

EC competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission

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1. INTRODUCTION AND FRAMEWORK ILLUSTRATION

A. INTRODUCTION

Much ink has been poured for the purpose of illustrating the dimensions of the interaction between European Community (EC) competition law¹ and international commercial arbitration that one might come to consider the topic largely explored, if not exhausted. In reality however, the interface between these two legal orders remains to a large extent unclear and thus open to further deliberation for a number of reasons, the most important of which – in this author's view – are the following.

First, the interface at hand is characterised by a multi-layered complexity anchored in the very nature and the peculiarities of each legal order; it occurs in an intricate legal and regulatory framework, and it seems to be dominated by the conceptual conflict that lies at its heart and arises out of the 'confrontation' between EC competition law and the international commercial arbitration realm, namely between a set of rules of a prevalent public law nature enjoying a supranational constitutional status through inclusion in the EC Treaty² and serving as transnational mandatory norms on the one hand, and a private, confidential, flexible, and independent adjudication mechanism for the resolution and final settlement of international commercial (and mostly contractual) disputes on the other.

Secondly, the remarkable dynamics of EC competition and international commercial arbitration as bodies of law, their ongoing expansion in scope and increase in influence worldwide, and the notable proliferation of their gravity within the current global and multi-cultural business environment, especially in terms of policy, legal, and economic considerations.

Last but not least, the piecemeal and fuzzy way of dealing with international arbitration on the part of the authorities of the EC has been far from helpful in rendering the picture of the relationship between the two more lucid and less patchy. It is indeed interesting that the constant conscious silence over arbitration involving competition law issues relating to Articles 81 and 82 EC and the zeal for tailoring arbitral proceedings to the needs of the EC merger control scheme emanate from the very same institution, namely the European Commission.

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¹The expression 'EC competition law' as used here includes the area of merger control.

²See A. Komninos, 'Arbitration and the Modernisation of European Competition Law Enforcement', (2001), 24(2) *World Competition* 211, at 222. Note that this constitutional dimension constitutes a unique and peculiar characteristic of EC competition law. The case is different with both Member States' competition laws and the US antitrust law. On this issue, see D. Chalmers, C. Hadjiemmanuil, G. Monti, and A. Tomkins, *European Union Law*, Cambridge University Press, 2006, at p. 52.

What is more, the latest developments and the present landscape of EC competition law bring the 'competition-arbitration' interface to the foreground and admittedly render it a lively and heated issue among scholars and practitioners of both competition and arbitration communities.

In what follows, an attempt is made to illustrate the current framework of the said interface, to shed some light on certain thorny issues with regard to both competition (Articles 81 and 82 EC) and merger (EC merger control remedies) arbitrations, and finally to draw some useful conclusions from the European Commission's attitude towards arbitration to date in so far as such an attitude may well serve as an indication of the Commission's possible future directions on the topic.

(B) FRAMEWORK ILLUSTRATION

The analysis in the present essay focuses on a three-dimensional framework which indeed resembles a triangle consisting of three – two relatively and one substantially – new developments within EC competition law regime, and which seems to indicate the emergence of a new era in the interface between competition and arbitration in Europe.

More specifically, Regulation 1/2003, the Modernisation Regulation³, through the abolishment of the notification mechanism and the European Commission's jurisdictional monopoly on Article 81(3) EC, the introduction of an *ex post* control system with a prevailing underlying self-assessment element, and the explicit provision for the full direct effect⁴ (previously grounded on the jurisprudence of the European Courts) of Articles 81 and 82 EC, reflects the EC's desire to move towards decentralisation⁵ in the enforcement of these articles and subsequently perhaps towards the enhancement of the role of private enforcement within the EC competition law regime.

The Modernisation Regulation aside, the private enforcement channel of EC competition law is further underlined by the newborn White Paper on private enforcement⁶ as a crucial adjudication arena for competition law disputes and as an essential instrument for both the final formulation of the modernised EC competition law and the attainment of its objectives. Arguably, the enhanced role of private enforcement along with the corresponding growing importance of private adjudication in Europe generally constitute a quite clear indication of the significant anticipated expansion of the use of arbitration in the application of EC competition law. This remark notwithstanding, it is pertinent and crucial to note here that both the Modernisation Regulation and the said White Paper remain silent over arbitration. And it is this silence that has divided commentators into those

³Regulation 1/2003 [2003] OJ L 1, pp.1-25.

⁴Regulation 1/2003, Article 1.

⁵See Regulation 1/2003, Articles 4, 5, 6, 25(3) and 29(2). See also, M. Dolmans and J. Grierson, 'Arbitration and Modernization of EC Antitrust Law: New Opportunities and New Responsibilities', (Fall 2003), 14(2) ICC International Court of Arbitration Bulletin, pp. 37-51.

⁶White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008.

who perceive it as a 'conscious and prudent choice' on part of the Commission⁷, and those who stress that it amounts to a 'conspicuous absence' of arbitration⁸.

At the same time, the use of international arbitration as a procedural tool to monitor certain behavioural commitments⁹ undertaken in the context of the Commission's so-called 'clearance decisions' – particularly in the field of merger control – constitutes a relatively recent but highly controversial phenomenon. Such decisions consist of two types of beneficiaries: the main ones, that is, the addressees of these decisions, and third-parties, such as competitors or other persons 'worthy of protection'¹⁰ under the relevant decision. The benefit of these decisions is granted on the condition that the main beneficiary is obliged to accept a potential arbitration request from any protected third party. In other words, a denial of such a request on the part of the addressee may lead to the withdrawal of his benefit by the Commission. This may be the case in both the Commission's competition¹¹ and merger¹² remedies, namely, the Commission's individual exemption decisions under Article 81(3) EC,¹³ and its merger-related decisions giving the green light to certain concentrations subject to specific conditions (conditional clearance).

