

Enforcement of Arbitration Agreements and International Arbitral Awards - the New York Convention of 1958 in Practice

Chapter: Arbitration of Antitrust Disputes

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1. Introduction

This chapter will not limit itself to the question of the arbitrability of antitrust disputes. It also will attempt to consider other interfaces between the New York Convention and antitrust law. U.S. and EC antitrust law shall serve as an illustration of antitrust rules.¹

2. Antitrust Disputes

Before taking a look at the types of antitrust disputes which may find themselves before an arbitral tribunal, the U.S. and EC antitrust provisions shall be briefly summarised.

The following basic types of situations covered by antitrust law can be distinguished:

- Cartels;
- Abuses of a dominant position; and
- Mergers.

This chapter will not take into account more specific antitrust provisions such as sec. 2 of the Clayton Act on price discrimination or sec. 3 of the Clayton Act on exclusive dealing arrangements.

2.1 Cartels

Section 1 of the Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

Article 81 (1) of the EC Treaty as the EC equivalent renders “prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market ...”.

¹ Valuable information for the subject of this chapter was given at the DIS Conference “Schiedsgerichtsbarkeit in kartellrechtlichen Angelegenheiten” on 11 May 2006 in Berlin, in particular by Michael D. Blechman, *Entwicklungen der Schiedsgerichtsbarkeit im Kartellrecht – Entwicklungen in den USA*, and by Thomas Eilmansberger, *Entwicklungen der Schiedsgerichtsbarkeit im Kartellrecht – Entwicklungen in der Europäischen Union*.

Given the wide scope of the wording of both provisions, most economic activity would come to a grinding halt were there nothing else. The practical solution introduced by the U.S. courts was the rule of reason, which balances the anti-competitive component against the pro-competitive effects and would find for illegality if the former outweighed the latter. However, some types of behaviour are considered anti-competitive *per se*, notably price fixing. Over the years, this distinction has become blurred,² as even in *per se* violation cases the defendants are allowed more room to show efficiency aspects.³

EC law provides a different solution. The ECJ has rejected the approach of the U.S. rule of reason.⁴ However, in *Wouters*,⁵ the ECJ held that when deciding on the compatibility of a national rule prohibiting multi-disciplinary partnerships of lawyers and accountants under Art. 81, the freedom of movement can be taken into account, including the rule of reason approach of the ECJ when applying the freedom of movement principle. It has been argued that this does not mean that the EC system now follows the U.S. distinction between *per se* violations and situations that are subject to a rule of reason analysis.⁶ In applicable legal writing, it is argued that there are *per se* violations in horizontal relations under EC law such as price fixing or market sharing.⁷

According to Art. 81 (3), the prohibition stipulated under Art. 81 (1) may be declared inapplicable in the case of individual agreements, decisions or concerted practices or groups of agreements, decisions or concerted practices. A requirement for the exemption is the improvement of the production or distribution of goods or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit. However, the exemption will not be granted if restrictions are imposed on the undertakings concerned, which are not indispensable in attaining the above-mentioned objectives or if the undertakings concerned are afforded the possibility of eliminating competition in respect of a substantial part of the products in question.

As of 1 May 2004, Regulation 1/2003⁸ abolished the monopoly of the Commission to apply Art. 81 (3) of the ECT.

2.2 Monopolisation - Abuse of dominant position

According to Sec. 2 of the Sherman Act, “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire to with any other person or persons, to monopolize

² Baker & Stabile (1993) 48 BL 395 at 398

³ FTC v. Indiana Federation of Dentists, 476 US 447 (1986); Dalhuisen, (1995) 11 151 at 157 {The Arbitrability of Competition Issues}.

⁴ Monti, (2002) 39 CMLR 1057 at 1086 et seq. {Article 81 EC and Public Policy}.

⁵ ECJ 19 February 2002 *Wouters and others v. Algemene Raad van de Nederlands Ordre van Advocaten* [2002], ECR {I-1577} paras 87 et seq.

⁶ Monti, (Fn. 4.) at 1086 et seq.

⁷ Dolmans/ Grierson (2003) 14 ICC Bull no.2, 37 at 40; Komninos (2000) 37 CMLR 459 at 476 {Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, Judgment of 1 June 1999, Full Court}.

⁸ 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 January 2003, p. 1.

any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony ...”.

Art. 82 of the EC Treaty provides that “[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.”

2.3 Mergers

Section 7 of the Clayton Act prohibits, broadly speaking, any merger, stock acquisition or asset acquisition, if the effect of this transaction “may be substantially to lessen competition or to tend to create a monopoly ...”.

Art. 2 (3) of the EC Merger Control Regulation⁹ provides that “[a] concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”

2.4 Remedies

The U.S. and the EC antitrust system recognise two systems of antitrust enforcement: public and private. In the private branch of enforcement, nullity and damages are the most likely sanctions. The by far prevailing branch of antitrust enforcement in the U.S. is private action, whereas in the EC it is the public branch of enforcement. This difference explains why “remedy-stripping” in arbitration clauses, meaning the exclusion of certain remedies such as discovery, recovery of costs, treble damages or class action,¹⁰ is an issue in the U.S. but not in the EC.

As opposed to the U.S., damage claims¹¹ are hardly of practical relevance in the EC.¹² So far, the system of multiple damages is not known in the EC. Recently, in its Green Paper on “Damages actions for breach of the EC antitrust rules”, the Commission mentions the introduction of double damages for horizontal cartels as one of several possible mechanisms to create an incentive for claims.¹³

⁹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1, 29 January 2004, page 7.

¹⁰ See e.g. Schwartz, Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles (2003) 38 U.S.F. L. Rev. 49 at 56.

¹¹ 15 U.S.C. § 15 (a) states in the relevant part that a private antitrust plaintiff “shall recover threefold the damages by him sustained”.

¹² See study on the conditions of claims for damages in case of infringement of EC antitrust rules, at the EC Commission’s website at http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html.

¹³ Green Paper on “Damages actions for breach of the EC antitrust rules” 19 December 2005 COM(2005) 672 final {SEC(2005) 1732} at page 7.

As regards public law remedies, such as fines or the unwinding of a merger, it may be an interesting theoretical discussion to address whether the competent agencies such as the U.S. Federal Trade Commission, the Antitrust Division of the U.S. Department of Justice or the EC Commission could delegate their powers to third parties like an arbitral tribunal. This is doubtful, even at first glance. In any case, it is clearly beyond the scope of this chapter. In an arbitration between private parties, due to a lack of arbitrability, the arbitral tribunal lacks competence to order such measures.¹⁴

3. Antitrust Law Issues in Arbitration

In general, there are a number of interfaces between arbitration and antitrust:

- Objective arbitrability,
- Interim measures,
- Scope of the arbitration agreement,
- Application of antitrust laws by arbitral tribunals,
- Contact between arbitral tribunals and competition authorities,
- Effect of prior proceedings and decisions of competition authorities on arbitral proceedings,
- Affect of arbitration proceedings on proceedings before competition authorities,
- Assistance by courts and competition authorities to arbitral tribunals,
- Antitrust issues and public policy in challenge proceedings, and
- Antitrust issues and public policy in recognition and enforcement proceedings.

Obviously not all of these situations involve the New York Convention. Historically, the discussion focussed first on arbitrability and once the arbitrability was, in principle, acknowledged, it moved on to public policy control. This chapter will try to investigate all possible connections to the New York Convention.

First, however, the following question will be answered: what are the typical antitrust issues that arise in arbitrations?

¹⁴ See e.g. Lesguillons [2003] CdA 17 at 17. {La solitude pondérée de l'arbitre face au droit de la concurrence}; Idot (1996) 5 RDAI/IBLJ 561 at 565 {Arbitrage et Droit Communautaire}; Maire/Hahn in Ball et al., Competition Law and Arbitration Law Ball et al., Competition Law and Arbitration Law 79 at 86 {Réglementation de la concurrence et évolution du concept d'arbitrabilité}.

The most common situation is the antitrust defence. Against a contractual claim, the respondent raises the defence that the clause which serves as the basis of the claim is null and void under antitrust law.

