herman VERBIST, "The Application of EC Law in ICC Arbitrations: Presentation of Arbitral Awards", in : *International Commercial Arbitration in Europe- ICC Special Supplement*, ICC Bulletin, Vol. 33, 33-57, Paris, 1994, pp. 43-44, as quoted in ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.*, p.162.

[124] *ICC Case 7181/1992, ICC Bulletin,* Vol. 6, Issue 1, 1995, p.55.

[125] Foreign overriding mandatory rules are defined those which belong neither to the *lex causae* nor to the *lex fori, see* Χρυσαφώ ΤΣΟΥΚΑ, "Το πρόβλημα των αλλοδαπών κανόνων αμέσου εφαρμογής στο πλαίσιο του δικαίου της Ευρωπαϊκής Ενώσεως", *Επιθεώρησις Εργατικού Δικαίου*, Τόμος 76, Τεύχος 1, 65-81, 2017, σελ. 71. In case of international arbitration where, as explained, there is no *lex fori*, as foreign overriding mandatory rules should be perceived the ones who belong neither to the *lex causae* nor to the *lex loci arbitri*. For a detailed analysis on the role of foreign overriding mandatory rules within the methodological structure of the private international law, *see* Χρυσαφώ ΤΣΟΥΚΑ, *Οι αλλοδαποί κανόνες αμέσου εφαρμογής και η σημασία τους ως προς την μεθοδολογική ταυτότητα του ιδιωτικού διεθνούς δικαίου*, Εκδ. Αντ. Ν. Σάκκουλα, Αθήνα, 1995.

[126] Daniel HOCHSTRASSER, "Choice of Law and "Foreign" Mandatory Rules in International Arbitration", *Journal of International Arbitration*, Vol. 11, Issue 1, 57-86, 1994, p. 58.

law, its political character, as well as its connection to interests different from the one pursued by private law reinforced the negation of foreign overriding mandatory rules being applicable in an international commercial arbitration.[127] Besides, the application of EU competition rules as foreign overriding mandatory rules might not be so straightforward as would be the case if they constituted overriding mandatory rules of the *lex contractus*. It is generally accepted that international arbitrators have the possibility but are not requested to raise the issue of a third country's mandatory rules *sua sponte*.[128] This is supported by an argument *a minori ad maius* based on the way national courts apply foreign overriding mandatory norms by recognizing the parties' burden of invoking them and requesting their application.[129]

II.B.2.a. The *lex contractus* permitting the application of foreign overriding mandatory rules

46. Nevertheless - and notwithstanding the extraterritorial effect of EU competition rules as acclaimed by the CJEU - the application of foreign mandatory norms in international commercial arbitration depends on the possibility that the applicable law (of a non-EU Member State) allows or requests the adjudicator - either judicial, or, in the case at hand, arbitral - to apply mandatory norms which do not belong to its legal order, but are, however, pertinent to the dispute. [130] This can be the example of art. 19 of the Swiss Federal Statute on Private International Law (hereinafter as "***Swiss PIL***")[131], which allows taking into account foreign mandatory norms when this is dictated by the interests of one of the parties and when there is a close link between the facts of the case and the legal order whose mandatory norms are called to be applied.[132] In *ICC Case 7673/1993*[133], by virtue of art. 19 of the Swiss PIL, the arbitral tribunal decided to apply EU competition law, irrespective of the fact that the contract and the dispute were subject to Swiss law. A very interesting point in the reasoning of the arbitrators in favor of the application of the EU competition

---

[127] *Ibid, loc.sit.*.

[128] BERMANN, *op.cit.*, p. 336.

[129] *Ibid, loc.cit.*.

[130] KOMNINOS, *Arbitration and EU Competition Law*, *op.cit.*, p. 201.

[131] "*1. When interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to by this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law. 2. In deciding whether such a provision is to be taken into consideration, one shall consider its aim and the consequences of its application, in order to reach a decision that is appropriate having regard to the Swiss conception of law.*", Art. 19, Swiss Federal Statute on Private International Law of 18 December 1987, translated in English available at

http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_from_1_1_2017.pdf (last access 30.10.2017).

[132] Pierre LALIVE, "The New Swiss Law on International Arbitration", *Arbitration International*, Volume 4, Issue 1, 2-24, 1988, p. 13.

[133] ICC Case 7673/1993, *ICC Bulletin*, Vol. 6, Issue 1, 1995, p. 57 seq.

rules in this particular case is found on the argument that not solely art. 19, but also art 187 par. 1[134] of the Swiss PIL lead to the same result. Art. 187 par. 1 of the Swiss PIL makes no reference to foreign overriding mandatory norms; it simply states that the "*arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection*". However, it was ruled that based on what is generally agreed, this provision is interpreted as meaning that "*arbitrators must or at least may observe the international public policies of other States or of the European Communities irrespective of the substantive law applicable*".[135]

47. Despite the existence of a concrete provision permitting the application of foreign mandatory norms, *i.e.* art. 19 of the Swiss PIL, the arbitrators in the case at hand, felt inclined to state that a neutral provision on the choice of the *lex contractus* somehow inflicted upon them the obligation to take into account the foreign overriding mandatory norms which could be potentially applicable. This could be attributed to an activism on behalf of the arbitrators, as well as to the discretion and the freedom with which they perceive that they should - and with which they might actually do - approach and execute their dispute-resolution duties. Nevertheless, the prioritization of art. 187 against art. 19 of the Swill PIL could be justified on the basis of its nature as *lex specialis* to the latter,[136] while a coherent and teleological approach would reconcile both through fusion and interpretation of art. 187 in light of the provision of art. 19 Swiss PIL, allowing foreign overriding mandatory norms in arbitration as well.

II.B.2.b. The *lex contractus* not permitting the application of foreign overriding mandatory rules

48. The previous observance on the discretion and freedom of the arbitrators is linked to the doctrinal solutions which were proposed regarding the way arbitrators should endeavor examining the application of EU competition law when the law of a non-EU Member State, as *lex contractus*, does not provide for the application of foreign overriding mandatory norms.

---

[134] Art. 187, Swiss Federal Statute on Private International Law of 18 December 1987, translated in English available at

http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_from_1_1_2017.pdf (last access 30.10.2017).

[135] Gordon BLANKE, "The Role of EC Competition Law in International Arbitration : A Plaidoyer", *European Business Law Review*, Vol. 16, Issue 1, 169-181, 2005, p. 177.

[136] Pierre LALIVE, Jean-Francois POUDRET, Claude REYMOND (eds), *Le droit de l'arbitrage interne et international en Suisse*, Payot, Lausanne, 1989, p. 187. As *lex specialis* it should exclude the application of art. 19 PIL, and by consequence the application of foreign overriding mandatory norms in the arbitral proceedings, something which apparently incentivized the arbitrators in the case at hand to interpret art. 187 more freely and more broadly.

49. It has been supported as appropriate to have recourse to a conflict-of-laws analysis for the determination of the overriding mandatory norms which are pertinent and applicable to each case.[137] In this way, the arbitral tribunal will facilitate the application of the overriding mandatory rules of the law which is sufficiently closely connected with the substance of the dispute.[138] Therefore, it should be successful at safeguarding the enforceability of the award as well as at tackling any attempt of the parties to surreptitiously evade the application of EU competition rules by selecting as applicable law that of a non-EU Member State.[139] However, this approach seems to undermine and run counter to the special nature of the overriding mandatory norms, which define unilaterally their material scope and whose application takes precedence over any conflict-of-laws rules,[140] despite the fact that they both function supplementarily[141].

50. Another way of securing the application of foreign overriding mandatory rules in international arbitration is proposed through the theory of "*truly international (or transnational) public policy*".[142] The latter incorporates principles of universal justice, fundamental values and interests which are vital not only for a specific jurisdiction, but also for the broader international community.[143] In this reasoning, if the rules that are excluded from the *lex contractus* form part of a truly international public policy, the arbitrator should prioritize their application against the will of the parties. This argument, as the exactly previous one, is based on the arbitrator's duty to render

---

[137] DANOV, *op.cit.,* p. 238, footnote 90 making reference to various academic opinions in that regard, among others LANDO, *op.cit.*, pp. 767-768.

[138] *See* Alex MILLS, *Confluence of Public and Private International Law : Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law,* Cambridge University Press, UK, 2009, p. 290, who raises this point based on the international minimum standard of treatment as a corollary of the influence of the international economic law in private international law.

[139] DANOV, *loc.cit., supra* n.136.

[140] Σπυρίδων ΒΡΕΛΛΗΣ, *Προβλήματα ιδιωτικού διεθνούς δικαίου στην σύμβαση εργασίας*, Εκδόσεις Αντ. Ν.Σάκκουλα, Αθήνα-Κομοτηνή, 1989, p.51; Τατιάννα ΠΑΠΑΔΟΠΟΥΛΟΥ, *Ο ρόλος του δικάζοντος δικαστή στο ιδιωτικό διεθνές δίκαιο*, Εκδ. Σάκκουλα, Αθήνα-Θεσσαλονίκη, 2000, p. 130; Ιωάννης ΣΩΜΑΡΑΚΗΣ, *Η μέθοδος αναγνώρισης νομικών καταστάσεων στο Ιδιωτικό Διεθνές και Ευρωπαϊκό Δίκαιο*, Νομική Βιβλιοθήκη, Αθήνα, 2015 , p. 242.

[141] Χαράλαμπος ΠΑΜΠΟΥΚΗΣ, "Η επιλογή του εφαρμοστέου δικαίου και οι κανόνες αμέσου εφαρμογής στη Σύμβαση της Ρώμης για το εφαρμοστέο δίκαιο στις συμβατικές ενοχές", *Νομικό Βήμα,* 1992.1327, p.1339; Χρήστος ΜΕΪΔΑΝΗΣ, *Η επιφύλαξη της δημόσιας τάξης στο κοινοτικό ιδιωτικό διεθνές δίκαιο και ειδικώτερα στις συμβάσεις των Βρυξελλών του 1968 και της Ρώμης του 1980*, Αθήνα, 2003, Εθνικό Κέντρο Τεκμηρίωσης - Εθνικό Αρχείο Διδακτορικών Διατριβών, available at :https://www.didaktorika.gr/eadd/handle/10442/15514, p. 159 (last access 29.10.2017).

[142] Yves DERAINS, "Public Policy and the Law Applicable to the Dispute in International Arbitration", *ICCA Congress Series No 3*, 1986, p. 227.

[143] LALIVE, *Transnational (or Truly International) Public Policy and International Arbitration, op.cit.,* pp. 285–6.

enforceable awards and to prevent anything that could hinder them from developing full effect in the enforcing country.[144]

51. However, the solution of the transnational public policy encounters various evidentiary difficulties, mainly regarding the universality of the norm.[145] It is also surrounded by the discretion of the arbitrators to rely on it, and the absence of a concrete prescribed obligation to do so.[146] What is more, one of the biggest challenges for using the theory of translational public policy in the particular case of EU competition rules is found on the hurdles of qualifying the latter as part of the transnational public policy; the content of transnational public policy is abstract and vague, and still subject to further elaboration. According to the International Law Association's "*Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*" various cases indicate that corruption, drug trafficking, smuggling and terrorism are recognized as virtually internationally illicit activities; however there are no concrete examples of recognized transnational public policy.[147] Therefore, it can be suggested that recourse to the transnational public policy might create even more uncertainties and controversies, comparing to the intended objective of applying EU competition law and the fulfillment of the latter's prerogatives, distorting the desired ratio between the means used and the objective for whose attainment they have been used.

[144] Yves DERAINS, *op.cit.*, p. 255, where reference is made to the interim award in the Dow Chemical ICC Interim Award in ICC Case 4131/1982, IX Y.B. Comm. Arb. 131 (1984), and the wording of the arbitral tribunal that "*the tribunal will, however, make every effort to make sure that the award is enforceable at law. To this end, it will assure itself that the solution it adopts is compatible with international public policy, in particular, in France* [the country where the award as to be enforced]".

[145] Andrew BARRACLOUGH, Jeff WAINCYMER, "Mandatory Rules of Law in International Commercial Arbitration", *Melbourne Journal of International Law*, Volume 6, Issue 2, 205 - 244, 2005, p. 221.

[146] Michael PRYLES, "Reflections on Transnational Public Policy", *Journal of International Arbitration*, Vol. 24, Issue 1, 1-8, 2007, p. 7. It is to be noted that the author suggests a nuanced obligation-discretion of the arbitrators to refer to transnational public policy depending on whether they are empowered to decide *ex aequo et bono*, on the absence of choice of *lex contractus* by the parties or on the basis of an express choice of applicable law by the parties. He reckons more relevant to consider the application of translational public policy in the first two cases, while he perceives the choice of the parties on the *lex contractus* as restrictive to a possible discretion of the arbitrators to refer to transnational public policy.

[147] Pierre MAYER, Audley SHEPPARD, "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", *Arbitration International*, Vol.19, Issue 2, 217-248, 2003.

II.C. EU competition law as a ground of public policy

52. The other side of acknowledging EU competition law as overriding mandatory rules is its function as a ground of public policy,[148] leading to either having the arbitral award set aside as annulled[149] or hindering the recognition and enforcement thereof in light of art. V par. 2b of the New York Convention. In the present chapter we will examine the evolution towards the establishment of the EU competition rules as public policy through the CJEU case law on the *ex officio* application of EU law (**II.C.1.**), as well as the extent of judicial review on arbitral awards on the basis of EU competition law as public policy (**II.C.2.**).

II.C.1. From *ex officio* application to the creation of a European public policy

53. Before qualifying the EU competition law as a ground of public policy, the imperativeness of its application was emanating from argumentation on the duty of the judicial authorities to raise EU law issues *ex officio*, even when the parties tried to evade it, and always in light of the principles of effectiveness and equivalence[150]. However, according to the CJEU case law, this seemed to require quite a hard balance. The parties' autonomy and freedom of disposition constitute the cornerstone principle in civil proceedings, in a way that it is for the private parties to determine the remedy sought by their application, the type of action to lodge, the arguments and the appropriate defense, while it is for the judiciary to maintain a more passive role and decide on the merits of the case presented before it.[151] The conciliation of this passive role of the judiciary with the need to assure effective judicial protection of the rights granted by EU law undoubtfully raises questions as to the possibility of the *ex officio* application of EU competition rules by the national judges when adjudicating on the annulment or recognition and enforcement of an arbitral award in the national legal order.

54. The case law of the CJEU on the *ex officio* application of EU competition law by national courts could prove of valued assistance in perceiving the possibilities of its *ex officio* application by

[148] ΜΕΪΔΑΝΗΣ, *op.cit.*, pp.151-152.

[149] Art. 34 par. 2b (ii), UNCITRAL Model Law. For a relevant example from a Member State's perspective, *see* the provisions of Greek law on the annulment of arbitral awards for reasons of public policy, and more particularly art. 897 par. 6 of the Greek Civil Code for domestic national arbitral awards and art. 34 par. 2b (bb) of Law 2735/1999 (ΦΕΚ 167/A/18.08.1999) for domestic international arbitral awards. The latter provision stipulates that the national judge examines *ex officio* the compliance of the arbitral award with the Greek public policy.

[150] CJEU, Judgment of 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, C-33/76, ECLI:EU:C:1976:188, p. 5; CJEU, Judgment of 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, C-45/76, ECLI:EU:C:1976:191, pp.12-16.

