Arbitration In The Context of EU Merger Control and Its Interface with Brussels I Regulation: A New Era For Arbitration In The EU Arena?

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In the EU context a merger forms the basic method to which firms resort in order to maintain their profit and viability. Within the EU Competition Law system, the EC Merger Regulation forms the legal framework that regulates this kind of transactions and reflects the need for maintenance or strengthening of competition in the internal market. The Commission holds a dominant role in the procedure for the implementation of concentrations with a Community dimension. Against this background, this paper examines the role of arbitration as a monitoring adjudicatory mechanism for the control of the merging parties' behaviour, in relation to the commitments they have undertaken in order to ensure a clearance Commission decision that will approve their implementation. Further, the actual role of the arbitrator is described, as influenced by the Commission's intervention in the arbitration proceedings in parallel with the significance of the arbitral award on the implementation of the intended concentrations. Finally, the Commission's latest attempt to incorporate arbitration in the Brussels I Regulation for the recognition and enforcement of civil and commercial judgments within the EU is examined as well as the impact that this 'uniformity' might have on the enforcement of the merger-related arbitral awards is assessed and its effect on the legal nature of arbitration is approached.

1. INTRODUCTION

In the EU legal framework, mergers have proved to play a significant role. With the character of transnational restructuring of undertakings operating in different Member States, mergers can either ensure a level playing field between the certain market players thereby enhancing effective competition or may result in a significant impediment of competition and cause major disorder in the internal market. In the EU Competition Law context, merger control is regulated by the EC Merger Regulation that forms its basis on the need for maintenance or strengthening of competition in the internal market. In this respect the Commission holds a dominant role in the control of the procedure for the implementation of concentrations with a Community dimension, in order to prevent potential competition obstacles raised by the notified concentrations that would in turn significantly harm the balance in the internal market. In order to achieve this goal, the Commission has embraced arbitration as an alternative dispute resolution mechanism, ideal for the 'judicial monitoring' of the behavioural remedies offered by the merging parties and ensure their compliance with the undertaken commitments, before it grants a clearance decision for a notified concentration to be implemented[2]. The role of the arbitrator at this point, as assessed in relation to the Commission's primary overall control, will significantly define the outcome of the proceedings for the implementation of the intended concentrations. Therefore, arbitration is proved to be valuable within that context since with its 'fast-track' mechanism it brings flexibility in the conduct of the proceedings and ease in the enforcement of the arbitral awards under the New York Convention which reflects worldwide recognition[3].

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[2] Gordon Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies,* 2006, at page 5.
[3] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

Also, the recent amendments on the recognition and enforcement of the arbitral awards within the European Union as proposed by the Commission, with uniform rules to regulate the procedure and with the concept of the 'free movement of judgments' in the EU as its basis, it is expected that considerable changes can be assessed on the way merger-related arbitral awards will be enforced within the EU framework.

2. THE EU MERGER CONTROL FRAMEWORK

The Merger Regulation 4064/89 and its successive Regulation 139/2004 (hereinafter referred to as 'ECMR') were introduced in order to fulfil a certain need for a legislative framework structured to regulate the control of mergers at the EU level[4]. The ECMR that not only amended but completely replaced the original EC Merger Regulation, and having 'the force of law', it directly affects all the Member States within the EU[5]. The ECMR is only applicable to concentrations, including mergers and acquisitions that have 'a Community dimension' depending on whether the undertakings involved in the concentration meet sufficient turnover thresholds, so as to reach the certain requirements demanded under the Regulation[6]. Thus, those concentrations which fall below the prescribed thresholds become part of the framework of national merger control rules. This turnover criterion has been characterized as 'blunt and arbitrary' having at the same time 'the great merit of clarity' as it divides the judicial powers between the Commission and the Member States by clearly defining the tasks that the ECMR brings about[7]. It is expressly mentioned that this specific threshold should be assessed with quantitative criteria considering the impact of the merger, which in that sense is arbitrary as those mergers which stand in a 'grey area', i.e. closely above or below the threshold set out in the ECMR, cannot be judged to be of any significant difference. Hence, the decision as to which concentrations form part of the 'Community dimension' concerning the threshold criterion, can only be made 'on the basis of a broad brush assessment'[8].

The adoption of the ECMR granted the Commission authorization to control concentrations with a Community dimension in the context of EU Competition Law. In terms of the control of concentrations the main objective of the EU rules is 'to avoid the obstacles that prevent greater European integration, ensuring a level playing field between undertakings operating in the different Member States'[9]. Although the meaning of mergers is not defined in the Regulation, given instead a concept of 'acquisition of control' in a wide sense it is made clear that the essential element of a concentration, whether it arises from the change of control between previously independent

[4] Council Regulation (EC) 139/2004 of 20 January 2004 [2004] OJ L24/1 and Council Regulation (EC) No.4064/89 21 December 1989 [1989] OJ L395/1, amended by Council Regulation (EC) 1310/97 of 30 June 1997[1997] OJ L180/1.
[5] Dabbah Maher, Merger Control Worldwide, 2006, at page 384.
[6] Article 1 of EC Merger Regulation; see further, Levy Nicholas, European Merger Control Law: A Guide To The Merger Regulation, 2003, at paragraph 6-3; Marc Blessing, Arbitrating Antitrust And Merger Control Issues, 2003, at page 51; Dabbah Maher, Merger Control Worldwide, 2006, at page 391.
[7] Levy Nicholas, European Merger Control Law: A Guide To The Merger Regulation, 2003, at paragraph 6-2.
[8] Ibid.
[9] Blanco Luis, EC Competition Procedure, 2006, at page 601.

undertakings or from the merger between undertakings, is that the change in the market structure and in the control of the relevant undertakings must be formed on a lasting basis[10]. Under this background the Commission while initiating a new substantive test of compatibility it also widened its investigative powers by establishing as a key factor for the approval of a merger, the implementation not to create or even strengthen a dominant position and consequently result in a significant impediment to effective competition in the common market or in a substantial part of it[11].

Unlike the legislation that implements Articles 101 and 102 EU and Regulation 1/2003 which introduces a system of 'shared competences', the Commission with the 'one-stop-shop' principle established by the Merger Regulation, is deliberately anticipated to be the solitary and exclusive authority for the control of concentrations within the EU[12]. Further, the issuance of a 'single institutional port of call' for the control of the Community defined concentrations, grants the Commission sole competence in the application of the Merger Regulation subject only to the judicial review by the ECJ and the General Court[13]. As a result, parallel proceedings between different national jurisdictions are prevented, as the merging parties have to notify the concentration in question solely to the Commission and strictly in accordance with the rules of the ECMR.

The merging parties' notification to the Commission is an essential part of the clearance process of concentrations in the context of the EU Merger Control system and triggers an investigative period. The latter is commenced by the Commission in order to reach a decision concerning the compatibility of the proposed concentration with the common market and the ECMR or its compatibility with the common market subject to certain conditions and obligations or lastly a prohibition decision[14]. Within this investigative period, the merging parties have the opportunity to undertake commitments in order to meet the Commission's criteria for granting a clearance decision. For a notification to be possible within the ECMR context there is no need for a prior binding agreement to have been formed between the merging parties or a public bid to have been announced, but it is encouraged on the basis of the parties' mere 'good faith intention' to reach an agreement or make a public bid[15]. On the contrary, concentrations implemented prior to their having been declared compatible with the common market by the Commission are to be declared unlawful[16].

[10] Within the definition of Article 3(1) of the EC Merger Regulation a 'concentration' arises when a change of control is created on a lasting basis either from 'the merger of two or more previously independent undertakings or parts of undertakings' (Article 3(1)(a) ECMR) or results from 'the acquisition by one or more persons already controlling at least one undertaking, or by one or more undertakings […] of direct or indirect control of the whole or parts of one or more other undertakings' (Article 3(1)(b) ECMR). A concentration is also deemed to be constituted in case of the creation of a full-function joint venture (Article 3(1)(b) ECMR). See also, Cook, John and Kerse, Christopher, EC Merger Control, Fifth edition, 2009, at page 27.
[11] Dabbah Maher, Merger Control Worldwide, 2006, at page 382.
[12] As defined in Article 3 of the EC Merger Regulation. This is enhanced by Article 21(3) which does not authorize national competition laws of the Member States for the control of concentrations with a Community dimension. See further, Dabbah Maher, Merger Control Worldwide, 2006, at pages 392-393 and Blanco Luis, EC Competition Procedure, 2006, at page 609.
[13] Article 21(2) ECMR.
[14] Articles 6(1)(a), 6(1)(b) and 6(2) ECMR; For a detailed analysis, see Dabbah Maher, Merger Control Worldwide, 2006, at pages 401-406.
[15] Article 4(1) ECMR.
[16] Articles 6(1)(b), 8(1) or 8(2) ECMR. For further discussion see Cook, John and Kerse, Christopher, EC Merger Control, Fifth edition, 2009, at page 118.