Claims based on antitrust provisions are much rarer. They would typically concern the financial consequences of nullity. If such claims are raised, in all likelihood, this will happen in the context of a contractual relationship between the parties, which is covered by an arbitration agreement. It is not impossible for third party claims, which have considerable importance in the U.S., to find their way to arbitration. However, there are considerable tactical and psychological obstacles for the parties submitting a dispute which has already arisen to arbitration.¹⁵

4. Grounds for the refusal of recognition and enforcement

As will be seen below, although the New York Convention provides an international framework, domestic law and applicable arbitration rules play an important role in deciding issues under the New York Convention such as:

- objective arbitrability (Art. V no. 2 (a): law of the country where recognition and enforcement is sought)
- validity of the arbitration agreement (Art. V no. 1 (a): law of the country of the seat of the arbitration in the absence of a choice of law by the parties)
- scope of the submission (Art. V no. 1 (c): no explicit provision on the applicable law)
- procedural rules governing the arbitration (Art. V no. 1 (d): law of the country of the seat of the arbitration with respect to the issues not agreed to by the parties)
- public policy (Art. V no. 2 (b): law of the country where recognition and enforcement is sought).

As will be shown, there are even more issues to which a final response can only be given on the basis of a specific legal system, such as a duty of passivity on the part of the arbitrator.

It is obvious that within the scope of such a chapter no comprehensive comparative exercise can be undertaken. Therefore, examples are drawn from a limited number of jurisdictions, namely Austria, England, France, Germany, Switzerland and the U.S. without claiming to be complete. They shall only serve as an illustration of answers to questions raised under the New York Convention as regards antitrust issues. Due to the scarcity of court decisions which deal with antitrust issues under the New York Convention, reference will also be made – again without any claim of completeness – to annulment decisions. This choice is based on the assumption that the standards of review of awards concerning antitrust issues

¹⁵ Idot [2001] ECLA307 at 309 seq. {Arbitration and the Reform of Regulation 17/62}

are not substantially different in annulment proceedings and in proceedings for the recognition and enforcement of an award.

Finally, due to the great relevance of domestic laws, any legal considerations by the author of this chapter can merely be treated as suggestions for a discussion, but not as a solution under a specific legal system.

5. Lack of objective arbitrability

In the U.S. and probably beyond its borders, the 1985 Mitsubishi case¹⁶ ended decades of U.S. court decisions which denied the arbitrability of antitrust claims. Although this decision is well known, it is worth briefly recalling the main considerations of the U.S. Supreme Court. It rejects all four ingredients of American Safety,¹⁷ which had led the Court of Appeals to deny arbitrability:

- Antitrust disputes do not lack arbitrability *per se*.
- The potential complexity of antitrust issues is no reason to deny arbitrability.
- There is no assumption of an innate hostility of arbitrators to antitrust claims.
- Although private remedies for antitrust violations, such as treble damages, have an incidental policing function, they are primarily remedial provisions in the interest of the injured party.

In the E.C., the Court of Justice never explicitly dealt with the issue of the arbitrability of antitrust claims. However, in the cases concerning arbitration,¹⁸ the Court of Justice did not

¹⁶ Smit (1987) 3 AI 7 {Mitsubishi: It is Not What it Seems To Be}; Carbonneau (1986) 2 AI 116 {Mitsubishi: the Folly of Quixotic Internationalism}; Lowenfeld (1986) 2 AI 178 {The Mitsubishi case: another view}; Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc., (1986) XI YB Com Arb 555; for further refs see Abdelgawad 354 (in fn. 71) and 444 (in fn. 68).

¹⁷ American Safety Equipment Corp. v. J.P. McGuire & Co., 391 F.2d 821 (2nd Cir. 1968).

¹⁸ See e.g. ECJ 1 June 1999 Eco Swiss China Time Ltd. v. Benetton International NV. [1999] ECR I-03055; De Groot (2003) 20 JIA 365 {The Impact of the *Benetton* Decision on International Commercial Arbitration}; Von Mehren (2003) 19 AI 465 {The *Eco-Swiss* Case and International Arbitration}; Philip in Nafzinger/Symeonides (eds) Law and Justice in a Multistate World, Essays in Honor of Arthur T. Von Mehren (Transitional Publishers 2002) {The Eco Swiss Judgment and International Arbitration}; Brulard/Quentin (2001) 18 JIA 533 {European Community Policy and Arbitration – National versus Community Policy}; Zobel [2001] 7 wbl 300 {Art 81 EGV im Schiedsgerichtsverfahren}; Dhunér [2000] Stockholm Arb Rep 24 {EC Competition Law and National Arbitration Procedure}; Komninos (fn. 7); Mourre [2000] Gazette du Palais 127 {Les rapports de l'arbitrage après l'arrêt Eco Swiss de la Cour de Justice des Communautés Européennes}; Poillot Peruzzetto (2000) 127 JDI 299; Von Quitzow [2000] Stockholm Arb Rep 33 {The Benetton Judgment and its Practical Implications on Arbitration}; Zekos (2000) 17 JIA 91 {Eco Swiss China Time Ltd v. Benetton International NV – Courts' Involvement in Arbitration}; Furse/D'Arcy [1999] ECLR 392 {Eco Swiss China Time Ltd. v. Benetton: E.C. Competition Law and Arbitration}; Idot, Note, [1999] Rev Arb 639; Rigozzi [1999] ASA Bull 455 {Arbitrage, ordre public et droit communautaire de la concurrence (ATF of November 13, 1998 and ECJ of June 1, 1999, *Benetton*)}; Senkovic/Lastenouse (1999) 14 Mealey's International Arbitration Report 46 {Eco Swiss China Time Ltd. v. Benetton International NV Judgment: Why Arbitrators Should Not Ignore European Competition Law}; Spiegel (1999) 10 EuZW 568 {Note}; Lugar [1998] ECLR 295 {E.C. Competition Law and Arbitration: Opposing principles?}; Liebscher; The Healthy Award 21 et seq.;

raise any doubt about the arbitrability in principle. The courts of quite a few Member States have recognised the arbitrability of antitrust claims,¹⁹ such as – implicitly - the German Supreme Court as early as 1966.²⁰ However, until the reform of EC antitrust law by Regulation 1/2003, individual and group exemptions were the exclusive prerogative of the EC Commission. Therefore, the granting of an individual exemption was not arbitrable. Since 1 May 2004, the situation has changed. Regulation 1/2003²¹ lifted the monopoly of the EC Commission to grant individual exemptions under Art. 81 (3) of the ECT. It is generally acknowledged that arbitral tribunals may now apply Art. 81 of the ECT in its entirety, including the possibility of granting individual exemptions.²²

A special situation in EC law²³ has arisen recently: the use of arbitration clauses in the context of merger control.²⁴ Under Art. 6 (2), respectively 8 (2), of the Merger Control Regulation²⁵, the Commission “may attach to its decision [...] conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.” Such commitments can be structural (e.g. a divestiture) or behavioural (e.g. non-discrimination of third parties, granting third parties access to restricted resources such as intellectual property rights).²⁶ Since the middle of the 1990’s, some of

¹⁹ See e.g. (some with further refs) Eilmansberger (2006) 1 SchiedsVZ 5 at 8 {Die Bedeutung der Art. 81 und 82 für Schiedsverfahren}; Van Houtte (2005) 23 ASA Bull 431 at 434 {Arbitration and Arts 81 and 82 EC Treaty A State of Affairs}; Pinsolle [2004] IALR 14 at 15 {Private Enforcement of European Community Competition Rules by Arbitrators}; Radicati di Brozolo [2004] IALR 23 at 23 et seq. {Antitrust : A Paradigm of the Relations between Mandatory Rules and Arbitration – a Fresh Look at the “Second Look”}; Derains [2003] CdA 45 at 45 {L’arbitre, la commission et la Cour: questions de procédure}; Lesguillons [2003] CdA 17 at 17; Mourre [2002] CdA 77 at 77 {Les rapports de l’arbitrage et du droit communautaire après l’arrêt Eco Swiss de la Cour de Justice des Communautés Européennes}; Idot (fn. 15) at 311; Rigozzi [1999] ASA Bull 455 at 458 et seq.; Hanotiau, L’arbitrage et le droit européen in Briner et al., L’Arbitrage et le Droit Européen (Bruylant, Bruxelles 1997) 31 at 34; Idot (fn. 14) at 562; Slot [1996] LIEI 101 at 102 et seq. {The Enforcement of EC Competition Law in Arbitral Proceedings}; Hetsch (1995) 6 ICC Bull no.2, 47 at 53 et seq. {Arbitration in Community Law}; Dalhuisen, (fn. 3); Blessing (editor) Objective Arbitrability Antitrust Disputes Intellectual Property Disputes ASA Special Series No. 6 (ASA Zürich 1994); Ball et al., Competition Law and Arbitration Law (ICC, Paris 1993); Weigand (1993) 9 AI 249 {Evading EC Competition Law by Resorting to Arbitration?}; Böckstiegel {Public Policy and Arbitrability} ICCA Congress series no. 3 (Kluwer Law International; New York 1986); Abdelgawad 32 et seq.; implicitly: Et Plus et al. v. Jean-Paul Welter et al. [2005] EWHC 2115 (Comm.) (QBD (Comm. Ct.))