[151] Sacha PRECHAL, Natalya SHELKOPLYAS, "National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and beyond", *European Review of Private Law*, Vol. 12, Issue 5, 589-611, 2004, p. 595.

arbitrators. More particularly, in *Van Schijndel*[152], the applicants in the main proceedings, who were refused exemption to the compulsory pension scheme for physiotherapists in the Netherlands, presented arguments based on EU law - and in particular the equivalent Treaty provision of the nowadays art. 101 TFEU - for the first time in cassation before the Dutch Supreme Court, and invoked that the lower courts should have entertained addressing these issues *propio motu*. The CJEU replied that, under the principle of equivalence, the national courts were indeed expected to raise issues of EU Law *ex officio,* if the domestic law permitted such an application by EU law,[153] as was in this particular dispute the case of grounds of public policy under Dutch law. However, according to the CJEU, this could not go so far as to distort the passive role assigned to the national courts and extend the ambit of the dispute as determined by the parties.[154] This respect for the procedural autonomy of the Member States should not be perceived as an "*à la carte*" *ex officio* application. Nevertheless, it constitutes a more conservative approach comparing to previous case law in *Verholen*[155]. In the latter, the CJEU decided that the right of an individual to rely on an EU directive after the time of its transposition has expired "*does not preclude the power for the national court to take that directive into consideration even if the individual has not relied on it*".[156]

55. In *Peterbroek*[157], the CJEU, staying close to the *Van Schijndel* rationale, had an additional element added to the formula; safeguarding the access of the national courts to the preliminary reference procedure was perceived as a guarantee for the effective judicial protection of EU rights and, therefore, advocated in favor of the power of the judiciary to raise issues of EU law *ex officio* and proceed to a preliminary reference, if needed.

56. The aforementioned cases might seem to be at odds, but a more careful look could discern a gradual evolution and correlation. *Verholen* might appear more generous and indulgent on the *ex officio* application of EU law, but it is not completely different from *Van Schijndel* despite their obvious differentiation on the facts of the cases - the first referring to the application of EU law in the lapse of the transposition time and the second to the application of EU competition law as a

---

[152] CJEU, Judgment of 14 December 1995, *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten*, Joined Cases C-430/93 and C-431/93, ECLI:EU:C:1995:441. .

[153] *Ibid*, p. 13.

[154] *Ibid*, p. 22.

[155] CJEU, Judgment of 11 July 1991, *Verholen and Others v Sociale Verzekeringsbank Amsterdam*, Joined cases C-87/90, C-88/90 and C-89/90, ECLI:EU:C:1991:314.

[156] *Ibid*, p. 15.

[157] CJEU, Judgment of 14 December 1995, *Peterbroeck, Van Campenhout & Cie v Belgian State,* C-312/93, ECLI:EU:C:1995:437, pp. 11-21.

ground of public policy. In *Verholen* the CJEU recognizes - in a defensive way - the discretion of the national judges to apply EU law *propio motu*, while in *Van Schijndel* the CJEU excludes the power of the national judges to apply EU law *ex officio* only in the cases where this is not permitted by national law for relevant domestic provisions. At this point it should be mentioned that grounds of public policy are usually addressed ex officio in domestic legal systems of the most Member States of the EU.[158] *Peterbroek* bolsters the space left open to national courts by *Van Schijndel* for the *ex officio* application of EU law, by offering a solid argument in favor thereof, based on the effective judicial protection acquired through the preliminary reference procedure. These considerations might suggest that the road was carefully paved for the next evolution, the "*liberation*" of the application of EU competition law from any specific provisions of national procedural laws, *i.e.* the acknowledgment of the EU competition rules as grounds of public policy and their incorporation as such in the national provisions of public policy by *Eco Swiss.*

57. In this case, the CJEU stated that the automatic voidance of an agreement concluded in breach of EU competition rules is dictated by the fact that the functioning of the rules on competition is one of the fundamental objectives of the Community,[159] so that when domestic rules of procedure permit the upholding of an application on setting aside an arbitral award for failure to observe national rules of public policy, the same should happen when there is failure to comply with the EU competition rules.[160] In this way, the CJEU embraced[161] the Second Look Doctrine, as previously expressed by SCOTUS in *Mitsubishi*; on the one hand, international arbitral tribunals should apply EU competition law when such issues are raised and are pertinent, because otherwise there would be the risk of delivering an award contrary to the public policy, and on the other hand, national courts are obliged to review the compliance of the arbitral awards in terms of EU competition rules and public policy and assure their uniform application within the EU.

[158] KOMNINOS, *EC Private Antritrust Enforcement, op.cit.,* p. 223.

[159] This has been highlighted by Advocate General Saggio in *Eco Swiss*, CJEU, Opinion of Advocate General Saggio of 25 February 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269, p. 36.

[160] *Eco Swiss*, pp. 36-39.

[161] *Eco Swiss*, p. 40, Renato NAZZINI, *Competition Enforcement and Procedure (2nd Edition)*, Oxford University Press, Oxford, 2016, p. 434.

58. Following *Eco Swiss*, the importance of the EU competition rules as fundamental for the objectives of the EU, has been repeated in subsequent case law of the CJEU, in *Courage*[162] and *Manfredi*[163], allowing us to refer to the emergence of a European public policy[164].

59. Public policy, albeit being described as a chameleon concept[165] due to its nuances and differentiations per State, constitutes a fundamental notion within every legal order. It represents the fundamental values and interests of the State and the society, and includes the essential legal, social, financial and cultural underpinnings of the legal order, as well as the recognized principles that form the notion of justice.[166] Having previously referred to the notion of transnational public policy, it should be mentioned at that point that some jurisdictions are further distinguishing domestic public policy in national and international; the latter being a more restricted area of public policy rules, applying in international situations and not in the purely domestic ones.[167]

60. This theoretical classification raises the question as to under which typology of public policy the aforementioned European public policy could be identified: national, international, transnational. The particular nature of the European public policy is depicted on the fact that it emanates from and mirrors the values of one single legal order - that of the EU[168] - but, at the same, it time relates to objectives belonging to a union of States rather than to one particular, and is expected to be applied by the Member States separately as a part of their own public policy.[169] This might permit

---

[162] *Courage,* pp.20-22.

[163] CJEU, Judgment of 13 July 2006, *Manfredi*, Joined cases C-295/04 to C-298/04, ECLI:EU:C:2006:461, p.31 where it is characteristically stated that "*it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts*".

[164] Olivier VAN DER HAEGEN, "European Public Policy in Commercial Arbitration: Bridge over Troubled Water?", *Maastricht Journal of European and Comparative Law*, Vol. 16, Issue 4, 449-476, 2009.

[165] PRECHAL, SHELKOPLYAS, *op.cit.*,p. 599

[166] Γιώργος ΠΕΤΡΟΧΕΙΛΟΣ, Αθηνά ΠΑΠΑΕΥΣΤΡΑΤΙΟΥ, Χρήστος ΖΟΥΜΠΟΥΛΗΣ, "Η διαιτητική επίλυση των διεθνών διαφορών" in : *σε* Χαράλαμπος ΠΑΜΠΟΥΚΗΣ, *Δίκαιο Διεθνών Συναλλαγών*, Νομική Βιβλιοθήκη, Αθήνα, 2010, p. 1305.

[167] Bernard HANOTIAU, Olivier CAPRASSE, "Public Policy in International Commercial Arbitration", in : Emmanuel GAILLARD, Domenico DI PIETRO, *Enforcement of arbitration agreements and international arbitral awards : the New York Convention 1958 in practice,* Cameron May, London, 2008, p. 787.

[168] *Van Gend en Loos*, p.12, where it is explicitly mentioned for the very first time that the EU (community at that time) "*constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.*".

[169] In the Member States that differentiate between domestic and international public policy, these considerations would pertain to the core of their international public policy, given that the main area where the *Eco Swiss* case law is to be applied relates to the public policy grounds in the recognition and enforcement of foreign arbitral awards and to the fact that national judges should make sure that foreign arbitral awards comply with the provision of the EU competition rules and do not undermine the objectives pursued by them. However, a fusion between these two categories of public policy is in fact observed between various EU Member States. An example could be inferred from the Greek legal system in light of the Judgments 14/2005 of the Greek Supreme Court (ΟλΑΠ 14/2015, ΤΝΠ ΝΟΜΟΣ) and 11/2009 of the Greek Supreme Court (ΟλΑΠ 11/2009, ΕφΑΔ 8-9/2009, 986).

to assert that the EU public policy is found at the crossroads of the three concepts of public policy mentioned above.[170] Despite the theoretical hurdles for the exact classification of EU competition rules as European public policy, the case law of the CJEU and the Second Look Doctrine proposed by it, indicate that their application through the relevant national provisions cannot be hindered and their function as grounds of public policy cannot be contested.

II.C.2. The extent of the judicial review on grounds of public policy

61. The logic behind the Second Look Doctrine would be impaired if there wasn't particular guidance as to the way this second look should be exercised. In *Mitsubishi,* SCOTUS favored the adoption of a "*Minimal Substantive Review*", according to which "*a minimal merits review of antitrust arbitral awards would not require intrusive inquiry, but it would be limited to ascertaining whether the tribunal took cognizance of the antitrust claims and actually decided them*".[171] As will be further shown directly below, the EU legal order does not estrange from this extent of judicial review of arbitral awards on grounds of EU competition law, without, however, explicitly referring to such a standard of review.

62. In *Eco Swiss* the CJEU noted that "*it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances*"[172], placing itself closer to a minimalist approach[173] which respects the principle of *res judicata* in international arbitration proceedings. These extreme circumstances include cases of hard core horizontal restrictions of competition that are repugnantly anti-competitive or cases where the arbitrators have completely ignored EU competition law, although it was argued sufficiently by the parties to arbitration.[174]

63. A restrictive approach towards the review on the application of EU competition rules as grounds of public policy has been also suggested by the CJEU, approximately one year after *Eco Swiss*, in *Renault*[175], a case concerning the recognition of an EU judgment within the EU under the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial

---

[170] VAN DER HAEGEN, *op.cit.,* p. 459.

[171] *Mitsubishi,* p. 3360.

[172] *Eco Swiss,* p. 35.

[173] Luca RADICATI DI BROZOLO, "Antitrust : a Paradigm of the Relations between Mandatory Rules and Arbitration : a Fresh Look at the "Second Look"", *International Arbitration Law Revie*w, Vol. 7, Issue 1, 23-37, 2004, p. 31.

[174] KOMNINOS, *Arbitration and EU Competition Law*, *op.cit.,* p. 214.

[175] CJEU, Judgment of 11 May 2000, *Renault,* C-38/98, ECLI:EU:C:2000:225.

matters,[176] applicable at the time. The referring court from Italy requested the CJEU whether it could refuse recognition of a judgment delivered in France by reasons of misapplication of the now art. 102 TFEU, and the CJEU replied that "*the court of the State in which enforcement is sought cannot* […] *refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or [EU] law was misapplied in that decision*"[177]. Although this case is different form our research question - since it refers to the recognition and enforcement of court judgments instead of arbitral awards and is, thus, related to the objective and principle of mutual trust between the Member States, which is not pertinent in the case of arbitration[178] - it constitutes, in light of the coherence and uniform application of EU law, a highly indicative paradigm as to how intrusive the judicial control on grounds of EU competition law as public policy is (not) perceived by the CJEU.[179]

64. Practice from the Member States also advocates in favor of a minimalist approach. The most well-known examples thereof are found in France, where the Paris Court of Appeals held both in *Thalès*[180] and in *Cytec*[181] that the violation of EU competition law as public policy in an international arbitration must be "*flagrant, effective and concrete*", or in other words sufficiently eye-catching ("*crève les yeux"*) in order to result in the setting aside of the arbitral award. Otherwise, it would require from the court to review the merits of the case and violate the procedural rule of prohibition of the review on the merits ("*révision au fond*"). German, Italian and Greek case law are also found close to the minimalist approach on the extent of review of violations of EU competition law as public policy.[182] In *Case 1665/2009*[183], the Greek Supreme Court stated that there was no violation of public policy because the arbitral tribunal had in fact taken into account and applied the EU competition rules by simply rejecting the relevant claims of the appellant on the merits; thus, there should not be any case of violation of public policy.

---

[176] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels, 1968, OJ L 299/32, 31.12.1972 (hereinafter as "***1968 Brussels Convention***").

[177] *Renault*, p. 33.

[178] CJEU, Judgment of 13 May 2015, *Gazprom*, C-536/13, ECLI:EU:C:2015:316, p. 37; CJEU, Opinion of Advocate General Wathelet of 4 December 2014, *Gazprom*, C-536/13, ECLI:EU:C:2014:2414, p. 154.

[179] In that regard, *see* KOMNINOS, *Arbitration and EU Competition Law*, *op.cit.*, pp. 219-220.

[180] Paris Court of Appeals, 18 November 2004, *Thalès Air Defence B.V. v GIE Euromissile, EADS France and EADS Deutschland GmbH*, (2005) Rev Arb 750; Denis BENSAUDE, "Thalès Air Defence BV v. GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law", *Journal of International Arbitration*, Vol. 22, Issue 3, 239-244, 2005, pp. 241-243.

[181] Paris Court of Appeals, 23 March 2006, *SNF SAS v Cytec Industries BV*, (2007) Rev Arb 100, confirmed by the French Supreme Court in Cour de Cassation, 4 June 2008, *SNF SAS v Cytec Industries BV*, (2008) Rev Arb 473.

[182] KOMNINOS, *Arbitration and EU Competition Law*, *op.cit.*, pp. 215-216.

[183] ΑΠ 1665/2009, ΤΝΠ ΝΟΜΟΣ.

65. On the contrary, Advocate General Wathelet in his elaborate opinion in *Genentech*[184] proposed a maximalist approach on the review of compatibility of international arbitral awards with substantive EU law, and in particular EU competition law, through the public policy reservation, since the opposite would run counter to the principle of effectiveness of the EU law.[185] Highlighting that in the context of international arbitration the responsibility of compliance with the European public policy lies with the courts of the Member States and not with the arbitrators, who are not subject to any such responsibility and are solely entrusted with interpreting and applying correctly the contract binding the parties,[186] he states that if the review was "*limited to manifest or flagrant infringements of Article 101 TFEU, this review would be illusory since agreements or practices liable to restrict or distort competition are "frequently covert*"[187]. He also added that "*even if there were a scale of infringements of Article 101 TFEU based on their obviousness and harmfulness including, in particular, restrictions by object and by effect, there is nothing in Article 101 TFEU to support the conclusion that these restrictions would be permissible,* [since] […] *either there is an infringement of Article 101 TFEU,* […] *or there is no infringement at all"*[188].Therefore, he concludes that the gravity of the infringement of EU competition law should not affect the extent of review on grounds of public policy.[189] He also suggests that this extent of review should not be conditional and depend on whether issues of EU competition law have been previously raised and debated in the arbitral proceedings, since this would favor the effort of parties who resort to anticompetitive behaviors to circumvent rules of public policy by recourse to international commercial arbitration.

66. Despite the high anticipation from the academic community and the arbitration practitioners as to whether the CJEU would clarify what seems to be unspecified in *Eco Swiss,* in *Genentech* the Court chose not to address the issues raised by Advocate General Wathelet on the extent of judicial review; it rather adjudicated on the substance of the preliminary reference ruling that the payment of royalties by a licensee for a licensed patent that has successively been revoked with retroactive effect is not incompatible with EU competition law if the licensee was free to unilaterally terminate the license agreement. Whether this silence on behalf of the CJEU reflects a rejection of the maximalist approach of the Advocate General or an effort to avoid answering for the moment the

[184] CJEU, Opinion of Advocate General Wathelet of 17 March 2016, *Genentech*, C-567/14, ECLI:EU:C:2016:177.

