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Arbitration and the Modernization of EC Antitrust Law: New Opportunities and New Responsibilities

On 26 November 2002, the Council of Ministers of the European Union reached political agreement on a new regulation implementing the antitrust provisions of the Treaty establishing the European Community (EC).² The new regulation replaces the current Regulation No. 17/62 and provides for a far-reaching reform of the EC's antitrust rules. The new rules will enter into force on 1 May 2004, on the same date as ten new Member States accede to the European Union.³

This reform will have considerable practical consequences for arbitration, including in particular giving arbitral tribunals for the first time the power to apply Article 81(3) EC. After an introduction and a brief overview of the rules of EC competition law, this paper will discuss the principal issues relating to the application of those rules by arbitral tribunals, and the changes that will be brought about by their modernization.

Introduction

Scarcity of published cases

Somewhat surprisingly, competition arguments appear to have been rare in published competition cases.⁴ Herman Verbist conducted a review of 700 ICC cases in the mid-1990s and found only 17 awards dealing with European competition law.⁵ Also surprising is that most cases appear to have resulted in a rejection of the competition law arguments. Of a sample of some 28 published cases (mostly from the ICC and one case from the Swiss Court of Arbitration for Sport)⁶ discussing EC antitrust law, only three tribunals accepted the competition law claims after proper examination.⁷ Only two cases seem to have involved arbitrators raising competition law arguments

¹ The authors acknowledge with thanks the contribution of Bob Greig and John Temple Lang, and of Naana Frimpong and Shana Wallace.

² Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations No. 19/65/EEC, (EEC) No. 1017/68, (EEC) No. 2821/71, (EEC) No. 2988/74, (EEC) No. 4056/86, (EEC) No. 3975/87, (EEC) No. 3976/87, (EEC) No. 1534/91 and (EEC) No. 479/92, O.J. 2003 L 1/1.

³ Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

⁴ There seems to be a substantial workload in *ad hoc* arbitrations, and a reflection of these can be found in M. Blessing, *EG/US Kartellrecht in Internationalen Schiedsverfahren – 77 Aktuelle Fragen aus der Praxis* (Basel: Helbing & Lichtenhahn, 2002).

⁵ H. Verbist, 'The Application of European Community Law in ICC Arbitrations' in *International Commercial Arbitration in Europe*, ICC ICARB. Bull. Special Supplement (Paris: ICC Publishing, 1994) 33; Extracts from ICC Awards on Arbitration and European Community Law, Part I (1994) 5:2 ICC ICARB. Bull. 44, Part II (1995) 6:2 ICC ICARB. Bull. 52. See also four ICC cases dating from between 1993 and 2000 summarized by E. Jolivet in 'Quelques exemples du traitement du droit communautaire dans l'arbitrage CCI', *Gazette du Palais*, Cahiers de l'arbitrage, No. 2003/1, part 2 (30-31 May 2003), 3.

⁶ This award is reasoned in detail, concluding that UEFA rules to guarantee independence of clubs were consistent with Articles 81 and 82 EC; CAS 98/200, (2000) XXV Y.B. Comm. Arb. 393.

⁷ ICC case 8626, hereafter pp. 55-59: a five-year non-compete clause was condemned. ICC case 10660, hereafter, pp. 62-66: a four-year post-termination non-compete clause and a ban on passive sales

of third-party equipment in a joint development and joint sales agreement were condemned. ICC case 10704, hereafter, pp. 66-77: a seven-year non-compete clause after the sale of a business was reduced to three years.

on their own initiative.⁸ There were two Dutch cases where antitrust arguments were raised only at the annulment stage (*Benetton* and *Sesam/Betoncentrale*).⁹ Only in the latter case was the argument upheld.

This review is of course far from scientific, and does not include settled cases (probably the large majority of cases),¹⁰ unpublished awards (taking into account that competition law issues may be one reason why parties refuse permission for publication), awards where arbitrators ignored competition issues, and awards under arbitration rules other than those of the ICC, but it is nevertheless surprising. Although competition law cases seem to have been relatively scarce in the past, there are clear indications and anecdotal evidence of an increase in antitrust arbitration.