²⁰ BGH 25 October 1966 (1967) 46 BGHZ 365.

²¹ Fn. 8.

²² Eilmansberger (fn. 19) at 8; Van Houtte (fn. 19) at 436; Dolmans/ Grierson (2003) 14 ICC Bull no.2, 37 at 49; Lesguillons (fn. 19) at 19; Liebscher [2003] IALR 84 {Arbitration and EC Competition Law – The New Competition Regulation: Back to Square One}; Idot (fn. 15) at 315 seq; ?}.

²³ U.S. enforcement agencies do not seem to resort to arbitration, but to monitor trustees (see Sachs SchiedsVZ 2004 123 at 129 {Schiedsgerichtsverfahren über Unternehmenskaufverträge – unter besonderer Berücksichtigung kartellrechtlicher Aspekte})

²⁴ See Liebscher (2004) 21 JIA 67 {Drafting Arbitration Clauses for EC Merger Control}; Liebscher (2003) 1 CdA 24 {L’arbitrage dans les procédures de contrôle des concentrations : des perspectives}; Blessing {Arbitrating Antitrust and Merger Control Issues} (Helbing & Lichtenhahn Basle/Geneva/Munich 2003); Idot [2000] Rev Arb 591 {Une innovation surprenante: l’introduction de l’arbitrage dans le contrôle des concentrations}; .

²⁵ Fn. 9.

²⁶ See e.g. CFI Gencor Ltd. v. Commission [1999] ECR II-753 at para. 319.

these behavioural commitments provide – as an offer *erga omnes* – the third party with a right to raise its claims under a commitment to arbitration.

An attempt²⁷ to construe such arbitration proceedings as a mixture between regulatory tasks and the resolution of conflicts between one party to a merger and third parties has – rightly – been rejected.²⁸ Therefore, in principle, such arbitration clauses do not pose any particular legal issues with regard to the objective arbitrability of antitrust disputes.²⁹

As already stated above under 2.4, public law remedies, such as fines or the unwinding of a merger, are not arbitrable.³⁰

An issue that arises in the U.S. is remedy-stripping. This is the case if a contract governed by the arbitration agreement limits the remedies of a party. Recently, in *Kristian*³¹, the U.S. Court of Appeals had to deal with a range of such provisions: limited discovery, waiver of treble damages, prohibition of an award of attorney's fees and costs, and a bar to class arbitration. As already decided by the Supreme Court³², limited discovery available in arbitration does not raise an issue of arbitrability. The other three may indeed have raised serious concerns had the Court of Appeals not found that all of these provisions were severable and subject to a savings clause.

Therefore, it can be concluded that, in any case in the U.S. and the EC, the arbitrability of antitrust claims, meaning claims concerning the validity of agreements under antitrust law and private remedies such as damages, restitution or unfair enrichment, is no longer a relevant issue in principle. What impact, if any, this has on the extent of the public policy control will be reviewed under 8.2 below.

6. Scope of the arbitration agreement

The general issue in this context is to which extent the arbitration agreement covers not only contractual, but also statutory claims. Although this is a construction issue, some general observations can be made.

There seems to be a favourable trend toward finding that statutory claims related to the contract are covered by an arbitration clause if no specific carve-out is made. In the U.S., one may refer to *Moses H. Cone*³³, where the U.S. Supreme Court stated that "[w]ith a healthy regard for the federal policy favoring arbitration ... the Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the con-

²⁷ Blessing (fn. 24.) at 170 et seq.

²⁸ Heukamp {Schiedszusagen in der Europäischen Fusionskontrolle} (Carl Heymanns Köln/Berlin/München 2006) 61 et seq.; Radicati di Brozolo (fn. 19) at 34 et seq.; Liebscher (fn. 24) at 70 seq.

²⁹ However, the specific wording used in merger cases was defective in quite a few cases; for references, see the legal writing in fn. 24.

³⁰ Fn. 14.

³¹ *Kristian v. Comcast Corporation* No. 04-2619 and No. 04-2655 (1st Cir. 2006)

³² *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991).

³³ *Moses H. Cone* 460 U.S. 1 (1983) at 24 seq.

tract language itself or an allegation of waiver, delay, or a like defense ..."³⁴ The clause in Mitsubishi³⁵ referred to "[a]ll disputes, controversies or differences which may arise ... out of or in relation to ... [the contract] or for the breach thereof" and – it seems – did not give rise to any concerns as regards its scope with respect to statutory antitrust issues. Repeatedly,³⁶ the U.S. Court of Appeals has held that "generally speaking, the presumption in favor of arbitration applies to the resolution of scope questions".

In quite a few European jurisdictions, the answer would not be different. In general, the courts are rather liberal in including statutory claims related to the contract in the scope of the arbitration agreement.

Even in light of a more restrictive wording such as "all claims arising out of the contract", it can be argued that an antitrust defence would be covered. Whether this is also true for claims based on antitrust law may be more doubtful.

It has been argued that an arbitration clause which excludes antitrust claims is null and void³⁷ and that the arbitral tribunal will have to declare that it lacks competence³⁸ if its decision on the merits would lead to the recognition of an agreement as illegal.³⁹

In *Eco Swiss*,⁴⁰ the Advocate General⁴¹ takes the same position by stating: "If the parties expressly decided not to raise any questions about the agreement's compatibility with Community competition law before the arbitral tribunal, the agreement would be void and the arbitration award could accordingly be challenged before the competent courts. In those circumstances, the arbitrator concerned could declare that they had no jurisdiction to make an award."

Firstly, it does not seem that such carve-out provisions have great practical relevance. Secondly, no arguments have been put forward supporting why the carve-out provision would entail the nullity of the entire arbitration agreement.

Even assuming a duty of the arbitral tribunal to render an award which cannot be successfully challenged at the seat of the arbitration, this would not be a legal basis for such a mandate. By accepting an arbitration on the basis of such a carve-out, such duty of the arbitral

³⁴ For further refs see Born at 406 et seq. {International Commercial Arbitration in the United States (Kluwer, 1994)}

³⁵ Fn. 16.

³⁶ *Paul Revere Variable Annuity Ins. Co. V. Kirschhofer*, 226 F3d 15 (1st Cir. 2000); *Kristian v. Comcast Corporation* No. 04-2619 and No. 04-2655 (1st Cir. 2006).

³⁷ *Mourre* [2002] Cda 77 at 78 ; Mayer in *L'Apport de la Jurisprudence Arbitrale* 31 (ICC No. 440/1 1986) {L'interférence des lois de police}

³⁸ *Derains, Rapport*, in *Ball et al.*, *Competition Law and Arbitration Law* 251 at 256.

³⁹ Mayer {*Le contrat illicite*} [1984] *Rev Arb* 205 at 215; *Hanotiou* (without providing reasons) (fn. 19) 31 at 50; *Slot* [1996] *LIEI* 105 {*The Enforcement of EC Competition Law in Arbitral Proceedings*}; *Abdelgawad* 293; see also *Schultsz* {*Rapport*} in *Ball et al.* *Competition Law and Arbitration Law* (ICC, Paris 1993) 221 (however, some of the refs do not refer to a lack of jurisdiction, but to the resignation of the arbitral tribunal).

⁴⁰ Fn. 18.

⁴¹ Opinion of Advocate General delivered on 25 February 1999, Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* at para. 24.

tribunal is limited to the dispute submitted to it. A legal basis for the arbitral tribunal to go beyond this limit does not seem to exist.

Even if one were to argue public policy concerns in respect of such a carve-out, such concerns could be taken care of by the nullity of the carve-out provision.⁴² Another possible legal ground for such nullity of a carve-out would be a mandatory function of the arbitral tribunal to consider all relevant legal aspects of the claims made by the parties. However, it does not seem that such a view is supported by court decisions or legal writing.

7. Procedural issues

7.1 *Ultra petita*

In the presence of an arbitration clause which does cover antitrust issues, the parties could still agree not to submit such antitrust issues to the arbitral tribunal. First of all, a court reviewing the scope of the submission may not be easily convinced of an illegal excess of authority by the arbitral tribunal.⁴³ Assuming that such a carve-out agreement by the parties is unambiguous, how may the arbitral tribunal react? Those who argue that an arbitration agreement with such a carve-out is null and void may argue that the arbitral tribunal must find that it lacks competence to decide the case.⁴⁴

As has been shown under 6., this view is not convincing. Therefore, the arbitral tribunal would be bound to respect this limitation. The arbitral tribunal may act outside *ultra petita*, if it raises antitrust issues against the will of both parties.⁴⁵

It has even been suggested⁴⁶ that if the parties do not agree to include the antitrust issues in the arbitration, the arbitrators could only render an award under the reservation of altering it as a consequence of any decisions concerning pertinent antitrust matters rendered by another authority. Another view⁴⁷ holds that the arbitral tribunal may be entitled not to continue with the arbitration on the basis of a violation of public policy if both parties do not allow the arbitral tribunal to do so.