Nevertheless, it should be noted that despite the fact that a centralized system of control is established in line with 'the overall policy goal' there are certain limits to the exclusive jurisdiction of the Commission[17]. In particular, the exclusive authority of the Commission to deal with concentrations having a Community dimension relates only to the Competition Law dimension[18]. Therefore, in some circumstances Member States are not precluded from the control of mergers in the ECMR context, as regards the pursuing of certain 'policy objectives' while being able to protect those legitimate interests that are not covered by the ECMR, but still being compatible with the EU Law. In that regard, it is clear from Article 21(4) ECMR that a Member State is merely permitted to block a concentration already or potentially cleared by the Commission while the opposite does not hold true under any circumstances[19]

3. THE INTERNATIONAL COMMERCIAL ARBITRATION REGIME

It is difficult to reach a coherent definition on arbitration, due to the dynamic nature of the latter, as an alternative dispute resolution mechanism in relation to the national courts. By depicting the fundamental characteristics of arbitration a more close approach will be attempted in order to highlight its nature.

The parties' agreement to arbitrate is essentially a bilateral agreement to avoid the national judicial system and resort to an alternative dispute resolution mechanism that with its fundamental safeguards will meet their legitimate expectations[20]. The essential part of the arbitration agreement is the arbitration clause, which is independent of the main agreement between the parties and stands on its own if the arbitration agreement is 'null and void'[21]. The institutional or ad hoc character of arbitration depends on the arbitration agreement between the parties.

Against this background, the use of international arbitration in the ECMR context, especially with the party autonomy principle at its core, is considered to be perfectly fit, because of the complexity and great range of remedies necessary for the clearance of complex notified concentrations[22]. In terms of the party autonomy principle, the arbitration procedure being determined by the parties' agreement on a case-by-case basis is subject to the special characteristics of each individual case.

[17] Blanco Luis, EC Competition Procedure, 2006, at page 610.
[18] Dabbah Maher, Merger Control Worldwide, 2006, at page 395.
[19] Ibid.
[20] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 4.
[21] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 27, and Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 101.
[22] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 26.

Furthermore, it is the neutral character of arbitration that grants preference to such a dispute resolution. The parties' rights to select the seat where the arbitration procedure will take place and the more close sight of the arbitrator to the subject matter of the dispute may assure the outcome preferred by the parties. Moreover, because of its a-nationality, arbitration becomes a mechanism of first choice in mergers for resolving disputes, while at the same time this flexibility does not undermine the arbitrators' 'independence and impartiality' until the outcome of the proceedings and the reaching of a decision[23].

Further, according to the principles of 'due process and fair hearing' as well as the 'independence and impartiality' that form the 'magna carta of arbitration', the arbitrators 'promise' to assess evidence with the 'maximum discretion' and the parties are treated on an equal and fair manner which results in a guarantee of a fair trial[24]. These principles in combination with the doctrine of confidentiality that depicts its very private nature, lead arbitration to constitute a distinguished dispute resolution mechanism that is not only 'tolerated', but more importantly it is widely recognized, a fact that is evident by the elimination of the State courts' monopoly[25].

4. THE FUNDAMENTAL ROLE OF THE NEW YORK CONVENTION TO THE ENFORCEMENT OF THE ARBITRATION AWARDS

'The arbitration award is the instrument recording the tribunal's decision provisionally or finally determining claims of the parties'[26]. The arbitral award 'seals' the arbitration proceedings and expires the arbitrator's mandate[27]. Its legal nature is final and binding with *res judicata* effect upon the parties, without providing for the review procedure of the award. Thus, the grounds for challenge of the award are limited and are subject to certain conditions.

The recognition and enforcement of the arbitral award in the international arena is of great importance for the world-wide success of the arbitration as a dispute resolution mechanism. It is at this stage that 'arbitration and the parties leave the private sphere in which they are operating' and the arbitration procedure is recognized officially in the public domain[28]. As it has been stated it is a private act which is being empowered by a public act[29].

[23] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at pages 256 ff., Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 29.
[24] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 95.
[25] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 26.
[26] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 628.
[27] Except for final there are more types of awards, but for the need of this study only the final is reffered. See further Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at Chapter 24.
[28] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 689.

However, it must be mentioned that the arbitrator's duty to render an award that could be enforceable on a world-wide basis is quite impossible, since it is not feasible for the arbitrator to consider all the countries where the parties would potentially seek enforcement at a later stage. The international arbitrator's mandate has the character of a 'best effort commitment' to ensure that he renders an award that is enforceable at law'[30].

The uniform enforcement of the arbitral awards is obtained through the New York Convention, which constitutes the 'backbone of the international regime for the enforcement of foreign awards'[31]. Having achieved the harmonization of the national rules regarding the enforcement stage, it has made it easier for an award rather than a foreign judgment to be enforced and this is one of the reasons that adds to its uniqueness and lead to its international recognition as an 'instrument for the uniform enforcement of foreign arbitral awards'[32].

5. ARBITRABILITY OF COMPETITION LAW ISSUES

Although not being the essential subject matter of the present research, it is considered important to refer firstly to the role of arbitration in the EU Competition Law context in order to subsequently introduce the role of arbitration in the Merger Control system.

Numerous opinions have been expressed as to the arbitrability of the EU Competition Law[33]. However, particularly the Commission's approach to arbitration has lead to the recognition of the latter as the ideal mechanism to solve competition law disputes. The decisions in *Eco Swiss* and *Mitsubishi* are landmark judgments for the role of international arbitration in the EU Competition Law regime and the arbitrators have so far embraced the duty to *ex officio* determine Competition Law issues that are raised before them during the award rendering process[34]. Therefore, the increasing role of private enforcement in the EU legal system and especially the developments mentioned in the area of merger control justify the conclusion that apparently, international arbitration has widely drawn the Commission's attention. Lastly, particularly in the area of EC Merger Control,

[29] Ibid, at page 689.
[30] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 36.
[31] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. See also, Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 693.
[32] Dempegiotis, S., EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003, JIA 25 (3), 2008s, at page 371.
[33] See further Hans Van Houtte, Arbitration and Arts. 81 and 82 EC Treaty – A State of Affairs, Kluwer Law International, Volume 23, No.3, 2005, at pages 431-448; Hans Van Houtte, The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission, 2008, 19, European Business Law Review, 63–75; Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, 246-250; Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at pages 201-203.
[34] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I 3055 and *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc,* 473 US 614,105 S Ct 3346 (1985). See also, Brekoulakis, Stavros, On Arbitrability: Persisting Misconceptions and New Areas of Concern; L. Mistelis, S. Brekoulakis, Arbitrability: International and Comparative Perspectives, 19-45, Kluwer, 2009; Queen Mary School of Law Legal Studies Research Paper No. 20/2009; Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, 246-250 and Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at pages 201-203.

the Commission has proved to benefit from the use of arbitration, because of its efficiency in the role that it has undertaken in relation to the monitoring of the merged entities' compliance with the behavioural commitments undertaken[35].

6. EU MERGER REMEDY RELATED ARBITRATION

A. The standard for commitments

In a number of cases, in order for a concentration to be declared compatible with the common market, without raising anti-competitive concerns, the merging parties are permitted to modify the concentration, offering certain commitments to the Commission so as to eliminate entirely any such concerns[36]. With the objective to obtain a clearance by the Commission, while avoiding the distortion of effective competition that the notified concentration would cause, the modification commitments proposed by the parties are known as remedies. According to the Commission's Notice on Remedies, these are categorised as either structural or divestiture, access and behavioural[37]. The most commonly used are structural and behavioural.