Commission wariness of arbitration

Traditionally, the Commission paid little or no attention to arbitration proceedings, and does not mention arbitration in its guidelines on cooperation with national courts. It regarded arbitration with suspicion (especially if involving mediation or arbitration *ex aequo et bono*), as a means to cloak collusion between competitors with an appearance of legitimacy.¹¹ The reason was that the Commission had seen arbitration clauses in early cartel agreements. Indeed, the Arbitration Institute of the Stockholm Chamber of Commerce was reportedly actively marketing its 'off shore' arbitration as a way of resolving disputes free from Commission intervention.

This began to change by the early 1990s.¹² The turning point came in 1992, when the Commission was confronted with a complaint in a matter that was also subject to arbitration. The defendant requested the Commission to leave the matter to the tribunal, which had experience of competition law. After deliberation, the Commission decided not to open an investigation 'pending the outcome of the arbitration proceedings', on the ground that:

the Commission has established a policy of reinforcing the role which national courts play in the enforcement of the EEC Treaty's competition rules. It would seem that cases of arbitral proceedings dealt with by standing institutions . . . where arbitrators base their findings on the law can be treated in an analogous manner to national judges . . . Arbitration is anchored in numerous legal national orders and the award delivered can be enforced under national law. . . . According to the New York Convention of 1958, recognition and enforcement of these awards can only be refused by national authorities in the specific circumstances as laid down in Article V . . . This demonstrates the value that legal systems in numerous states attribute to arbitration awards. . . . In the present case [with an arbitration clause requiring an award within 6 months], a decentralized application will provide a particularly quick and efficient way of bringing to an end any possible infringement and providing legal certainty.¹³

for the possibility of withdrawal of the block exemption if arbitral awards should be issued enforcing agreements inconsistent with EC competition law.

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See J. Temple Lang, International Arbitration Panel Discussion, in B. Hawk, *International Antitrust Law*

and Policy: *Fordham Corporate Law 1994* (Fordham Corporate Law Institute) 418 at 421.

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Letter [unpublished] of Mr J. Dubois of the EC Commission to counsel for the defendant in Case No. IV/34.085, dated 3 March 1992, relating to ICC case 7181,

(1996) XXI Y.B. Comm. Arb. 99, and H. Verbist, *supra* note 5 at 43. The antitrust arguments were rejected and, having reviewed the award, the Commission acquiesced in this conclusion.

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ICC case 7539, [1996] J.D.I. 1030, and ICC case 7181, (1996) XXI Y.B. Comm. Arb. 99. In both cases, the issues were raised ex officio, only to be rejected. In the second case, the claimant had in fact raised two arguments based on both Articles 81 and 82. The first of these arguments was that, if Article X of the relevant agreement was interpreted in the way the respondent contended for, that would violate Articles 81 and 82 EC. The tribunal went further and held: 'In view of the public policy character of Art. 85 [now 81], the Arbitral Tribunal does have to examine ex officio whether Art. X of the Agreement is not caught by the prohibition of the restrictive agreements.'

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Hof Amsterdam, 12 October 2000, *Sesam v. Betoncentrale*, (2002) *Nederlandse Jurisprudentie* (N.J.), case no. 111. The Court of Appeals of Amsterdam annulled an arbitral award of 1995, on the ground that the permanent post-sale non-compete clause violated Article 81 EC. Neither the parties nor the arbitrators or the court dealing with the annulment procedure at first instance had raised competition law arguments.

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For competition issues that arose in one case that was eventually settled (*Repsol-Arco*), see M. Dolmans & M. Odriozola, 'Site Licence, Right Licence? Site Licences Under E.C. Competition Law', [1998] 19:8 *European Competition Law Review* (E.C.L.Rev.) 493.

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See e.g. 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: Hart, 2003). This was apparently the reason why Article 9(1) of the old patent licence block exemption (Regulation No. 2349/84) and Article 7(1) of the old know-how block exemption (Regulation No. 556/89) provided

More recently, the Commission has begun to use arbitration proceedings as a tool to monitor and enforce undertakings in merger control proceedings and in certain exemption decisions (*e.g. UIP*).¹⁴ It is to be hoped that the Commission would extend this approach also to ‘commitment decisions’ that it will be able to issue under the new Regulation No. 1/2003 (which will render legally binding voluntary remedies offered by firms that wish to avoid an infringement decision).¹⁵

Nevertheless, the Commission does not mention arbitration in Regulation No. 1/2003.

Main principles of EC competition law

Before discussing its impact on arbitration, it is useful to discuss briefly the main provisions of EC competition law.