7.2 Ex officio treatment

7.2.1 Authority of the arbitral tribunal

In a situation where the parties have not addressed the (potential) antitrust issues, the question is whether the arbitral tribunal may raise them or is even under an obligation to do so.

⁴² Simont [1998] RDAI/IBLJ 547 at 548 seq. {Arbitrage et Droit de la Concurrence – Quelques Reflexions d'un Arbitre}

⁴³ See Haas {New York Convention in Weigand Practitioner's Handbook on International Arbitration (C.H. Beck 2002)} Art. V marg. No. 57 with further refs.

⁴⁴ Mayer (fn. 37) at 42.

⁴⁵ De Groot (fn. 18) at 372; Idot (fn. 18) at 649 with further refs.

⁴⁶ Von Mehren (fn. 18) at 469.

⁴⁷ Kurkela {Competition Laws in International Arbitration: the may, the must, the should and the should not} JFT 6/2003 609 at the end of 3.

As regards the power of the arbitral tribunal to raise antitrust issues not pleaded by the parties, the underlying general issue is whether the arbitral tribunal is bound by the legal basis for the claims pleaded by the parties. This does not seem to be the case.⁴⁸

Derains⁴⁹ rightfully distinguishes between the legal issues in dispute and the claims. The arbitral tribunal does not act *ultra petita* when dealing with legal issues concerning claims made by the parties. The arbitral tribunal may raise such issues *sua sponte*.⁵⁰

There does seem to be a general consensus that an arbitral tribunal may raise antitrust issues *sua sponte*. However, a clear distinction must be made,⁵¹ namely between an arbitral tribunal pointing out that, in its view, antitrust rules should be considered, and an arbitral tribunal which would actually, *sua sponte*, investigate the – supposed – antitrust issue. If both parties refuse to entertain antitrust arguments, it has been argued that – in practice – it is nearly impossible for the arbitral tribunal to investigate an antitrust issue *motu proprio*.⁵² However, the arbitral tribunal will not be in a substantially different position than a court⁵³ (in particular, in cases where the competent antitrust authority does not take a great interest in the case).

It may well be that the applicable arbitration law requires the arbitral tribunal to allow the parties to express their views on legal issues raised *sua sponte* by the arbitral tribunal. Such an obligation exists under English law⁵⁴ and French law⁵⁵, while less so under German law⁵⁶ and Swiss law.⁵⁷ Basically, the latter two require a discussion of legal issues raised by the arbitral tribunal *sua sponte*, if such issues would be surprising to the parties. A general obligation of arbitral tribunals to share their legal views with the parties before rendering the award does not seem to exist under the New York Convention.⁵⁸

Under the New York Convention, the issue is whether the *sua sponte* application of a certain set of antitrust rules without allowing the parties the possibility of issuing submissions

⁴⁸ This follows from the duty of the arbitral tribunal to inform the parties of (certain) legal issues raised by it *sua sponte*: see Liebscher Healthy Award 249 seq., 256, 264, 269 with further refs.

⁴⁹ Derains (fn. 19) at 49, Derains [2001] ECLA 323 at 337 {Specific Issues arising in the Enforcement of EC Antitrust Rules By Arbitration Courts}.

⁵⁰ In *Eco Swiss* (Fn. 18.), only the performance of the agreement, not its validity, was at issue. The law of the Netherlands would not have allowed the arbitral tribunal to raise this issue of validity under antitrust law *sua sponte* (See Opinion of Advocate General delivered on 25 February 1999, Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* at para. 19.). However, it is not clear whether this was an issue of *ultra petita*.

⁵¹ Van Houtte (fn. 19) at 440 seq.

⁵² van Houtte (fn. 19) at 440; *Shelkopyas* 235.

⁵³ *Idot* (fn. 14) at 576.

⁵⁴ See e.g. *Ascot Commodities v. Olam International* [2002] CLC 277 (QBD C(Comm.Ct)); *Top Shop Estates v. C. Danino* (1985) 1 EGLR 9 (QBD); *Franco-Tunisienne D'Armement-Tunis v. The Government of Ceylon (The „Massalia“)* [1959] 2 Lloyd's Rep 1 (CA); *Sutton and Kendall and Gill* {Russell on Arbitration} marg. No. 5-057

⁵⁵ CA Paris 6 April 1995 *Thyssen Stahlunion v. Maaden* [1995] Rev Arb 448; CA Paris 25 November 1993 *Paco Rabanne Parfums and another v. Les Maisons Paco Rabanne* [1994] Rev Arb 730 with note by Bureau.

⁵⁶ Liebscher Healthy Award 264 with further refs.

⁵⁷ Liebscher Healthy Award 269 seq. with further refs.

⁵⁸ Haas, Art. V marg. No. 31.

in this respect may be considered as a violation of due process under Art. V (1) (b). There is some discussion as to whether the recognition and enforcement court shall apply the forum standards for due process or whether Art. V (1) (b) establishes a standard independent from domestic legal systems.⁵⁹ As no such independent standard pertinent to this issue has been established so far, the discussion is of no practical relevance in this context.

On the basis of the above, it may well be that Art. V (1) (b) applies where an arbitral tribunal applies antitrust rules *sua sponte* without having given the parties the opportunity to issue submissions on these legal issues. However, if the arbitral tribunal was authorized by an agreement of the parties or by undisputed procedural order⁶⁰ to apply legal rules without granting the parties an opportunity to comment thereon, due process will usually have been respected.

An arbitral tribunal which raises an antitrust issue *sua sponte* could be considered as lacking the necessary impartiality as the potential point raised usually will be in favour of only one party. A lack of impartiality would be a violation of public policy under Art. V (2) (b).⁶¹ However, it follows from the requirement to grant the parties the right to be heard with respect to such *sua sponte* issues, that it is not *per se* improper for the arbitral tribunal to raise new legal issues. The line to the application of Art. V (2) (b) may be crossed as soon as the arbitral tribunal does more than just point out possible legal issues. If an arbitral tribunal, for example, explained which additional allegations are missing, this may create at least an objective lack of impartiality.

7.2.2 Obligation of the arbitral tribunal

As regards an obligation of the arbitral tribunal to raise antitrust issues, several potential “connecting factors” related to the obligation of the arbitral tribunal to apply issues of antitrust rules are put forward:⁶²

- The antitrust rules are part of the applicable law – either chosen by the parties or, in the absence of such a choice, determined by the arbitral tribunal.
- The antitrust rules are part of the law of the seat of the arbitration. It is pointed out that – to the extent these rules are part of public policy in the country of the seat of the arbitration – an award ignoring them is subject to challenge.⁶³
- The arbitral tribunal must ensure the enforcement of the award and, therefore, take into account all antitrust rules of all possible or all likely places of enforcement.

⁵⁹ Haas Art. V marg. nos 27 et seq with further refs; Van den Berg 298.

⁶⁰ On establishing the applicable law in general see Kaufmann-Kohler (2005) 21 AI 631 {The Arbitrator and the Law: Does He/She Know it? Apply it? How? And a Few More Questions}.

⁶¹ Haas, Art. V marg.no.109 with further refs; Van den Berg 302, 377 with further refs.

⁶² See e.g. Van Houtte (fn. 19)at 438 seq; Radicati di Brozolo (fn. 19) at 30; Brulard/Quintin (fn. 18) at 536 et seq.; Horvath (2001) 18 JIA 135 at 146 seq. {The Duty of the Tribunal to Render an Enforceable Award}.

⁶³ Radicati di Brozolo (fn. 19)at 27 argues that the mandatory rules of the seat of the arbitration should not be treated differently from any other mandatory rules.