Structural remedies refer to those commitments that bring a significant change in the relevant market structure, thereby resulting in the strengthening of competition, whereas behavioural remedies entail a promise for the future behaviour of the merged entity to prevent the distortion of effective competition in the common market[38] Following the principle of proportionality, the commitments undertaken by the parties should be adequate enough so as to eliminate any competition problems and lead to a clearance Commission decision after the completion of the merger assessment[39].The Commission will only accept those remedies that will keep competition in a certain level playing field within the EU, while preventing 'significant impediments' that would constraint effective competition making them, thus, highly case-specific[40]. The Commission has explicitly stated in the Notice on Remedies its preference to structural and particularly divestiture remedies, considering them as the most effective

[35] James Bridgeman, The Arbitrability of Competition Law Disputes, 2008, 19, European Business Law Review, at page 148.
[36] Article 6(2) of the ECMR (related to investigative stage Phase I) and Article 8(2) of the ECMR (related to investigative stage Phase II). According to Blessing, in a more realistic approach, the commitments are 'imposed' by the Commission and not 'offered' by the parties (Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at page 79). See also Blanco Luis, EC Competition Procedure, 2006, at page 683; for further details on phases I and II investigations by the Commission see also Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at page 78.
[37] Paragraph 17 of the Remedies Notice; Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at page 287.
[38] Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at pages 282 ff.
[39] This is stated at Recital 30 of the ECMR and recognized formally in the Commission's Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, October 2008. For further discussion see Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at pages 283-284.
[40] Paragraphs 12 and 16 of the Notice on Remedies. See also, Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at page 284.

way to maintain effective competition in the common market[41]. Therefore, a 'hard commitment' that would lead to a new competitive unit, strengthening this way competition within the relevant market is certainly preferred to a plain promise for well behaving in the future by a dominant enterprise, in the sense of 'mere-soft' behavioural remedies, at least not in a stand-alone basis as they lack legal certainty and permanence[42] Furthermore, according to *Blessing*, in certain cases where the Commission has to determine *ex ante* the possible anti-competitive effects of a proposed concentration and must impose behavioural commitments, arbitration seems to be the best possible solution to deal with that kind of situations on a 'rule of reason' level[43].

B. The Commission's increasing use of arbitration clauses in behavioural and structural remedies

Behavioural remedies are greatly beneficial both for the Commission and for the parties as they are flexible, since they can be tailored to the particular concerns in each case[44]. Due to their medium to long-term perspective, while they refer to the future behaviour of the merged undertaking their extended use has been reinforced as long as they have *quasi-structural* effects thereby causing immediate as well as permanent changes in the market structure and provided that they incorporate the appropriate monitoring mechanisms[45]. Therefore, with their very structural nature, access-behavioural commitments, while directly affecting market structure, are capable of removing the compatibility test of the 'significant impediment of effective competition' which is the cornerstone of the ECMR and therefore they may be widely used by the Commission[46].

However, behavioural commitments, because they concern the future behaviour of the merged entity, they are difficult to be monitored by the Commission since the latter does not have adequate resources for extensive monitoring[47] Hence, a special mechanism for 'self-enforcement' has to be incorporated in the access commitments in order for their effectiveness and implementation to be ensured . The solution to this particular

[41] Paragraphs 15 and 17 of the Remedies Notice. For further discussion see Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at pages.293-321; also Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at pages 70-72.
[42] The European Antitrust Review 2009, Efficiencies and Remedies under the ECMR, at page 4. Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at page 71.
[43] Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at page 81.
[44] The European Antitrust Review 2009, Efficiencies and Remedies under the ECMR, at page 4.
[45] Gordon Blanke, Comments on Draft revised Commission Notice on remedies acceptable under the Merger Regulation, available at http://209.85.229.132/search?q=cache:3y9X2TVRcSMJ:ec.europa.eu/competition/mergers/legislation/files_remedies/berwin.pdf+Gordon+Blanke,+Comments+on+Draft+revised+Commission+Notice+on+remedies+acceptable+under+the+Merger+Regulation&cd=2&hl=el&ct=clnk.
[46] Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, 2008, 19, European Business Law Review, at page 78.
[47] As an illustration, a typical behavioural commitment would require the merged entity to continue supplies to a third party on a non-discriminatory basis.
[48] Notice on Remedies, at paragraph 127. See also, Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, 2008, 19, European Business Law Review, at page 79.

problem is to impose an arbitration agreement to the merged entity[49]. It is exactly at this point that the role of the arbitration commitments proves to be dominant, as they help the Commission to monitor behavioural commitments and ensure compliance, an important function that could not be fulfilled merely by the Commission[50]. This is the essential aim that justifies the role of the arbitration clause when incorporated in the commitments undertaken by the merging parties[51].

In the Remedies Notice, the Commission by referring to 'other structural remedies' it implies access commitments thereby considering behavioural equal to structural remedies, especially given the fact that behavioural remedies incorporate arbitration commitments, i.e. most of the access commitments are backed by arbitration obligations[52]. Hence, the important and effective role of the arbitration commitments is highlighted in the context of the ECMR behavioural remedies[53].

The broad acceptance of such commitments by the Commission is greatly depicted in the judgment of the General Court in *EasyJet v. Commission*, where the arbitration commitments were manifestly approved as the appropriate monitoring tool for behavioural remedies within the scope of the EU Merger Control[54]. Further, in the judgments of *Gencor* and *ARD* an increased use of behavioural over structural remedies was evident[55].

Despite the fact that arbitration clauses are mainly incorporated in behavioural remedies, the Commission has so far used arbitration clauses in certain cases revolving around structural remedies[56]. By way of example, it is worth noting the innovative choice of procedure in *Dow Chemical/ Union Carbide* where the arbitrator was to choose one of the parties' proposals, providing this way for 'pendulum' arbitration[57].

[49] The first arbitration commitment is to be found in a 1992 Commission's decision (Decision of the Commission Case No IV/M.235 of 4 September 1992, *Elf Aquitaine – Thyssen / Minol*).
[50] Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, *at page* 81.
[51] Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, (2008) 19 European Business Law Review, at page 79.
[52] Paragraph 17 of the Notice on Remedies. See also, Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, 2008, 19 European Business Law Review.
[53] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006.
[54] Case T-177/04 – *EasyJet v. Commission*, Judgment of the Court of First Instance of 4 July 2006.
[55] Case T- 102/96 – *Gencor v. Commission*, Judgment of the European Court of First Instance of 25 March 1999, [1999] ECR II- 753 and Case T- 158/00 – *ARD v. Commission*, Judgment of the Court of First Instance of 30 September 2003, [2003] ECR II-3825.
[56] Comp./ M. 2268, Commission Decision of 8 May 2000, OJ C16, 19 January 2002; *GlaxoWellcome/Smithkline Beecham* (2000); Comp./M.2268, *Pernod Ricard/ Diageo/ Seagram Spirits*, Commission Decision of 8 May 2000, OJ C16, 19 January 2002. For further discussion see James Bridgeman, The Arbitrability of Competition Law Disputes, 2008, EBLR at page 165 and Marc Blessing, Arbitrating Antitrust And Merger Control Issues, at pages 110-111 and 113-114.
[57] Comp./ M. 1671, Commission decision of 3 May 2000, OJ, C245, 14 September 2001 . See also, James Bridgeman, The Arbitrability of Competition Law Disputes, 2008, EBLR at page 165; Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 61.