[185] *Ibid*, p. 58.

[186] *Ibid*, p. 61.

[187] *Ibid*, p. 64.

[188] *Ibid*, p. 66.

[189] *Ibid*, p. 67, where he remarkably notes that "*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*".

question of the extent of judicial control,[190] it should be noted that if the CJEU wanted to lift any limitations from the exercise of this judicial control, it would have done it. The CJUE showed no such reticence in the case of public policy exceptions *vis-à-vis* arbitral awards in the area of the EU consumer law.[191]

67. The balance between the minimalist and the maximalist approach is hard to be stricken. An extensive judicial review which would reach the merits of the case could render redundant the recourse to arbitration, and would encumber the parties with significant burdens in respects of time and money. Particularly as regards EU competition law, the fact that the *de minimis* principle is encompassed therein could be used to suggest that this *de minimis* rationale should be also present and govern the extent of review of public policy for violations of EU competition law. However, it is against the very essence of the public policy and the rule of law to have differentiated standards of review. The importance of some specific objectives and values for the State and the society which had them included in the nucleus of the public policy cannot be mitigated afterwards or found running at different speeds. After all, the extensive control might be the price which has to be paid for the increasing arbitrability of areas which belong to the public policy.[192] If the review is not thorough enough to safeguard the compliance with the public policy considerations, the "*second look*" which was proposed as a guarantee for the arbitrability of public policy matters would easily turn into a "*blind look*", typical, mechanical and useless in substance.

[190] Marco BOTTA, "Comment on ''Genentech'': The Arbitrability Paradoxin EU Competition Law", *ICC-International Review of Intellectual Property and Competition Law*, Vol. 38, Issue 2, 235-244, 2017, p. 241.

[191] CJEU, Judgment of 26 October 2006, *Mostaza Claro*, C-168/05, ECLI:EU:C:2006:675, pp.33-39, where it was ruled that "*a national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment*" (p.39).

[192]Bernard HANOTIAU, Olivier CAPRASSE, "Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention Belgian and French Perspectives", *Journal of International Arbitration*, Vol. 25, Issue 6, 721–741, 2008, p. 738.

III. PROCEDURAL ASPECTS IN THE APPLICATION OF EU COMPETITION LAW BY ARBITRAL TRIBUNALS

68. After having addressed the main issues of substantive nature that can arise in the context of the relationship between the international commercial arbitration and EU competition law, the focus is now concentrated on the development of the procedural dialogue between these two areas of law, both in a judicial as well as in an administrative level. Firstly, we will examine the relationship between the arbitral tribunals and the EU Courts (**III.A**.), *i.e.* the CJEU (**III.A.1.**) and the national courts of the Member States (**III.A.2.**), and then we will refer to the interplay between arbitral proceedings and proceedings in the context of the European Competition Network (**III.B.**), *i.e.* proceedings before both the European Commission (**III.B.1.**) and the NCAs (**III.B.2.**).

III.A. The dialogue between the arbitral tribunals and EU courts

69. The EU legal order is based on a decentralized system of justice where national courts are the primary venue for the assertion of EU rights,[193] required under art. 19 par. 2 TEU[194] to apply EU law and secure the effective judicial protection that is entrusted therein. In addition, national courts, as gatekeepers and the only competent to decide on the referral of preliminary questions to the CJEU, participate actively in the formation of EU law and the dialogue that is in this way established with the CJEU.[195] This entails the strong cooperation of the CJEU and the national courts in a common legal framework and in pursuit of the same common goals.[196] In light of the principle of sincere cooperation enshrined in art. 4 par. 3 TEU[197], as stipulated many times in the

[193] Takis TRIDIMAS, "The ECJ and the National Courts: Dialogue, Cooperation and Instability" in : Damian CHALMERS, Antony ARNULL (eds), *The Oxford Handbook of European Union Law*, Oxford University Press, Oxford, 2015, p.404.

[194] "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*."

[195] The reinforcement of the role of the national courts in the EU judicial system is also dictated by the restrictive legal standing of private parties to bring actions for the review of the legality of EU acts under the Treaty provisions (art. 263 TFEU), and the subsequent competence of the national courts in that respect. The latter proceedings might lead to a preliminary references procedure, strengthening, thus, the dialogue between the CJEU and the national courts, even though this indirect judicial review of EU acts. In that regard *see* the Opinion of Advocate General Kokott of 17 January 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, ECLI:EU:C:2013:21, p.21 seq.

[196] Allan ROSAS, "The National Judge as EU Judge: Opinion 1/09", in : Pascal CARDONNEL, Allan ROSAS, Nils WAHL, *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh,* Hart Publishing, Oxford, 2012, p. 105.

[197] "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

case law of the CJEU, the latter in conjunction with the national courts are called to ensure the full application of EU law in all Members States, as well as to ensure that the interpretation and the application of the Treaties is observed.[198] Therefore, keeping in mind the role of the EU jurisdiction, we are hereby examining the interplay between the arbitral tribunals and the EU courts, both at a national level, as a well as at the supranational level of the CJEU.

III.A.1. The role of the CJEU

70. Despite the fact that the CJEU undoubtfully reflects the primary point of authority in the interpretation and application of the EU law and EU competition rules, its relationship with international commercial arbitration could be characterized quite defective, given the absence of any direct connections between them. The CJEU itself cut the cord of any prospect of dialogue when, in *Nordsee,* it adjudicated for the first time that arbitral tribunals cannot refer preliminary references to the Court of Luxembourg. This constitutes settled case law and its reversal from the CJEU appears quite improbable.

III.A.1.a. *Nordsee* as a leading case

71. In *Nordsee,* the CJEU was seized by a preliminary reference sent by a sole arbitrator in proceedings initiated between German shipping groups under the arbitration clause of a pooling agreement for the internal allocation of EU (at that time Community) funds. The aim of the parties was to equally benefit from the funds so as to build a certain agreed amount of factory ships under a joint project. In the proceedings the sole arbitrator had to examine the validity of the pooling agreement in light of specific provisions of EU law and decided to make a preliminary reference to the CJEU. The importance of the reference pertains to the first question thereof, on whether the provisions of the Treaties authorize an arbitral tribunal, which decides according to the law and not according to equity, and which delivers awards of a definitive nature in a respective way as judgments, to make a reference to the CJEU.

72. The answer of the CJEU, despite acknowledging certain similarities between the arbitration *fora* and the national courts and tribunals, concentrated on the strength of the nexus between the first

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

[198] CJEU, Opinion of the Court of 8 March 2011, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, Opinion 1/09, ECLI:EU:C:2011:123, pp.68-69; CJEU, Judgment of 16 December 1981, *Foglia v Novello*, C- 244/80, ECLI:EU:C:1981:302, p. 16.

with the judicial administration and organization of the Member State, concluding that it could not justify the inclusion of arbitral tribunals within the ordinary national judicature. The absence of a legal obligation to refer a dispute to arbitration and the exclusion of the national public authorities from the proceedings before the arbitral tribunal led the CJEU to the conclusion that arbitral tribunals could not be classified as national courts or tribunals of a Member State, competent to make preliminary references to the CJEU.[199] This position has been criticized for downgrading the function and objectives of the arbitration as a system of dispute resolution, emphasizing solely on the relation of the arbitral tribunal with the official system of administration of justice within a particular State.[200] In addition, it could be suggested as rather rigid and unfair to request from a panel of independent arbitrators to apply EU competition law as overriding mandatory norms without granting them the possibility of receiving clarifications on their interpretation and application by the judicial authorities who are to finally determine their ambit.

73. The criteria determining the quality of a(n) (adjudicative) body as a court or tribunal of a Member State for the purpose of a preliminary reference are specific, and determined in light of the principle of autonomy of the EU law.[201] As clarified by the CJEU, they relate to the following findings: respect to the procedure *inter partes*, application of rules of law, establishment by law, independence, permanence, and compulsory character of jurisdiction.[202] However, these criteria are not equal, or at least they are not all given the same priority. In *Armello,*[203] the CJEU stated that a national court which is to determine an appeal against an arbitration award is considered a national court or tribunal in the context of the preliminary reference procedure, notwithstanding the fact that the parties have defined in the arbitration clause that this court should decide according to "*what appears fair and reasonable*" and not according to the rules of law.[204] *Armello*, which chronologically follows *Nordsee,* fully endorses the importance given by the latter to the criterion of the strong institutional link between courts and a certain state under whose sovereignty they function; even the adjudication on the basis of equity and not by applying the rules of law could

[199] CJEU, *Nordsee, op. cit.,* pp.11-13

[200] Βασίλειος ΧΡΙΣΤΙΑΝΟΣ, "Η θέση της Εμπορικής Διαιτησίας στο Δικαιοδοτικό Σύστημα της Ευρωπαϊκής Κοινότητας" in : Μιχάλης ΣΤΑΘΟΠΟΥΛΟΣ, Κώστας ΜΠΕΗΣ, Φίλιππος ΔΩΡΗΣ, Ιωάννης ΚΑΡΑΚΩΣΤΑΣ, *Γενέθλιον Απόστολου Σ. Γεωργιάδη - Τόμος ΙΙ,* Εκδ. Αντ. Ν. Σάκκουλα, 2006, pp. 2085-2086.

[201] Takis TRIDIMAS, "Knocking on heaven's door: Fragmentation, Efficiency, and Defiance in the Preliminary Reference Procedure", *Common Market Law Review*, Vol.40, Issue 1, 9-50, 2003, p.27.

[202] CJEU, Judgment of 17 September 1997, *Dorsch Consult Ingenieursgesellschaft v Bundesbaugesellschaft Berlin*, C-54/96, ECLI:EU:C:1997:413, p.23; CJEU, Judgment of 4 February 1999, *Köllensperger and Atzwanger*, C-103/97, ECLI:EU:C:1999:52, p.17.

[203] CJEU, Judgment of 27 April 1994, *Gemeente Almelo and Others v Energiebedrijf IJsselmi*j, C-393/92, ECLI:EU:C:1994:171.

[204] *Ibid*, pp. 23-24.

be overlooked, if the body referring the preliminary question "*is equipped with the authority of the State*"[205].

74. Therefore, the main and underlying *rationale* impeding arbitral tribunals from qualifying as courts competent for a preliminary reference appears to be their lack of integration in the administration of justice of the Member State. This is linked to the importance of the duty of sincere cooperation, which is found in the very core of the conception of the preliminary reference procedure, and reflects the foundations of an intrinsic constitutional balance between the EU and the Member States. It is also linked to the general system of judicial remedies of the EU law. Member States can be held liable for breaching EU law by acts or omissions of the judiciary,[206] the latter including the breach of the obligation of the national courts to refer a preliminary question to the CJEU when the specific conditions for such a reference are met.[207] However, even if it was accepted that the arbitrators could refer questions of EU law to the CJEU,[208] when subsequently they might fail to abide by this duty and make a preliminary reference when this would be obligatory, the Member State could not be held liable for breaches of EU law because of the conduct of an authority that does not belong to any brunch of its government.[209] This would create a deep inconsistency and an arbitrary imbalance within the system of judicial protection of the EU that could not have been justified.

III.A.1.b. The possibility of reversing *Nordsee*

75. Albeit *Nordsee* has not been reversed, there is case law of the CJEU accepting preliminary references submitted by arbitral tribunals, and suggesting, as Advocate General Wathelet supports

[205] CJEU, Opinion of Advocate General Reischl of 2 February 1982, *Nordsee*, ECLI:EU:C:1982:31, p. 1122.

[206] CJEU, Judgment of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others,* Joined cases C-46/93 and C-48/93, ECLI:EU:C:1996:79, pp.32-35.

[207] CJEU, Judgment of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513, pp.33-36, 117-119; CJEU, Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, ECLI:EU:C:2015:565, p.47, on the obligation of the court or tribunal of the Member State to make a preliminary reference if adjudicating at last instance and if there are no remedies available against that judgment.

[208] This is an hypothesis based on analogy, and it might be going far beyond what is required so as to be validly supported by such an analogy. Taking into account that under art. 267 par. 3 TFEU such an obligation is incumbent upon the national courts or tribunals against whose judgments remedies are not available, even if we try to assimilate arbitral tribunals to national courts, the existence of remedies against the arbitral awards - either by choice of the parties providing for arbitral appeals, or by the remedies available on the admission of the arbitral award in the national legal order - excludes this obligation and renders even more vague and difficult the determination of an infringement of EU law leading to the liability of the Member State.

[209] ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.*, pp. 222-223.

in his Opinion in *Achmea*[210] that "*arbitral tribunals are not automatically excluded from the concept of 'court or tribunal of a Member State' within the meaning of Article 267 TFEU*"[211]. In *Danfos*[212], *Merck Canada*[213], and *Ascendi*[214] the CJEU declared admissible such preliminary references.

76. More particularly, in *Danfoss,* a reference from the Danish Industrial Arbitration Board which, according to the Danish law, had compulsory jurisdiction over specific employment disputes, the CJEU acknowledged the arbitration tribunal as competent to submit preliminary references based on the fact that its composition was not within the parties' discretion, but prescribed by law.[215] In *Merck Canada,* the relevant Portuguese law provided for a compulsory recourse to arbitration, either institutional or *ad hoc*, for the resolution of disputes regarding industrial property rights on reference medicinal products and generic medicines. The referring tribunal was in fact an *ad hoc* tribunal. The CJEU recognized the disputed arbitral tribunal as a court or tribunal of a Member State under art. 267 TFEU based on the fact that it was established by law, its competence was compulsory, and its decisions are binding to the parties. [216]

77. In *Ascendi*, the arbitral resolution of tax disputes was not obligatory, but after the party chose to have recourse to arbitration, then this arbitration would be available only through a particular body set by law - ad hoc arbitration and arbitration *ex aequo et bono* being excluded. The CJEU examined separately[217] all the conditions under which a judicial body is qualified as a court or tribunal of a Member State, and found that the disputed arbitral body complied with the criteria. According to the CJEU, the fact that this arbitration was not obligatory from the beginning could

---

[210] CJEU, Opinion of Advocate General Wathelet of 19 September 2017, *Slowakische Republik v Achmea BV*, C-284/16, ECLI:EU:C:2017:699. In this case, it is examined whether an arbitral tribunal established by a bilateral investment treaty between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic can refer preliminary questions to the CJEU under art. 267 TFEU. Advocate General Wathelet examines carefully the criteria of establishment by law, permanence, compulsory jurisdiction, independence, impartiality,and *inter partes* proceedings and reaches a conclusion that such an arbitral tribunal can qualify as a court or tribunal of a Member State under the preliminary reference procedure before the CJEU, *see ibid*,pp. 89-131.

[211] *Ibid,* p. 87.

[212] CJEU, Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, agissant pour Danfoss*, C-109/88, ECLI:EU:C:1989:383.

[213] CJEU, Order of 13 February 2014, *Merck Canada*, C-555/13, ECLI:EU:C:2014:92.

[214] CJEU, Judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, ECLI:EU:C:2014:1754.

[215] *Danfoss*, pp. 7-8. The determining factor of the compulsory recourse to arbitration and its establishment by law was also upheld in CJEU, Judgment of 27 January 2005, *Denuit and Cordenier*, C-125/04, ECLI:EU:C:2005:69, pp. 13-16, where the CJEU declared inadmissible a reference from the College of arbitration of the Belgian Commission on Travel Disputes because the jurisdiction of the latter was not mandatory to the parties - but dependent on an arbitration agreement - and there were also other means of resolving the dispute.

