

# THE PROPER SCOPE OF ARBITRATION IN EUROPEAN COMMUNITY COMPETITION LAW

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#### I. INTRODUCTION

Arbitration has numerous advantages, and its popularity is therefore to a large extent justified. First, the parties have considerable control over arbitration proceedings. They are free to choose the arbitrators, the place, the time and language of the arbitration, the procedural and substantive laws applicable to it, and many other matters which are in general beyond their control in judicial proceedings. Second, arbitration is the most confidential of the several binding methods of settling disputes. Third, arbitration proceedings are less formal than those before a judge, and the confrontation between the parties to them is less intense, thus permitting the survival of business relations upon the completion of the arbitration. Finally, arbitration possesses a unique and significant advantage in today's world where business is becoming increasingly global—it avoids litigation in a foreign courtroom and all the disadvantages associated with such litigation.<sup>1</sup>

It is therefore not surprising that arbitration has gained considerable recognition in the global community as an effective method of resolving international disputes, including those involving matters of major public importance such as competition claims. This Article will focus on the arbitration of antitrust disputes under the competition rules of the European Community (EC). Although there is no leading case on the arbitrability of such disputes, the European Court of Justice (ECJ), as well as the European Commission (Commission), have consistently recognized them as arbitrable, albeit in indirect terms. Although arbitrability, as such, is no longer questioned, there remains uncertainty about the proper scope of these arbitrations and about the effective application of EC competition rules by arbitrators.

The proper scope of arbitration under EC competition law is extremely difficult to determine, requiring recourse to decisions of the

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1. Such as possible bias of the foreign Court, litigation in a foreign language, recourse to a foreign lawyer, application of local mandatory rules, difficulties in enforcing the foreign judgment, etc.

ECJ, the Commission, as well as various national courts. As outlined in Part I, these authorities have in recent years clarified this matter, explaining in the process the power and duties of the arbitrator in applying EC competition law. Part II demonstrates, however, that the scope of arbitration under EC competition law, as explained by these authorities, has many inconsistencies and dangers, which must be rectified rapidly, in the interests of both the European Union and of the reputation of international commercial arbitration.

## II. DIFFICULTIES IN DETERMINING THE PROPER SCOPE OF ARBITRATION UNDER EC COMPETITION LAW

The Community's founding treaties contain only a few provisions concerning arbitration, and case law on the subject remains sparse at both the EC and national levels. Notwithstanding this, the proper scope of arbitration under EC competition law has in recent years been clarified by decisions of the ECJ, the Commission and various national courts.

### A. *The Community's Founding Treaties and Arbitration*

The Community's founding treaties are either silent, or incomplete and vague, as to the proper scope of arbitration within the Community's legal framework. One of the few references to arbitration in these treaties is that in Article 65.5 of the treaty establishing the European Coal and Steel Community (ECSC). This article grants the High Authority of the ECSC (i.e., the Commission) the power to penalize agreements in violation of the competition laws, including those agreements which enterprises have "enforced or attempted to enforce by arbitration."<sup>2</sup> Another reference is contained in Article 220 of the treaty establishing the EC, which requires member States to enter into negotiations with each other to secure the simplification of formalities governing the reciprocal recognition and enforcement of judicial judgments and arbitral awards, but which does not state which matters are arbitrable under Community law.<sup>3</sup> And finally, the EC Treaty expressly permits arbitration of disputes governed by EC competition law in two situations: Those in which the Community itself agrees to submit a

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2. TREATY INSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, art. 65.5, 261 U.N.T.S. 140, 197-98.

3. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, art. 220, 1992 O.J. (C 224) 1 [hereinafter EC TREATY].

contractual dispute to arbitration by the ECJ, under Article 181,<sup>4</sup> and those in which the ECJ is named to adjudicate disputes between member States, under Article 182.<sup>5</sup>

The relative paucity of provisions on arbitration in the Treaties should not be taken as an indication of hostility to the arbitral process.<sup>6</sup> On the contrary, the ECJ, in the *Feilhauer* case,<sup>7</sup> by affirming that an arbitration clause under Article 181 cannot be challenged by relying on provisions of member State law that purportedly pose obstacles to the Court's jurisdiction, underlined the desire to integrate arbitration more fully into the Community's processes. However, the absence of hostility towards, or even the encouragement of, arbitration does not indicate the proper scope of arbitration between private parties in which EC competition law is at issue. For such a determination, one must look to the decisions of the ECJ and of the Commission.

*B. The Contributions of the European Court of Justice and the Commission*

The ECJ does not have a leading case on the arbitrability of disputes under EC competition law. However, the decisions rendered by both the ECJ and the Commission have recognized in indirect terms the arbitrability of certain aspects of these disputes and have helped considerably in identifying the proper scope of such arbitration.

1. The Commission

The Commission has the exclusive power to grant exemptions from Article 85, with or without conditions, if the agreement in question improves production or distribution or promotes economic progress.<sup>8</sup>

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4. EC TREATY art. 181. Article 181 provides: "The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law." *Id.* The scope of Article 181 is very broad, covering contracts made under both public and private law, including relationships between the EC and its member States, firms, and individuals.

5. EC TREATY art. 182. Article 182, which has never been invoked, provides: "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of this Treaty if the dispute is submitted to it under a special agreement between the parties." *Id.*

6. Christian Gavaldà, *Arbitration in the Context of Community Law: A Comment on Commission v. Feilhauer*, 4 AM. REV. INT'L ARB. 61, 62 n.5 (1993).