C. Legal nature of the arbitration commitments

Arbitration commitments constitute, in particular, unilateral *erga omnes* obligations undertaken by the parties, to resort to arbitration, any claims that third party beneficiaries might have against the Commission's decision on the clearance of a certain merger, when they estimate that the merger commitments have not been honoured[58]. In this respect, arbitration commitments have a 'semi-compulsory' nature, as one of the parties in case that seeks to obtain a clearance decision by the Commission is then obliged to consent to the arbitration agreement. At the same time it serves an 'open-ended' character, as the arbitration agreement constitutes a promise to arbitrate, that the merging party makes against the third parties and thus the latter derive their right to arbitrate from the commitment undertaken by the merging party[59]. In that case we have an 'arbitration without privity' similar to the arbitration procedure in the scope of bilateral investment treaties. In this context, an arbitration commitment is consensual in nature as long as the merged undertaking, which is under investigation by the Commission, gives its consent to the commitments that the Commission approves, while the third party beneficiary, which claims harm from anticompetitive behaviour, consents to arbitration by initiating the arbitral process[60]. The relationship between the merged entity and the third party beneficiary has no contractual basis, which in turn does not create any obligation on the third party against the merged entity's *erga omnes* promise to arbitrate, but it is independent either to refer to the Commission to start its own parallel investigations or to seek compensation for losses that the third party suffers, bringing civil law claims before the Member States courts for breach of EU Competition Law[61]. In other words the third party is not *'required'* to arbitrate eventual disputes with the merged entity as this is merely a *'possibility'* offered by the commitment letter[62]

D. The adjudicatory or regulatory function of arbitration

Mergers in the ECMR context are under the exclusive competence of the Commission as regards their assessment, but also for the monitoring of the commitments accepted in order to grand the clearance decision[63]. Incorporating the arbitration clause as their essential part, the arbitration commitments, when accepted by the Commission, do not lead to the latter's delegation of powers to the arbitrator in terms of the ECMR nor do they affect the Commission's statutory competence on the implementation of the said commitments, but they establish a monitoring device for these commitments[64]. The General Court in its ARD judgment clearly confirms this view by distinguishing and separating the role of the Commission to that of the arbitrator's, recognising the initiation of

[58] Blessing in particular refers to 'erga omnes offers'. See Marc Blessing, Arbitrating Antitrust And Merger Control Issues at page 164; Alexis Mourre, Dissenting Opinion on a Dangerous Project, 2008, 19, European Business Law Review, at page 224.
[59] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 7 and Brozolo; Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 185.
[60] Alexis Mourre, Dissenting Opinion on a Dangerous Project, 2008, 19, European Business Law Review, at page 224.
[61] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 185.
[62] Patrick Wautelet, Arbitration In EU Commission Cleared Merger Transactions, at page 6.
[63] Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, (2008) 19 European Business Law Review, at page 80.
[64] Ibid.

parallel proceedings between the merged parties and the Commission. In particular, it accepts that in case that the merging parties are violating the undertaken commitments, by not complying with the arbitral award, the Commission in order to ensure that the award is enforced it can rely on the ECMR provisions that regulate the enforcement of the commitments[65]. On the other hand, the tribunal indirectly enforces the commitments when dealing with the private disputes which may arise between the parties with an adjudicative role[66]. Therefore, in this case the monitoring mechanism empowered by the arbitration commitment leads to the result that the arbitrator's responsibilities run in parallel with those of the Commission's[67]. Therefore, the arbitrator's role is separate from the Commission's and clearly orientated to the adjudicatory task assigned to him in respect of the commitments.

The arbitrator's adjudicatory role is clearer when approached by analogy to the national judge in case where the arbitration clause is not a part of the commitment decision made by the Commission. In such a case, in an attempt for the enforcement of the third-party beneficiary's rights, national courts would judge on the basis of their public authority. Although being bound by the direct effect of the supremacy of EU Law, the national judge would keep his independent character, without being a 'regulatory extension of the Commission'[68]. Correspondingly, the arbitrator's mandate when accomplishing his task as a private judge in merger related disputes is completely independent. At this point it needs to be made clear that national courts' authority is not considered equal to that of the arbitral tribunal, as national courts form part of the state machinery, in terms of the Article 249 EU and consequently they are bound by the Commission's decisions. On the other hand, the arbitration tribunal does not fall within the scope of the same Article, as its adjudicative role is not on behalf of the State and accordingly by keeping its independent character it is not obliged to follow the Commission's decisions[69].

Moreover, the Commission in reaching its decisions under the exclusive jurisdiction granted by the ECMR, it cannot limit the national courts' competence to deal with the civil consequences that may arise in situations where the merger related commitments are violated[70]. The exclusive jurisdictional power delegated to the Commission to modify the commitments that the parties undertake in opting for a clearance decision, is not extended to the aspect of any civil action arising from such commitments[71]. Hence, when the parties have agreed on arbitration, this is interpreted as an alternative choice to court proceedings.

[65] Ibid; Articles 6(3), 8(6), 14 and 15 of the ECMR.
[66] Ibid.
[67] Ibid.
[68] Note that this is so even though they are being bound by Article 10 EC and the supremacy of EC law. Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 63; Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 9.
[69] Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, 246-250.
[70] Article 21(2) ECMR no 139/2004. See also, Alexis Mourre, Dissenting Opinion on a Dangerous Project, 2008, 19, European Business Law Review, at page 226.
[71] Ibid.

Even from a more formal perspective, in terms of an investigation for a breach of a commitment, the decisions made by the arbitrators on such matters cannot be regarded as evidence that there is in fact a breach of the notified commitment, despite the fact that both the Commission and the tribunal share the same concept of 'breach'.Therefore, it is not deemed to furnish an adequate basis for the Commission to rely on it[72]. Consequently, the Commission has to hold the investigation procedure on its own, as long as arbitrators do not act on its behalf and they are not obliged to give a response to the Commission on that part[73].

Further, it is supported that merger-related arbitration is an ordinary arbitration governed by the national law of the jurisdiction where the arbitration took place[74]. In this respect, like in any ordinary arbitration procedure, the arbitrator will have to deal with civil claims, such as a damages action that may arise from the breach of the arbitration commitments. Thus, he will have to accomplish his ordinary adjudicatory task, quite in the same way as any other arbitral tribunal. In those circumstances, 'the arbitrator or the arbitral tribunal will have to apply his own independent judicial appreciation, and the findings will be binding upon the parties, subject to the limited judicial review as may be available under the provisions of the applicable Arbitration Act.'[75]. In general he will have to follow ordinary principles that are applied in arbitrations dealing with Community and Competition law issues[76]. Equally, national courts will serve the same duty to set aside or enforce the final award as in relation to any ordinary arbitration dealing with such matters, without having any power to review the award on the merits[77]. Even more, as the argument goes, the dispute arising between the third-party beneficiary and the merged entity on the basis of claims that derive from the non-fulfilment of the commitments, is a private law dispute which does not differ from the dispute that arises from the breach of an EC Competition Law dispute. On the contrary, these disputes have been argued to be identical[78].

What is the scope of the arbitrator's indpendence?

The arbitrator's independent role in making a decision under the merger-related arbitration commitment, has as a consequence that this independence would lead to the commitments to be enforced properly, while at the same time the Commission maintains its responsibility for the overall enforcement of the commitments[79]. Still, the question remains as to the existence of a distinguishing line that orientates and separates these two worlds regarding the private nature that characterises arbitration underlined by the fundamental principle of party autonomy and the Community's mandate as a 'public prosecutor' in the EU Competition Law context[80].

[72] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 13.
[73] Ibid.
[74] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 12.
[75] Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at pages 172-173.
[76] Ibid, at page 12.
[77] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 12.
[78] Ibid, at page 8.
[79] Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, 2008, 19, European Business Law Review, at page 81.
[80] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 20.

However, the private nature of international arbitration which is based on the parties' agreement to arbitrate their disputes, indicates the rendering of the award by the arbitrator on the basis of his own private judgment and further the universal recognition and enforcement of the award under the New York Convention. On the other hand, the Commission 's public nature in the context of EU Competition Law underlines its mandate to make decisions that will maintain effective competition in the internal market and in accordance with the EU legal order. More specifically, in the merger control area the Commission will have to approve the undertaken commitments by the interested parties in order to grant its clearance decision on the notified concentration. Against this background, the role of the international arbitrator to monitor the parties' compliance with the undertaken commitments is distinct for the reasons analysed before. But, still, although the arbitrator can remain independent in conducting the arbitration proceedings and render a final award on the basis of his own judgment, to the extent that his award must be enforceable, he is impliedly 'obliged' to take into close consideration the *reason d'etre* of the commitment included in the Commission's decision and accordingly to prevent the initiation of parallel investigation by the latter as regards the monitoring of the undertaken commitments[81]. In an opposite situation, even if the arbitrator manages to render a final award, if this award is not in line with the Commission's clearance decision, it will not be enforced under the New York Convention.

Further, the essential for international arbitration party autonomy principle, within the scope of EU merger related arbitration, it must be accepted that it is compromised, considering the fact that, when the parties agree to a binding commitment to arbitrate as part of the Commission's decision, the third party beneficiary, derives his right to arbitrate from this *erga omnes* commitment, without being obliged to accept that offer, but standing on his own will. Thus, he identifies the involvement of the Commission to the arbitration procedure in the scope of the arbitration commitment[83].