[216] *Merck Canada*, pp. 18, 21.

[217] *Ascendi*, pp. 24-34.

not deprive it from its compulsory nature. The latter is linked to the actual establishment of arbitration by law - as in the case at hand - and does not depend on the will of the parties; it is simply contractual arbitration which departs from the criterion of compulsory jurisdiction.[218] The reasoning of the CJEU as regards the fulfillment of the criterion of permanence in the case at hand is also interesting, since "[despite the fact that they are] *ephemeral and their activity ends once they have made their ruling, the fact remains that, as a whole, the Tribunal Arbitral Tributário, as an element of the system referred to, is permanent in nature".* [219]

78. Commencing from *Danfoss* and advancing to *Merck Canada* and *Ascendi,* we observe that the CJEU, using the same criteria which were acclaimed in its previous case law[220], gradually expands the definition of the court or tribunal of a Member State for the purposes of the preliminary reference procedure, including even *ad hoc* tribunals which do not correspond to the criterion of permanence (*Merck Canada*) or even tribunals which were established by law, but only as an alternative dispute resolution mechanism (*Ascendi*). With regard to the latter, the CJEU seems to ignore the fact that the State itself, as the other party to the tax dispute, gave its consent for arbitration by enacting the relevant law, a consent that meets with the will of the individuals who finally chose arbitration as the tax dispute resolution mechanism. It has been criticized for assuming the compulsory character of jurisdiction despite the prevailing role of express consent and will of the parties to have recourse to this arbitral jurisdiction.[221]

79. The above developments in the CJEU case law are suggesting a timid and gradual departure from the *Nordsee* on the determination of an arbitral tribunal as a court competent to submit preliminary references to the CJEU, through a different prioritization and more expansive interpretation of the criteria enshrined therein. However, it is doubtful whether this can open the doors of the Court of Luxembourg to international commercial arbitration, even when the latter is addressing issues of EU competition law which belong to the main objectives of the EU and constitute an area of public policy.

80. This is mainly due to the fact that international commercial arbitration would still fail to comply with the criterion of establishment by law, which remains a common denominator of great importance in the three cases mentioned above. A possible solution would be if - inspired by *Ascendi* - recourse to arbitration would be explicitly provided by law as an alternative dispute

[218] *Ibid*, pp. 27-28.

[219] *Ibid*, p. 26.

[220] *Supra* III.A.1.a, par. 73.

[221] Paschalis PASCHALIDIS, "Arbitral tribunals and preliminary references to the EU Court of Justice", *Arbitration International*, 2016, https://doi.org/10.1093/arbint/aiw026, p. 15.

resolution mechanism which the parties could chose, regardless of whether - in the sense of *Merck Canada* -the resolution was entrusted to an institutional or *ad hoc* arbitration body. In the case of EU competition law disputes, this recourse to arbitration could have been explicitly provided in the articles of the Damages Directive, and, then, transposed by the Member States in their national legislation. However, the EU legislator chose differently and limited the reference to arbitration in the preamble of the Damages Directive and some technical provisions on the suspension of proceedings and limitation periods in the case of consensual dispute resolution. This seems more consistent with the aim of preserving the balance which was introduced and established by the implementation of the *Nordsee* case law and which relates to the constitutional underpinnings in the administration of justice within the EU.[222] Nevertheless, the Member States could chose to legislate specifically on the recourse to arbitration as regards antitrust disputes, and, therefore, entertain the application of the findings in *Ascendi* and *Merck Canada* in international commercial arbitration. It seems that progress can never be halted, even if it comes at a slower pace.

III.A.2. The role of the national courts

81. Although in *Nordsee* the CJEU excluded the possibility of preliminary references transmitted directly from the arbitral tribunals, it also indicated[223] that within its well-established cooperation with the national courts the latter can make up for this "*missed opportunity*" in the implementation of the EU competition law. The strengthened role of the national courts in the dialogue with the arbitral tribunals cannot be denied, but might sometimes lead to a "*rivalry*" between these two dispute resolution mechanisms, and to the national courts taking the lead over arbitral tribunals.

III.A.2.a. Preliminary references from the national courts

82. The national courts, being entrusted with the duty to control the admission of arbitral awards in the national legal order, constitute an one-stop shop for reassuring the compliance of the award with the EU competition rules as part of the public policy. On that basis, the latter, depending on whether they are the courts of the *locus arbitri* or the *locus executionis* can abrogate the validity of the rendered award or exclude its recognition and enforcement.

[222] ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.*, p. 235.

[223] *Nordsee*, p. 14.

83. This outcome presupposes and requires carrying out "*an effective review of the award in question*"[224], which in itself includes the possibility of sending a preliminary reference to the CJEU for reasons of interpretation,[225] and embraces the inclusion of the EU competition rules in the "*public economic policy of the community*"[226]. The review of the arbitral award in light of the EU competition rules constitutes the "*antidote*" to the absence of preliminary references directly from the arbitral tribunals to the CJEU.[227]

84. In addition to the above, it has been supported in doctrine as well as witnessed in practice the possibility of indirect references during the arbitral proceedings.[228] This is the case where the arbitrator may request from the national courts to refer a preliminary question to the CJEU regarding matters of EU law which require further interpretation and guidance, so that the arbitrator could afterwards validly adjudicate on the dispute. The possibility of these indirect references has been mentioned in *Nordsee,* where the Court referred to the cooperation of the national courts with the arbitral tribunals and their supportive role in certain procedural matters that could arise,[229] describing in a subtle manner the indirect reference as already defined above.

85. The indirect character of this reference, and particularly its incompliance with the conditions set under the preliminary reference procedure for a "*question* [which] *is raised before any court or tribunal of a Member State*" and for a subsequent judgment to be issued by the national court or tribunal to this particular effect, raise doubts as to the pertinence of these *sui generis* references with the nature and the function of the preliminary reference procedure.[230] The latter is designed to strengthen and support the administration of justice within the Member States and not to simply give advisory opinions[231] - something which could in fact happen in the context of an indirect reference, since the CJEU's response might not relate to a dispute arising before the national courts and would not be legally binding for the arbitral tribunal. Departing from the findings of the CJEU

---

[224] Opinion of Advocate General Saggio, *Eco Swiss*, p. 32.

[225] *Eco Swiss*, p. 40.

[226] Opinion of Advocate General Saggio, *Eco Swiss*, p. 38; *Eco Swiss*, pp. 37-38.

[227] *Nordsee*, pp.14-15, *Eco Swiss,* pp. *32-34.*

[228] Renato NAZZINI, "Chapter 25: Parallel Proceedings before the Tribunal and the Courts/Competition Authorities", in : Gordon BLANKE, Phillip LANDOLT (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011, p. 911, with particular reference to the Danish Arbitration Act permitting such indirect references, Jürgen BASEDOW, "EU Law in International Arbitration: Referrals to the European Court of Justice", *Journal of International Arbitration,* Vol. 32, Issue 4, 367-386, 2015, pp. 374-376, ΔΕΜΠΕΓΙΩΤΗΣ, p. 230.

[229] *Nordsee*, pp.14-15.

[230] Natalya SHELKOPLYAS, *The Application of EC Law in Arbitration Proceedings*, Europa Hart Publishing, Groningen, 2003, p. 420.

[231] *Foglia v Novello*, p. 18.

could always be an option for the arbitral tribunal. However, this should not be considered highly probable given that under this indirect reference mechanism it is the arbitral tribunal seeking guidance from the CJEU; therefore, it is not expected to ignore or disregard the guidance and help that it actively sought.

III.A.2.b. Anti-suit Injunctions: A way out and a way back in

86. As analyzed above national courts appear to be slowly and steadily opening the door of the EU judicature to the international arbitration, assisting in the interpretation of EU competition law through the preliminary references to the CJEU, direct or indirect - when the latter are possible. They are restoring, thus, the balance of the procedural dialogue between international commercial arbitration and the EU judicial system, optimizing the establishment of a closer cooperation in that regard. However, it seems that it is also the national courts which might be brutally closing this same door. This relates to the role of anti-suit injunctions in the EU legal order and the effect that the latter can have on the dialogue between the EU courts and international arbitration on points of EU competition law.

87. A simple example could be drawn from a juridical claim of damages for violation of EU competition rules, when there is an arbitration agreement including such claims in its scope. A successful anti-suit injunction could ensure the possibility of the arbitral tribunal to decide on issues of EU competition law and engage in a dialogue with the EU Courts. On the contrary, the refusal of an anti-suit injunction would limit the jurisdiction of arbitral tribunals and halt the process of cooperation between the latter and the EU judicature.

88. In *West Tankers*[232], the CJEU ruled that anti-suit injunctions, restraining a person from commencing or continuing judicial proceedings before the court of a Member State on the ground that such proceedings would be contrary to an arbitration agreement contravened Regulation 44/2001[233], despite the fact that arbitration was excluded from its scope of application. The reasoning of the Court was based on the fact that arbitral proceedings could have consequences undermining the effectiveness of the Regulation 44/2001 towards the unification of the rules of conflict of jurisdiction in civil and commercial matters and, respectively, the free movement of

[232] CJEU, Judgment of 10 February 2009, *Allianz (anciennement Riunione Adriatica di Sicurtà)*, C-185/07, ECLI:EU:C:2009:69.

[233] *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,* OJ L 12/1, 16.1.2001.

decisions and the trust established between the Member States.[234] Anti-suit injunctions were found to be incompatible with the general principle emerging from the case law on the 1968 Brussels Convention - the legal regime previous to Regulation 44/2001- according to which "*every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it*".[235] For the CJEU, this would lead to an impediment to access to the court, to an incentive for dilatory litigation strategies avoiding the national court's jurisdiction, and finally to the narrowing of the extent of the judicial protection that the parties are entitled, since it would deprive the latter from the possibility of requesting from a national court the essential examination of the validity of the arbitration agreement.[236]

89. The judgment in *West Tankers* has been criticized for promoting the objectives of Regulation 44/2001 to the detriment of the effectiveness of international arbitration,[237] before the question of anti-suit injunctions reached again the CJEU in *Gazprom*[238]. This case concerned an anti-suit injunction issued by an arbitral tribunal. The CJEU ruled that the latter was bound solely by the New York Convention and that the issuance of the injunction was not contrary to and could not have been hindered by application of the Regulation 44/2001.[239] The CJEU found that the principle of mutual trust established by Regulation 44/2001 could not be breached by an alleged interference of the court of one Member State in the jurisdiction of another if the first recognized and enforced an anti-suit injunction issued by an arbitral tribunal on a dispute that would fall within another Member State's jurisdiction. It also held that the parties' right to judicial protection was secured since any objections against the arbitral injunction could be validly presented during the recognition and enforcement proceedings before the national courts.[240] Advocate General Wathelet in his opinion in *Gazprom* went a step forward, and suggested that under the new Regulation 1215/2012[241], which has now replaced Regulation 44/2001, it is not only anti-suit injunctions issued by the arbitral tribunals, but also those issued by national courts which do not

[234] *Allianz,* pp.24-25.

[235] *Ibid,* p. 29.

[236] *Ibid,* p. 31.

[237] Horatia MUIR WATT, "Cour de justice des Communautés européennes (grande chambre) – 10 février 2009 – Aff. C185/07", *Revue critique de droit international privé, Vol.98, Issue 2*, 2009, p.373; Bernard AUDIT, "Arrêt Allianz and Generali Assicurazioni Generali, EU:C:2009:69", *Journal du Droit International*, Octobre 2009, no 4, p. 1283.

[238] CJEU, Judgment of 13 May 2015, *Gazprom*, C-536/13, ECLI:EU:C:2015:316.

[239] *Ibid,* pp. 41-43.

[240] *Gazprom,* pp. 37 -39.

[241] *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,* OJ L 351/1, 20.12.2012.

fall within its material scope and which should also be allowed.[242] Nonetheless, the CJEU did not address this particular point and seemed unready to depart from its findings in *West Tankers*.

90. Although *Gazprom* addresses an issue different from that on the *West Tankers,* since the first is dealing with an anti-suit injunction which is issued in the course of arbitral proceedings and is considered permissible under EU law, while the second is dealing with an anti-suit injunction which is issued in the course of judicial proceedings and is perceived as incompatible with the relevant EU provisions, this does not mean that the *Gazprom* does not covertly limit the effects of the *West Tankers case law.* The parties to an arbitration can simply ask from the arbitral tribunal to issue itself an anti-suit injunction and the reef posed by *West Tankers* will have been left behind.[243]

91. The above suggest that even though the negation of anti-suit injunctions issued by national courts can halt the dialogue between international commercial arbitration and the EU judicature on points of EU competition law, the permissibility of anti-suit injunctions issued by arbitral tribunals can restore the foundations of this same dialogue. What is more, the provisions in the Damages Directive on the suspension of judicial proceedings on claims for antitrust damages as well as on the suspension of the limitation period for bringing such actions while a consensual dispute resolution is pending appear to support arbitral proceedings and indirectly armor anti-suit injunctions granted in favor of the latter.

III.B. The dialogue between the arbitral tribunals and the European Competition Network

92. The modernization of the EU Competition law has significantly reinforced the role of the NCAs[244] of the Members States and has given birth to the European Competition Network (hereinafter as "***ECN***"), a new decentralized system of parallel competences between the European Commission and the NCAs, ensuring close cooperation in the application of the EU competition rules.[245] The allocation of work among the members of the ECN is provided in the Commission Notice on the

[242] Opinion of Advocate General Wathelet, *Gazprom,* pp. 153-157.

[243] Paschalis PASCHALIDIS, "The Future of Anti-Suit Injunctions in Support of Arbitration After the EU Court of Justice's Judgment in the Gazprom Case", *Journal of International Arbitration,* Vol. 34, Issue 2, 333-345, 2017, p. 339.

[244] According to art. 3 of the Regulation 1/2003 the NCAs have a parallel competence in the application of EU competition law, and based on art. 5 thereof they are given great powers of decision.

[245] Preamble, p. 15, Regulation 1/2003.

cooperation within the ECN[246] "on the basis of equality respect and solidarity"[247]. Bearing in mind this decentralization as well as this closest cooperation[248] in the application of EU competition law not only by the European Commission but also by the members of the ECN, it is considered prudent to address hereby the relationships that are developed between the arbitral tribunals on the one hand, and the European Commission (**III.B.1.**) and the NCAs (**III.B.2.**) on the other hand. This will help to seize the complete spectrum of the procedural aspects of cooperation within the ECN as regards the application of EU competition rules in international commercial arbitration.

93. Before advancing to the analysis as to whether and to what extent the members of the ECN can intervene and support the arbitration tribunals in the adjudication of EU competition law matters, it has to be mentioned that there is no explicit provision regulating the relationship between the members of the ECN and the international arbitral *fora.* Neither the Treaty provisions, nor the Regulation 1/2003, not even the European Commission's notice on the cooperation with the Courts of the EU Member States in the application of EU competition rules (hereinafter as "***Commission Cooperation Notice***")[249] provide for any framework under which a dialogue with arbitral tribunals could be established and developed. Evidently, there is no specific Communication or Notice from the European Commission offering guidelines on that matter either. Therefore, the analysis and the consideration of this particular issue is hereby addressed through the possibility and the extent of an analogous application of the provisions governing the same kind of cooperation between national courts and either the European Commission or the NCAs.