Article 82 EC

Article 82 EC and equivalent provisions of national antitrust law prohibit companies occupying a dominant position in a substantial part of the common market from abusing that position. In practice, market shares in the area of 70–80% are considered, absent exceptional circumstances, to be *per se* evidence of dominance,¹⁶ shares above 50% can create a presumption of dominance,¹⁷ and market shares between 40% and 50% may be indicative of dominance together with other factors.¹⁸ Dominance is not an easy concept for arbitral tribunals to apply, since it requires a definition of the relevant product and geographical market from an economic and legal perspective,¹⁹ and a careful assessment of the parties’ power on that market. This is a fact-intensive exercise, and may require expert testimony.

The concept of an ‘abuse’ raises similar difficulties, since it requires a detailed review of the facts and the (not always consistent) case law of the Commission, the European courts, and national courts. Article 82 EC mentions a few examples such as (a) imposing unfair trading conditions (including excessive or exclusionary pricing), (b) limiting production, markets or technical development to the prejudice of the consumer, (c) discrimination, and (d) tying. There are few types of behaviour that qualify *per se* as abusive, and most cases depend on a legal, economic and factual analysis, in light of Community competition policy.

Article 81 EC

Article 81(1) EC and equivalent provisions under national antitrust law prohibit agreements between undertakings (as well as concerted practices and decisions of trade associations) that appreciably restrict competition in the European Union, and affect trade between Member States.

It is not always easy to recognize what is a ‘restriction of competition’. Article 81(1) contains a non-exhaustive list of examples including agreements to restrict development, production or distribution of products, agreements to discriminate,

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See M. Blessing, *Arbitrating Antitrust and Merger Control Issues*, (Basel: Helbing & Lichtenhahn, 2003).

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For details on this type of decision, see J. Temple Lang, ‘Commitment Decisions under Regulation 1/2003: Legal Aspects of a New Kind of Competition Decision’, (2003) 24 *E.C.L.Rev.* 347.

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Case 85/76 *Hoffman-La Roche v. Commission*, [1979] *European Court Reports* (E.C.R.) 461.

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Case C-62/86 *Akzo v. Commission*, [1991] I *E.C.R.* 3359.

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Case T-219/99 *Virgin/British Airways*, O.J. 2000 L 30/1, [2000] 4 *Common Market Law Reports* (C.M.L.R.) 999.

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See Commission Notice on the definition of relevant markets, [1997] O.J. C 372/5.

and tying agreements. In the seminal case of *STM/MBU*, the European Court of Justice (ECJ) held that:

It is necessary first to consider the precise purpose of the agreement in the economic context Where an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered, and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition must be understood within the actual context *in which it would occur in the absence of the agreement in dispute.*²⁰

Accordingly, the Commission identifies two sorts of violations: The first are *per se* violations, such as agreements between competitors ('horizontal agreements') to fix prices, reduce output, or prevent imports to divide customers or markets, and agreements between suppliers and distributors or licensees ('vertical agreements') to fix minimum prices or to prevent parallel trade within the EU. These restrictions are deemed unjustifiable and are relatively easy for arbitral tribunals to recognize and to apply.

The second category consists of the 'rule of reason' restrictions. Examples of these are licence and distribution restrictions, tying clauses, cooperation between competitors in R&D or production or marketing, agreements to discriminate, and even certain joint ventures. These are restrictions whose effect on competition (positive or negative) will depend on the circumstances. Like any 'open norm', the application of the 'rule of reason' under Article 81 depends on the facts and increasingly requires an economic evaluation and review of case law and other authorities to ensure that the concept of 'restriction of competition' is properly applied. In any arbitration where competition law is expected to play a significant role, parties are therefore well advised to select one or more arbitrators who are well versed in competition law and economics and, if need be, to resort to expert testimony.

Article 81(2) provides that provisions in breach of Article 81(1) are null and void and unenforceable, unless exempted under Article 81(3). Moreover, damages may be claimed. Whether the nullity of a particular clause leads to nullity of the entire agreement is a matter to be determined under the applicable contract law or the *lex mercatoria*, as the case may be. Generally speaking, the entire agreement will be null if the restrictive clause was of the essence for the parties' arrangement.

Application of Article 81(3)

Agreements to which Article 81(1) applies, and which restrict competition, may nonetheless benefit from an exemption under Article 81(3), provided that the restrictions can be shown to meet the following cumulative conditions. They must:

- (1) contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- (2) allow consumers a fair share of the resulting benefits;
- (3) contain only such restrictions as are necessary to achieve such benefits; and
- (4) not eliminate competition in respect of a substantial part of the goods concerned.