Focusing on Regulation 139/2004, the Merger Regulation¹⁴, international arbitration is used by the Commission with noticeable ardour as a monitoring device for the correct implementation of certain behavioural commitments under the Commission's conditional clearance decisions. Interestingly, the case of arbitration commitments in the context of the EC merger control regime and its remedies scheme is now expressly mentioned in the new draft revised Notice on Remedies¹⁵. Also, the Commission's existing Model Texts on certain

⁷A. Komninos, above note 1, p. 218.

⁸P. Landolt, *Modernised EC Competition Law in International Arbitration*, Kluwer Law International, 2006, p. 39.

⁹Note that the terms 'commitments' and 'remedies' are herein used interchangeably.

¹⁰See A. Komninos, above note 1, p. 217.

¹¹See e.g. Dec. 99/781/EC, *British Interactive Broadcasting/Open*, OJ [1999] L 312/1, where among the conditions of an individual exemption under Article 81(3) EC granted by the Commission was the recourse to an 'appropriate and independent arbitration procedure'. For numerous examples and a detailed analysis of the Commission's practice in this respect see M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, Swiss Commercial Law Series, Volume 14, Helbing & Lichtenhahn, 2003, pp. 83 et seq. Also see M. Bowsher, 'Arbitration and Competition', in T. Ward and K. Smith (eds.), *Competition Litigation in the UK*, Sweet & Maxwell, London, 2005, pp. 398–431.

¹²See the arbitration commitments in Cases No IV/M.1185, *Alcatel/Thomson CSF-SCS*; No IV/M.1313, *Danish Crown/Vestjyske Slagterier*; No Copm/M.1684, *Carrefour/Promodes*; No Comp/M.1751, *Shell/BASF/JV-Project Nicole*; No Comp/M.1795, *Vodafone Airtouch/Mannesmann*; No Comp/M.1846, *Glaxo Welcome/Smithkline Beecham*; and No Comp/JV.37, *BSkyB/Kirch Pay TV*. See also the case No Comp/M.2050, *Vivendi/Canal+/Seagram*, where the Commission underlined the absence of a potential resource to arbitration. After that, a sophisticated ICC arbitration was proposed to the Commission, which finally entertained its concerns. For a detailed analysis of merger remedies see M. Blessing, above note 10, pp. 49 et seq.; also see G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies*, Europa Law Publishing, Groningen, 2006. For an update see G. Blanke, 'The Use of International Arbitration in EC Merger Control: Latest Developments', (2007), 28(12) European Competition Law Review 673.

¹³Note that for the purposes of the present paper, the Commission decisions under Article 9 of the Modernisation Regulation are treated on par with the Commission prior-Modernisation individual exemption decisions under Article 81(3) EC.

¹⁴Regulation 139/2004 [2004], OJ L 24, pp. 1–22.

¹⁵See the draft revised Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004, (2007), in particular paras 66 and 127. Note that until adoption of the draft revised Notice (2007) –scheduled for early 2008– the old

types of remedies are strongly anticipated to be complemented by a model arbitration clause that may well be used in several merger remedy scenarios¹⁶. This is why the nature, the parameters, and the future prospects of the so-called 'remedy arbitrations'¹⁷ constitute at present one of the most divisive and burning debates within the arbitration and competition communities in Europe.

2. INTERNATIONAL COMMERCIAL ARBITRATION AND ARTICLES 81 AND 82 EC – COMPETITION ARBITRATIONS.

(A) ARBITRABILITY OF COMPETITION LAW DISPUTES

In general, arbitrability answers the question of what types of disputes can be submitted to arbitration. Each state, based on its sovereignty, retains the power to formulate its own answer to this question according to the public policy considerations prevailing at a certain time within its domain. Indeed, as noted by some commentators, 'arbitrability determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins.'¹⁸

Albeit highly controversial in the past, the arbitrability of competition law disputes is now generally acknowledged on both sides of the Atlantic. In the USA, the arbitrability of competition law has not been debated since the dust of *Mitsubishi*¹⁹ case settled. In the EC, the arbitrability of EC competition law was implicitly yet doubtless confirmed in the seminal judgment of the European Court of Justice (ECJ) in *Eco Swiss*²⁰, where the ECJ also underlined the Member States' interests in the sound and effective operation of arbitration.²¹ EC law aside, the current legislation and jurisprudence of the leading European jurisdictions clearly gravitate in the same direction.²²

It is important to stress at this point that when referring to the arbitrability of competition law, one invariably focuses on the 'civil' aspect of competition law, namely on

Notice on Remedies, i.e. Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ 2001 C68, remains in force.

¹⁶J. Luebking, 'Revision of the Notice on Merger Remedies', (2007), 2 Competition Policy Newsletter 6, at 8-9.

¹⁷As made clear above, arbitration commitments may arise not only in the context of the Merger Regulation and its remedies scheme, namely the Commission's merger-related decisions declaring certain concentrations to be compatible with the common market subject to specific conditions, but also in the context of the Modernisation Regulation, and in particular its Article 9, which clearly, though tacitly, invites arbitration commitments within the scope of the Commission's Article 81(3) EC individual exemption clearance decisions. Such arbitration scenarios are generally termed 'remedy arbitrations' or 'EC remedy-related arbitrations'. Although the present paper is confined to the analysis of the former type of remedy arbitrations, the same analysis applies *mutatis mutandis* to the latter type as well. For a very recent use of an arbitration commitment in a decision under Article 9 of the Regulation 1/2003 see Case Comp/37749 *Austrian Airlines* and SAS AB.