There seems to be a considerable consensus that, in any case, the arbitral tribunal will consider the antitrust law of the *lex contractus*.⁶⁴ Some add that the arbitral tribunal is not obliged to apply antitrust law which is not part of the *lex contractus*.⁶⁵

Derains⁶⁶ points out that in the absence of a choice by the parties, the arbitral tribunal usually has the freedom to determine the law applicable to the merits of the dispute, either directly or by way of determining the applicable conflict of laws rules.⁶⁷ The absence of a *lex fori* for arbitral tribunals means that, as opposed to the state court judge, all legal systems, in principle, rank equally; none has a privileged status *per se*. Derains argues that in deciding whether to apply a certain set of antitrust rules, the arbitral tribunal shall only do so if this is within the "legitimate expectations of the parties". In his view if the parties have chosen the *lex contractus* of a certain state, the application of its antitrust law is in doubt within such legitimate expectations. The same applies to antitrust law at the place of the performance of the contract. Although from the point of view of case management, the expectations of the parties are relevant, they seem to be rather illusive when used as a legal concept to determine the obligation of the arbitral tribunal to raise issues *sua sponte*.

At first glance, a reference to the *lex contractus* seems logical. However, it is not.⁶⁸ To the extent the *lex contractus* results from the choice of law agreed to by the parties, this is not an appropriate connecting factor for the application of antitrust rules. The argument that antitrust rules which are part of the chosen legal system shall be applied on the basis of the parties' agreement does not hold water. The application of antitrust rules is not subject to party autonomy. Usually, the effect on the market decides its application.

Therefore, the arbitrators will always decide on the application of a specific set of antitrust rules. This shows that *lex contractus* is not an appropriate connecting factor. The actual behaviour of the arbitral tribunal cannot be the legal basis for establishing whether the arbitral tribunal behaved properly.

As regards the second two arguments, the recent debate has very much focussed on "reading the tea leaves" in the Eco Swiss cup. Although the question had been posed to the ECJ, it did not consider it necessary to answer it.

There are two schools of thought regarding the legal basis of an obligation of the arbitrator to apply EC competition law *sua sponte*:

- the intrinsic features of EC law such as supremacy, direct effect, effet utile and uniform application⁶⁹, and

⁶⁴ Mourre (fn. 37) at 79 seq.; Idot (fn. 15) at 313; Idot (1996) 5 Cda 561 at 568; with a different angle Derains (fn. 49) at 333, 336.

⁶⁵ Idot (fn. 15) at 313.

⁶⁶ Derains (fn. 49) at 325 seq.

⁶⁷ See e.g. sec. 46 English Arbitration Act 1996, art. 1497 NCPC, sec. 1051 German CPC, sec. 603 new Austrian CPC, art. 28 UNCITRAL ML.

⁶⁸ See Abdelgawad 337 et seq.

⁶⁹ Hetsch ICC Bull [1995]47 at 54 seq.; see for further refs Shelkopyas 330 seq. (critical).

- the duty of the arbitral tribunal to render an award which (a) cannot be challenged and (b) will be recognized and enforced under the New York Convention.⁷⁰

The first one is not convincing as arbitral tribunals, unlike state courts, are not bound by the legal foundations of these principles, in particular the duty of Community loyalty under Art. 10 of the ECT.⁷¹

For the second one, there is quite an array of views, the following just being a sample. However, it has rightfully been pointed out that a reference to the law of the (possible) place of enforcement is usually not appropriate.⁷²

Idot⁷³ speaks of an "obligation" (in quotation marks) to apply EC antitrust rules, even *ex officio*, if the award may be executed in a Member State.⁷⁴ This is obviously based on an alleged duty of the arbitral tribunal to avoid any ground for the refusal of recognition and enforcement under the New York Convention.

Sachs⁷⁵ and Idot⁷⁶ think that the consequence of Eco Swiss is that arbitral tribunals have to apply EC antitrust law if the facts submitted by the parties indicate a potential violation of antitrust law.

Brulard/Quintin⁷⁷ and Zobel⁷⁸ believe – without any qualifications - that Eco Swiss established a duty of the arbitral tribunal to apply Art. 81 of the ECT *ex officio*.

Von Quitzow⁷⁹ states that “[t]he obligation imposed on arbitration tribunals by [Eco Swiss] is very close to a duty to apply Community law *ex officio*.”

Komninos⁸⁰ thinks that in the case of *per se* violations such as price fixing or market sharing, there is a duty of the arbitrator, as an award ignoring the issue would be vulnerable to being set aside. If the risk is smaller, there is no such duty. It would be difficult to apply such a concept in practice.

Blessing argues that arbitral tribunals should apply antitrust rules *motu proprio*,⁸¹ but – at the same time - respecting the “subjectively reasonable expectations of the parties”, thus

⁷⁰ Dolmans/Grierson, (2003) 14 ICC Bull no. 2, 37 at 44 {Arbitration and the Moderization of EC Antitrust Law: New Opportunities and New Responsibilities}; Von Mehren (fn. 18) at 466, 468; Brulard/Quintin (fn. 18) at 539; Seraglini, Note [2001] Rev Arb 781; Slot (fn. 19) at 104.

⁷¹ Liebscher (fn. 22) at 92 with further refs.; Prechal/Shekopyas [2004] ERPL 589 at 608 {National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond}.

⁷² Poudret/Besson marg. No. 706 with further refs.

⁷³ Idot (fn. 15) at 314.

⁷⁴ See also Idot (fn. 14) at 570.

⁷⁵ Sachs SchiedsVZ 2004, 123 at 128.

⁷⁶ Idot (fn. 18) at 650.

⁷⁷ Brulard/Quintin (fn. 18) at 536.

⁷⁸ Zobel (fn 18)

⁷⁹ Von Quitzow (fn. 18) at 36.

⁸⁰ Komninos (fn. 7) at 476 seq.

⁸¹ Introduction to Arbitration (1999) 257.

applying the antitrust rules with a “distant look”. He does not disclose the legal basis for the concept of “distant look” and – indeed – it is not convincing.

Pinsolle⁸² agrees with the proposition that arbitrators are obliged to apply EC competition law if the law of one of the Member States was chosen by the parties. Rightfully, he points out that the competition law does not automatically apply in such a case, but that it is potentially applicable. However, in the end he proposes taking three elements into account: the choice of law by the parties, the seat of the arbitration and the likely place of enforcement. The more of these factors come into play, the more arbitrators should take EC competition law into account.⁸³

Radicati di Brozolo⁸⁴ thinks that in cases where the relevance of antitrust law is *prima facie* relevant, the arbitral tribunal is “probably even required” to raise the antitrust issues *ex officio*.

Prechal/Shelkopyas rightfully state that Eco Swiss left it open whether there is an obligation on the part of the arbitral tribunal to apply EC competition law.⁸⁵ The Advocate General⁸⁶ suggested that the ECJ answer the relevant question “that Community law does not require arbitrators, when they have been asked to rule on the performance of an agreement, to raise of their own motion questions about the compatibility of that agreement with Community competition law if consideration of those questions would oblige them to abandon the passive role assigned to them, going beyond the ambit of the dispute defined by the parties and relying on facts and circumstances other than those on which the party with an interest in application of those provisions relied in order to substantiate his claim.”

Nazzini argues for an obligation to apply antitrust law if the parties pleaded an infringement.⁸⁷

The Swiss Supreme Court⁸⁸ denied an obligation of the arbitral tribunal to raise EC competition law issues *sua sponte*.

In *Thalès*⁸⁹, the Paris Court of Appeal held that the failure of arbitrators to raise antitrust issues *sua sponte* does not in itself provide a ground to annul an award.⁹⁰ This could be seen as a contradiction to earlier decisions, where the Paris Court of Appeal considered the arbi-

⁸² Pinsolle [2004] IALR 14 at 19.

⁸³ Pinsolle (fn. 82) at 22.

⁸⁴ Radicati di Brozolo (fn. 19) at 31

⁸⁵ Prechal/Shelkopyas (fn. 71) at 608.

⁸⁶ Opinion of Advocate General (fn. 41) at para. 26.

⁸⁷ Nazzini [2004] ECLR 153 at 156. {International Arbitration and Public Enforcement of Competition Law}

⁸⁸ BG 13 November 1998 [1999] ASA Bull. 529

⁸⁹ CA Paris 18 November 2004 *Thalès Air Defence BV v. GIE Euromissile and others* (2005) 132 JDI 357 with note by Mourre; Bensaude (2005) 22 JIA 239 {*Thalès Air Defence BV v. GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition law*}; Niggemann (2005) 3 *SchiedsVZ* 265 with further refs in fn. 4 {*Europäisches Wettbewerbsrecht und Schiedsgerichtsbarkeit: Eco Swiss und europäischer Ordre Public in der praktischen Anwendung in Frankreich*}.