7. Case C-209/90, *Commission v. Feilhauer*, 1 C.M.L.R. 26 (1996).

8. Council Regulation 17/62, art. 8.1, 1962 J.O. (L 204) 13. For additional information on the role of the EC Commission, see DERRICK WYATT & ALAN DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* 276 (1980).

The Commission has used its power to require parties to inform it of any arbitration awards or proceedings concerning the application or interpretation of a wide range of exempted arrangements.<sup>9</sup> By doing so, the Commission has shown itself to be suspicious of arbitration, but has at the same time implicitly recognized that disputes involving EC competition law are arbitrable.

Furthermore, the fact that the Commission has the exclusive right to grant exemptions gives an indication of the limits of the power of an arbitrator when confronted with EC competition law. Indeed, justifications based on the alleged efficiency, or other public benefits, of an agreement are difficult for an arbitrator to test, and when they are claimed to exist, the arbitrator must abandon the case for lack of jurisdiction. However, he seems to be able to consider whether the alleged offense falls under a block exemption or a negative clearance, and may also be able to pronounce on the likelihood of an exemption if such a request is pending.<sup>10</sup>

Negative clearances certifying the absence of violation of Article 85(1)<sup>11</sup> or Article 86,<sup>12</sup> and block exemptions under Article 85(3),<sup>13</sup> limit

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9. See, e.g., Commission Decision 75/494, art. 2, 1975 O.J. (L 222) 39, 40; Commission Decision 78/253, art. 3, 1977 O.J. (L 70) 69, 78.

10. See J.H. Dalhuisen, *The Arbitrability of Competition Issues*, 11 ARB. INT'L 151, 163 (1995).

11. Article 85(1) of the EC Treaty provides:

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by association 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, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EC TREATY art. 85(1).

12. Article 86 of the EC Treaty provides:

Any 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. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent

considerably the need to have recourse to policy considerations in litigation, and so facilitate the task of arbitrators. However, there remains the problem of the interpretation of the scope of the negative clearances or exemptions, and of EC competition law in general. It seems that the arbitrator facing such issues, unlike a national court, cannot count on the assistance the Commission makes available under its "Notice on Cooperation Between National Courts and the Commission in applying Article 85 and 86 of the EC Treaty."<sup>14</sup> Such assistance<sup>15</sup> is not available to arbitration tribunals since they are not considered national courts under point 42 of the Notice.<sup>16</sup> As indicated below, the ECJ seems to have adopted a similar approach concerning the availability of Article 177 of the EC Treaty to arbitration tribunals.

## 2. The European Court of Justice

According to Article 177 of the EC Treaty, a national court may ask the ECJ for a preliminary ruling on a question of Community law.<sup>17</sup>

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transactions with other trading parties, thereby placing at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EC TREATY art. 86.

13. Article 85(3) of the EC Treaty provides:

The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings; any decision or category of decisions by associations of undertakings; any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EC TREATY art. 85(3).

14. 1993 O.J. (C 39) 6.

15. The assistance of the Commission consists in providing statistics, market studies, information concerning proceedings before it and opinions on points of law.

16. Point 42 of the Notice provides that the Commission will not accede to requests for information unless they come from a national court. *See supra* note 14, at 11. A contrary view is expressed by J.H. Dalhuisen who believes that arbitrators may receive such assistance. Unfortunately, the author does not put forward any legal argument in support of this conclusion. *See Dalhuisen, supra* note 10, at 163.

17. EC TREATY art. 177. Article 177 states:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty. (b) . . . . (c) . . . . Where such

Such assistance has played an important role in making uniform the interpretation and application of EC law by national courts. Unfortunately, a commercial arbitrator is not a court or a tribunal of a member State within the meaning of Article 177 of the EC Treaty, and therefore cannot have recourse to this possibility when faced with a problem of interpretation.

In 1966, the arbitration tribunal of the fund for nonmanual workers employed in the mining industry in the Netherlands sought to refer a question to the ECJ.<sup>18</sup> The Court held that this arbitration tribunal should be considered a court or tribunal within the meaning of Article 177, and that its request for interpretation was admissible.<sup>19</sup> It should be noted, however, that the tribunal in this case was a permanent tribunal constituted under national law, rather than an ad hoc tribunal,<sup>20</sup> and that its composition was decided by the State and its procedure was similar to that of a court.

In the *Nordsee* case,<sup>21</sup> a number of factors present in the *Vaassen* case were absent, most notably the permanence of the arbitration tribunal: The *Nordsee* reference was from an ad hoc arbitrator appointed voluntarily by the parties to decide a particular case. In light of this, the ECJ decided that the relation between the arbitrator and the State was not close enough to permit recourse to Article 177. The court recognized, however, albeit in indirect terms, the arbitrability of disputes under EC competition law, by admitting the possibility that a preliminary question on Community law could be referred to the ECJ by an arbitrator indirectly, through the national courts, either in the context of a request by the arbitrator for assistance from the national courts, or of a review of

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a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

*Id.*

18. Case 61/65 *Vaassen v. Beambtenfonds Mijnbedrijf*, [1966] E.C.R. 261.

19. *Id.*

20. Arbitrations can be conducted either on an ad hoc basis or under institutional auspices, *i.e.*, under the supervision of permanent bodies that have their own arbitration rules and render considerable services in regard to the proceedings. In ad hoc arbitrations, the parties do not agree on a set of arbitration rules but create their own procedural framework. See KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 53 (1993).