¹⁸See Carbonneau and Janson, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability', (1994), 2 *Tulane Journal of International and Comparative Law* 193, at 194.

¹⁹*Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985).

²⁰Case C-126/97 *Eco Swiss v. Benetton* [1999] ECR I-3055.

²¹*Ibid*, para 35.

²²For a comparative survey see P. Landolt, *above* note 7, Chapter 5. See also D. Rahmann, 'Arbitrability of Antitrust Issues', (1990), 12 *Comparative Law Yearbook of International Business* 97.

those private law claims adduced and those private remedies sought when an infringement of the competition rules has occurred.²³ By corollary, issues relating to the administrative aspect of competition law, such as disputes as to whether public sanctions in the form of fines following a violation of competition law should be imposed are not considered arbitrable.²⁴

In principle, therefore, all disputes arising out of any type of horizontal or vertical collusion (Article 81 EC) or abusive conduct (Article 82 EC) can be submitted to arbitration.²⁵ However, one should never forget that the *conditio sine qua non* of any arbitration (competition arbitrations included) is the existence of a valid arbitration agreement. Quite importantly, this remark reflects the inherent limits of arbitration as an alternative private justice forum; nonetheless, in practice business contracts frequently feature arbitration clauses. Arbitration, thus, plays a central role in contractual disputes, whereas its role in non-contractual ones is secondary.²⁶

More specifically, arbitrability is not contested in relation to disputes arising from multilateral (e.g. among partners) or bilateral (e.g. between a seller and a buyer) contracts with horizontal or vertical dimensions operating either on a long-term or on a transaction-by-transaction basis. Such disputes may well concern several pricing scenarios or price discrimination, exclusivity, market partitioning, tie-in or bundling situations, resale, refusals to supply or other abuses of a dominant position, and the like²⁷. In such cases, Articles 81 and 82 EC may constitute the basis of either a claim or a defence, and the remedies²⁸ (e.g. damages, restitution, or declaratory relief) sought before arbitral tribunals would almost invariably centre upon 'the validity of the contract itself, of its horizontal or vertical restrictions, and on any damages resulting from anti-competitive behaviour.'²⁹ On the other hand, disputes raising public issues by somehow affecting the society (in the form of a whole class of citizens), disputes involving claims against third parties, as well as disputes where tortious behaviours (outside a contractual relationship) are largely at stake, are normally not considered to be arbitrable. In such scenarios, the dispute in question is extremely unlikely to be covered by a pre-existing valid arbitration agreement. As a general rule, therefore, the arbitrability of EC competition law disputes presupposes a pre-existing contractual relationship or at least contractual framework within which a valid arbitration agreement would exist.

²³See S. Dempegiotis, 'EC competition law and international arbitration in the light of EC Regulation 1/2003: Conceptual conflicts, Common grounds, and Corresponding legal issues', (forthcoming June 2008), 25(3) *Journal of International Arbitration*.

²⁴See J.D. Lew, L. Mistelis, and S. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 485.

²⁵For a detailed presentation of various case scenarios of competition arbitrations see M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, Swiss Commercial Law Series, Volume 14, Helbing & Lichtenhahn, 2003, Annex 2, p. 209 et seq.

²⁶See L. Idot, 'Arbitration and the Reform of Regulation 17/62', in C. D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland/Oregon, 2003, pp. 307-321, at pp. 309-311.

²⁷See J. Dalhuisen, 'The Arbitrability of Competition Issues', (1995), 11(2) *Arbitration International* 151, at 158-159.

²⁸For more details on the remedies that arbitrators can grant under Articles 81 and 82 EC see H. van Houtte, 'Arbitration and Articles 81 and 82 EC Treaty – A State of Affairs', (2005), 23(3) *ASA Bulletin* 431, Kluwer Law International.

²⁹J. Dalhuisen, *above note 26*, at 163.

(B) ARBITRABILITY OF ARTICLE 81(3) EC AND ITS APPLICATION BY INTERNATIONAL ARBITRATORS

Prior to the modernisation of EC competition law regime, the arbitrable EC competition rules were Articles 81(1) and (2), and 82 EC. The intriguing question post-modernisation concerns the arbitrability of Article 81(3) EC and its applicability in international arbitration proceedings. The difficulty of this twofold question rests on the public policy considerations rooted in the evaluation of Article 81(3) EC and the subsequent Commission's doubt about arbitrators' ability to deal with such delicate issues. In practice, the testing question is whether international arbitral tribunals can decide on the question of individual exemption under Article 81(3) EC as do national courts now.

As far as the arbitrability of Article 81(3) EC is concerned, it suffices to mention here that thus far the arbitrability of EC competition law appears to have been governed by a single principle: the arbitrators' competence to adjudicate on EC competition law issues must coincide (in terms of scope) with that of national judges. The ECJ in *Nordsee*³⁰ and *Eco Swiss*³¹ appears to be well-informed of this principle: through its complete silence, it implicitly acknowledged not only this principle but also the possibility of arbitrators applying all the EC competition rules having direct effect, as is the case now with Article 81(3) EC.³² It follows that under the Modernisation Regulation the adjudication arsenal of international arbitrators contains Article 81(3) EC in so far as the same applies to Member State courts. The silence of Regulation 1/2003 in this regard bears the same gravity as the silence of its predecessor, Regulation 17/62.³³ Finally, the non-arbitrability of Article 81(3) EC impairs the effectiveness of arbitration as an adjudication vehicle, thereby thoroughly contrasting with the *Eco Swiss* recognition of the Member States' interests in effective arbitration.³⁴ As a result, the question of arbitrability of Article 81(3) should be answered in the affirmative.