⁹⁰ See e.g. *Enodis v. Société Prodim* [1996] *Rev Arb* 146 with note by Derains which stipulates such an obligation; however, the court remained silent about the consequences of the violation of this duty.

tral tribunal to be obliged to raise public policy issues *ex officio*.⁹¹ This seeming conflict can be easily solved.⁹² The French courts agree that the arbitral tribunal is obliged to apply the law properly. However, in general there is no legal sanction if the arbitral tribunal does not live up to this commandment, except for the public policy control (Sec. 8).

However, the question here is whether it is at all necessary to solve the issue under the New York Convention. What is the situation under the assumption that the applicable arbitration law indeed obliged the arbitral tribunal to raise and pursue antitrust issues *sua sponte* and the arbitral tribunal failed to do so?

Is the answer given by the Paris Court of Appeal in Thalès also valid under the New York Convention?

The answer to this question may depend on the legal basis for such an obligation. To attempt a summary of the different views of the scholars referred to above, an obligation of the arbitral tribunal to make sure that the award may not be subject to a successful challenge at the seat of the arbitration seems to be the most likely candidate. Under the assumption that the scope of public policy in the respective domestic challenge proceedings is the same as under Art. V (2) (b), the answer under the New York Convention is the same as under Thalès. The fact that an arbitral tribunal did not raise an antitrust issue *sua sponte* is not a ground for refusing recognition and enforcement. The only thing that matters is whether the award violates public policy.

8. Public policy

8.1 Content

There is a consensus that “public policy” in Art. V (2) (b) applies only in the most serious cases.⁹³ It has been called an “emergency break”.⁹⁴ Only a violation of the most fundamental principles of a legal system will fall under Art. V (2) (b).

“Public policy” in Art. V (2) (b) (as in challenge proceedings) has the purely defensive function of public policy. In this sense, the Swiss Federal Supreme Court⁹⁵ held that “one must emphasise in this respect that public policy, within the meaning of art. 190 (2) (e) SPIL, is only a mere reservation or incompatibility clause, which means that it only has a role of protection (‘negative’ public policy) and that it does not produce any normative effect on the relationship in dispute.”⁹⁶

The question is whether antitrust law qualifies as one of these fundamental principles.

⁹¹ 14 June 2001 SA Cargill France v. Tradigrain [2001] Rev Arb 805 with note by Derains; 14 June 2001 SA Compagnie Commerciale v. Tradigrain [2001] Rev Arb 773 with note by Seraglini; CA Paris 16 March 1995 Enodis v. Prodim [1996] Rev Arb 146 with note by Derains..

⁹² Niggemann (fn. 89) at 270.

⁹³ Van den Berg 360 at seq.

⁹⁴ Haas, Art. V marg. no. 104.

⁹⁵ BG 30 January 2002 X SA v. Y SA [2002] ASA Bull 328.

⁹⁶ Prechal/Shelkopyas (fn. 71) at 602

The majority view is affirmative in principle.⁹⁷

One exception is Switzerland. The Swiss Federal Supreme Court⁹⁸ originally ruled that "[i]n fact, it seems doubtful that the provisions of competition law – national or European – are part of the fundamental legal or moral principles recognised in civilised states, to the extent that their infringement should be considered as being contrary to public policy."⁹⁹ In 2006,¹⁰⁰ the Swiss Federal Supreme Court took a definite stance and ruled that competition law is not part of Swiss public policy in challenge proceedings. In a nutshell, the Supreme Court finds that the differences between the various competition law systems in the world do not allow for the conclusion that they belong to international public policy, which would allow the setting aside of an award rendered in an international arbitration in Switzerland.¹⁰¹

As regards the specific content of antitrust rules which pertain to public policy, case law does not give any guidance.

In the most recent important decision, in *Eco Swiss*¹⁰² the ECJ held that Art. 81 (1) is a rule of public policy.¹⁰³ The decision of the ECJ was criticised for several reasons,¹⁰⁴ however, the scope of this article does not allow room for entering into this discussion.

The ECJ did not decide whether the concept of public policy should be confined to certain fundamental breaches of antitrust law. It has been argued that the fundamentality test must also apply to antitrust law.¹⁰⁵ According to this majority view, not every violation of an antitrust rule can be equated with a violation of public policy.

Apart from this majority view,¹⁰⁶ which however, could so far not supply easy-to-apply criteria to determine which of the antitrust rules pertain to public policy and which do not,¹⁰⁷ the other school of thought starts from the concept of the so-called *loi de police*, mandatory rules which must be applied in an international relationship irrespective of the law that gov-

⁹⁷ Fn. 16; fn. 18.

⁹⁸ BG 15 July 2001 X Ltd v. Y BV [2002] ASA Bull 337.

⁹⁹ Doubtful also Radicati di Brozolo [2003] RCDIP 1 at 21 at seq. {Mondialisation, juridiction, arbitrage: vers des règles d'application semi-nécessaire ?}

¹⁰⁰ BG 8 March 2006 4P.278/2005.

¹⁰¹ Poudret/Besson {Droit compare de l'arbitrage international} (Schulthess Médias Juridiques SA, Zurich/Bâle/Genève 2002) marg. no. 707.

¹⁰² Fn. 18.

¹⁰³ Derains (fn. 49) at 331;

¹⁰⁴ Prechal/Shelkopyas (fn. 71) at 605 seq.; Zobel (fn. 18); Liebscher *The Healthy Award* 32 et seq.

¹⁰⁵ In favor of "fundamentality": Van Houtte (fn. 19) at 447; Radicati di Brozolo (fn. 19) at 28; Baudenbacher [2001] ECLA 341 at 350 {Enforcement of EC and EEA Competition Rules By Arbitration Tribunals Inside and Outside the EU}; Liebscher 10 *Am Rev Int Arb* 81 at 89 seq. {European Public Policy after *Eco Swiss*}; with a different approach Shelkopyas 235 seq. {The Application of EC Law in Arbitration Proceedings} (Europa Law, Groningen 2003); Schlosser {Das Recht der internationalen privaten Schiedsgerichtsbarkeit} (2. ed. 1989) {J.C.B. Mohr}; Kühn (1987) 3 *AI* 226 at 235 {Arbitrability of Antitrust Disputes in the Federal Republic of Germany}; Lorenz {Kartellrechtliche Probleme der nationalen und internationalen Schiedsgerichtsbarkeit} (Münster Univ. Diss. 1986) 156 et seq.; Liebscher, *Healthy Award* 43 et seq.

¹⁰⁶ Fn. 105; Liebscher 310 et seq., 432 et seq. with further refs.; Poudret/Besson marg. no. 707; Shelkopyas 378 seq. with further refs.

¹⁰⁷ See some attempts in Liebscher, *Healthy Award* 25 et seq.

erns that relationship.¹⁰⁸ Their proponents¹⁰⁹ want to make sure that these are properly applied in arbitration.¹¹⁰ Antitrust law is one prominent example of a *loi de police*. This view argues that all and any antitrust rules pertain to public policy.

One modified emanation of this view is the Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards from the Committee on International Commercial Arbitration of the International Law Association.¹¹¹ It states in Recommendation 1(d) that “[t]he international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “lois de police” or “public policy rules”; and (iii) the duty of the State to respect its obligations towards other States or international organisations.”

From the choice of wording, it seems that the threshold for *lois de police* being “essentiality” is lower than “fundamentality”. With respect to international obligations, the element of “fundamentality” seems to be completely abandoned. Such a distinction is not justified. All and any legal rules pertain to public policy only if they pass the fundamentality threshold. This seems to be the prevailing view.¹¹²

The clear majority does not view every *lois de police* as pertaining to public policy. These mandatory rules are subject to the same test of fundamentality as every other legal rule.¹¹³

On another issue, in *Sonatrach*,¹¹⁴ the U.S. Court of Appeals held that it does not violate public policy if an award deals with an antitrust argument used as a defence, although such a defence would not be permitted in U.S. state courts.

8.2 Scope of the public policy review by courts

Some authors argue that the “price” arbitration has to pay for the recognition of antitrust matters is that the proper application of antitrust matters may be fully reviewed by state

¹⁰⁸ Collins {Dicey & Morris on the Conflict of Laws 13th ed.} (Sweet & Maxwell, London, 2000) marg. no. 32-131; Mayer (1986) 2 AI {Mandatory Rules of Law in International Arbitration} 274 at 275 ; Poudret/Besson marg. no. 706 with further refs.