21. Case 102/81, *Nordsee Deutsche Hochseefischerei v. Reederei Mond et al.*, [1982] E.C.R. 1095.

an arbitral award.<sup>22</sup> The English High Court immediately adopted this approach.<sup>23</sup>

The decisions of the ECJ, like those of the Commission, have had the merit of clarifying, and providing guidelines concerning, the proper scope of arbitration under EC competition law. National courts have also been active in this effort.<sup>24</sup>

### C. *The Clarification Provided by National Courts*

The United States Supreme Court's holding in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>25</sup> that Sherman Act claims could be made subject to arbitration engendered a liberalization of European attitudes towards arbitrability, as shown by the recent decisions of Swiss and French courts.

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22. The European Court of Justice at points 14 and 15 of its reasoning stated:

As the Court has confirmed in its judgment of 6 October 1981 *Broekmeulen*, Case 246/80 [1981] ECR 2311, Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it.

In that context attention must be drawn to the fact that if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award—which may be more or less extensive depending on the circumstances—and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.

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

*Id.* at 1111.

23. See *Bulk Oil (Zug) v. Sun Int'l Ltd.*, [1984] 2 C.M.L.R. 91, 129 (Comm. Ct. 1983) (U.K.).

24. For additional information regarding the roles of the member States in regard to EC competition law, see WYATT & DASHWOOD, *supra* note 8, at 276. As stated by the authors, EC competition rules have created “a new area of law and policy, where the Community is ascribed the role of policy maker and the Member States as such do not (formally at least) play any significant part in the formation of that policy . . . .” *Id.* National courts of the member States have, however, played a major role in clarifying the proper scope of arbitration of EC competition law.

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



1. The Influence of the United States: The *Mitsubishi* Case

The former rule on the arbitration of antitrust disputes in the United States was applied in 1968 in *American Safety Equipment Corp. v. J.P. Maguire and Co.*<sup>26</sup> The Court of Appeals for the Second Circuit held in this case that an agreement to arbitrate antitrust claims was invalid because of “the pervasive public interest in enforcement of the antitrust laws.”<sup>27</sup> An important exception to this rule, also recognized in the Second Circuit, was that antitrust claims could be arbitrated if the arbitration agreement had been made after the dispute had arisen.<sup>28</sup>

This situation changed in 1985 with the Supreme Court’s decision in *Mitsubishi*. The case dealt with the question of the arbitrability of claims arising under the United States antitrust laws, pursuant to an arbitration agreement between Mitsubishi, a Japanese corporation, and Soler, a Puerto Rican corporation.<sup>29</sup> Mitsubishi sued in a federal court to compel arbitration under this agreement,<sup>30</sup> and Soler counterclaimed for an injunction and damages, alleging that Mitsubishi had conspired to divide markets in violation of the Sherman Act.<sup>31</sup> The Supreme Court held that Soler’s claim was arbitrable, and that American courts should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction. The Court concluded that

concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.<sup>32</sup>

Since then, the lower courts have followed the Supreme Court’s approach, liberally construing agreements to arbitrate so as to require arbitration over a broad range of international antitrust disputes, without

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26. 391 F.2d 821 (2d Cir. 1968).

27. *Id.* at 827-28.

28. *Caenen v. R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir. 1972).

29. *Mitsubishi*, 473 U.S. at 614.

30. *Id.* at 615.

31. *Id.*

32. *Id.* at 629.

regard to the nature of the dispute or the nationality of the contracting parties.<sup>33</sup>

The increasing tendency, in United States courts, to enforce arbitration agreements generally<sup>34</sup> is confirmed by the Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*,<sup>35</sup> in which the Court enforced an agreement to arbitrate claims for treble damages under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO). A federal appellate court noted that this decision made it difficult to confine the principle of *Mitsubishi* to international transactions.<sup>36</sup> The United States District Court for the Southern District of New York City agreed, holding that domestic antitrust disputes are now arbitrable.<sup>37</sup> A similar evolution in favor of arbitration can be found in recent Swiss and French decisions regarding arbitration under EC competition law.

## 2. Swiss Case Law

An arbitral tribunal sitting in Switzerland declared itself incompetent to examine whether a specialization agreement between a Belgian and a Spanish corporation, governed by Belgian law, was incompatible with EC competition law.<sup>38</sup> The Tribunal Fédéral Suisse, Switzerland's highest court, held that such a tribunal *was* competent to make this examination, and that failing to do so, it had rendered an award that was void.<sup>39</sup> The decision of the Swiss Supreme Court strongly confirms the arbitrability of disputes under EC competition law, and sends a clear signal to arbitrators that their awards will be overturned if they refuse to deal with competition law issues.

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33. William J. T. Brown & Stephen D. Houck, *Arbitrating International Disputes*, in 7 J. INT'L ARB. 77, 79 (1990); see also *High Strength Steel, Inc. v. Svenskt Stal Aktiebolag*, 1985-2 Trade Cas. (CCH) ¶ 66,884 (N.D. Ill. 1985); *In re Hops Antitrust Litigation*, 655 F. Supp. 169 (E.D. Mo. 1987).