Turning to the applicability of the said provision in arbitral proceedings, it is really interesting to notice that national judges' capability to deal with the complex policy and economic issues arising out of Article 81(3) EC was at the centre of criticism against Regulation 1/2003.³⁵ This remark aside, Article 81 EC as a whole constitutes a source of rights and obligations 'enforceable by legal and natural persons as a matter of Community law'³⁶ due to its direct effect provided for under Article 1 of Regulation 1/2003. In other words, there is no ground to argue that the application of Article 81(3) EC should be treated in a different way 'from any other question of fact or law arising in any international arbitration.'³⁷ In addition, despite the wording of Articles 5 and 6 of Regulation 1/2003

³⁰Case 102/81 *Nordsee* [1982] ECR 1095.

³¹See *above* note 19.

³²See R. Nazzini, 'International Arbitration and Public Enforcement of Competition Law', (2004), 3 *European Competition Law Review* 153, at 155-156.

³³Regulation 17/1962, OJ [1962] L 13/204.

³⁴See P. Landolt, *above* note 7, p. 104; See also Article V(2)(a) of the New York Convention on Recognition and Enforcement of Arbitral Awards 1958.

³⁵See A. Komninos, 'Arbitration and the Modernisation of European Competition Law Enforcement', (2001), 24(2) *World Competition* 211, at 222.

³⁶R. Nazzini, *Concurrent Proceedings in Competition Law: Procedure, Evidence, and Remedies*, Oxford University Press, 2004, p. 335.

³⁷*Ibid*, p. 337.

the applicability of Article 81(3) EC is not restricted to the ambit of National Competition Authorities (NCAs) and national courts. On the contrary, the mere reason for Articles 5 and 6 of Regulation 1/2003 referring only to NCAs and national courts is that arbitral tribunals fall outside the scope of Article 10 EC. Indeed, if the Commission intended to exclude Article 81(3) EC from the arbitrators' jurisdiction, it would have done so expressly. Again, the silence of the Modernisation Regulation in this respect has the same bearing on the arbitrators' power to apply Article 81(3) EC as that of its predecessor on the arbitrators' power to apply Article 81(1) and (2) EC, namely it simply amounts to an implicit acknowledgement of the arbitrators' jurisdiction over the entirety of Article 81 EC.³⁸ According to some prominent commentators, such an inference is also in line with the teleological, systematic, and historical interpretation developed by the ECJ and extending also to Regulation 1/2003.³⁹

A final practical consideration seems to confirm the soundness of the above standpoint. In fact, the exclusion of Article 81(3) from the arbitrators' arsenal would absurdly put them in the very uncomfortable position of facing a procedural deadlock.⁴⁰ Imagine, for instance, an arbitral tribunal coming up with an Article 81(3) EC issue and considering possible solutions: a reference to the Commission is impossible under the new regime, and an Article 234 EC reference to the ECJ would not have better luck owing to the *Nordsee* precedent. The only plausible solution seems to be the activation of the supportive role of a national court. However, it would be really meaningless, even if possible, for a national court to decide only on Article 81(3) EC without applying Article 81(1) EC first. Such a grotesque outcome would clearly contradict with the *Eco Swiss* perspective over effective arbitration mentioned above.

The foregoing argumentation notwithstanding, it is true that the analysis required under Article 81(3) EC involves intricate factual, legal, and economic issues as well as delicate policy considerations. Moreover, international arbitral tribunals – falling outside the scope of Article 10 EC – do not enjoy the cooperation mechanisms provided for under Regulation 1/2003. However, the answer to the above ascertainments should not be the rejection of the arbitrability of Article 81(3) EC and its application by international arbitrators. Instead, a robust solution could be found in the increased awareness of the very peculiarities and pitfalls of competition arbitrations. In this author's view, such an attitude could lead to the taking of appropriate measures⁴¹ with regard to the formulation and conduct of such arbitrations, which would ensure – with an eye on the enforcement stage – that the issues of Article 81(3) EC are seriously considered and carefully addressed.

(C) THE DUTY OF ARBITRAL TRIBUNALS TO APPLY ARTICLES 81 AND 82 EC EX OFFICIO

One of the most puzzling and controversial questions in respect of the application of EC competition rules by international arbitrators is whether the latter have a duty to

³⁸See C. D. Ehlermann and I. Atanasiu, *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford/Portland/Oregon, 2003. This is the conclusion reached by all the panelists and commentators.

³⁹See e.g. A. Komninos, *above* note 34, p. 220.

⁴⁰*Ibid*, pp. 221-222.

⁴¹For some workable such measures see R. Nazzini, *above* note 35, pp. 336-337.

raise and apply the said rules *sua ponte* when neither party to arbitration invokes such rules in the arbitral process or one party does so and the other opposes. Interestingly, the ECJ has neatly avoided so far to explicitly answer this question and thus to interfere in the arbitration's realm.