To improve legal certainty and facilitate application of Article 81(3), the Commission has adopted a number of block exemptions covering certain categories of agreements that, although restrictive of competition, are deemed generally to satisfy the requirements for exemption under Article 81(3). These block exemption regulations are designed to be relatively easily applicable by courts and arbitral tribunals, but their application in certain cases requires careful and expert assessment.

Application of EC competition law by arbitral tribunals

Procedural difficulties for arbitrators due to Commission monopoly

Where block exemption regulations do not apply, individual exemptions may be granted under Article 81(3). Under the current system (applicable until 1 May 2004), however, only the EC Commission is empowered to grant an exemption under Article 81(3). In order to obtain an exemption, parties must notify the agreement to the Commission on a so-called Form A/B, which is a cumbersome and time-consuming process. Notification ensures protection from fines (until 1 May 2004) and, in the event that an individual exemption is granted, guarantees the enforceability of the agreement and constitutes a bar to private actions for damages. Although there is no deadline for notification, until 1 May 2004, an exemption may only be granted (and immunity only applies) from the date of notification. Exemption decisions have no retroactive effect.

Unless a block exemption regulation applies or an individual exemption has been granted, courts and arbitral tribunals that have to assess restrictive provisions in theory face difficulties (taking into account their obligation to make every effort to ensure that their award is enforceable at law).²¹ In practice, however, our review of arbitral awards dealing with European competition law suggests that there have been few significant problems:

- ♦ In most cases, the tribunal was able to dismiss the antitrust claim on the basis of lack of evidence, a rule of reason analysis of Article 81(1) inspired by clear precedent or application of a block exemption regulation.²²
- ♦ One would have expected a few cases where the tribunal felt compelled to annul a clause that was clearly in breach of Article 81(1) even though it might have qualified for exemption under Article 81(3), on the ground that the tribunal was not competent to apply Article 81(3). This unsatisfactory outcome would arguably have been dictated by the EC Commission's monopoly on granting individual exemptions. The award would probably have survived an application for annulment or a request to deny exequatur since the outcome would not result in a restriction of competition and therefore not be in breach of public policy. A cursory review of published ICC cases, however, revealed no cases in this category.²³
- ♦ No cases were found where arbitrators were tempted to apply Article 81(3) anyway. Ignoring the Commission monopoly and applying Article 81(3) would

²¹ See e.g. ICC Rules of Arbitration, Article 35.

²² See the cases mentioned above and the four ICC cases summarized by E. Jolivet, *supra* note 5. See also ICC cases 7357, hereafter, pp. 53-54, and 9240, hereafter, pp. 59-61.

²³ There were only two cases (ICC cases 8626, hereafter, pp. 55-59, and 10660, hereafter, pp. 62-66) where arbitrators applied Article 81(1) to annul contractual provisions (a five-year post-term non-compete clause in a licence agreement; a four-year post-termination non-compete clause and a ban on passive sales of third-party equipment) on the ground that the clauses violated Article 81 and no exemption had been applied for. These cases would probably not have qualified for exemption in any case. E. Jolivet mentions one other case (ICC case 10246) where the arbitral tribunal stated that because it was not competent to apply Article 81(3), it had to uphold the validity of an (implicit) non-compete clause in an exclusive patent licence that apparently did not qualify under the technology transfer block exemption. This approach is questionable under EC competition law, but with the modernization of EC competition law these types of problems will disappear. See E. Jolivet, *supra* note 5 at 8.

have been a relatively safe option, even in the absence of clear precedent. No problems would have arisen if Article 81(3) had been applied correctly or even if an exemption had been denied incorrectly. Moreover, the rule in Regulation 17/62 giving the Commission a monopoly over granting exemptions is not itself public policy. Public policy concerns would have arisen only if the arbitrators (i) had their seat in the European Economic Area (EEA), (ii) exempted or cleared a clause that ought to have been prohibited under Articles 81 or 82 and (iii) in so doing ‘manifestly’ breached European competition law.²⁴