34. Today in the United States, there are few subject that remain nonarbitrable. See, e.g., Gerald Aksen & Wendy S. Dorman, *Application of the New York Convention by United States Courts: A Twenty-Year Review (1970-1990)*, 2 AM. REV. INT'L ARB. 65, 83 (1991). It seems as though any commercial dispute is considered arbitrable by U.S. Courts. The only fields that are excluded from arbitrability are sensitive issues such as those arising out of criminal law or family law (for example, the custody of children).

35. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

36. *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 173 (7th Cir. 1988).

37. *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 671 F. Supp. 972, 979 (S.D.N.Y. 1987).

38. 1 REV. ARB. 124 (1993).

39. *Id.* at 125.

However, the importance of this decision must be kept in perspective. Belgian law, the law of a member State of the Community, governed the contract; the outcome might have been different if the *lex contractus* had been that of a nonmember State. Furthermore, the Swiss Supreme Court did not provide any guidance as to the power of the arbitrator in dealing with EC competition law. What should the arbitrator do once he has examined the validity of a contract under these rules? May he declare the contract void in case of a violation or should he declare himself incompetent in such a case? What sort of sanctions, if any, may he impose? Guidance with respect to many of these unanswered questions was provided by the French courts.

### 3. French Case Law

French courts at first held that a dispute is not automatically inarbitrable simply because it is governed by a mandatory rule,<sup>40</sup> and that an arbitrator may apply such a rule (e.g., a rule of competition law), whenever necessary, to the case before him.<sup>41</sup> Strangely, however, the French courts held that it did not follow from this that the arbitrator was also permitted to render an award—this he could only do if he considered that the mandatory rules in question had not been violated. If, on the other hand, he believed that a violation existed, he could not proceed because the case would be inarbitrable.<sup>42</sup> This approach was severely criticized<sup>43</sup> and fortunately abandoned in later cases.

In 1991, the Court of Appeals of Paris finally authorized arbitrators to sanction violations of mandatory rules.<sup>44</sup> An important clarification was provided by the same court in 1993 with regard to arbitrators' powers under EC competition law, when it held that arbitrators cannot award injunctions or fines, but may impose civil sanctions for violations of these rules. This was the first time a French court had provided precise information concerning the extent of arbitrators' powers in this area;<sup>45</sup> the court distinguished clearly between

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40. See Cass. com., Nov. 29, 1950, D. 1951, 170.

41. Cass. com., Oct. 21, 1981, 2 REV. ARB. 264, 265 (1982).

42. CA Paris, 1e ch. Supp., Jan. 20, 1989, 2 REV. ARB. 280, 281 (1989).

43. See, e.g., Patrice Level, *L'arbitrabilité*, 2 REV. ARB. 213, 236-37 (1992); Berthold Goldman, *Conclusions*, in COMPETITION AND ARBITRATION LAW 337 (Institute of International Business Law and Practice 1993).

44. See CA Paris, 1e ch. Supp., Mar. 29, 1991, 3 REV. ARB. 478 (1991).

45. See CA Paris, 1e ch. A, May 19, 1993, 4 REV. ARB. 645 (1993). The court stated:

Si le caractère de loi de police économique de la règle communautaire du droit de la concurrence interdit aux arbitres de prononcer des injonctions ou des

civil sanctions, which the arbitrator may impose (award damages, declare a contract void, etc.), and those which are reserved to State and Community authorities (injunctions, fines, etc.) because they are part of the *imperium merum*.<sup>46</sup>

The Court of Appeals of Paris went even further in the *Aplix* case in its effort to clarify the power of an arbitrator with respect to EC competition law.<sup>47</sup> The court stated that the arbitrator could only apply those competition laws that have *complete direct effect*. Laws of the European Community create rights and obligations not only between member States and individuals (vertical direct effect), but also between individuals in their interpersonal relations (horizontal direct effect). Direct effect is full or complete only when it is both vertical and horizontal. It follows, therefore, that according to the French court, arbitrators cannot apply rules that are not completely directly effective, because the substance or the methods of exercise of these rules may be subject to member State discretion.<sup>48</sup> The court also affirmed, once again, that the exclusive competence of the Commission under EC competition law limits the power of the arbitrator in applying this law,<sup>49</sup> because it precludes him from granting exemptions under Article 85(3), imposing fines, or enjoining behavior forbidden by Article 85(1).<sup>50</sup> The

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amendes, ils peuvent néanmoins tirer les conséquences civiles d'un comportement jugé illicite au regard de règles d'ordre public pouvant être directement appliquées aux relations des parties en cause, même si celles-ci ne sont pas toutes ensemble attirées à la procédure arbitrale.

46. See Ch. Jarroson, *Réflexions sur l'imperium*, Litec 1991 spéc. n.32, p. 245.

47. CA Paris, 1<sup>e</sup> ch. C, Oct. 14, 1993, 1 REV. ARB. 164, 165 (1994). The court stated:

L'arbitre ne peut appliquer que les règles communautaires bénéficiant d'un effet direct plein; cependant, la compétence exclusive parfois reconnue aux autorités communautaires telles que la Commission, est une limite à l'applicabilité par l'arbitre de la règle communautaire. Le caractère de loi de police communautaire du droit de la concurrence ne permet pas aux arbitres notamment d'interdire des comportements contraires à l'art. 85 § 1 du Traité CEE, d'assortir ces injonctions de sanctions pécuniaires ainsi que d'accorder une exemption individuelle au titre de l'art. 85 § 3 du Traité CEE; en revanche, les arbitres, comme le juge étatique de droit commun, peuvent tirer les conséquences civiles d'un comportement jugé illicite au regard de règles d'ordre public pouvant être directement appliquées aux relations des parties en cause.