Indeed, the ECJ stressed in *Nordsee* that 'Community law must be observed in its entirety throughout all the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it.' Furthermore, in the *Van Schijndel* and *Peterbroeck* judgments⁴³ the ECJ made clear that national judges have a legal duty or obligation – emanating from Article 10 EC – to consider, raise, and apply EC competition law on their own initiative, provided that the factual scope of the dispute before them is not exceeded. In *Eco Swiss* the ECJ implicitly reconfirmed the said duty of national judges, although the question addressed to it concerned the corresponding duty of arbitrators.⁴⁴ In fact, the only duty that the ECJ in *Eco Swiss* expressly referred to was that of national judges to review and annul an arbitral award which is contrary to EC competition law (*in casu* Article 81 EC) on the ground of public policy (*ordre public*) provided that the national procedural laws provide for such an annulment⁴⁵. To put it differently, the *Eco Swiss* judgment reflects the EU legal order's requirements as regards the Member State courts' duties and responsibilities when dealing with arbitral awards. Consequently, it is fair to argue that Community law imposes no direct legal duty or obligation upon arbitrators to raise and apply EC competition law *ex officio*. The ECJ simply recommends in *Eco Swiss* that arbitrators do so in order to protect the status and quality of their award in light of the public policy defence as formulated by and depicted in the combination of the *Eco Swiss* requirements and the test applicable under Article V(2)(b) of the New York Convention 1958. It follows that the answer to the question at issue is not to be found in the framework of Community law, but in that of international arbitration law and practice instead.

International arbitrators have an implicit and *de facto* duty to apply EC competition law *ex proprio motu* when relevant to the dispute before them.⁴⁶ This appears to be the case irrespective of the *lex contractus* and regardless of the arbitral tribunal's seat being within or outside Europe. *A fortiori* so, when the *lex contractus* (or the *lex causae*, if determined by the arbitrators) is a Member State law or the seat of arbitration is in the EC or enforcement is likely to be sought in the EC.

⁴²*Nordsee*, above note 29, at 1111, para 14.

⁴³Joined cases C-430 – 431/93 *Van Schijndel* [1995] ECR I-4705; Case C-312/93 *Peterbroeck* [1995] ECR I-4599. These two highly controversial judgments raised many complex issues and focused – in the light of the principle of effectiveness of Community law – on the impact of the principle of judicial passivity of national judges on the (non-)application of a Community law rule. In any case, these judgments are not directly applicable to international commercial arbitration.

⁴⁴M. Dolmans and J. Grierson, 'Arbitration and the Modernisation of EC Antitrust Law: New Opportunities and New Responsibilities', (Fall 2003), 14(2) ICC International Court of Arbitration Bulletin 37, at 44.

⁴⁵ appears that this is the case with most Member State laws.

⁴⁶See among others, G. Blanke, 'The Role of EC Competition Law in International Arbitration – A Plaidoyer', (2005), 16(1) European Business Law Review 169, at 175-176; A. Komninos, 'Assistance to Arbitral Tribunals in the Application of EC Competition Law', in C.D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford/Portland/Oregon, 2003, pp. 363-385, at 369-370; L. Idot, above note 25, at pp. 314-315.

The aforementioned statement needs to be clarified on two crucial fronts, namely, the 'relevance test' and the basis of the said implicit *de facto* duty. As far as the former is concerned, arbitration practice and case law have set out a quite practical standard reflected in the following question: *may* the agreement at issue affect the EC territory and particularly the trade between the Member States?⁴⁷ In practice, the consideration of this test by arbitrators is based on an Article 7(1) of the Rome Convention approach. As for the latter, international arbitrators have, among other things, two fundamental obligations: first, to make any effort to guarantee the enforceability of their award,⁴⁸ and second, to try to meet the legitimate expectations of the parties through their conduct of the arbitral proceedings and their choices thereof.⁴⁹ The disregard by arbitrators of transnational mandatory rules (e.g. Articles 81 and 82 EC) objectively applicable to the dispute in hand falls definitely outside the legitimate expectations of the parties and impairs the quality of their award, thereby rendering it susceptible to national courts' scrutiny and risking its unenforceability.⁵⁰

As a consequence, international arbitrators are not bound by any (legal) EC law obligation to deal with EC competition law issues arising in the context of arbitral proceedings. However, in the aftermath of *Eco Swiss*, they have come under an implicit *de facto* duty to consider, raise, and apply EC competition law when relevant to the case before them, in order and to the extent necessary to preserve the quality, effectiveness, and enforceability of their award. Nevertheless, such a *de facto* duty does not entail that international arbitral tribunals are directly bound by the general duty of cooperation enshrined in Article 10 EC and the doctrine of supremacy of Community law,⁵¹ or even by the relevant duty of the preservation and promotion of the uniform and consistent application of EC (competition) law throughout the Community⁵². And indeed, this remark reflects one of the subtlest and most testing issues of competition arbitrations, namely the extremely fine demarcation line between the contractual mandate entrusted to international arbitrators by the parties and the role of the former as private enforcers of public policy.⁵³

⁴⁷P. Landolt, *above* note 7, pp. 133-135. See particularly the M. Blessing's 'application worthiness' criterion analysed by the author.

⁴⁸See e.g. Article 35 of the ICC Rules of Arbitration, which reads: '... [the Arbitral Tribunal] shall make every effort to make sure that the Award is enforceable at law'. See also G. Horvath, 'The Duty of the Tribunal to Render an Enforceable Award', (2001), 18(2) *Journal of International Arbitration* 135.