Against this background, the role of the arbitrator in monitoring the parties' compliance with the undertaken arbitration commitments is clearer. The commitment decision which entails the parties' agreement to arbitrate, arguably, does not affect the Commission's statutory powers as an 'EU legal order prosecutor' and no way does it mean that it is substituted by the arbitrator. The arbitrator awards private law remedies under national law, while the Commission is the enforcing authority of the Community as well as the guardian of the EU Treaties according to Article 211 EU and it imposes public law sanctions provided for by the ECMR. The arbitrator maintains his independence with the final award sealing his mandate that is not fully reviewed by the Commission as in this way it would clash the adjudicatory function of arbitration and degrade its role to merely regulate administrative matters. At this point the distinct line that orientates the arbitrator's and the Commission's role is drawn and it is clear that their functions do not overlap.

[81] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 21.
[82] Ibid, at page 23.

Nevertheless, the Commission's intervention may be expressed by other means such as reserving the possibility to challenge the arbitrator's award before national courts. In the Eco Swiss case the ECJ held that *'a national court to which an application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy'*[83]. In this respect, national courts in ensuring their compliance with EU Competition Law, they will have to take a 'second look' on the merits of the award and not be restricted to a procedural review. Therefore, the applicable law, when adjudicating the parties' compliance to the commitments undertaken before the Commission's clearance decision, is 'by definition' EU Competition Law, which in turn is an essential part of the EU legal order, directed by the doctrines of 'direct effect' and 'supremacy' of EU law[84]. Thus, in terms of the cleared merger transactions, the arbitrator has to apply the provisions of EU Competition Law in order to ensure the enforceability of the awards that he renders. Otherwise, his award and its enforcement will be challenged by means of breach of public policy.

Last, but not least, even at the exequatur stage, i.e. when the national courts decide on the effectiveness and enforceability of the arbitral award, the Commission maintains its role of monitoring the undertaken commitments. Therefore, in case that the arbitral award is not in line with a Commission finding, the public order defence can be invoked under the New York Convention and the recognition and enforcement of the arbitral award can be challenged. It is obvious that the Commission's and the arbitrator's role might not substitute each other, but the latter's independence is still arguable, as the Commission seems not to have taken a final position regarding the influence it wishes to exercise on the arbitration procedure.

E. The role of the Commission as *amicus curiae*

The role of the Commission in the arbitration proceedings is widely debated. In particular, it is questionable whether the Commission should serve as an *amicus curiae* when arbitration proceedings are conducted in terms of arbitration commitments or it should merely stand as an observer. A potential intervention in the merger-related arbitral proceedings on the Commission's behalf, would take place pursuant to the arbitration agreement that underlines these proceedings.

[83] Case C-126/97, Eco-Swiss China Time Ltd. v. Benetton International NV, [1999] ECR I-3055, at paragraph 41.
[84] Ibid.

From the arbitral tribunal's point, the Commission's assistance in that regard is considerable for the outcome of the proceedings in terms both of the interpretation of the EU Competition Law provisions and of the commitments incorporated in the Commission decision, having in mind the fact that, unlike national courts, the tribunal cannot directly refer to the ECJ for a preliminary ruling. This leads to a uniform application of EU Competition Law by ensuring a certain economic and legal standard in the internal market in accordance with the aims of the European Community[85]. Also, this kind of contribution by the Commission could guarantee the enforcement of the final arbitral award in accordance with the provisions of the New York Convention as it would certify that it does not contradict the EU public policy. In that case the Commission should only offer its interpretation in the scope concerned by the arbitral proceedings, retaining this way its separate role from the tribunal under the arbitration commitments in dispute.

In the same regard, the Commission's participation in the hearings during the proceedings of the arbitral tribunal, either as an observer or as an amicus curiae on its own right, depicts its *amicus curiae* intervention without actively taking part, but by being informed about the conduct of the proceedings and is ready to assist the arbitrator on technical issues arising in the competition law context. Accordingly, this may prohibit the tribunal from rendering a potentially unenforceable award in case that it might be contrary to the European public policy[86]. Furthermore, should the tribunal accept its intervention, the Commission could be a witness of the hearings on its own right, testifying the appropriate conduct of the proceedings with regard to the correct application of the EU Competition Law. Nevertheless, the Commission's intervention cannot intrude the decision of the arbitral tribunal, if not asked to do so, by the latter. Moreover, even if this situation does occur, the arbitrator is not obliged to consider the Commission's statements that go beyond its sole interpretation on the appropriate applicability of the EU Competition Law rules, or on the definition of the commitment decision, as the final award on the merits is on the arbitrator's independent mandate[87].

Moreover, the Commission could contribute to the arbitral proceedings by submitting amicus curiae briefs in relation to the subject matter of the decision, mainly when this is required by the ECMR[88]. The *amicus curiae* brief depicts the Commission's opinion on the related issue, without having the character of evidence. Still, the arbitral tribunal has obligation to apply for this kind of support by the Commission.

Importantly enough, since the Commission has a different mandate from that of the arbitral tribunal in the 'EU-merger-remedy-related' context, it can undeniably initiate proceedings to ensure the correct application of the EU Law provisions, while arbitration proceedings are pending on the same subject matter. The Commission's administrative authority in the EU realm enables it to start parallel proceedings with the arbitral tribunal

[85] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, *at page* 161.
[86] Ibid, at pages 167-168.
[87] Ibid, at page 169.
[88] Ibid, at page 171.

invalidating the res *judicata* principle[89]. Similarly, the Commission's parallel investigation proceedings on request by a third party to the commitment, with binding legal effect on the concerned party, are justified due to the reason that even in the case where the arbitral tribunal has rendered a final award, it would be unenforceable because of its incompliance with EU Law as the Commission's investigation might have proved. Hence, endorsing the arbitral award to its decision, adding the direct effect of its decisions to the national courts based on the supremacy of EU Law, it would guarantee its enforcement by the Member State courts[90]. Nevertheless, it should be taken into account, that only serious concerns should call this duty for the Commission.

When the final award is made by the arbitral tribunal, the Commission's expertise in EU Competition Law issues and especially mergers, would contribute to its effectiveness. The award would be rendered enforceable, minimizing at the same time the risk of exposing the parties to concurrent or additional public proceedings by the Commission, in case that EU merger rules have not been applied properly by the international arbitrator. Therefore, the parties' recourse to arbitration would be led 'ad absurdum'[91]. Also, the role of the Commission could be deemed similar to that of an expert when asked for his pronouncement by the tribunal although its opinion would be highly authoritative[92].

On the other hand, this model of intervention by the Commission raises serious concerns on the balance kept in the relationship between the Commission and the arbitral tribunal on the basis of the merger related commitments. Despite the alleged non-binding nature of the *amicus curiae*, such an intervention plays a significant role on the arbitrator's mandate in this field and it should seriously be considered that rather important policy reasons orientate the Commission's intervention. The fundamental principles that derive from arbitration as a private dispute resolution mechanism make more than obvious the need for a balanced participation in the proceedings. The basic principles of confidentiality seem to be at stake when the Commission interferes in the arbitral proceedings when participating in the hearings either as an observer or as a witness on its own right, trying to have control of the conduct of the proceedings in accordance with the EU Competition Law rules. This is especially the case when it reviews on its own initiative the outcome of the proceedings. In other words, if the balance is not kept, the arbitral tribunal will be vested with duties equal to the Member States courts', subject to the Commission's objectives and at last form part of the judicial system of the European Community[93].

Notwithstanding the Commission's significant contribution to the arbitrator by sharing its expertise on competition and particularly in merger related issues, the handling of the sacrosanct principle of confidentiality of arbitration as indicated by its nature as a private dispute resolution mechanism draws special attention. It is

[89] Ibid, at page 163.
[90] Ibid, at page 174.
[91] Ibid, at page 178.
[92] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 13.
[93] Alexis Mourre, Dissenting Opinion on a Dangerous Project, 2008, 19, European Business Law Review, at pages 221-222.

arguably stated, that as far as arbitrators are not obliged to inform the Commission on the conduct of the arbitration proceedings, the duty of confidentiality fully prohibits this co-operation[94]. Therefore, the informative role of the Commission becomes apparently uncertain as long as it is to 'keep its internal deliberations confidential and not prejudice its decisions until published'[95]. In an arbitration procedure where the independent nature of the arbitrator is not clear, but appears to rule under the Commission's mandate and its close supervision, it cannot be considered as an independent dispute resolution mechanism benefited by the New York Convention and the UNCITRAL model law.