*Id.* at 164.

48. *Id.* at 166.

49. *Id.*

50. *Id.* at 164.

effect of this decision on the jurisprudence of the national courts of the member States remains uncertain.<sup>51</sup>

While the authorities, both in the Community and in the national legal systems, discussed above have gone some way towards defining the proper scope of arbitration under EC competition law, a few points still remain unclear. For example, what should the arbitrator do when the principal claim before him involves an issue of EC competition law? Many scholars believe that such a dispute is inarbitrable,<sup>52</sup> but what is the rationale of this view? What is meant by the “principal” or the “main” claim? Furthermore, can an award made by an arbitration tribunal be considered an “agreement” for the purposes of Article 85 of the EC Treaty?<sup>53</sup> The fact that the subject has been considerably clarified does not mean that the present situation deserves commendation and is beyond criticism; quite the contrary, since behind it lurk a great many dangers.

### III. THE DANGERS OF ARBITRATION UNDER EC COMPETITION LAW

The risks and inconsistencies of the present situation will be discussed in Section A, followed by a general discussion, in Section B of the difficulties in the coexistence of EC competition law and arbitration.

#### A. *The Risks and Inconsistencies of the Present Situation*

The fact that the arbitrator cannot have recourse to the assistance of the ECJ or the Commission, together with the risk that competition rules might be evaded, are the two most important inconsistencies and dangers inherent in the present situation.

##### 1. The Lack of Assistance of the ECJ and the EC Commission to Arbitration Tribunals

The decision of the ECJ in *Nordsee*, depriving ad hoc arbitrators of the privilege of requesting a preliminary ruling on a question of community law, is senseless and dangerous. In making this ruling, the court showed a thorough lack of concern for the uniform interpretation and application of EC competition law. As a result, a complex and

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51. It is crucial that national courts of the member States follow suit in order to create a harmonized and coherent European jurisprudence on the issue.

52. CA Paris, 1e ch. Supp., Jan. 20, 1989, 2 REV. ARB. 280, 296 (1989), note Idot.

53. It has, for example, been suggested that only an award by consent of the parties can be likened to agreement. See Case 65/86, Bayer AG v. Heinz Süllhöfer, [1988] E.C.R. 5249, 5286, 4 C.M.L.R. 182 (1990).

unclear provision may be interpreted differently by two ad hoc arbitral tribunals, possibly rendering opposing awards on the same issue. The possibility that an arbitration tribunal may refer a question to the ECJ through the national courts does not provide a solution, since most arbitration awards are complied with spontaneously by the parties and therefore do not come before a court.<sup>54</sup> In any event, this alternative is time and money consuming, and totally disregards the current evolution of commercial arbitration into an alternative to litigation in national courts.<sup>55</sup> There is also no basis for distinguishing between an ad hoc arbitral tribunal and a permanent institution, as far as access to guidance from the ECJ is concerned; indeed, it is contradictory to require ad hoc arbitrators to respect competition rules and at the same time preclude them from recourse to the ECJ's assistance under Article 177. There is similarly little sense in depriving arbitration tribunals, but not national courts, of the benefit of assistance from the Commission.

## 2. The Risk of Evading EC Competition Law

The ECJ has held that arbitral tribunals must apply EC law as the applicable substantive law, since it is part of the national law of each member State.<sup>56</sup> The situation is unclear, however, when the dispute before the arbitrator is governed by a law of a nonmember State, or when the question is whether the arbitrator is required to apply EC competition law *ex officio*. In general, since the arbitrator cannot ignore the fact that his award must be enforced,<sup>57</sup> he must apply the mandatory provisions of the country where enforcement of the award will be sought,<sup>58</sup> as well as

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54. Gerhard Bebr, *Arbitration Tribunals and Article 177 of the ECC Treaty*, 22 COMMON MKT. L. REV. 489, 498 (1985).

55. See Anthony McClellan, *EC Situation, in COMPETITION AND ARBITRATION LAW* (Institute of International Business Law and Practice 1993).

56. See, e.g., Case 246/80, *Broekmeulen v. Huisarts Registratie Commissie*, [1981] E.C.R. 2311, 2328, 1 C.M.L.R. 91 (1982).

57. Although the majority of awards are honored through the voluntary compliance of the parties, recourse to official authorities is sometimes needed to enforce an award. Indeed, an arbitral award is not the legal equivalent of a judicial judgment. It is not self-executing. For example, in the United States, it must be converted into a judicial judgment before an order or a writ of execution can be issued to enforce the award.