⁴⁹For the subtle interrelation of those two obligations see S. Dempegiotis, *above* note 22.

⁵⁰See Y. Derains, *Specific Issues Arising in the Enforcement of EC Antitrust Rules By Arbitration Courts*, in C.D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford/Portland/Oregon, 2003, pp. 323-339, at p. 336.

⁵¹Most recently in this regard see Case C-125/04 *Denuit v. Transorient* [2005] ECR I-00923.

⁵²For a thorough analysis of this particular viewpoint see N. Shelkopyas, *The Application of EC Law in Arbitration Proceedings*, Europa Law Publishing, Groningen, 2003, pp. 3-21.

⁵³It would probably be more accurate to speak of private enforcers of transnational rules with a constitutional status (i.e. Articles 81 and 82 EC) boasting public policy considerations and aiming at serving and defending the Community public interest.

3. INTERNATIONAL COMMERCIAL ARBITRATION AND EC MERGER CONTROL – MERGER ARBITRATIONS

(A) TOPOGRAPHY OF ARBITRATION COMMITMENTS

Pursuant to the Regulation 139/2004, certain types of concentrations⁵⁴ that have a Community dimension⁵⁵ have to be notified to and approved by the European Commission prior to their implementation. In such cases, the Commission is entrusted with the substantive appraisal of the operations in hand and – where necessary – with the prevention of those concentrations which are likely to have a significant anti-competitive effect on the internal market.⁵⁶ To entertain the Commission's potential concerns over anticompetitive effects, if any, the firms involved in the proposed concentrations tend to offer so-called 'commitments' (or 'remedies', or 'undertakings'). Such commitments may be: structural (such as divestiture); other structural (such as access remedies); or behavioural (concerning the future behaviour of the merged firm).⁵⁷ In some cases, the remedies package may consist of a mixture of structural and behavioural remedies.

In recent years, international arbitration has been repeatedly used by the Commission as a monitoring mechanism for the correct implementation of certain behavioural commitments undertaken by firms towards the Commission, in order for the latter to declare the proposed concentration compatible with the common market and to issue a conditional clearance decision.⁵⁸ In theory, such arbitration commitments – through their adjudication and procedural monitoring function – appear to vest certain ordinary behavioural commitments with a 'quasi-structural effect'.⁵⁹ In practice, this implies that the Commission is very likely to give a green light to a proposed concentration where a behavioural commitment is offered together with 'a workable arbitration commitment for monitoring purposes'.⁶⁰

The submission to arbitration as a procedural commitment under the EC merger control regime has an interesting twofold dimension: on the one hand, it provides for a plain

⁵⁴See Article 3 of the Regulation 139/2004. See also M. Dabbah, *EC and UK Competition Law: Commentary, Cases and Materials*, Cambridge University Press, 2004, pp. 448-453.

⁵⁵See Articles 1 and 5 of the Regulation 19/2004. For an up-to-date analysis on the meaning of 'Community dimension' see M. Dabbah, *above* note 53, pp. 453-459; also see J. Cook and C. Kerse, *EC Merger Control*, Sweet & Maxwell, 4th edition, 2005, pp. 97 et seq.

⁵⁶See Article 2 of the Regulation 139/2004, which sets out the appraisal criteria (Article 2(1)) and the appraisal test (Article 2(2) and (3)) for the substantive assessment of concentrations with Community dimension.

⁵⁷For a full account on this distinction see J. Cook and C. Kerse, *above* note 54, pp. 282 et seq. On the case of behavioural remedies more specifically see K. Paas, 'Non-Structural Remedies in EU Merger Control', (2006), 27(5) *European Competition Law Review* 209.

⁵⁸For some noticeable recent cases involving arbitration commitments see the following Commission decisions: Comp/M.3083 *GE/Instrumentarium*, decision of 2 September 2003; Comp/M.3225 *Alcan/Péchiney (II)*, decision of 29 September 2003; Comp/M.3280 *Air France/KLM*, decision of 11 February 2004; Comp/M.3916 *T-Mobile Austria/Tele.ring*, decision of 26 April 2006; Comp/M.3998 *Axalto/Gemplus*, decision of 19 May 2006; Comp/M.4180 *Gaz de France/Suez*, decision of 14 November 2006; and Comp/M.4314 *Johnson & Johnson/Pfizer Consumer Healthcare*, decision of 11 December 2006.

⁵⁹See G. Blanke, 'The use of international arbitration in EC merger control – a brief statement', (2007), 12(2) *IBA Arbitration Newsletter* 30, at p. 31.

⁶⁰*Ibid*, at p. 32.

and effective adjudication framework within which substantive remedies to competitors or other third parties that need to be protected are offered, thereby addressing the Commission's concerns in this regard; on the other hand, it provides for a familiar and attractive justice forum in the business world, which is tailor-made to the parties' individual needs and business interests, and offers at the same time the firms involved the opportunity to have their commercial disputes resolved in a cost-effective and time-efficient manner. And, indeed, the above described use of international arbitration reflects a highly perceptive choice on part of the Commission, through which it accomplishes a twofold aim, namely to safeguard important competition interests, and to provide gratification to the firms involved by letting them choose their preferable dispute resolution forum.