94. At the very start of any attempt for analogous application, one should bear in mind that arbitral tribunals are not are not courts[250], neither organs of the Members States or the EU, bound to act within the duty of sincere cooperation of art. 4 par. 3 TEU.[251] As analyzed before,[252] according to

---

[246] *Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/2003),* OJ C 101/43, 27.4.2004.

[247] *Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities,* 10.12.2002, available at

http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015435%202002%20ADD%201(last access 16.11.2017), p. 7.

[248] René SMITHS, "The European Competition Network: Selected Aspects", *Legal Issues of Economic Integration*, Vol. 32, Issue, 2, 175-192, 2005, p. 177 seq.

[249] *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC* (2004/C 101/04), OJ C 101/54, 27.4.2004.

[250] Renato NAZZINI, "International Arbitration and Public Enforcement of Competition Law", *European Competition Law Review*, Vol. 25, Issue 3,153-162, 2004, pp. 153-155.

[251] Walter VAN GERVEN, "L'arbitrage dans le droit européen", *Revue de Droit International et de Droit Comparé*, Vol.72, Issue 1, 67, 1995, p. 73, KOMNINOS, *Arbitration and EU Competition Law, op.cit.*, pp. 202-203, 207.

[252] *See* Chapter III.A.1.a.

settle case law the arbitral tribunals do not constitute EU Courts, and for this reason cannot directly refer preliminary references to the CJEU. This substantial distinction between the national courts and the arbitral tribunals might hinder assumptions of analogy to the extent that the provisions whose analogous application is sought draw importance not on the adjudicative role of the national courts - something which is common to arbitral proceedings - but rather on the special position of the courts within the legal order of the Member States and their relation with the other branches of the government and with the European Institutions.

III.B.1. The role of the European Commission

95. The framework of a possible direct link between the European Commission and the arbitral tribunals on matters of application of EU competition rules will be hereby examined in the light of articles 15 and 16 of the Regulation 1/2003 on the cooperation between the European Commission and the national courts on the same matters.

III.B.1.a. The possibility of a European Commission interference in the course of arbitral proceedings

96. The European Commission can assist national courts in the application of EU competition rules through art. 15 of the Regulation 1/2003. According to par. 1 of the said provision "*in proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules*". Similarly, par. 3 of the same article provides another opportunity for the direct involvement of the European Commission in the course of arbitral proceedings. Under the latter provision, the European Commission, acting on its own initiative might intervene and submit written observations on pending cases before national courts, as well as present oral arguments within the same proceedings, if the national courts permit such an oral interference.

97. Following a teleological approach, the analogous application of these provisions in the case of international commercial arbitration would facilitate the work of the arbitrators, providing them with important factual information, as well as with clarifications on the application of the EU competition law, and, therefore, strengthen the effective and quick resolution of the dispute. In this way, the parties to the arbitration will gain a considerable amount of time and money, instead of risking having their final award been denied enforcement. In addition, this practice would be in line with the Commission's own objective to promote and reinforce the private enforcement of the

EU competition law.[253] In the absence of such an assistance to the arbitral tribunals, the latter would be alienated from the regulatory spectrum of the European Commission and its observance on the compliance with EU competition law, and the coherence in the private enforcement of EU competition rules could be detrimentally imperiled.[254]

98. The above indicate that the cooperation and the offer of assistance by the European Commission to the arbitral tribunals is not a matter of who is finally the strongest counterparty in a one-on-one battle, but, rather, a condition leading to a win-win situation for both stakeholders since their interests - *i.e,* the interest of the international arbitral tribunal to effectively resolve the dispute and issue a valid, enforceable award without undermining its own jurisdiction and independence, and the interest of the European Commission to secure the uniform application of the EU competition law - would be satisfied. Requiring and accepting assistance from the European Commission would not equate to any retreat of the arbitration process in favor of external formalities and expectations of foreign institutions; it would simply reinforce the value of the issued award.

99. Another argument in favor of the analogous application of the aforementioned provisions is emanating from the soft-law nature of the Commission Cooperation Notice, which specifies the provisions of the Regulation 1/2003 on the direct involvement of the European Union in the course of judicial proceedings. Despite the fact that the arbitral proceedings are not included in the *rationae materiae* of the Commission Cooperation Notice, its soft-law nature should advocate in favor of their inclusion by force of analogy.[255]

100. Notwithstanding the analysis above, there is strong argumentation against any analogous application thereof. It is suggested that an attempt in this direction disregards the very nature of arbitration which is based on the principle of privity, independence and confidentiality.[256]

101. As regards the principle of privity and independence, it should be highlighted that the arbitrators should not be obliged to request the European Commission's assistance, unless the parties to arbitration have agreed so.[257] However, even in case of lack of legal obligation to refer to and co-

[253] *See* points 2, 5-6, 34, 42 of the Preamble of the Damages Directive.

[254] It is, therefore, deduced that the European Commission will use its discretion in favor of providing assistance following arbitrators' request to this direction.

[255] KOMNINOS, *Arbitration and the Modernization of European Competition Law Enforcement*, *op. cit.*, p. 229.

[256] KOMNINOS, *Arbitration and EU Competition Law*, *op.cit.*, p. 204; Assimakis KOMNINOS, "Chapter 21: Assistance by the European Commission and Member States Authorities in Arbitrations", in : Gordon BLANKE, Phillip LANDOLT (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011, p. 738.

[257] The parties may have explicitly permitted this possibility within the text of arbitration clause, or in the Terms of Reference, or if they have chosen the application of procedural rules which permit such an involvement on behalf of the European Commission. An example could be either the ICC Rules of Procedure or the LCIA Rules of Procedure,

operate with the European Commission the arbitrators might still act in this way. Bearing in mind their duty to issue an enforceable award, it is very likely that, if they find themselves in a situation where the enforceability of the award would be imperiled without the contribution of the European Commission, they would indeed request the latter's assistance. This is reinforced by the fact that arbitrators are usually expected to apply EU competition law *ex officio*, and therefore, this might also justify their interest in requiring guidance from the European Commission, as well as the interest of the European Commission in providing guidance to an authority which is to apply the EU competition rules *propio motu*.[258]

102. The need to respect the parties' autonomy and express will, as well as the interference of the European Commission in the proceedings without the parties having initially provided for that possibility could be reconciled if the arbitrators acquired the parties' consent before actually referring to the European Commission or allowing the latter to intervene through written and oral observations. This requirement of prior consent might be significantly limiting the powers of the European Commission in its supervision on the application of EU competition rules.[259]

103. Taking these considerations to their extremes, it could be suggested that, in absence of specific regulation on the matter, the dilemma is summarized as to whether the arbitrators will abide to their mandate as granted by the parties and respect their will of not having the European Commission involved or whether they will abide by their innate duty as arbitrators to issue awards that are enforceable and refer to the European Commission without the parties' consent. However, depending on the case, the enforceability of the award could be secured even without the European Commission's interference; enforceability and having the European Commission involved are not necessary and irreplaceable factors to an absolute abstract equation. The distress of such a dilemma is usually avoided, since in most of the cases, the arbitrators which are chosen by the parties are experienced and well informed in the area of competition law. They will most probably be able to issue an enforceable award by applying EU competition rules without needing the interference of

which, under art. 35 and 32.2. respectively, provide for the discretion of the arbitrators to accepts briefs from the European Commission as *amicus curiae*.

[258] Carl NISSER, Gordon BLANKE, "ICC Draft Best Practice Note on the European Commission Acting as Amicus Curiae in International Arbitration Proceedings –The Text", *European Business Law Review*, Vol. 19, Issue 1, 198-218, 2008, p. 202.

[259] It should be highlighted that practice has shown that the European Commission might still find ways to notify the parties to an arbitration of its opinion regarding the implementation of EU competition rules in a specific case, even at a later stage following the issuance of the arbitral award. In *Preflex v Lipski Case*, as quoted in KOMNINOS, *Arbitration and EU Competition Law, op.cit.,* p.212, after the delivery of a Belgian judgment through which the arbitral award was admitted in the Belgian legal order, the Commission communicated to the parties its objections finding incompatibilities with the EU competition rules, and in this indirect way led the parties to agree on a different settlement of their dispute.

the European Commission. In addition, the implementation of these rules is in any case secured via the relevant public policy grounds hindering the recognition and enforcement of an arbitral award. In the last case, it would simply be to the detriment of the legitimate expectations and the interests of the parties to the arbitration to receive an enforceable award in a timely manner.

104. As regards confidentiality, it is true that the European Commission might be concurrently undergoing investigation procedures against the parties to whose arbitral proceedings it had requested or it had been summoned to intervene. It is also true that the European Commission remains free to instigate parallel proceedings while arbitral proceedings are pending.[260] In the context of the Regulation 1/2003 the notion of confidentiality is not absolute, so as to override the investigatory powers of public authorities.[261] Art. 12 par. 1 and art. 18 thereof preclude the possibility of presenting confidentiality as a ground of avoiding the investigatory powers of the European Commission and a way of fleeing its control. At the same time, both the European Commission and the arbitral tribunal should respect the parties' right against self-incrimination[262] under EU competition law.

105. These considerations suggest that a fine balance should be struck between the two. Defying confidentiality would amount to undermining arbitration as a dispute resolution mechanism which is very common in practice among the Member States. It might even overcome the objective for which confidentiality itself has been outpassed in the very beginning, since the European Commission could exercise its investigatory powers without interfering in the arbitral proceedings. In fact, the obligation of the European Commission to abide by the principle of proportionality[263] and by the protection of fundamental rights under the Charter of Fundamental Rights of the European Union[264], suggest a restrained exercise of its investigatory powers within a pending

[260] NISSER, BLANKE, *op.cit.*, p. 206.

[261] Renato NAZZINI, *Competition Enforcement and Procedure*, *op.cit.*, p. 448.

[262] CJEU, Judgment of 18 October 1989, *Orkem v Commission*, C-374/87, ECLI:EU:C:1989:387, pp.29-41; CJEU, Judgment of 15 October 2002, *ICI v Commission*, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P, C-254/99 P, ECLI:EU:C:2002:582, p. 273 seq.; CJEU, Judgment of 4 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, ECLI:EU:C:2004:6, p.65; CJEU, Judgment of 14 July 2005, *ThyssenKrupp v Commission*, Joined cases C-65/02 P and C-73/02 P, ECLI:EU:C:2005:454, p. 49; CJEU, Judgment of 29 June 2006, *Commission v SGL Carbon AG*, C-301/04 P, ECLI:EU:C:2006:432, p. 42; CJEU, Judgment of 25 January 2007, *Dalmine v Commission*, C-407/04 P, ECLI:EU:C:2007:53, p. 34.

[263] CJEU, Judgment of 20 May 2010, *Commission v Tetra Laval*, C-12/03 P, ECLI:EU:C:2005:87, p. 39.

[264] *Charter of Fundamental Rights of the European Union (2000/C 364/01)*, OJ C 326/391, 16.10.2012. Art. 51 par. 1 thereof stipulates that the EU Institutions are bound by the provisions of the Charter regardless of the capacity under which they might function - therefore the European Commission could not be spared of applying is provisions while implement EU competition law. The pertinent provision in that regard is art. 48 on the presumption of innocence and the rights of defense. For the latter's application in the context of EU competition law *see* Marc VEENBRINK, "The Privilege against Self-Incrimination in EU Competition Law : A Deafening Silence?", *Legal Issues of Economic Integration*, Vol. 42, Issue 2, 119-142, 2015.

arbitration. This means that respect to confidentiality itself cannot outweigh the interests of the European Commission in intervening in the proceedings (or the interest of having the European Commission intervene, as analyzed above), it can however limit[265] the scope of its intervention in the proceedings in light of the respect for the principle of proportionality and the right of the parties against self-incrimination.

106. Another argument against the establishment of close cooperation between the arbitral tribunal and the European Commission has been suggested with emphasis on the fact that such a co-operation could only be effected through the conclusion of mutually agreed practices and could never constitute the subject matter of a legislative proposal.[266] However, this assertion does not run counter to the analogous application of the provisions on cooperation between national courts and the European Commission in the case of international commercial arbitration. On the contrary, it reinforces this position, since the very absence of a concrete legislative provision to that regard does not seem to exclude the possibility of establishing a cooperation on the basis of agreed practices, and in light of the principle of the parties' autonomy which governs the conduct of arbitration.

107. Taking into account the argumentation presented above, an analogous application of art. 15 and 16 of the Regulation 1/2003, in the benefit of the interests of both stakeholders, could be validly supported. However, this analogy should be subject to limitations prescribed by the very nature and functions of the two institutions. These limitations refer to the requirement of previous consent for the European Commission's involvement and the reassurance of the observance of the parties' rights in light of the principle of proportionality by the European Commission during the whole interference.

III.B.1.b. The communication of arbitral awards to the European Commission

108. Another link of cooperation between the European Commission and the adjudicating authorities is found under art. 15 par. 2 of the Regulation 1/2003, according to which Member States shall forward to the European Commission, any written judgment delivered by the national courts on the application of the EU competition rules. It is provided that this should take place without any delay, strictly after the parties have been notified of the delivery of such a judgment. Bringing this provision in the case of the arbitral proceedings, a strictly analogous application would be hindered

[265] NISSER, BLANKE, *op.cit.*, p. 207; NAZZINI, *Competition Enforcement and Procedure*, *loc.cit.* .

[266] Renato NAZZINI, *Concurrent Proceedings in Competition Law : Procedure, Evidence and Remedies*, Oxford University Press, Oxford, 2004, p. 336.

by the fact that arbitral awards do not fall under the jurisdiction of the Member State, and, therefore, cannot be notified to the European Commission by that Member State, unless they are admitted to the its national legal order through the recognition proceedings - the latter being usually differentiated depending on whether the award is a domestic or a foreign one. The lack of uniformity in that regard, and the insecurity as to whether the Member State has full cognizance of all the arbitral awards that are to be admitted in its legal order before the actual procedure for their admission and the subsequent acquirement of *exequatur* could impede an analogous application of the provision.

109. The only way through which the European Commission might be communicated with an arbitral award which addresses issues of EU competition law would be through the national courts before which an action is brought for either the annulment or the recognition and enforcement of the arbitral award.[267] Thus, it will not be arbitral awards that will be notified to the Commission; but rather national judgments, exactly as provided under art. 15 par. 2 of the Regulation 1/2003.

110. Trying to establish a more direct connection between the European Commission and the arbitral tribunals in light of the above provision by insinuating that, since the arbitral tribunals do not belong to any jurisdiction and have no forum, it should be the arbitrators themselves that notify the Commission of the issuance of the award and not the Member States would be quite problematic.

111. Notwithstanding the fact that such a position would ensure a direct and quicker dialogue between the two stakeholders, it cannot be supported by any grounds of analogy. It is hard to suggest to arbitrators to notify an institution under whose control they do not abide and function[268], *i.e.* the European Commission, on the matter of the issuance of the award. In addition to that, it could be suggested that the arbitrators have no particular interest in notifying an institution which cannot provide the award with an *exequatur* and which does not directly affect or hinder the enforceability of the award - as, for example, would be the case of the national courts when they adjudicate on the admission of the arbitral awards in the national legal order. Moreover, taking into account this very admission of the arbitral awards in national legal orders, the aforementioned lack of interest is accentuated in the case where the *locus arbitri* and the *locus executionis* of an award addressing issues of EU competition law are outside the EU. The European Commission constitutes an institution alien to their legal orders, since their national courts bear no obligation towards it at the procedures of admission of the arbitral awards. *A maiore ad minus* no such obligation could be incurred to the arbitrators either.