¹⁰⁹ Abdelgawad {Arbitrage et droit de la concurrence} (L.G.D.J Paris 2001) 454 et seq.; Seraglini {Lois de police et justice arbitrale internationale} (Dalloz Paris 2001) marg.nos 320 et seq.; Racine {L’arbitrage commercial international et l’ordre public} (L.G.D.J Paris 1999) marg.no 910; Mayer (fn. 108); see also Eilmannsberger (2006) 1 SchiedsVZ 5 at 15; Thalhammer [2005] wbl 62 at 65 {Die Rolle der Schiedsgerichte bei der Durchsetzung von EG-Kartellrecht unter dem Regime der VO 1/2003 – Zugleich ein Beitrag zu 1 Ob 270/03t und § 124 KartG}; Rubino-Sammartano {International Arbitration Law and Practice 2nd. ed.} (Kluwer Law International The Hague/London/Boston 2001) 504.

¹¹⁰ For a detailed critique of this concept of *loi de police* in arbitration see Liebscher, *Healthy Award* 432 et seq.

¹¹¹ Homepage www.ila-hq.org; [2002] Rev Arb 1061.

¹¹² See Liebscher, *The Healthy Award* 432 et seq. with further refs.

¹¹³ Fn. 106.

¹¹⁴ US Court of Appeal (2nd Circuit) *La Société Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures (« Sonatrach ») v. Shaheen Natural Resources Company, Inc.* (1984) 1 JIA 379.

courts.¹¹⁵ Shelkopyas¹¹⁶ rightfully pointed out that those who advocate this approach tend to also advocate that all and any *lois de police* are part of public policy or shall be treated like public policy.

Those who include *lois de police* in “public policy” without subjecting these rules to a test of fundamentality – logically – argue for a full review of the award under antitrust law. Two principles are said to be in conflict: the finality of the award and the requirement that *lois de police* are correctly applied in every aspect.¹¹⁷ Under this view, the arbitral tribunal's scope of appreciation only exists where matters have not yet been decided by the competent antitrust authority.¹¹⁸

This approach has rightfully been rejected¹¹⁹, as was – for example – done by the U.S. Court of Appeals¹²⁰, which stated in *Baxter* that: “Mitsubishi did not contemplate that, once the arbitration was over, the federal courts would throw the result in the waste basket and litigate the antitrust issue anew. That would just be another way of saying that antitrust matters are not arbitrable“.

Three different situations can be distinguished when looking at the scope of court review:

- The (potential) antitrust issues were not dealt with in the arbitration.
- The arbitral tribunal reviewed the antitrust issue and did find a violation of antitrust rules.
- The arbitral tribunal reviewed the antitrust issue and did not find a violation of antitrust rules.

8.2.1 Antitrust issue raised before the state court for the first time

The first question to be answered is whether antitrust issues may be raised at all for the first time at the recognition and enforcement stage. The answer is affirmative. The substantive public policy defence cannot be waived.¹²¹

The second issue is the extent of the court review in this situation.

Radicati de Brozolo¹²² advocates that, in general, the court should only satisfy itself that the arbitral tribunal has duly considered the questions allegedly raised by such rules and has provided a reasonably exhaustive explanation for its decision. A more extensive review, possibly even with a reconsideration of the relevant elements of fact and law, is justified

¹¹⁵ See e.g. Abdelgawad 467.

¹¹⁶ Shelkopyas 369 et seq. with further refs.

¹¹⁷ Eilmansberger (fn 109) at 15.

¹¹⁸ Eilmansberger (fn. 109) at 16.

¹¹⁹ See e.g. Radicati di Brozolo (fn. 99) at 18 et seq.; Radicati di Brozolo (fn. 19) at 25 seq.

¹²⁰ *Baxter International v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003).

¹²¹ Haas Art. V marg. No. 111.

¹²² Radicati di Brozolo (fn. 19) at 28.

where the arbitral tribunal did not deal with antitrust law at all, if its relevance could not have been credibly overlooked by it.

Derains¹²³ argues that the review by the state court judge may be more intense, if the parties did not raise the antitrust issue in the arbitration and the arbitral tribunal did not deal with it either.

The Eco Swiss case¹²⁴ concerned a situation where the public policy issue had not been raised during the arbitral proceedings, but only at the challenge stage. The ECJ remained silent on the degree of court review required in such a situation.

After the Eco Swiss decision had been rendered, the issue came before the Paris Court of Appeal in *Thalès*.¹²⁵ During the arbitration, neither the parties nor the arbitral tribunal raised any antitrust issues. These were put forward for the first time in the annulment proceedings. The Court of Appeal confirmed that the review by the court does not depend on the parties' behaviour in the arbitration. As stated in other previous cases,¹²⁶ a violation of public policy – including Art. 81 of the ECT - must be blatant, actual and concrete to justify annulment. Determining a violation of Art. 81 of the ECT would require an examination of the complex commercial relationships between the parties and other competitors. The Paris Court of Appeal did not consider itself to be in a position to undertake such analysis.¹²⁷

In addition, the Paris Court of Appeal states that the violation must be manifest. It has been noted that it is unusual for this additional requirement to be introduced in annulment proceedings as it originates from the proceedings for the recognition and enforcement of an award.¹²⁸ However, this is not an issue under the New York Convention, where indeed the standards may even be more strict than in annulment proceedings.

8.2.2 Antitrust rules found to be violated by the arbitral tribunal

The question in this case is whether public policy was violated by this decision, if the arbitral tribunal erred in being too restrictive. Scholars take the view that the recognition and enforcement of awards which – mistakenly – consider a clause null and void under Art. 81 (1) of the ECT cannot be denied.¹²⁹ In Eco Swiss, the ECJ only seemed concerned with the

¹²³ Derains, note [2001] Rev Arb 810 at 818 et seq.; Seraglini, note [2001] Rev Arb 781 at 793 et seq. takes the opposing view.

¹²⁴ Fn.18

¹²⁵ Fn. 89.

¹²⁶ See e.g. cases in Rev Arb 2001, 805.

¹²⁷ In case of alleged corruption (CCas. 19 December 1995 [1996] Rev Arb 48 with note by Bureau; CA Paris 30 September 1993 *European Gas Turbines SA v. Westman International Ltd* [1994] Rev Arb 359 with note by Bureau) and alleged lack of an arbitration agreement (CCas. 6 January 1987 *Southern Pacific Properties Ltd* and another v. Arab Republic of Egypt [1987] Rev Arb 469 with note by Leboulanger), French courts held that in annulment proceedings, the courts may fully review the law and the facts.

¹²⁸ Niggemann (fn. 89) at 271.

¹²⁹ Eilmansberger (fn. 109) at 14 seq.; Dolmans/Grierson (2003) 14 ICC Bull no.2, 37 at 47; Abdelgawad 457 with further refs; Thalhammer (fn. 109) has a different view and states without providing reasons that an award which did – unjustifiably – not apply art. 81 (3) ECT violated public policy.

arbitral tribunal being too liberal.¹³⁰ Indeed, it would be difficult to determine which fundamental principle was violated if the arbitral tribunal “over applied” antitrust law. It could be argued that it interferes with contractual freedom. However, this argument would justify a review of the merits of any award in the end, which is excluded under the New York Convention.

8.2.3 Antitrust rules found not to be violated by the arbitral tribunal

In *Mitsubishi*¹³¹, the U.S. Supreme Court stated that while the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remains minimal, it would not require intrusive inquiry to ascertain that the arbitral tribunal took cognizance of the antitrust claims and actually decided them. This implies great restraint on behalf of the court deciding on the recognition and enforcement of the award and excludes any review of the merits.

In *Baxter*¹³², the Court of Appeals did not allow the party who opposed the recognition and enforcement to reargue an antitrust argument, which it had already raised in front of the arbitral tribunal. The Court of Appeals considered that, as regards the parties to the arbitration, the (negative) answer given by the arbitral tribunal to the antitrust question was conclusive. Referring to *Mitsubishi*, the Court of Appeals found that the arbitral tribunal in *Baxter* “took cognizance of the antitrust claims and actually decided them. Ensuring this is as far as [the Court of Appeals’] review legitimately goes.”

Recently, the Supreme Court confirmed the limited scope of court review. In *Associated Coal*¹³³, the court referred to the standard for public policy review expressed in *Paperworks v. Misco Inc.*,¹³⁴ restating that ““as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,” the fact that “a court is convinced he committed serious error does not suffice to overturn his decision.”” In *Garvey*, the Supreme Court confirmed this and added, by referring also to *Misco*:¹³⁵ “When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator’s “improvident, even silly, fact-finding” does not provide a basis for a reviewing court to refuse to enforce the award.”

French courts also take a hands-off approach in annulment proceedings.¹³⁶ It would be hard to argue that in proceedings for the recognition and enforcement of an award, the inquiry of the state court should be more intense. According to the Paris Court of Appeal¹³⁷, “the control of the respect of rules of public policy ... must be carried out from elements of fact and

¹³⁰ Fn.18 at para. 19.