58. The arbitrator must take into consideration mandatory rules of the country or countries where the award will be enforced to facilitate enforcement. Article V(2)(b) of the 1958 New York Convention provides: "Recognition and enforcement of the award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . the recognition or enforcement of the award would be contrary to the public policy of that country." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V(2)(b), 330 U.N.T.S. 42 [hereinafter *New York Convention*].

those of the country where the seat of the arbitration tribunal is located, in order to avoid the setting aside of his award by relevant national courts.<sup>59</sup> Article 26 of the ICC Rules clearly encourages arbitrators to be mindful of mandatory provisions by stating that the court of arbitration shall make every effort to ensure that the award is enforceable at law.<sup>60</sup> It is, indeed, generally recognized that the arbitrator may not disregard mandatory provisions of a public policy character,<sup>61</sup> such as those of EC competition law.<sup>62</sup> It is believed that such provisions must be applied even when arbitrators act as *amiable compositeurs*,<sup>63</sup> or when the governing law is the *lex mercatoria*.<sup>64</sup> Unfortunately, no continuous practice can be recognized, because few awards have been published on the subject. Of particular note is a 1983 ICC award, which held that an arbitrator dealing with a contract entered into by an Italian and a Korean party must, before even determining the *lex contractus*, apply *ex officio* the competition rules of the States where the award would be enforced.<sup>65</sup>

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59. The country where the award is rendered is competent to set aside the award. The arbitral award must therefore pass muster under standards of review in the country where arbitration takes place. The setting aside of an award in the country where it was made will, in the majority of cases, be an obstacle to enforcement of the award in a third country. Indeed, Article V(1)(e) of the New York Convention provides that recognition and enforcement of the award may be refused if the award has been set aside or suspended by a competent authority of the country in which that award was made. New York Convention, *supra* note 60, art. V(1)(e), 330 U.N.T.S. at 40.

60. Article 26 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce provides: "In all matters not expressly provided for in these Rules, the International Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law." International Chamber of Commerce, ICC RULES OF CONCILIATION AND ARBITRATION art. 26, at 27 (1988).

61. Sigrard Jarvin, *The Sources and Limits of the Arbitrator's Power*, CONTEMP. PROBS. INT'L ARB. 50, 71 (1986).

62. There is no doubt that EC competition law is part of public policy within the meaning of the 1958 New York Convention. Awards violating EC competition rules cannot therefore be enforced. See Article XI of the Charter for the Dispute Settlement Centre for disputes arising from allocation procedures under the International Energy Programme of 1974. The last sentence of the article states that recognition and enforcement of an award may be refused if the award is contrary to the public policy of the State in which recognition or enforcement is sought, including the law of the European Communities.

63. Frank-Bernd Weigand, *Evading EC Competition Law by Resorting to Arbitration?*, 9 ARB. INT'L 249, 252 (1993). *Amiable compositeur* is similar to the *amicable compouders* under Louisiana law and practice. *Amicable compouders* are arbitrators authorized to alleviate the strictness of law in favor of natural equity. For additional information on the *amiable compositeur*, see JEAN ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL EN DROIT INTERNE ET INTERNATIONAL PRIVÉ* 157 (1993).

64. Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 765 (1985).

65. Yves Derains, *L'ordre Public et le Droit Applicable au Ford du Litige dans L'arbitrage International*, 3 REV. ARB. 375, 397-400 (1986). On the other hand, it seems that English

Supervisory powers of national courts over arbitral proceedings are not, however, a complete protection against the evasion of EC competition law, since these powers vary significantly from country to country. One of the ways in which the national judge can exercise control over arbitration is through the procedure of setting aside arbitration awards. The arbitral award must pass muster under the standards of review applicable in the country where the arbitration takes place.<sup>66</sup> However, in order to encourage arbitration locally, a number of countries have adopted arbitration statutes that permit an escape from such control.<sup>67</sup> For example, the Belgian law of March 27, 1985, suppressed the setting aside procedure in cases where the parties do not have a connection with Belgium, *i.e.*, if none of the parties has Belgian nationality, or is resident there.<sup>68</sup> Switzerland's Federal Code on Private International Law authorizes parties who are not domiciled in Switzerland to renounce recourse to the setting aside procedure.<sup>69</sup> There is, indeed, a recent trend towards limiting the possibility of judicial review, and even towards enabling the parties to exclude any review at all. National laws have been reformed to ensure finality, and courts have followed suit by upholding awards, except in the most extreme cases.<sup>70</sup>

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arbitrators do not have to raise questions of law *ex officio*, other than the questions raised by the parties.

66. See *supra* note 53.

67. It has long been the desire of international trade to restrict the influence of the place of arbitration and to delocalize awards, *i.e.*, to remove the power of the courts at the place of arbitration to make an internationally effective declaration of the award's nullity. See, *e.g.*, Jan Paulsson, *Delocalization of International Commercial Arbitration: When and Why it Matters*, 32 INT'L & COMP. L.Q. 53 (1983).

68. Article 1717 of the Code Judiciaire Belge. See H. Van Houtte, *La loi Belge du 27 mars 1985 sur l'arbitrage international*, 2 REV. ARB. 29 (1986); Jan Paulsson, *Arbitration unbound in Belgium*, 2 ARB. INT'L 68 (1986).

69. A.J. Van Den Berg, *The Efficacy of Award in International Commercial Arbitration*, 4 J.C. INST. ARB. 264 (1992). The jurisprudence of Sweden has led to an approach similar to the one of Switzerland. Jan Paulsson, *Arbitrage international et voies de recours: La Cour Suprême de Suède dans le sillage des solutions belge et helvétique*, 3 JOURNAL DU DROIT INT'L 589 (1990).