[267] KOMNINOS, *Arbitration and EU Competition Law*, *op.cit.*, p. 202.

[268] As already mentioned, arbitral tribunals belong to no jurisdiction and have no *forum*, *supra* II.B., par. 25.

112. The issuance of the award constitutes the end of the arbitral proceedings, and by that, the end of the arbitrators' duties under the arbitration clause. If they were obliged to refer to another institution or authority after the end of their adjudicative duties, this would seem to undermine the arbitral tribunal's own competence over the dispute as well as its independence, and would diffuse a sentiment of lack of legal certainty as to the finality of the judgment - irrespectively of the subsequent judicial control that any arbitral award is subject to.

113. Of course, it is easily presumable that the parties are not expected to notify the European Commission of the issuance of such an award *propio motu.* Apart from the fact that such a position cannot be supported by force of analogy from the wording of article 15 par. 2 of the Regulation 1/2003, it would be unlikely that the parties - having recourse to arbitration because they seek for a quick and effective solution to their dispute- would accept an extra procedural burden that would slow down the whole procedure and would bear no direct effect to the validity of the award.

III.B.1.c. Conflicting Decisions and Stay of Proceedings

114. Under art. 16 of the Regulation 1/2003 it is provided that the national courts ruling on cases which address issues of EU competition rules should not run counter to the European Commission's decisions, in case such decisions exist on the dispute at hand. Despite the fact that this provision does not entail any such obligation of arbitral tribunals, practice in international arbitration bears witness to the fact that arbitrators attribute a *de facto* increased evidential value to the findings of previous decisions from the European Commission on infringements of EU competition law.[269] Besides, divergence from the findings of the European Commission on the infringement of the EU competitions rules could possibly render the arbitral award contrary to public policy.

115. Although it cannot be disregarded that an analogy would secure the uniform application of EU competition law as well as the enforceability of the award itself, this practice is not equated to an exact and complete application of art. 16 of the Regulation 1/2003 in arbitral proceedings, since in any case the arbitrators will have to assess the case and might choose to differ from the European Commission. Doctrine suggests that the positive effects of the *res judicata* principle emanating from a European Commission should not be overstated, mainly because of the exclusivity of the arbitral tribunal's jurisdiction, as chosen by the parties, as well as because the European Commission's legal determinations and factual findings are specific to the market conditions at a

[269] ΔΕΜΠΕΓΙΩΤΗΣ, *op.cit.*, p. 288, where reference is made to ICC Case 8626/1996, *ICC Bulletin,* Vol.14, Issue 2, 2003, pp. 55-59; ICC Case 10660/2000, *ICC Bulletin,* Vol.14, Issue 2, 2003, pp.62-66

certain time.[270] It is also suggested that since the public policy grounds come into play in the case of blatant and serious violations of EU competition law, the arbitrators should enjoy the discretion to differentiate from the decision of the European Commission depending on the gravity of the competition law infringement.[271]

116. Following the same rationale of respect towards the European Commission's adjudication and decisions, art. 16 of the Regulation 1/2003 stipulates that when there are parallel proceedings, national courts are granted the discretion to assess the necessity to stay proceedings and await the outcome of the European Commission's decision.[272] According to doctrine, the latter should also apply when the European Commission's proceedings run in parallel with international commercial arbitration.[273] Again, this is somehow dictated by the arbitral tribunal's duty to make every effort to assure that the award is enforceable at law. An arbitral award running counter to the findings of a European Commission's decision will be violating the EU competition rules and will be most probably set aside at the course of subsequent judicial review for reasons of public policy.[274]

117. Against this approach, it is suggested that the independence of the arbitral tribunals from the pursuit of any national or supranational interest - as would be the case of national courts - and their sole interest in resolving the dispute of private parties in a sound manner block any assumption that proceedings before the European Commission should produce the outcome of staying the concurrent arbitration[275]. Ordering the stay of proceedings with the aim of avoiding having arbitral awards conflicting with the findings of the European Commission, as provided under art. 16 of Regulation 1/2003, constitutes a *lex specialis* to the duty of sincere cooperation under art. 4 par. 3 TEU, but the arbitral tribunals are not bound by the latter, and, therefore should not be bound by its *lex specialis* either.[276] Especially taking into account that under the provision of Regulation 1/2003 the national courts are not obliged to stay proceedings but only to assess the necessity of staying

---

[270] LANDOLT, *Modernised EC Competition Law in International Arbitration*, *op.cit.*, pp. 242-243.

[271] KOMNINOS, *Arbitration and EU Competition Law*, *op.cit*., p. 208-209. The author highlights that the prerogative of the CJEU in recognizing a plea of public policy for violations of EU competition law was based on the need to ensure that no anti-competitive effects occur on the market and not on the need or wish to ensure that the European Commissions are absolutely and to their whole content binding upon the arbitral tribunals. *Contra* NAZZINI, *Concurrent Proceedings in Competition Law*, *op.cit.*, pp. 352-353.

[272] This resonates previous case law in CJEU, Judgment of 14 December 2000, *Masterfoods and HB*, C--344/98, ECLI:EU:C:2000:689.

[273] DANOV, *op. cit.*, p. 272; NAZZINI, *International Arbitration and Public Enforcement of Competition Law*, *op.cit.*, p.161.

[274] National case law verifies this position that the public policy of a Member State is breached if an arbitral award which is inconsistent with a subsequent European Commission's decision and contrary to the EU competition law is finally enforced, *see* UK Commercial Court, *Lauritzencool Ab v Lady Navigation Inc,* [2004] EWHC 2607 (Comm).

[275] KOMNINOS, *Arbitration and EU Competition Law*, *op.cit.*, p. 208.

[276] *Ibid, loc.cit.* .

proceedings, the position that the arbitral tribunals should not await for the European Commission's decision is further reinforced. In addition to that, the assessment of the arbitral tribunal in view of prospective or concurrent proceedings before the European Commission is at some point speculative, since the arbitrators are required to embark upon a prognostic exercise.[277]

118. However, the absence of pursuit of national or supranational priorities by the arbitral tribunals cannot render less important or even relinquish their own interest in resolving the private dispute in a sound manner; an interest which would be gravely disregarded by the issuance of an unenforceable award for reasons of public policy and violation of EU competition law. Therefore, it appears more coherent with the duty of arbitrators to be able to assess the necessity of staying proceedings in the advent of parallel investigations from the European Commission.

III.B.2. The role of the NCAs

119. As it concerns the involvement of the NCAs in pending arbitral proceedings, it follows that if the role of the European Commission has not yet been institutionalized in that specific regard, nor could the role of the NCAs have constitute the subject matter of such a regulation. In fact there is no such specific provision in EU law.

120. However, taking into account that the European Commission and the NCAs collaborate within the same network, and that, after the modernization of the EU competition law they have shared competences in the public enforcement and application of the EU competition rules, it follows *a maiore ad minus* that if the European Commission is prescribed and also allowed to contribute to the arbitrators' work by analogy, the same should happen with the case of the NCAs.

121. In fact, Regulation 1/2003 provides for the involvement of the NCAs as *amici curiae* in the course of judicial procedures in a similar manner as this was provided for the European Commission, and applying this in the case of arbitral proceedings could be also supported by analogy. More specifically, under art. 15 par. 3 of the Regulation 1/2003 NCAs, acting on their own initiative, may submit to the national courts their written and oral observations - if the courts permit this oral interference - on the application of the EU competition rules. These briefs might quite beneficial to

[277] NAZZINI, *Competition Enforcement and Procedure, op.cit.,* p. 444.

the arbitration proceedings, especially in cases which require wider appreciation of the competitive conditions of the affected markets.[278]

122. However, the arguments which were presented above against the analogous application of provisions on the intervention of the European Commission in arbitration can be also presented here. The principle of the parties' autonomy and the respect for confidentiality in a way that do not violate the parties' rights against self-incrimination should be also duly regarded and balanced again the need to have the NCAs interfere so as to secure the enforceability of the award, or the NCAs' own impetus to become more active in the implementation of the EU competition law. The express consent of the parties to allow the intervention of the European Competition is still considered a necessary guarantee for satisfying compliance with the principle of autonomy.[279]

123. It is suggested that the role of the NCAs in the course of the arbitral proceedings should be particularly limited - especially when it is them which take the initiative to require to intervene - because their participation in the process is secured at the point of admission of the arbitral awards in the national legal order, when the NCAs can actually intervene in the procedure.[280] In any case the proper point of interference would be before the national courts when the arbitral award will be admitted in the national legal order.

124. As regards the effect of administrative decisions of NCAs in the outcome of pending arbitral proceedings, it is suggested that these decisions are not binding before the arbitral tribunal, and that they constitute evidences which can be rebutted and which will be assessed as all the evidential material submitted to the arbitral tribunal.[281] Nonetheless, if the NCA decision refers to the same parties and to the same behavior which are examined in the course of the arbitration, then the challenge of the findings of the NCA might constitute an abuse of rights on behalf of the arbitrators - especially if the NCA decision is final after appeal before the competent national courts.[282]

125. This is reinforced by the fact that the Damages Directive provides that the infringement of the EU competition law that is proclaimed in a NCA decision is established in an irrefutable manner for the purposes of an action for damages before the national courts of the Member State whose NCA

[278] Renato NAZZINI, "A Principled Approach to Arbitration of Competition Law Disputes : Competition Authorities as Amici Curiae and the Status of their Decisions in Arbitral Proceedings", *European Business Law Review*, Vol. 19, Issue 1, 89-114, 2008, pp. 106-107.

[279] *Ibid*, *op.cit*, p. 108.

[280] *Ibid*, *loc.cit.* .

[281] *Ibid*, op.cit, p. 110.

[282] *Ibid*, op.cit, p. 111.

has issued the relevant infringement decision.[283] However, the fact that such a decision is recognized only as a *prima facie* evidence - and not as an irrefutable evidence - if the action for damages is lodged before the courts of a different Member,[284] could advocate in favor of the position that the NCA decisions cannot be binding upon the arbitral tribunals which do not belong to any jurisdiction and have no constitutional attachment to any NCA.

[283] Art. 9 par. 1, Damages Directive.

[284] Art. 9 par. 2, Damages Directive.

IV. CONCLUSION

126. Evaluating the relationship between international commercial arbitration and EU competition law in light of the above analysis, we can note that they are co-existing in a tacit pact of mutual respect, despite the differences that could have kept them at odds, as well as that they are evolving into a closer interplay through slow and steady judicial and normative steps.

127. Signs of gradual approximation between them are portrayed in the affirmation of the arbitrability of antitrust disputes, as well as in the fact that EU Competition rules emerge as applicable in the adjudication of the merits of the dispute brought to arbitration. The latter is due to the structuralization of EU law and, mainly, to the instruments of private international law, *i.e.* the renowned principle of primacy and direct effect of EU law and the functions of the overriding mandatory rules respectively. The qualification of EU competition law as a ground of public policy, renouncing the validity and impeding the recognition and enforcement of arbitral awards, constitutes a further point of intersection between the two; a rather vibrant one, keeping in mind the debate on the minimalist or maximalist review that the national courts should follow in order to verify the application of EU competition law without re-adjudicating the case. The currently prevailing position of the CJEU and the national courts of EU Member States, placed closer to the minimalist approach, suggests that the boundaries between the two systems of dispute resolution are quite clear and impenetrable without fear of the latter imperiling the efficiency of EU competition law. It seems that each stakeholder is given its own space and recognition of their proper interests; arbitration is welcomed to address issues of EU competition law, reassured that its jurisdiction will not be challenged and the parties' autonomy will not be breached, while the EU legal order can be comforted that EU competition rules will be applied as overriding mandatory norms and at a second stage respected as grounds of public policy, outwinning any possibility of having them been non-observed or overstepped.

128. This fair and delicate balance between the two is further fomented through the absence of a direct dialogue between the arbitral tribunals and the EU judicature. Arbitral tribunals, on the one hand, fail to qualify for directly referring preliminary questions to the CJEU, and, on the other hand, are subject only to the *ex post* judicial review by the national courts during the admission of arbitral awards in the national legal orders. In view of this last function, national courts remain the sole connector between the CJEU and international commercial arbitration on the matters of EU competition law. This judicial (and arbitral) introversion could be accused of hindering a creative fusion and the establishment of a dialogue that could render the resolution of antitrust disputes more effective and more efficient in time and money, precipitating the sought interpretation on the

application of EU competition law. However, it seems to be nurturing the loyalty in the basic foundations of both international commercial arbitration and the organization of the EU judicature, *i.e.* autonomy and sincere cooperation, respectively.

129. The latter principles seem also to determine the relationship between the international commercial arbitration and the members of the ECN, as well as to guide the absence of particular EU-deriving provisions on the establishment of a direct communication between them. The argumentation presented in the context of the present thesis indicates that an analogous application of the EU provisions which regulate the relationship between national courts and members of the ECN could be beneficial to the interests of both the parties to an antitrust dispute and the institutional stakeholders involved. The regulated involvement of the ECN in the arbitral proceedings in a sound manner, respecting confidentiality and the parties' autonomy could fill the gap generated by the inability of the arbitral tribunals to make preliminary references to the CJEU - and their late-coming dependence on the national courts in that matter - as well as it could facilitate the issuance of enforceable arbitral awards which abide by the prerogatives of EU competition law.

130. As an ultimate remark, it appears that international commercial arbitration and EU competition law are not confronting each other in a steep way. Without undermining the importance of normative evolution and the pursuit of further steps of approximation as previously suggested, they seem to rather prefer to continue growing their delimited spheres of action in parallel, permitting for encounters and mutual concessions by virtue of the guidance of the EU law and the entrusted discretion of the arbitrators in their duty to resolve dispute presented before them. As it has been acknowledged, "*in reality, the attitude and action of an arbitrator faced with an [EU] antitrust issue should be influenced by pragmatism rather than principle*"[285].

[285] Julian LEW, "Determination of Arbitrator's Jurisdiction and the Public Policy Limitations on that Jurisdiction", in : Julian LEW (ed*), Contemporary Problems in International Arbitration,* Martinus Nijhoff Publishers, London, 1986, p. 60.

V. REFERENCES

V.A. LEGISLATION

TREATIES

Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, OJ C 115/47, 9.5.2008.

Consolidated version of the Treaty on European Union, 13 December 2007, OJ C 115/13, 9.5.2008.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 October 1958, 330 UNTS 38.

Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels, 1968, OJ L 299/32, 31.12.1972.

*Charter of Fundamental Rights of the European Unio*n (2000/C 364/01), OJ C 326/391, 16.10.2012.

EU SECONDARY LAW

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003.

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, OJ L 349/1, 5.12.2014.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1, 16.1.2001.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1, 20.12.2012

OTHER

UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985).

ICC International Court of Arbitration, Rules of Arbitration, ICC No. publication 808.

Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101/81, 27.4.2004.

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ C 368/13, 22.12.2001.

Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/2003), OJ C 101/43, 27.4.2004.

Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2004/C 101/04), OJ C 101/54, 27.4.2004.

Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities, 10.12.2002, available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015435%202002%20ADD%201.

UNITED NATIONS, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration,* New York, 2012, available at http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf.

V.B. TABLE OF CASES

COURT OF JUSTICE OF THE EUROPEAN UNION

JUDGMENTS

Judgment of 6 April 1962, *De Geus en Uitdenbogerd v Bosch and Others*, C-13/61, ECLI:EU:C:1962:11.

Judgment of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1.

Judgment of 15 July 1964, *Costa v E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66.