¹³¹ Fn. 16.

¹³² *Baxter International, Inc. v. Abbott Laboratories*, Vol 28 (2003) YB Com Arb 1154.

¹³³ *Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, et al.* 188 F.3d 501 (U.S. 57 2000)

¹³⁴ 484 U.S. 29 at 38 (1987).

¹³⁵ 484 U.S. 29 at 39 (1987).

¹³⁶ For an overview see Mourre (2005) 132 JDI 362 {Note}.

¹³⁷ CA Paris 20 April 2000 *Barbot Construction Métallique v. J. Richard Ducros* [2001] Rev Arb 806 with note by Derains.

of law upheld by the arbitrators in their award taking into account what has been pleaded before them, the court to which proceedings for annulment have been referred is not the judge of the proceedings that have already taken place before the arbitral tribunal."¹³⁸

Also the Austrian Supreme court respects the rule that there is no review of the merit of the award even in case of an alleged violation of public policy. In *Radenska II*¹³⁹, the Supreme Court held that in recognition and enforcement proceedings the violation "must be evident. In no case may the foreign [award] be reviewed from a factual or legal point of view."

German courts do not seem to accept any limit of the court's power to review legal arguments and facts.¹⁴⁰ It is held that a review, if an award complies with public policy, is only possible if the state court is free to assess the law and the facts. Somewhat qualifying the approach, the Hamburg Court of Appeal held that the *exequatur* court may rely on the facts established by the arbitral tribunal in a proper way.¹⁴¹ In any case, in practice the German courts do not seem to be ready to conduct a true review of the merits of the case even in antitrust matters.

Quite a few scholars are not in favour of any review of the facts.¹⁴²

It may be added that under the old EC antitrust regime where the Commission had sole competence to grant individual exemptions from Art. 81 of the ECT, the court review was very limited.¹⁴³ "Admittedly, in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemptions under Art. 81(3)." If this approach continues also under the new decentralized regime, this will also apply to the review of awards.

Finally, the ILA Report¹⁴⁴ suggests that if a *lois de police* is not respected, only a manifest disruption of "the essential political, social or economic interests protected by the rule" justifies the refusal of *exequatur*; if international obligations are not respected, only a "manifest infringement" ..

¹³⁸ Critical with respect to previous decisions, argued for a limited review of the factual conclusions: *Idot* (fn. 14) at 576.

¹³⁹ OGH 23 February 1998 *Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska*, Vol. 24a (1999) YB Com Arb 919; Reiner [2000] IPRax 323 at 326 {Zur Vollstreckung eines Schiedsspruches nach dem Europäischen Übereinkommen von 1961 trotz Aufhebung im Ursprungsland und zum Umfang der ardre public-Kontrolle nach Artt. 81, 82 EGV} states that the Supreme Court did want to exclude a review of the facts and – in general – argues for a full review of the award in antitrust matters. However, this is exactly what the Supreme Court says.

¹⁴⁰ OLG Düsseldorf 21 July 2004 VI Sch(Kart) 1/02 DIS databank; BGH 31 May 1972 (1972) 22 WuW 824 (BGH 1226); BGH 25 October 1966 (1967) 46 BGHZ 365 at 369 seq; Reiner [2000] IPRax 323 at 326 for Austria.

¹⁴¹ OLG Hamburg 12 March 1998 [1999] IPRspr no. 178.

¹⁴² *Eilmannsberger* at 16; *Radicati di Brozolo* (fn. 19) at 28; *Shelkoplyas* 376 seq.; for considerations under EC law see: fn. 18; *Van den Berg* 270 seq. {The New York Arbitration Convention of 1958 Towards a Uniform Judicial Interpretation} (Kluwer Law and Taxation, Deventer 1981); *Zobel* (fn. 18) argues that *EcoSwiss* requires a full review of the proper application of art. 81 ECT by the state courts.

¹⁴³ *CFI Métropole and others v. Commission* [1996] ECR II-649 at para 118.

¹⁴⁴ Fn. 111.

9. Conclusions

In general, it can be observed that the relationship between antitrust law and arbitration law has been dealt with in not much more than a handful of relevant cases, but has given rise to a considerable amount of seminars and legal writing.

As has been observed at the beginning of 4., the answer to many questions which can be raised on the subject depends on the applicable arbitration law. Therefore, it is not possible to give any substantive conclusions without being either preposterous or misleading.

Therefore, the following are mere suggestions for research to be done in the individual recognition and enforcement case. They follow the grounds for a refusal of recognition and enforcement covered in this context and listed in 4., supplemented by some thoughts on the court review of public policy issues.

9.1. Objective arbitrability

The private law consequences of antitrust violations, such as nullity, damages, restitution, and unfair enrichment, are arbitrable.

9.2 Valid arbitration agreement

It is argued in the legal doctrine that agreements which carve out antitrust issues from arbitration render the entire arbitration agreement null and void. No court decisions seem to have dealt with this case, which does not seem to have practical importance in the first place.

It can be argued that the nullity of the entire arbitration agreement is, in any case, not the right sanction. If at all, the nullity of the carve-out should be discussed.

9.3 *Ultra petita*

The scope of the submission does not include the legal basis for the claims and defences raised by the parties.

However, if the parties explicitly limited the legal grounds on which they base their claims, an arbitral tribunal is bound to respect these limits. However, if one takes the view that an agreement by the parties stating that the arbitral tribunal shall not deal with antitrust issues is null and void, then – obviously – this border does not exist.

9.4 Sua sponte application

An arbitral tribunal may raise antitrust issues *sua sponte*. The fact that an arbitral tribunal refrained from doing so is no ground to refuse the recognition and enforcement of an award.

9.5 Due process

In accordance with the applicable arbitration law, the arbitral tribunal may be obliged to grant the parties an opportunity to comment on antitrust issues which the arbitral tribunal considers applying *sua sponte*.

9.6 Impartiality

The fact that an arbitral tribunal raises antitrust issues *sua sponte* does not *per se* create a justified doubt as regards the impartiality of its members. Should the arbitrators go further, e.g. by indicating which factual allegations are missing, this view may change.

9.7 Public policy

9.7.1 Content

Independent of the area of law concerned, only concrete rules of fundamental importance pertain to public policy. It is disputed whether any and all antitrust laws qualify as such fundamental rules. The courts have not taken any explicit position on this. Scholars are divided.

9.7.2 Scope of court review

Court practice follows the principle of a very restrictive review, also in cases of alleged antitrust violations. There is only a minority of scholars who have argued for full control.

Abbreviations

AI	Arbitration International
Am Rev Int Arb	American Review of International Arbitration
BG	Bundesgericht (Swiss Federal Supreme Court)
BGH	Bundesgerichtshof (German Supreme Court)
BGHZ	Decisions of the German Supreme Court in civil matters
BL	Business Lawyer
CA	French Court of Appeal
CC	French Supreme Court
CCas.	Cour de Cassation (French Supreme Court)
CdA	Les Cahiers de l'arbitrage
CFI	European Court of First Instance
CMLR	Common Market Law Report
Comm. Ct	Commercial Court
CPC	Code of Civil Procedure
DIS	German Institution of Arbitration
ECJ	European Court of Justice
ECLA	European Competition Law Annual
ECLR	European Competition Law Review
ECR	European Competition Report
ECT	European Community Treaty
ERPL	European Review of Private Law
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWHC	England and Wales High Court

IALR	International Arbitration Law Review
ICC Bull	ICC International Court of Arbitration Bulletin
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
IPRspr	Die deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts
IPRSpr.	Kropholler, Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1999 (Mohr Siebeck, 2001, XXII)
JDI	Journal du Droit International
JIA	Journal of International Arbitration
JFT	Juridiska Föreningens Tidskrift
LIEI	Legal Issues of European Integration
NCPC	French New Code of Civil Procedure
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OJ	Official Journal (of the European Union)
OLG	(German or Austrian) Court of Appeal
p.	page
QBD	Queen's Bench Division
RCDIP	Revue critique de droit international privé
RDAl/IBLJ	Revue de Droit des Affaires Internationales / International Business Law Journal
Rev. Arb.	Revue de l'arbitrage
RSDIE	Revue suisse de droit international et de droit européen
SchiedsVZ	Zeitschrift für Schiedsverfahren
SPIL	Swiss Private International Law
Stockholm Arb Rep	Stockholm Arbitration Report

U.S.F.L.Rev.	United States Federal Law Review
wbl	Wirtschaftsrechtliche Blätter
WuW	Wirtschaft und Wettbewerb
YB Com Arb	ICCA Yearbook Commercial Arbitration