70. For example, France has the most permissive legislation for enforcing arbitration awards. See report on the colloquium organized in Paris, September 23, 1981 on the French reform on international arbitration, 4 REV. ARB. 1 (1981). Such legislation has engendered negative effects. In 1994, the French Cour de Cassation enforced an arbitral award rendered in Switzerland despite the fact that it was set aside there. Cass. 1<sup>e</sup> civ., Mar. 23, 1994, 2 REV. ARB. 327 (1994). Thereafter, a new award contrary to the one enforced in France was rendered in Switzerland. See Hilmarton, *Cour de Cassation*, REV. ARB., Mar. 23, 1994, 1994.327. Further, the new award was also granted exequatur in France. See Yearbook of Comm. Arb'n XIX, 1994, pp. 214-22. The Paris Court of Appeal thereafter confirmed both exequaturs, permitting the coexistence of two contradicting decisions between the same parties on the same subject matter. See Hamid G. Gharavi, *Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention*, 6 J. TRANSNAT'L L. & POL'Y 101 (1996).



There is therefore a possibility that EC competition law might be evaded by opting for arbitration.

It is in the interest, not only of the European Union but also of the international arbitration community generally, to eliminate the risks and inconsistencies engendered by the present situation. It might be reasonable to authorize a review on the merits of the few awards where arbitrators apply EC competition law. The abandonment of the *Nordsee* principle should also be encouraged. All the assistance that the Commission provides to national courts should be made available to arbitrators.<sup>71</sup> But all these changes, even if they occur, may be insufficient to assure a proper application of EC competition law, because arbitration and competition law inhabit two completely different worlds, whose coexistence is fraught with difficulty.

#### B. *The Difficult Coexistence of EC Competition Law and Arbitration*

The arbitrator of disputes under competition law faces barriers to the effective execution of his duties: The mission for which he was named, the confidentiality which he must respect and (usually) his lack of economic knowledge, all combine to put the arbitrator in a delicate position when confronted with the application of competition law.

##### 1. Two Antithetical Missions

The arbitrator and competition law do not form the perfect couple. The arbitrator derives his power from the autonomy of the parties and pursues a private mission. Unlike the judge, he has no *lex fori* and is not linked to any public policy other than that of the *lex contractus*.<sup>72</sup> He is primarily at the service of the parties and is not entrusted with the mission of protecting the public interest of a given state whose law has been chosen to govern the dispute.<sup>73</sup> Authorizing arbitrators to deal with competition issues is entrusting them with an important public task which may not be entirely consistent with their original mission.<sup>74</sup> The public

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71. The fact that the Commission is already over-loaded should not be used as a ground for refusing such assistance.

72. Serge Lazareff, *Mandatory Extraterritorial Application of National Law*, 11 ARB. INT'L 137, 138 (1995).

73. *Id.*

74. See *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826-27 (2d Cir. 1968). The court made the following statement which can apply by analogy to EC competition law:

mission which EC competition law pursues is of fundamental importance, inspired as it is by the need to promote the internal market. In the Community, this is part of a strategy in which the free movement of persons, goods and services, and the regulation of public monopolies, subsidies and procurement also play a role.<sup>75</sup> In the United States, such considerations are covered by the constitutional commerce clause. Is it therefore reasonable to entrust to arbitrators such a substantial mission?

## 2. The Confidentiality of Arbitration as a Threat to the Application of EC Competition Law

The confidentiality of arbitration is certainly an important reason for its success,<sup>76</sup> but can also represent a serious threat to the application of competition rules. EC officials are extremely concerned about this risk. Jacques Werner, the former Vice-Chairman of the ICC Commission on the Law and Practices Relating to Competition, wrote about discussions he had with high officials of the Directorate-General for Competition in the Commission.<sup>77</sup> It appears that the officials were extremely disturbed by a case involving two EC companies which had concluded a market sharing agreement in direct violation of Article 85 of the EC Treaty.<sup>78</sup> The agreement was governed by Swiss law, with arbitration taking place in Switzerland.<sup>79</sup> Only one original contract was signed, which was hidden in a Swiss bank; no copies of it were permitted to be made.<sup>80</sup> When the dispute arose, the arbitrators were invited to examine the contract, but were not allowed to mention it in their decision.<sup>81</sup> That such a situation can arise is not surprising, in view of the

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A claim under the antitrust laws is not merely a private matter. The Sherman act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public interest. Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage.

75. *Id.*; Dalhuisen, *supra* note 10, at 155.

76. Indeed, a major reason for choosing arbitration is the greater likelihood of confidentiality in a private forum. Institutions such as the American Arbitration Association and the International Chamber of Commerce seem to have an excellent reputation for discretion. *See* Brown & Houck, *supra* note 39, at 79.

77. Jacques Werner, *Application of Competition Laws by Arbitrators, The Step Too Far*, 12 J. INT'L ARB. 23 (1995).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Another danger of arbitration in regard to competition law is that arbitrators are not always obliged to explain the reasoning for their award. *See, e.g.,* Sobel v. Hertz, Warner & Co.,

incompatibility between the confidentiality of arbitration and the public mission of competition law.