Judgment of 30 June 1966, *Société Technique Minière v Maschinenbau Ulm,* C-56/65, ECLI:EU:C:1966:38.

Judgement of 9 July 1969, *Voelk v Vervaecke,* C-5/69, ECLI:EU:C:1969:35.

Judgment of 14 July 1972, *ICI v Commission*, C-48/69, ECLI:EU:C:1972:70.

Judgment of 30 January 1974, *BRT v SABAM*, C-127/73, ECLI:EU:C:1974:6.

Judgment of 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, C-33/76, ECLI:EU:C:1976:188.

Judgment of 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, C-45/76, ECLI:EU:C:1976:19.

Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA (II),* C-106/77, ECLI:EU:C:1978:49.

Judgment of 16 December 1981, *Foglia v Novello*, C- 244/80, ECLI:EU:C:1981:302

Judgment of 23 March 1982, *Nordsee v Reederei Mond,* C-102/81, ECLI:EU:C:1982:107.

Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, agissant pour Danfoss*, C-109/88, ECLI:EU:C:1989:383.

Judgment of 18 October 1989, *Orkem v Commission*, C-374/87, ECLI:EU:C:1989:387.

Judgment of 24 January 1991, *Alsthom Atlantique SA v. Compagnie de construction Sulzer SA*, C-339/89, ECLI:EU:C:1991:28.

Judgment of 11 July 1991, *Verholen and Others v Sociale Verzekeringsbank Amsterdam*, Joined cases C-87/90, C-88/90 and C-89/90, ECLI:EU:C:1991:314.

Judgment of 31 March 1993, *Ahlström Osakeyhtiö and Others v Commission*, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85, ECLI:EU:C:1993:120.

Judgment of 27 April 1994, *Gemeente Almelo and Others v Energiebedrijf IJsselmi*j, C-393/92, ECLI:EU:C:1994:171.

Judgment of 14 December 1995, *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten*, Joined Cases C-430/93 and C-431/93, ECLI:EU:C:1995:441.

Judgment of 14 December 1995, *Peterbroeck, Van Campenhout & Cie v Belgian State*, C-312/93, ECLI:EU:C:1995:437.

Judgment of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, Joined cases C-46/93 and C-48/93, ECLI:EU:C:1996:79.

Judgment of 24 October 1996, *Viho v Commission*, C-73/95 P, ECLI:EU:C:1996:405.

Judgment of 17 September 1997, *Dorsch Consult Ingenieursgesellschaft v Bundesbaugesellschaft Berlin*, C-54/96, ECLI:EU:C:1997:413.

Judgment of 28 April 1998, *Javico v Yves Saint Laurent Parfums*, C-306/96, ECLI:EU:C:1998:173.

Judgment of 4 February 1999, *Köllensperger and Atzwanger*, C-103/97, ECLI:EU:C:1999:52.

Judgment of 25 March 1999, *Gencor v Commission*, T-102/96, ECLI:EU:T:1999:65.

Judgment of 1 June 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269.

Judgment of 23 November 1999, *Joint Cases Jean-Claude Arblade, Arblade & Fils SARL, and Bernard Leloup, Serge Leloup, Sofrage SARL*, C-369/96 and C-376/96, ECLI:EU:C:1999:575.

Judgment of 11 May 2000, *Renault*, C-38/98, ECLI:EU:C:2000:225

Judgement of 9 November 2000, *Ingmar GB*, C- 381/98, ECLI:EU:C:2000:605.

Judgment of 14 December 2000, *Masterfoods and HB*, C-344/98, ECLI:EU:C:2000:689.

Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465.

Judgment of 15 October 2002, *ICI v Commission*, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P, C-254/99 P, ECLI:EU:C:2002:582.

Judgment of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513.

Judgment of 4 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, ECLI:EU:C:2004:6.

Judgment of 27 January 2005, *Denuit and Cordenier*, C-125/04, ECLI:EU:C:2005:69.

Judgment of 14 July 2005, *ThyssenKrupp v Commission*, Joined cases C-65/02 P and C-73/02 P, ECLI:EU:C:2005:454.

Judgment of 29 June 2006, *Commission v SGL Carbon AG*, C-301/04 P, ECLI:EU:C:2006:432.

Judgment of 13 July 2006, *Manfredi*, Joined cases C-295/04 to C-298/04, ECLI:EU:C:2006:461.

Judgment of 26 October 2006, *Mostaza Claro*, C-168/05, ECLI:EU:C:2006:675.

Judgment of 25 January 2007, *Dalmine v Commission*, C-407/04 P, ECLI:EU:C:2007:53.

Judgment of 10 February 2009, *Allianz (anciennement Riunione Adriatica di Sicurtà)*, C-185/07, ECLI:EU:C:2009:69.

Judgment of 20 May 2010, *Commission v Tetra Laval*, C-12/03 P, ECLI:EU:C:2005:87.

Judgment of 17 October 2013, *Unamar*, C-184/12, ECLI:EU:C:2013:663.

Judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, ECLI:EU:C:2014:1754.

Judgment of 12 June 2014, *Intel Corp. v Commission*, T-286/09, ECLI:EU:T:2014:547.

Judgment of 13 May 2015, *Gazprom*, C-536/13, ECLI:EU:C:2015:316.

Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, ECLI:EU:C:2015:565.

Judgment of 6 September 2017, *Intel Corporation Inc.. v Commission*, C-413/14 P, ECLI:EU:C:2017:632.

OPINIONS OF ADVOCATE GENERALS

Opinion of Advocate General Lagrange of 27 February 1962, *De Geus en Uitdenbogerd v Bosch and Others*, C-13/61, ECLI:EU:C:1962:3.

Opinion of Advocate General Mayras of 14 July 1972, *ICI v Commission*, C-48/69, ECLI:EU:C:1972:32.

Opinion of Advocate General Reischl of 2 February 1982, *Nordsee*, ECLI:EU:C:1982:31.

Opinion of the Advocate General Saggio of 25 February 1999, *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269.

Opinion of Advocate General Kokott of 17 January 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, ECLI:EU:C:2013:21.

Opinion of Advocate General Wathelet of 4 December 2014, *Gazprom*, C-536/13, ECLI:EU:C:2014:2414.

Opinion of Advocate General Wathelet of 17 March 2016, *Genentech*, C-567/14, ECLI:EU:C:2016:177.

Opinion of Advocate General Wathelet of 19 September 2017, *Slowakische Republik v Achmea BV*, C-284/16, ECLI:EU:C:2017:699.

OPINION OF THE CJEU

Opinion of the Court of 8 March 2011, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, Opinion 1/09, ECLI:EU:C:2011:123.

ORDER OF THE CJEU

Order of 13 February 2014, *Merck Canada*, C-555/13, ECLI:EU:C:2014:92.

ICC ARBITRATIONS

ICC Case 4131/1982, IX Y.B. Comm. Arb. 131 (1984).

ICC Case *7181/1992*, *ICC Bulletin,* Vol.6, Issue 1, 1995, p.55.

ICC Case 7673/1993, *ICC Bulletin*, Vol. 6, Issue 1, 1995, p. 57.

ICC Case 7357/1995, *ICC Bulletin*, Vol.14, Issue 2, 2003, p.30.

ICC Case 8626/1998, *ICC Bulletin*, Vol.14, Issue 2, 2003, p.55.

ICC Case No 10660/2000, *ICC Bulletin*, Vol.14, Issue 2, 2003, p.62.

ICC Case 10704/2001, *ICC Bulletin*, Vol.14, Issue 2, 2003, p.66.

NATIONAL COURTS

UNITED KINGDOM

Commercial Court, *Lauritzencool Ab v Lady Navigation Inc,* [2004] EWHC 2607 (Comm).

House of Lords, *Premium Nafta Products Ltd v Fili Shipping Co Ltd*, 17 October 2007, [2007] 2 All E.R. (Comm) 1053.

Commercial Court (Queen's Bench Division), *Monde Petroleum SA v Westernzagros Ltd*, [2015] EWHC 67 (Comm).

England and Wales Court of Appeal (Civil Division), *Ryanair Ltd v Esso Italiana Srl*[2013] EWCA Civ 1450.

UNITED STATES OF AMERICA

SCOTUS, *American Safety Equipment Corp. v J. P. McGuire & Co*, 391 F.2d 821(2d Cir. 1968).

SCOTUS, *Scherk v Alberto-Culver Co*., 417 U.S. 506 (1974).

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

FRANCE

Paris Court of Appeals, 18 November 2004, *Thalès Air Defence B.V. v. GIE Euromissile, EADS France and EADS Deutschland GmbH*, (2005) Rev Arb 750.

Paris Court of Appeals, 23 March 2006, *SNF SAS v. Cytec Industries BV*, (2007) Rev Arb 100.

Cour de Cassation, 4 June 2008, *SNF SAS v. Cytec Industries BV*, (2008) Rev Arb 473.

GREECE

ΟλΑΠ 11/2009, ΕφΑΔ 8-9/2009, 986.

ΑΠ 1665/2009, ΤΝΠ ΝΟΜΟΣ.

ΟλΑΠ 14/2015, ΤΝΠ ΝΟΜΟΣ.

V.C. BIBLIOGRAPHY

BOOKS

BORN Gary, *International commercial arbitration - commentary and materials (2nd Edition)*, Kluwer Law International, The Netherlands, 2001.

KOMNINOS Assimakis, *EC Private Antritrust Enforcement : decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008.

LALIVE Pierre, Jean-Francois POUDRET, Claude REYMOND (eds), *Le droit de l'arbitrage interne et international en Suisse*, Payot, Lausanne, 1989.

LANDOLT Phillip, *Modernised EC Competition Law in International Arbitration*, Kluwer Law International, The Hague, 2006.

MILLS Alex, *Confluence of Public and Private International Law : Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge University Press, UK, 2009.

NAZZINI Renato, *Competition Enforcement and Procedure (2nd Edition)*, Oxford University Press, Oxford, 2016.

NAZZINI Renato, *Concurrent Proceedings in Competition Law : Procedure, Evidence and Remedies*, Oxford Univeristy Press, Oxford, 2004.

PAPADOPOULOS Anestis, *The International Dimension of Competition Law and Policy*, Cambridge University Press, New York, 2010.

RACINE Jean-Baptiste, *L' arbitrage commercial international et l' ordre public,* L.G.D.J. (Bibliothèque de droit privé), Paris, 1999.

RENOLD Marc-André, *Les conflits de lois en droit antitrust : contribution à l'étude de l'application internationale du droit économique,* Zürich: Schulthess, Switzerland, 1991.

ROSE Vivien, BAILEY David, *Bellamy and Child: European Union Law of Competition (7th Edition*), Oxford University Press, UK, 2013.

SHELKOPLYAS Natalya, *The Application of EC Law in Arbitration Proceedings*, Europa Hart Publishing, Groningen, 2003.

WHISH Richard, BAILEY David, *Competition Law* (7th Edition), Oxford University Press, UK, 2008.

ΒΡΕΛΛΗΣ Σπυρίδων, *Ιδιωτικό Διεθνές Δίκαιο*, Νομική Βιβλιοθήκη, Αθήνα, 2008.

ΒΡΕΛΛΗΣ Σπυρίδων, *Προβλήματα ιδιωτικού διεθνούς δικαίου στην σύμβαση εργασίας*, Εκδόσεις Αντ. Ν.Σάκκουλα, Αθήνα-Κομοτηνή, 1989.

ΔΕΜΠΕΓΙΩΤΗΣ Σωτήρης, *Διεθνής Εμπορική Διαιτησία και εφαρμογή των κανόνων ανταγωνισμού*, Νομική Βιβλιοθήκη, Αθήνα, 2016.

ΠΑΜΠΟΥΚΗΣ Χαράλαμπος, *Η Lex mercatoria ως εφαρμοστέο δίκαιο στις διεθνείς συμβατικές ενοχές : συμβολή στη γενική θεωρία του δικαίου των διεθνών συναλλαγών*, Εκδ. Αντ. Ν. Σάκκουλα, Αθήνα, 1996.

ΠΑΠΑΔΟΠΟΥΛΟΥ Τατιάννα, *Ο ρόλος του δικάζοντος δικαστή στο ιδιωτικό διεθνές δίκαιο*, Εκδ. Σάκκουλα, Αθήνα-Θεσσαλονίκη, 2000.

ΣΩΜΑΡΑΚΗΣ Ιωάννης, *Η μέθοδος αναγνώρισης νομικών καταστάσεων στο Ιδιωτικό Διεθνές και Ευρωπαϊκό Δίκαιο*, Νομική Βιβλιοθήκη, Αθήνα, 2015

ΤΣΟΥΚΑ Χρυσαφώ, *Οι αλλοδαποί κανόνες αμέσου εφαρμογής και η σημασία τους ως προς την μεθοδολογική ταυτότητα του ιδιωτικού διεθνούς δικαίου*, Εκδ. Αντ. Ν. Σάκκουλα, Αθήνα, 1995.

CONTRIBUTIONS TO EDITED BOOKS

ATWOOD James, FINLEY Kelly, "Chapter 34: The Arbitration of Antitrust Class Actions under United States Law", in : BLANKE Gordon, LANDOLT Phillip (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011.

BERMAN Harold, DASSER Felix, "The "new" law merchant and the old sources, content and legitimacy", in : CARBONNEAU Thomas (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Merchant Law*, Dobbs Ferry, New York, 1990.

BERMANN George, "Mandatory rules of law in international arbitration", in : FERRARI Franco, KROLL Stefan (eds), *Conflict of Laws in International Arbitration*, Sellier European Law Publishers, Munich, 2011.

BLANKE Gordon, "EU Competition Arbitration", in : Luis ORTIZ BLANCO (ed), *EU Competition Procedure* (3rd Edition), Oxford University Press, UK, 2013.

BLESSING Marc, "Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts", in : VOGT Nedim Peter (ed), *Swiss Commercial Law Series Volume 9*, Helbing & Lichtenhahn, Frankfurt, 1999.

DANOV Mihail, "Jurisdiction and Judgments in Relation to EU Competition Law Claims", in : BEAUMONT Paul, HARRIS Jonathan (eds), *Studies in Private International Law Volume 3*, Oxford and Portland, Oregon, 2011.

DE NOVA Rodolfo, "Conflits des lois et norms fixant leur proper domaine d' application",in : Jacques Maury (ed), *Mélanges offerts à Jacques Maury, Tome I Droit international privé et public*, Dalloz et Sirey, Paris, 1960.

DE WITTE Bruno, "Direct effect, primacy and nature of the legal order", in : CRAIG Paul, DE BURCA Gráinne (eds), *The Evolution of EU Law (2nd Edition)*, Oxford University Press, Oxford, 2011.

FALLON Marc, FRANCQ Stéphanie, "Private Enforcement of Antitrust provisions and the Rome I Regulation", in BASEDOW Jurgen, FRANCQ Stéphanie, IDOT Laurence (eds), *International Antitrust Litigation : Conflict of Laws and Coordination, Hart Publishing*, Oxford and Portland, Oregon, 2012.

FAULL Jonathan, KJOBYE Lars, LEUPOLD Henning, NIKPAY Ali, "*Part I General Principles, 3 Article 101, D Jurisdiction*", in : FAULL Jonathan, NIKPAY Ali, TAYLOR Deirdre (eds), *Faull & Nikpay: The EU Law of Competition* (3rd Edition), Oxford University Press, Oxford, UK, 2014.