(B) ARBITRATION COMMITMENTS: A NOVEL SPECIES OF ARBITRATION

It should be clear from the preceding analysis that the 'merger arbitrations', i.e. arbitration commitments under the EC merger control regime, have certain features that clearly distinguish them from traditional perceptions of international arbitration. Various brave attempts have been made to find an appropriate terminology⁶¹ for this newly emerged phenomenon, none of which appears to enjoy a unanimous acknowledgement. The differences in the said terminology clearly depict the different perceptions of the real nature, the precise character, and the actual dimensions of this new development. However, those subtle differences aside, there seems to be a general consensus that this new arbitration phenomenon constitutes a new form of arbitration and signifies a new era in international arbitration as a long-standing private justice forum.

The phenomenon of arbitration commitments brings to the surface the inherent tension between the private nature of arbitration, its flexible and confidential proceedings, and its intrinsic fundamental principle of party autonomy on the one hand, and the rigid administrative framework of EC law and the European Commission's public mandate as the guardian of the Community public interest as well as the Community 'public prosecutor' in EC competition law proceedings on the other.⁶² It follows that the cardinal difference between merger arbitration and traditional arbitration is the unprecedented trade-off between public and private interest taking place in the former's realm and reflected in the almost absolute erosion of party autonomy by the dominance of the Community public interest and the need for its protection. And indeed, striking a workable balance between the arbitrating parties' private interests and the Community public interest is far from being

⁶¹For the term 'supranational' see G. Blanke, 'The Case for Supranational Arbitration – Ideas and Prospects', in G. Blanke (ed.), *Arbitrating Competition Law Issues: A European and a US Perspective*, 19(1) European Business Law Review (special edition), Kluwer Law International, 2008, pp. 1-231, at pp. 17-41; 'International Arbitration in EC Merger Control: A 'Supranational' Lesson to be Learnt', (2006), 6 European Competition Law Review 324; 'The Transformation of International Arbitration and the Emergence of the Supranational Arbitrator: Lessons from EC Merger Control', (2005), 6 International Arbitration Law Review 211. For the terms 'sui generis' and 'regulatory' see M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, Swiss Commercial Law Series, Volume 14, Helbing & Lichtenhahn, 2003. For the term 'regional' ('régional') see C. Nourissat, 'L'Arbitrage Commercial International Face A l'Ordre Juridique Communautaire: Une Ère Nouvelle?', (2003), 7 RDAI 761, at 776. Here the author places the 'regional arbitration' on an intermediary level between national and international arbitration.

⁶²See G. Blanke, 'The Case for Supranational Arbitration – Ideas and Prospects', in G. Blanke (ed.), *Arbitrating Competition Law Issues: A European and a US Perspective*, 19(1) European Business Law Review (special edition), Kluwer Law International, 2008, pp. 17-41, at p. 20.

an easy task for international arbitrators, the role and powers of whom appear to be enhanced with supranational regulatory –as distinct from merely adjudication– dimensions.

Interestingly, in the case of arbitration commitments, an award on civil law damages (private law remedy) and an order to comply with the Commission's original Commitment Decision (administrative law remedy) may well coexist within the same adjudication forum. This remark captures the dual function of international arbitrators in such cases as 'prolonged arm and instrument'⁶³ of the Commission (outsourced regulatory task) on the one hand, and as private judges of the claims of the parties (adjudicatory task) on the other. It is against this backdrop that the Commission comes as a guardian of the whole remedy process having 'the last word even over and above' the arbitrators' findings⁶⁴.

The foregoing discussion reveals that the classic international arbitration as a private dispute resolution mechanism is undergoing an unprecedented transformation taking place within the wider realm of EC competition law and policy. In this sense, international arbitration is being shaped to meet the specific requirements of arbitration within the said realm and its procedural framework.⁶⁵ The aforementioned transformation leads to the formulation of a new species of arbitration distinct from the traditional notion of international commercial arbitration. This new species of arbitration could be described as a *sui generis* arbitration of a hybrid (adjudication – regulation) nature and with supranational (Community level) dimensions. It goes without saying that the transformation of international arbitration as a private justice vehicle results directly in the transformation of the international arbitrators' role as private judges of contractual disputes.⁶⁶

(C) SPECIAL FEATURES OF MERGER ARBITRATIONS: A SUMMARY⁶⁷

The pervading net result of the emerging arbitration *status quo* illustrated above is the distortion of almost all the fundamental features of traditional arbitration. Given its limited space, the present article has to confine itself to a mere enumeration of the most significant unique features of merger arbitrations (i.e. arbitrations in the context of EC merger control remedies) with the ultimate aim of underlining the boldest divergences of such arbitrations from traditional international commercial arbitration.

Starting with the foundation of the arbitration structure, the *inter partes*-effect of the contractual agreement to arbitrate has been replaced by a unilateral *erga omnes* offer to arbitrate on the part of third-party beneficiaries (e.g. a competitor). Effectively, therefore, the

⁶³M. Blessing, *above* note 60, pp. 10–11 and 196.

⁶⁴*Ibid.*, p. 11.

⁶⁵See G. Blanke, *above* note 61, pp. 19–20.

⁶⁶For a detailed discussion on this issue see G. Blanke, 'The Transformation of International Arbitration and the Emergence of the Supranational Arbitrator: Lessons from EC Merger Control', (2005), 6 *International Arbitration Law Review* 211.