Importantly in this context, it is said that even if the *amicus curiae* role of the Commission is to be accepted in a merger-related arbitration, its role should be limited and its intervention should take place in certain circumstances, where its contribution would appear to be necessary for the proceedings without replacing the arbitrator's authority neither be institutionalised under any circumstances. Under no event should the making of a decision be shifted on the Commission's shoulders[96]. If the certain ground that motivates the Commission's intervention in the arbitration's framework is not defined, the issue of *ex officio* application of EU Law by the arbitrator or in respect to the 'subjectively reasonable expectations of the parties' could convincingly be raised[97].

Against this debate on the actual and potential role of the Commission in the arbitration proceedings, a 'hybrid' nature of arbitration may be said to be born. This refers to a certain type of arbitration, that maintains its independent character when initiating the arbitration proceedings and renders an award final in nature, without being bound, at least directly, by the principles of 'direct effect' and 'supremacy' as implied by the EU legal order. Still, if the arbitrator wants his award to be enforceable under the New York Convention and in order to avoid the risk to be set aside for public policy reasons, then he has to co-operate efficiently with the Commission and consider the *reason d' etre* underlying the commitment decision. EU merger-related arbitration is, thus, conceived as 'supranational arbitration' especially formed as indicated by the ECMR[98]. In any case, though, the 'efficient and fair dispute resolution and effective application of competition policy must be safeguarded without losing sight of the private nature of the arbitral process as opposed to proceedings before the courts'[99].

[94] Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, at page 260. On the issue of confidentiality see Loukas M. Mistelis, Confidentiality, *at pages* 211-231.
[95] Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, at page 260.
[96] Hans Van Houtte, The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission, 2008, 19, European Business Law Review, *at page* 73.
[97] For further discussion on the ex officio application of the EC Competition Law by the arbitrator see further discussion at Hans Van Houtte, Arbitration and Arts. 81 and 82 EC Treaty – A State of Affairs, Kluwer Law International, Volume 23, No.3, 2005.
[98] Gordon Blanke, The Case for Supranational Arbitration – Ideas and Prospects, 2008, 19, European Business Law Review, at page 19.
[99] Renato Nazzini, A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as Amici Curiae and the Status of Their Decisions in Arbitral Proceedings, 2008, 19, European Business Law Review, 89–114 and Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 158.

A highly important issue concerns the recognition and enforceability of the awards rendered by the arbitrator in terms of the arbitration commitments and considering the role of the New York Convention with the public policy exception, in relation to that matter. In that regard, this paper aims to examine the recent amendments on the enforcement of the arbitral awards within the EU in the light of the Commission's Green Paper on Regulation 44/2001, in order to estimate how it impliedly affects the role of arbitration in the control of mergers within the EU.

7. THE MATRIX OF THE EUROPEAN JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS UNDER THE REGULATION 44/2001 AND THE USE OF ARBITRATION

The relationship between arbitration and court proceedings in the European Union arena was, until recently, rather underdeveloped. Especially in terms of the Brussels Jurisdiction Convention and more specifically, the Brussels I Regulation, arbitration was completely excluded from its scope. Based on Article 220 of the EU Treaty which aims at the 'simplification of formalities governing the reciprocal recognition and enforcement of judgments', the rationale of the Regulation is to enhance the enforceability of national courts' judgments within the EU on civil and commercial issues in line with the fundamental principles of 'free movement of judgments' and 'full faith and credit' or mutual trust'[100]. The 'free movement of judgments' has been converted into an essential principle for the proper function of the internal market. Having been characterized as 'a federating instrument' reflecting the 'country of origin principle' concerning the recognition of judgments within the EU, independently of the Member States where the judgments find their origin and enforcement, it is considered to serve the role of the 'cornerstone of the European area of freedom, justice and security'[101]. With its recent Green Paper the Commission is attempting to revisit the Judgment Regulation process by enhancing the interface between arbitration and the Regulation, in order to provide a 'clear and non-conflictual enforcement system of arbitral awards internationally'[102]. Within that context, it is possible to explain the basic points introduced by the Regulation that can directly affect arbitration.

To start with, the Regulation recognizes the significant role of arbitration in the world of international commerce, by pointing out the increasing importance for the arbitration agreements and arbitration awards to be safeguarded the 'fullest possible effect'[103]. In this framework, while recognising the fundamental role of the 1958 New York Convention and its satisfactory operation in arbitration, the Regulation suggests that the time has come where 'certain specific points' should be added to the Regulation regarding arbitration, in line with the free movement of judgments principle and within the EU framework, so as to avoid parallel court and arbitration proceedings, without at the same time changing the scope of the New York Convention nor aiming at regulating arbitration in any way whatsoever.

[100] Assimakis P. Komninos, EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law By National Courts, 2008, at page 255.
[101] Ibid.
[102] Brussels, 21.4.2009 COM (2009) 175 final.
[103] Section 7.

More specifically, the Regulation suggests that the exclusion of arbitration should be (partially) deleted from its scope, embracing court proceedings ancillary to arbitration and in this manner enhancing the interface between court and arbitral proceedings[104]. Further, it suggests that legal certainty would be achieved, while 'granting exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties'[105]. Moreover, according to the Regulation in case that the seat of arbitration is not defined by the arbitration agreement or not reached by the tribunal, the courts of the Member States with exclusive jurisdiction over the dispute should be appointed[106]. At the same time 'uniform criteria' for the determination of the seat of arbitration are suggested for a more certain outcome[107].

In that case the fundamental principle of party autonomy that governs arbitration proceedings seems to be at stake. The parties' right to directly choose the seat of arbitration through the arbitration agreement or indirectly by the arbitral tribunal or the appointing authority, can be seriously limited[108]. Even in the case of institutional or *ad hoc* arbitrations with specific rules governing the proceedings and in case that the seat of arbitration has still to be defined, as long as there is no arbitration agreement, the national courts do not have the jurisdiction to decide the seat of arbitration. The Commission at this point, following the Heidelberg Report, suggests the interference of the courts with exclusive jurisdiction over the dispute enhancing at the same time forum shopping[109]. On the other hand, the Arbitration Committee by incorporating a reference to the jurisdiction rules of the Regulation, it stresses out that giving one of the parties the opportunity to choose the seat of arbitration at its own motion and independently of the other parties' consent is considered to be completely inappropriate[110]. Furthermore, when the parties in an arbitration choose the seat of arbitration, they prefer a neutral place to initiate such proceedings, and they also prefer to be subject to a national legislation that will be more suitable to adjudicate the subject matter of the dispute as well as to fulfil their legitimate interests. Thus, it seems that a 'neutral connecting factor' would be appropriate[111].

[104] Section 7, at page 9. Note that the ECJ in the Marc Rich case analyses what is specifically meant by 'ancillary' procedures. *[ECJ] Marc Rich & CO v Societa italiana Impianti PA-25 julliet 1991-Cour de Justice des communautes europeennes*
[105] Section7, at page 9.
[106] Green Paper, Section 7, at page 9.
[107] Green Paper, Section 7, at page 9 footnote 14.
[108] Article 16 UNCITRAL Arbitration Rules.
[109] Section 7, at page 9. See also, Report on the Application of Regulation Brussels I in 25 Member States, by Prof.. Dr. Hess, Prof. D. T. Pfeiffer, and Prof. Dr .P. Schlosser - The 'Heidelberg Report', International Bar Association, Arbitration Committee, Working Group on the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee (COM (2009) 174 final) and the Green Paper on the Review on Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and the Enforcement of judgments in Civil and Commercial Matters at page 5.
[110] Ibid at page 5.
[111] Ibid at page 6.

While the scope of exclusive jurisdiction is not clearly defined, it is noted that it is rather suitable in specific and limited measures in support of arbitration. One such measure is the appointment of an arbitrator. The ancillary support of the state court of the seat of arbitration is sufficient enough for the arbitral tribunal to be established[112]. In that manner, the judicial support given to the arbitration proceedings is centralized in one single court and conflicting decisions that might occur by parallel proceedings conducted by foreign courts, are avoided[113]. Also, another factor concerns the *lex arbitri*[114], that is more possibly considered to be the law of the seat of arbitration which that makes the courts of the seat suitable enough for supporting the establishment of the arbitral tribunal[115]. Hence, while the appointment of the arbitrator is in line with the provisions of Article V(1)(d) of the New York Convention, it is at least assured that the arbitral award will be enforced[116]. So, as long as in the EU regime most of the national arbitration laws are in line with this kind of supportive measures taken by the courts, in this respect it seems to be identified that there is no need for the establishment of a mandatory rule by the Regulation[117].