The fact that only few awards are published in this field confirms the confidentiality surrounding arbitrations. It is also not a surprise to see that no cases were reported following the EC Commission's requirement that parties inform it of any arbitration awards or proceedings concerning the application or interpretation of a variety of exempted agreements.<sup>82</sup>

### 3. The Inadequate Economic Knowledge of Arbitrators

The American Arbitration Association and the International Chamber of Commerce filed briefs before the United States Supreme Court in the *Mitsubishi* case,<sup>83</sup> in order to demolish what Professor Lowenfeld calls the "myth" that complicated issues such as those arising under antitrust laws could not be dealt with by arbitrators, who might be tired businessmen not interested in major public law issues such as those invoked in antitrust cases.<sup>84</sup> Unfortunately, this is not a myth. The substantial compensation offered to arbitrators has encouraged many to enter this field following their retirement, apparently motivated to a large extent by the promise of comfortable commissions for their services, which are rendered in attractive locations where the seat of the tribunal is located.<sup>85</sup>

Competition claims usually involve a complex factual background, and require analysis of economic conditions and of extensive and complex documentation. How can arbitrators be competent to rule on such issues which are frequently unanticipated at the time of their appointment?<sup>86</sup> Can they define the relevant market? If so, are they capable of determining whether substitute products exist, and the geographic limits within which this determination should be made? Many believe that such questions are generally beyond the grasp of those

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469 F.2d 1211, 1215 (2d Cir. 1979). Such obligation should at least be imposed on the fraction of the award dealing with competition issues.

82. See WYATT & DASHWOOD, *supra* note 8, at 276.

83. See 473 U.S. at 614.

84. Andreas F. Lowenfeld, *The Mitsubishi Case: another view*, 2 ARB. INT'L 178, 182 (1986).

85. For an indication on arbitrators' fees, see, e.g., AMERICAN ARBITRATION ASSOCIATION, THE INTERNATIONAL ARBITRATION KIT 263, 325, 339, 346 (1993). In an arbitration under the auspices of the International Chamber of Commerce, arbitrators' fees, if the sum in dispute exceeds \$100,000,000, may reach a maximum of \$231,500 + 0.05 % of the amount over \$100,000,000.

86. See, e.g., *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1472, 1479 (9th Cir. 1984) (holding that commercial arbitrators are frequently drawn from the business community because of their expertise in business matters, and are ill suited to safeguard the public interest).

who do not have a sound knowledge of economics.<sup>87</sup> The fact that arbitrators are deprived of the assistance of the ECJ and the Commission does not make their situation any easier; and nor does the fact that less formal procedures are used in arbitration, such as relaxed rules of evidence, which are completely inappropriate in settling a competition claim.<sup>88</sup> In addition, international arbitration tribunals are poorly equipped for fact-finding, and consequently the determination of facts extremely difficult.<sup>89</sup>

It seems that not much can be done about the lack of economic knowledge of arbitrators, except, as already mentioned, to provide them with greater assistance. The idea of requiring that only international lawyers be appointed as arbitrators, and of abandoning the principle of the autonomy of the parties,<sup>90</sup> should be rejected. Recourse to international lawyers would only transform international arbitration into an even smaller club than it is at present, and would completely take away from the parties the most important advantage of arbitration: The power to choose arbitrators according to their expertise in the factual substance of a case.

#### IV. CONCLUSION

The present scope of arbitration under EC competition law is confusing and difficult to determine, despite the clarification it has received in recent years. This process of clarification remains to be completed, because a number of points remain obscure.

In addition, fundamental changes must occur. The present scope of arbitration under EC competition law is far from appropriate. Today,

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87. Werner, *supra* note 79, at 23. The author discloses his experience as a commissioner with the Swiss Federal competition authority, where he noticed the absurdities which can be reached when lawyers, devoid any understanding of what a market is and how it functions, deal with competition law cases.

88. See James R. Atwood, *The Arbitration of International Antitrust Disputes: A Status Report and Suggestions*, 21 *FORDHAM CORP. L. INST. INT'L ANTITRUST L. & POL'Y* 367, 368-69 (1995). The author believes that in short, the international acceptability of an arbitration proceeding dealing with an antitrust dispute is likely to be considerably greater than a judicial proceeding dealing with the same subject matter. The confidentiality of arbitration as well as the use of less formal proceedings are cited in this effect. But such advantages of arbitration are certainly considered acceptable by private parties and arbitrators, but are completely inappropriate when it comes to public policy and application of competition law.

89. Charles N. Brower, *Evidence Before International Tribunals: The Need For Some Standard Rules*, 28 *INT'L LAW* 47 (1994).

90. See, e.g., Klaus Peter Berger, *Party Autonomy in International Economic Arbitration: A Reappraisal*, *AM. REV. INT'L ARB.* 1 (1993).

an arbitrator with absolutely no knowledge of economics may be asked to settle a dispute involving a complex issue of competition law, for which he may receive no assistance from either the ECJ or the Commission. Such an arbitration may take place in Belgium or Switzerland, where there may be no recourse to set aside the award, in a situation in which an arbitrator interested primarily in his remuneration is asked to respect the confidentiality of his mission. It is not a surprise that the present situation is referred to as “grotesque.”<sup>91</sup> Changes must take place in two main directions: Giving arbitrators more assistance in applying competition rules, and developing and exercising a more efficient supervisory power over arbitration awards and proceedings.

In general, recourse to international commercial arbitration should be encouraged in a period of globalization. However, the arbitration world, which has obtained more rights in the past decades than it has offered guarantees, must now accept that it must make concessions in order to take due account of the responsibilities with which it has been entrusted.

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91. Werner, *supra* note 79, at 22.