⁶⁷This summary is grounded primarily on three thorough pieces of work, namely: G. Blanke (ed.), *Arbitrating Competition Law Issues: A European and a US Perspective*, 19(1) *European Business Law Review* (special edition), Kluwer Law International, 2008, pp. 1–231; G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies*, Europa Law Publishing, Groningen, 2006; and M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, Swiss Commercial Law Series, Volume 14, Helbing & Lichtenhahn, 2003.

commencement of arbitration in such cases does not rest upon party-autonomy or privity, but on a third-party beneficiary's initiative instead. It follows that looser standards of confidentiality apply to such cases given that the Commission stands beyond the reach of the confidentiality rules, and also that the scope of a merger arbitration clause will normally be much narrower than that of a traditional international commercial arbitration clause, due to the former clause's tailor-made drafting to meet the needs and requirements of particular behavioural remedies within the EC merger control regime.

In addition to the features stressed above, it is important to note the expedition requirement under the arbitration commitments, which is vividly depicted in the strict time limits imposed for both the conduct of the arbitral process and the rendering of the arbitral award. As for the arbitral award itself, two crucial features are worth mentioning: first, the formalities associated with such merger arbitration awards in terms of publication requirements; and secondly, the fact that the said awards appear to be more 'fragile' than the ordinary arbitral awards in terms of finality and enforceability 'to the extent that the Commission remains free to make its own assessments of the commitments in question under the Merger Regulation.'⁶⁸ Of course, in this regard, '[i]f a Member State court finds the award to be incompatible with the Commitment Decision, it will not enforce the award.'⁶⁹

Last but not least, an inherent unique feature of merger arbitrations is the almost unavoidable dialogue between the international arbitrators and the European Commission. This dialogue ensures the compatibility of the resulting arbitral award with the Commission's original Commitment Decision (Community level) on the one hand, and secures the enforceability of the said award before the Member State courts (national level) on the other. Furthermore, depending on the case at hand, this dialogue may take several different forms. More specifically, it may rest upon 'general reporting requirements to the Commission', or 'the arbitrator's entitlement to make requests of information or interpretation to the Commission in relation to the remedy provisions of individual remedy packages', or 'the Commission's overall role as *amicus curiae*' in the arbitral process.⁷⁰ Finally, the aforementioned dialogue indicates, among other things, the 'high level of technicality'⁷¹ of the merger arbitration proceedings and the corresponding qualifications and expertise in EC competition law required of arbitrators handling such cases.

4. CONCLUSION

In recent years, arbitrating competition (and merger control) issues has become a fundamental feature of the world of international arbitration and a testing aspect of the international arbitration profession. Indeed, arbitration practitioners seem to have realised that the handling of EC competition law issues is now an integral part of their 'competence'

⁶⁸G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies*, Europa Law Publishing, Groningen, 2006, p. 193.

⁶⁹*Ibid.*

⁷⁰See G. Blanke, *above* note 61, at p. 22. On the specific and quite thorny issue of the Commission's role as *amicus curiae* in arbitral proceeding see C. Nisser and G. Blanke, 'Reflections of the Role of the European Commission as *Amicus Curiae* in International Arbitration Proceedings', (2006), 4 *European Competition Law Review* 174.

⁷¹See G. Blanke, *above* note 61, at p. 37.

particularly in the light of a crucial parameter of the EC modernisation programme, namely the rapidly growing 'awareness of private law remedies'⁷² as a possible response to anticompetitive conducts. As a result, international practice shows that arbitral tribunals are dealing with EC competition law issues more and more frequently and more and more reliably having become aware of their role as organs operating within the private enforcement system of EC competition law.⁷³ Moreover, the Commission through its Modernisation Regulation attempts to reinforce the integrity and effectiveness of the enforcement of EC competition law. In this context, the addition of arbitration to the private enforcement arsenal of EC competition law as an alternative arm seems to coincide with the Commission's objectives under the new regime. The direct implication of such an acknowledgment is the legal problems emanating from the application of Articles 81 (as a whole) and 82 EC by international arbitrators.

At the same time, the Commission sees arbitration as a credible instrument of resolving not only competition (Articles 81 and 82 EC) but also merger control (Regulation 139/2004) issues, and envisages a novel form of arbitral proceedings where it or other national authorities could intervene, if necessary, as *amici curiae*. In fact, in the last few years, the Commission has adopted a practice of using arbitration proceedings as a viable way of monitoring certain behavioural commitments undertaken in the context of the Commission's competition (Article 9, Regulation 1/2003) and merger (EC merger control remedies) related clearance decisions. This newly emerged arbitration phenomenon constitutes a novel species of arbitration which needs first to crystallise into a definite form and then to be fully tested in practice. Until then, one may have to be content with studying the evolution of this new development, and to follow the heated and divisive debate over its real nature and actual dimensions conducted among the leading scholars and practitioners in this fascinating area of law.

It is important to note that the framework of the interplay between the EC competition law and international arbitration highlighted above contrasts sharply with the complete absence of any EC legislation on arbitration. This apparent contradiction explains the reason why there seems to be a common ground among commentators and practitioners of both legal fields that the time has come for the Commission to reconsider its silence over arbitration through a soft law approach (e.g. a Notice). This would indeed be a wise choice of 'educational interest'⁷⁴ in terms of building an EC competition law culture among arbitrators. This culture would be extremely valuable considering the close interface between the bodies of law under examination here and their exposure to the evolution and challenges of the modern age. In this regard, the express mentioning of the arbitration commitments in the new Commission draft Notice on Remedies,⁷⁵ though confined to the area of merger control, should be considered a positive first step in the right direction.

⁷²See R. Nazzini, *above* note 35, p. 25.

⁷³*Ibid.*, p. 326.

⁷⁴This term is borrowed from L. Idot, *above* note 25, p. 321.

⁷⁵See paras 66 and 127 of the draft revised Notice on Remedies. See also *above* note 14.