Further problems arise in terms of the exclusive jurisdiction of the arbitral tribunal in the procedure of gathering the evidence. In disputes with international dimension the place where the evidence is located and which is considered to be the place where the courts of the state offer their support to the arbitral tribunals is not the place of the seat of the arbitration. Instead a neutral 'third' country is usually selected by the parties to constitute the seat of arbitration[118]. It is then obvious, that during the gathering of the evidence the parties have to request for court support indirectly by referring first to the courts of the seat and they must officially apply for 'cross-border judicial assistance', as long as, due to their exclusive jurisdiction in supporting the arbitral tribunals in the procedure of taking evidence, the parties cannot seek for assistance in the state that allocates the evidence[119] .

The same is supported for the provisional measures. The European Court of Justice in the *Van Uden* case decided that rules regulating jurisdictional issues under the Regulation cannot determine the jurisdiction for ordering provisional measures, when the parties have agreed to resort to arbitration[120]. In the more recent *West Tankers* case, the ECJ declared incompatible the anti-suit injunctions ancillary to the arbitration with the Regulation[121]. In both cases, it is obvious that within the scope of exclusive jurisdiction, parties' freedom to resort to any forum where the provisional measures are enforceable is eliminated as long as they have to apply first to the court of the seat of arbitration and then enforce the ruling in another State.

[112] George Martin, Brussels I review-Illmer and Steinbruck on the Interface Between Brussels I and Arbitration, Journal of Private International Law, June 2009.
[113] Hans Van Houtte, Why Not Include Arbitration in the Brussels Jurisdiction Regulation?, Arbitration International, Vol. 21 No. 4 (2005), at page 509.
[114] On the concept of Lex arbitri see L. Mistelis, Reality Test: Current State of Affairs in Theory and Practice Relating to 'Lex Arbitri, The American Review of International Arbitration, 2006, Volume 17 No.2.
[115] George Martin, Brussels I review-Illmer and Steinbruck on the Interface Between Brussels I and Arbitration, Journal of Private International Law, June 2009, at page 1.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] *Van Uden Maritimes BV v/ Kommanditgesellschaft in Firma Deco-line*, Case C 391/95, 17 November 1998, ECR I 7091.
[121] *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA and others,* [2007] UKHL 4.

Considering the principles established by the *Van Uden* case and taking into account the time-consuming and onerous character of a rule for 'cross-border judicial assistance', the exclusive jurisdiction rule does not seem to align with the international arbitration practice.

Another interface between arbitration and the Judgment Regulation relates to the validity of the arbitration agreement. The Regulation suggests that the suppression of the arbitration exception by its scope might lead to the automatic recognition of judgments that decide on the existence, validity or scope of the arbitration agreement[122]. Further, it proposes 'the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal' giving this way 'priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity or scope of the arbitration agreement'[123].

On this point there are several opposite views which hold that such a proposal is, at first, inconsistent with the parties' direct decision to resort to arbitration in order to settle their disputes[124]. This can be explained by considering that they are obliged to bring court proceedings in order to stop the procedure before a Member State court that deals with a suit, without considering the arbitration agreement, thereby enhancing parallel proceedings[125]. Similarly enough, the arbitrator will have to suspend arbitration proceedings until the Member State court decides on its jurisdiction. Hence, it is further stated that the Regulation, with this proposal, completely disregards the diverse arbitration laws of each Member State, namely the doctrine of 'Kompetenz-Kompetenz', that confers on the arbitrators the right to decide on their own competence, without any kind of court control[125]. For instance, in terms of the negative effect of the doctrine of Kompetenz-kompetenz, French law grants supreme priority to the arbitral tribunal to decide on its own power unless the arbitration agreement is prima facie 'manifestly null and void'[127]. Additionally, in this context[12], under Article II (3) of the New York Convention, the doctrine of 'Kompetez-Kompetenz' is further recognized, as the courts of the Contracting States declare their incompetence, while referring the parties to arbitration, when requested by one of the parties, in cases they are seized of an action in a matter, in relation to which the parties have made an arbitration agreement, unless the agreement is found to be null and void, inoperative and incapable of being performed[128]. So, in this respect, under the New York Convention, even the courts of the states that do not apply the negative effect of the 'Kompetenz-Kompetenz' doctrine, are still empowered to refer the parties to arbitration, when the subject matter seized before them is agreed to be settled by arbitration. All in all, it is suggested that the arbitration agreement should not be stayed under any circumstances in case of parallel court proceedings.

[122] Green Papers, at page 9.
[123] Ibid.
[124] Arbitration Commitee, at page 7-8.
[125] Ibid.
[126] For the meaning of the doctrine see further Lew, Mistelis, Kroll, at paragraphs 14-13 ff.
[127] French NCPC Art.1458. Further on the Kompetenz-kompetenz concept see Brekoulakis, Stavros, The Negative Effect of Compétence-Compétence: The Verdict Has to Be Negative, Austrian Arbitration Yearbook, at pages 238-258, 2009; Queen Mary School of Law Legal Studies Research Paper No. 22/2009
[128] In other countries, following the principle of UNCITRAL Model law Article 8, when the matter brought before the courts is the subject matter of the arbitration agreement, the courts have to refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed and despite the fact that the issue is pending before the courts the arbitration proceedings may commence or continued and an award may be made. See also Germany ZPO, Article 1032(2).

The Heidelberg Report in dissuading parallel proceedings, it proposes the initiation of a mechanism to allocate jurisdiction[129]. In particular, it suggests that the court of the Member State at the place of arbitration, when seized by the parties of the arbitration agreement for a declaratory relief considering the existence, validity or scope of this agreement, it will have priority over the court first seized, with binding effect upon the courts of the Member States[130]. Thus, the Report confers exclusive jurisdiction to the courts of the seat of arbitration and recognizes the *res judicata* effect of their decision upon the courts of the Member States.

At this point it is worth noting the issue of *lis pendens*, *contained* in Article 27(1) of the Judgment Regulation, which by way of example refers to the parties in an arbitration agreement providing for *ad hoc* arbitration in Paris. According to that example, proceedings before a court of a Member State are initiated by one party that seeks a decision on the validity of the arbitration agreement, while the other party of the arbitration agreement seeks from the court of the seat of the arbitration (in Paris) support for the appointment of an arbitrator. At that point the negative effect of Kompetenz-Kompetenz, which applies in French law, would govern the decision of the court on the *prima facie* validity of the arbitration agreement, in order to appoint the arbitrator. It is at this particular point that the lis pendens issue arises, since in case of deletion of the arbitration exclusion, the provision of Article 27(1) of the Regulation applies. A decision on the validity of the arbitration agreement will be pending before the courts between the same parties. In order to prevent the *lis pendens* result, the Green Paper proposes the concentration of the litigation on the validity of the arbitration agreement before the courts of the seat of arbitration, conferring to their decisions obligatory power, so that parallel proceedings can be avoided[131].

It is supported that by allocating jurisdiction in this way, legal certainty is safeguarded for the parties, while contradicting decisions are avoided and the parties' interest in an early decision on the existence, validity and scope of the arbitration agreements with binding force is fulfilled[132].

Conversely, there is an argument on that point, that sounds coherent enough, which supports that in any case, this provision should define that the stay of the proceedings for the court first appointed should be issued even in those cases where parallel court proceedings are taking place in order to decide on the prima facie existence, validity, or scope of the arbitration agreement or further in such a case where the arbitral tribunal will decide on the existence,

[129] Article 22 No 6 to the Brussels I Regulation.
[130] Heidelberg Report paragraph 133-134.
[131] Mourre, The Regulation of International Arbitration by European Law: What Does the Future Hold?, Kluwer Law International, May 2009.
[132] George Martin, Brussels I review-Illmer and Steinbruck on the Interface Between Brussels I and Arbitration, Journal of Private International Law, June 2009, at page 3.

validity or scope of the arbitration agreement in the first instance[133]. Hence, all the decisions made by the arbitral tribunals and the courts that allow the arbitration proceedings to go on are enclosed, including the decisions that are restricted to decide on the basis of the negative effect of Kompetenz-Kompetenz, whether the arbitration agreement is prima facie null and void, or inoperative[134]. With this amendment, such a provision would consider all diverse arbitration laws in all Member States averting parallel proceedings and safeguarding the effectiveness of the arbitration agreement[135].