HANOTIAU Bernard, "The Law Applicable to Arbitrability", in : Albert Jan VAN DEN BERG, *ICCA Congress Series No 9-Improving the Efficiency of Arbitration and Awards: 40 years of application of the New York Convention*, Kluwer Law International, 1999.

HANOTIAU Bernard, CAPRASSE Olivier, "Public Policy in International Commercial Arbitration", in : GAILLARD Emmanuel, DI PIETRO Domenico, *Enforcement of arbitration agreements and international arbitral awards : the New York Convention 1958 in practice*, Cameron May, London, 2008.

IDOT Laurence, "Arbitration and the Reform of Regulation 17/62" in : EHLERMANN Claus-Dieter, ATANASIU Isabella (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oregon USA, 2003.

IDOT Laurence, "Le droit de la concurrence", in : FUCHS Angelika, MUIR WATT Horatia, PATAUT Etienne (eds), *Les Conflits de lois et le système juridique communautaire*, Dalloz, Paris, 2004

KOMNINOS Assimakis, "Arbitration and EU Competition Law", in : BASEDOW Jurgen, FRANCQ Stéphanie, IDOT Laurence (eds), *International Antitrust Litigation : Conflict of Laws and Coordination, Hart Publishing*, Oxford and Portland, Oregon, 2012.

KOMNINOS Assimakis, "Chapter 21: Assistance by the European Commission and Member States Authorities in Arbitrations", in : BLANKE Gordon, LANDOLT Phillip (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011.

LALIVE Pierre, "Transnational (or Truly International) Public Policy and International Arbitration" in : SANDERS Pieter (ed), *Comparative Arbitration Practice and Public Policy in Arbitration*, Kluwer Law and Taxation, Deventer, 1987.

LANDOLT Phillip, "Chapter 2: Arbitration Clauses and Competition Law", in: BLANKE Gordon, LANDOLT Phillip (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011.

LEW Julian, “Competition Laws: Limits to Arbitrators’ Authority”, in : MISTELIS Loukas, BREKOULAKIS Stavros (eds.), *Arbitrability : International & Comparative Perspectives*, Wolters Kluwer Law and Business, Kluwer Law International. The Netherlands, 2009.

MOURRE Alexis, “Chapter 1:Arbitrability of Antitrust Law from the European and US Perspectives”, in : Gordon BLANKE, Phillip LANDOLT (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011.

NAZZINI Renato, “Chapter 25: Parallel Proceedings before the Tribunal and the Courts/Competition Authorities”, in : BLANKE Gordon, LANDOLT Phillip (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, The Hague, 2011.

PAMBOUKIS Charalambos, “On Arbitrability: The Arbitrator as a Problem Solver”, in : MISTELIS Loukas, BREKOULAKIS Stavros (eds.), *Arbitrability : International & Comparative Perspectives*, Wolters Kluwer Law and Business, Kluwer Law International. The Netherlands, 2009.

REDFERN Alan, HUNTER J. Martin, BLACKABY Nigel, PARTASIDES Constantine, “An overview of international arbitration”, in : BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER J. Martin (eds), *Redfern and Hunter on International Arbitration*, Oxford University Press, UK, 2009.

REDFERN Alan, HUNTER J. Martin, BLACKABY Nigel, PARTASIDES Constantine, “The Agreement to Arbitrate”, in : BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER J. Martin (eds), *Redfern and Hunter on International Arbitration,* Oxford University Press, UK, 2009.

REDFERN Alan, HUNTER J. Martin, BLACKABY Nigel, PARTASIDES Constantine, “Powers, Duties and Jurisdiction of an Arbitral Tribunal”, in : BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER J. Martin (eds), *Redfern and Hunter on International Arbitration*, Oxford University Press, UK, 2009.

ROSAS Allan, “The National Judge as EU Judge: Opinion 1/09”, in : CARDONNEL Pascal, ROSAS Allan, WAHL Nils, *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh,* Hart Publishing, Oxford, 2012.

TRIDIMAS Takis, “The ECJ and the National Courts: Dialogue, Cooperation and Instability” in : Damian CHALMERS, Antony ARNULL (eds), *The Oxford Handbook of European Union Law*, Oxford University Press, Oxford, 2015.

ΠΕΤΡΟΧΕΙΛΟΣ Γιώργος, ΠΑΠΑΕΥΣΤΡΑΤΙΟΥ Αθηνά, ΖΟΥΜΠΟΥΛΗΣ Χρήστος, “Η διαιτητική επίλυση των διεθνών διαφορών” in : ΠΑΜΠΟΥΚΗΣ Χαράλαμπος (ed), *Δίκαιο Διεθνών Συναλλαγών*, Νομική Βιβλιοθήκη, Αθήνα, 2010.

ΧΡΙΣΤΙΑΝΟΣ Βασίλειος, “Η θέση της Εμπορικής Διαιτησίας στο Δικαιοδοτικό Σύστημα της Ευρωπαϊκής Κοινότητας” in : ΣΤΑΘΟΠΟΥΛΟΣ Μιχάλης, ΜΠΕΗΣ Κώστας, ΔΩΡΗΣ Φίλιππος, ΚΑΡΑΚΩΣΤΑΣ Ιωάννης, *Γενέθλιον Απόστολου Σ. Γεωργιάδη - Τόμος ΙΙ,* Εκδ. Αντ. Ν. Σάκκουλα, 2006.

ARTICLES

BARRACLOUGH Andrew, WAINCYMER Jeff, "Mandatory Rules of Law in International Commercial Arbitration", *Melbourne Journal of International Law*, Volume 6, Issue 2, 205 - 244, 2005.

BASEDOW Jürgen, "EU Law in International Arbitration: Referrals to the European Court of Justice", *Journal of International Arbitration*, Vol. 32, Issue 4, 367-386, 2015.

BENSAUDE Denis, "Thalès Air Defence BV v. GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law", *Journal of International Arbitration*, Vol. 22, Issue 3, 239-244, 2005.

BLANKE Gordon, "The Role of EC Competition Law in International Arbitration : A *Plaidoyer*", *European Business Law Review*, Vol. 16, Issue 1, 169-181, 2005.

BOTTA Marco, "Comment on ''Genentech'': The Arbitrability Paradoxin EU Competition Law", *ICC- International Review of Intellectual Property and Competition Law*, Vol. 38, Issue 2, 235-244, 2017.

DRIESSEN - REILLY Miriam, "Private damages in EU competition law and arbitration: a changing landscape", *Arbitration International*, Vol. 31, Issue 4, 567-587, 2015.

FLERE Pavle, "Impact of EC Competition Law on Arbitration Proceedings", *Slovenian Law Review*, Vol. 3, Issue, 1, 155-175, 2006.

FRANCESKAKIS Phocion, *Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois*, Revue critique de droit international prive, Paris, 1-36, 1966.

GOLDMAN Berthold, "L'Arbitrage International et le Droit de la Concurrence", *ASA Bulletin*, Vol.7, Issue 3, 260-301, 1989.

GOLDMAN Berthold, "Frontières du Droit et Lex Mercatoria", *Archives de Philosophie du Droit*, T. IX, 177-192, 1964.

GOODE Roy, "The role of the lex loci arbitri in international arbitration", *Arbitration International*, Vol. 17, Issue 1, 19-39, 2001.

GUEDJ Thomas, "The theory of Lois De Police, a functional trend in continental private international law : a comparative analysis with modern American theories", *The American journal of comparative law*, Vol.39, Issue 4, 661-697, 1991.

HANOTIAU Bernard, CAPRASSE Olivier, "Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention Belgian and French Perspectives", *Journal of International Arbitration*, Vol. 25, Issue 6, 721–741, 2008.

HOCHSTRASSER Daniel, "Choice of Law and "Foreign" Mandatory Rules in International Arbitration", *Journal of International Arbitration*, Vol. 11, Issue 1, 57-86, 1994.

IDOT Lawrence, "Arbitration and EC Law", *International Business Law Journal*, Issue 5, 561-591, 1996.

KOMNINOS Assimakis, "Arbitration and the Modernisation of European Competition Law Enforcement", World Competition, Vol. 24, Issue 2, 211-238, 2011.

LALIVE Pierre, "The New Swiss Law on International Arbitration", *Arbitration International*, Volume 4, Issue 1, 2-24, 1988.

LANDO Ole, "The Lex Mercatoria in International Commercial Arbitration", *International and Comparative Law Quarterly,* Vol. 34, Issue 4, 747-768, 198.

LANDOLT Phillip, "The Inconvenience of Principle : Separability and Kompetenz-Kompetenz", *Journal of International Arbitration,* Vol. 30, Issue 5, 511-530, 2013.

LENAERTS Koen, CORTHAUT Tim, "Of birds and hedges: the role of primacy in invoking norms of EU law", *European Law Review,* Vol.31, Issue 3, 287-315, 2006.

LUBKING Johannes, "The European Commission's View of Arbitrating Competition Law Issues", *European Business Law Review,* Vol.19, Issue 1, 77-87, 2008.

MAYER Pierre, SHEPPARD Audley, "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", *Arbitration International,* Vol.19, Issue 2, 217-248, 2003.

MUIR WATT Horatia, "Cour de justice des Communautés européennes (grande chambre) – 10 février 2009 – Aff. C185/07", *Revue critique de droit international privé, Vol.98, Issue 2*, 2009.

NAZZINI Renato, "International Arbitration and Public Enforcement of Competition Law", *European Competition Law Review*, Vol. 25, Issue 3,153-162, 2004.

NAZZINI Renato, "A Principled Approach to Arbitration of Competition Law Disputes : Competition Authorities as Amici Curiae and the Status of their Decisions in Arbitral Proceedings", *European Business Law Review,* Vol. 19, Issue 1, 89-114, 2008.

NISSER Carl, BLANKE Gordon, "ICC Draft Best Practice Note on the European Commission Acting as Amicus Curiae in International Arbitration Proceedings –The Text", *European Business Law Review,* Vol. 19, Issue 1, 198-218, 2008.

PASCHALIDIS Paschalis, “The Future of Anti-Suit Injunctions in Support of Arbitration After the EU Court of Justice’s Judgment in the Gazprom Case”, *Journal of International Arbitration,* Vol. 34, Issue 2, 333-345, 2017.

PASCHALIDIS Paschalis, “Arbitral tribunals and preliminary references to the EU Court of Justice”, *Arbitration International*, 2016, https://doi.org/10.1093/arbint/aiw026.

PIERS Maud, “How EU Law Affects Arbitration and the Treatment of Consumer Disputes The Belgian Example”, *Dispute Resolution Journal*, Vol. 59, Issue 4, 76-85, 2005.

PINSOLLE Philippe, “Private enforcement of European Community competition rules by arbitrators”, *International Arbitration Law Review*, Vol. 7, Issue 1, 14-22, 2004.

PLATTE Martin, “An Arbitrator’s Duty to Render Enforceable Awards”, *Journal of International Arbitration*, Vol. 20, Issue 3, 307-312, 2003.

PRECHAL Sacha, SHELKOPLYAS Natalya, “National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and beyond”, *European Review of Private Law*, Vol. 12, Issue 5, 589-611, 2004

PRYLES Michael, “Reflections on Transnational Public Policy”, *Journal of International Arbitration*, Vol. 24, Issue 1, 1-8, 2007.

RADICATI DI BROZOLO Luca, “Antitrust : a Paradigm of the Relations between Mandatory Rules and Arbitration : a Fresh Look at the "Second Look”, *International Arbitration Law Review*, Vol. 7, Issue 1, 23-37, 2004.

SHUMAKER III Edward, “Why Arbitration is Tailor made for Professional Firms”, *Dispute Resolution Journal,* Vol. 58, Issue 1, 43-44, 2003.

SMITHS René, “The European Competition Network: Selected Aspects”, *Legal Issues of Economic Integration,* Vol. 32, Issue, 2, 175-192, 2005.

TRIDIMAS Takis, “Liability for breach of community law : growing up and mellowing down?”, *Common Market Law Review*, Vol. 38, Issue 2, 301-332, 2001.

TRIDIMAS Takis, “Black, white and shades of grey : horizontality of directives revisited”, *Yearbook of European Union Law*, Vol.21, Issue 1, 327-354, 2001.

TRIDIMAS Takis, “Knocking on heaven’s door: Fragmentation, Efficiency, and Defiance in the Preliminary Reference Procedure”, *Common Market Law Review*, Vol.40, Issue 1, 9-50, 2003.

VAN DER HAEGEN Olivier, “European Public Policy in Commercial Arbitration: Bridge over Troubled Water?”, *Maastricht Journal of European and Comparative Law*, Vol. 16, Issue 4, 449-476, 2009.

VAN GERVEN Walter, “L’arbitrage dans le droit européen”, *Revue de Droit International et de Droit Comparé,* Vol.72, Issue 1, 67, 1995.

VEENBRINK Marc, "The Privilege against Self-Incrimination in EU Competition Law : A Deafening Silence?", *Legal Issues of Economic Integration*, Vol. 42, Issue 2, 119-142, 2015.

VERBIST Herman, "The Application of EC Law in ICC Arbitrations: Presentation of Arbitral Awards", in : *International Commercial Arbitration in Europe- ICC Special Supplement,* ICC Bulletin, Vol. 33, 33-57, Paris, 1994.

ΜΠΟΣΚΟΒΙΤΣ Κοσμάς, «Κοινοτικός Δικαστής και οικονομικό σύνταγμα : η συμβολή του ΔΕΚ στη διαμορφωση του συντακτικού οικονομικού προτύπου της Ευρωπαϊκής Κοινότητας», *Το Σύνταγμα*, 2/2001, 235.

ΠΑΜΠΟΥΚΗΣ Χαράλαμπος, "Η επιλογή του εφαρμοστέου δικαίου και οι κανόνες αμέσου εφαρμογής στη Σύμβαση της Ρώμης για το εφαρμοστέο δίκαιο στις συμβατικές ενοχές", *Νομικό Βήμα*, 1992.1327.

ΠΑΠΑΔΟΠΟΥΛΟΥ Ρεβέκκα-Εμμανουέλα, "Το καθεστώς ελεύθερου ανταγωνισμού στην Ευρωπαϊκή Κοινότητα υπό το φως της δημοκρατικής αρχής: Συγκλίσεις και αποκλίσεις", *Ευρωπαίων Πολιτεία*, 2/2009, 373.

ΠΑΠΠΑΣ Νικόλαος, "Το διατητεύσιμο των διαφορών", *Δίκαιο Επιχειρήσεων και Εταιρειών,* Τεύχος 7/2002, 684.

ΤΣΟΥΚΑ Χρυσαφώ, "Το πρόβλημα των αλλοδαπών κανόνων αμέσου εφαρμογής στο πλαίσιο του δικαίου της Ευρωπαϊκής Ενώσεως", *Επιθεώρησις Εργατικού Δικαίου*, Τόμος 76, Τεύχος 1, 65-81, 2017.

MISCELLANEOUS

DERAINS Yves, "Public Policy and the Law Applicable to the Dispute in International Arbitration", *ICCA Congress Series No 3*, 1986.

ΜΕΪΔΑΝΗΣ Χρήστος, *Η επιφύλαξη της δημόσιας τάξης στο κοινοτικό ιδιωτικό διεθνές δίκαιο και ειδικώτερα στις συμβάσεις των Βρυξελλών του 1968 και της Ρώμης του 1980*, Αθήνα, 2003, Εθνικό Κέντρο Τεκμηρίωσης - Εθνικό Αρχείο Διδακτορικών Διατριβών, available at https://www.didaktorika.gr/eadd/handle/10442/15514.