Last but not least, the Regulation, in determining the validity of the arbitration agreement proposes 'a uniform conflict rule' connected to the law of the State of the place of arbitration which aims to reduce possible contradicting decisions on the validity of the arbitration agreement among Member States[136]. Nevertheless, it seems doubtful that this provision would suffice to eliminate the *lis pendens* issue, as this way, in case where the seat of the arbitration is not decided by the parties, jurisdictional rules should be applied by them in order to determine the applicable law to the arbitration agreement despite the fact that this conflict of law rules would not be sufficient enough to connect the dispute with the applicable law[137]. Hence more jurisdictional options would be available to the parties and would result in enhanced forum shopping[138].

Finally, an area of interface between the arbitration and the Regulation concerns the recognition and enforcement of arbitral awards within the EU in accordance with the provisions of the New York Convention. The Green Paper suggests that a provision incorporated in the Regulation that would permit the non-enforcement of a judgment irreconcilable with an arbitral award, would benefit the latter which is enforceable under the New York Convention[139]. It seems, that such a rule that safeguards the effectiveness of the arbitral awards is well accepted given the fact that the New York Convention would continue to govern the recognition and enforcement of the arbitral awards in line with the applicable national arbitration laws.

Further, it is proposed 'to grant the Member State where the arbitral award was rendered, exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community'[140]. But in this respect, it should be taken into account the fact that in line with the New York Convention, arbitral awards set aside in their state of origin can still be recognized and enforced in other Member States, as there are no common grounds recognized by all Member States. Considerable case law, in terms of the arbitration exception, has proven that even in that case were fundamental legal principles are breached by an arbitral award in one Member State, this does not prescribe its non-enforcement by another State with which they do not share common legal principles.

[133] The new article 27 αα proposed by the Heidelberg Report; see further paras133-134 of the Report. See also, Arbitration Committee, at page 8.
[134] Arbitration Committee, at page 8; Article 1458 French NCPC.
[135] Arbitration Committee, at page 9.
[136] Green Paper, at page 9.
[137] Arbitration Committee, at page 10.
[138] Mourre, The Regulation of International Arbitration by European Law: What Does the Future Hold?, Kluwer Law International, May 2009.
[139] Green Paper, at page 9.
[140] Green Paper, at page 9.

This issue was examined in the *Fincantiery* case, where an award was rendered in France and enforced by the French cour de cassation , despite the fact that the Italian courts had nullified the arbitration agreement[141]. Similarly in *Putrabali* an arbitral award set aside in England was enforced by the French courts[142]. Consequently, it is obvious that the New York Convention, despite providing for a certain basis of conformity, nevertheless it still accepts differences between Member States, especially when public policy issues are concerned.

Following the proposal of the Commission, decisions made under the exclusive competence of Member States where the award is rendered, setting aside this award for contradiction to the public policy principle of that Member State, would then freely circulate in the European Union, preventing this way its enforcement by those Contracting States that could recognize the particular award in terms of the New York Convention, as it might not be contrary to their national public policy rules[143]. It is considered that, with this provision, the Commission, sets lower thresholds and creates a reality within the European Union which is less favourable than that existing in other States governed by the New York Convention. Thus, it provokes a conflict with the Regulation thereby making the EU arena a detrimental venue for international arbitration.

All in all, it seems that the interface between arbitration and European law is not that easy. With fundamentally different backgrounds, the New York Convention and the European Judicial Private Law are not treated equally. The European law has its basis on the 'free movement of judgments' whereas arbitration is based on the concept that each country has its own legal provisions and approaches differently the recognition and effect of the awards with international character. If the arbitration exception is deleted from the scope of the Regulation, basic principles which essentially characterize arbitration will have to be revisited. Such a deletion, far from leaving untouched the operation of the New York Convention, would cause the Contracting States to be in breach of their obligations under that Convention. What is more, the European Union would be treated as if it were one territory with respect to the Convention and would lead to the regionalization of the law of arbitration. This in turn, would result in the European Union being a jurisdiction where the New York Convention would no longer apply. Even if a regulation of the New York Convention is not intended, the goal of making the EU an integrated territory for arbitration through a reform of recognition procedures does not seem very pragmatic. In any case, the balance seems difficult to be kept and the exceptional character of the New York Convention appears to be seriously jeopardized.

[141] *[FRA] Legal Department of the Ministery of Justice of the Republic of Iraq v. Fincantiery –Cantieri Navali Italiani, et al.-15 June 2006- Cour d'appel (Court of Appeal), Paris.*
[142] *[FRA] Societe PT Putrabali Adyarnulia v. Societe Rena Holding et Societe Moguntia Est Epices – 29 Juin 2007 (Cour de Cassation).*
[143] New York Convention, Article V (2)(b).

8. CONCLUSION

This article initially discussed the role of arbitration in the context of the ECMR and illustrated its significance in the process of clearance of the notified concentrations by the Commission, through the means of monitoring the implementation of the arbitration commitments undertaken by the merging parties. Moreover, it examined the legal nature of the arbitrator within these proceedings as influenced by the policy of the Commission, and the way this interrelation can lead to the creation of a 'hybrid' nature of arbitration, mainly caused by the role of the arbitral award in this context. Due to the impact of the enforcement of the arbitral award on the role of arbitration in the clearance procedure, as regards its compatibility with the EU legal order, the recent amendments on the enforcement of the arbitral awards within the EU were examined in the light of the Commission's Green Paper on Regulation 44/2001 and its effects on the clearance procedure of concentrations by the Commission subject to the ECMR rules in relation to arbitration were estimated.

This article concludes that, the wide attempt made by the Commission to extend its reach to international arbitration in different but interrelated areas within the context of EU Competition Law and in particular in relation to mergers, recognises arbitration and the established procedural mechanism appropriate for the enforcement of such legal regime. Furthermore, under the scope of the adoption of uniform conflict rules that will enhance the free movement of arbitration awards within the EU, arbitration would facilitate the accomplishment of the common market. On the other hand, the above changes in the Commission's view on arbitration, with its obvious aim to bring all arbitration aspects under the scope of Regulation 44/2001, especially as regards the enforcement of the awards, entails the danger to completely change arbitration's universal character and finally trigger its function in the control of mergers in the EU. With the implementation of the harmonised rules proposed by the Commission on the enforcement of arbitration awards, the protections built in the enforcement mechanisms provided by the New York Convention are abandoned and an increased involvement of court control is introduced in the state of the seat of arbitration while at present it is possible to directly enforce the arbitration award in other New York Convention states[144]. This in turn, calls in question the hybrid nature of arbitration in terms of the EU Merger Control and totally doubts the scope of the arbitrator's independence, as in fact the Commission's intervention to the arbitration proceedings becomes more than apparent. As a result this could convert arbitration as its 'prolonged arm', when the Commission imposes certain criteria for its function and regulates at the same time its legal framework. Such an intervention would have a strong impact on arbitration's fundamental principles that establish it as an internationally accepted ideal dispute resolution mechanism and its legal framework would be seriously damaged.

[144] The Commission suggests that 'the Member State where an arbitral award was given [should be granted] exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community'.

At the end of the day the whole structure of the control of the Commission's clearance decisions in merger transactions, from the monitoring of the behavioural commitments of the merging parties to the recognition and the enforcement of the arbitration award would change as although arbitration would keep its key role to these proceedings, it would still be completely different in its legal nature. Thus, we would not be talking about a hybrid nature of arbitration in terms of the EU Merger Control system, but for a special review mechanism established and structured by the Commission in order to delegate its powers in the conduct of the whole merger control procedure. All in all, the present position in the relationship between arbitration and EC Merger Control is that there is a constant process towards conversion, as these legal norms do not run in a parallel manner but they meet at a certain point and in particular in the assessment of mergers. Therefore, not only arbitration is not immune from the EC Competition Law system, but on the contrary it has been adopted by the Commission as a principal factor in the examination of mergers.