- ♦ Arbitrators could have avoided the issue, if they had any leeway, by interpreting the clause so as to be consistent with Articles 81(1) EC and 82 EC, without actually addressing the criteria for application of these articles, on the basis of the principle that if a contract is ambiguous it must be interpreted in a manner that is meaningful and in compliance with law. However, no cases were found where this had been done explicitly (although there are cases where arbitrators’ remarks afterwards suggest that it had been done implicitly).
- ♦ Finally, procedural solutions were available: in particular, suspension or bifurcation of the arbitration, pending notification. In one case, the tribunal considered whether it should ask the Commission for an ‘expert report’, but eventually dealt with the arguments itself on the ground that it was relatively easy to decide that the Exclusive Distribution Block Exemption Regulation applied.²⁵ Moreover, the tribunal expressed concerns about due process, since there was no guarantee that the parties would be properly heard before the Commission issued its ‘expert report’.

In ICC case 7181, the plaintiff filed a separate competition complaint, while the defendant resisted a referral to the European Commission. The Commission eventually decided to await the award of the arbitral tribunal, as a sign of trust in arbitration proceedings.²⁶

In the *Repsol/Arco* litigation,²⁷ where one party had notified the disputed agreement for exemption, the parties agreed to have the arbitrators rule in phase 1 on the contract matters, while the Commission was reviewing the plaintiff’s notification and the defendant’s complaint. Phase 2 would begin after receipt of the Commission decision (which never came, since the case was settled after the Commission issued a Statement of Objections and just before the interim award in phase 1). This was a practical way to accommodate the Commission’s monopoly.

Arbitrators cannot ask the European Court for preliminary rulings

National courts have the possibility of referring preliminary questions of law to the ECJ under Article 234 EC (ex 177 of the EC Treaty). However, the ECJ in *Nordsee* withheld this possibility from non-permanent arbitral tribunals.²⁸ (Interestingly, however, it is expected that the EFTA Court would be prepared to answer preliminary references from arbitral tribunals.) As a result, in arbitration proceedings, references under Article 234 EC are possible only in annulment and exequatur proceedings.²⁹

It has been suggested that tribunals should refer difficult questions to a *juge d’appui* (a procedure that in certain cases allows arbitrators to turn to the courts for assistance)

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See case C-126/97, *Eco Swiss China Time v. Benetton International NV*, *infra* note 32.

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ICC case 7146, (2001) XXVI Y.B. Comm. Arb. 119.

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ICC case 7181, (1996) XXI Y.B. Comm. Arb. 99.

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For further discussion of the *Repsol/Arco* litigation, see M. Dolmans & M. Odriozola, *supra* note 10.

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Case 102/81, *Nordsee Deutsche Hochseefischerei*, [1982] E.C.R. 1095.

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Case C-393, *Gemeente Almelo v. Energiebedrijf IJsselmij*, [1994] E.C.R. I-1477 (referral possible in annulment proceedings even if arbitrators decided *ex aequo et bono*).

for referral to the ECJ.³⁰ In some countries this would require an adjustment of national rules of civil procedure.³¹

EC competition law as public policy

The Benetton case – Public policy concerns arise if the arbitrators enforce a clause that should have been prohibited under Article 81 or 82, and in so doing ‘manifestly’ breach European competition law. According to the ECJ in *Eco Swiss v. Benetton*:³²

a national court to which 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 [now Article 81 EC], where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

This rule applies to EC competition law, but not necessarily to the competition laws of all European countries. The Dutch Hoge Raad, which raised the questions in *Benetton*, made it very clear that Dutch competition law is not regarded as public policy, and that awards ignoring it cannot be annulled or refused exequatur.³³ The ECJ reached a different conclusion for Article 81 EC, on the ground that it:

constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly . . . that any agreements . . . prohibited pursuant to that article are automatically void.³⁴

The Court went on to explain that this is sufficient for purposes of Articles V(1)(c) and (e) and II(b) of the New York Convention, and added that:

it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given uniform interpretation . . . It follows that, in the circumstances of the present case, unlike Van Schijndel and Van Veen, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 85(1) of the Treaty should be open to examination by national courts when asked to determine the validity of an arbitral award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.³⁵

outcome was unfavourable for Benetton: since the question of damages did not affect the structure of competition law, this argument was not of a nature such as to raise issues of public policy (Dutch Supreme Court, *Benetton III*, HR 25 February 2000, (2000) N.J. 508 (Annot. H.J.S.).

33 *Benetton*, *supra* note 32, para. 24. See also decision of the Hoge Raad of 21 March 1997 in *Eco Swiss China Toma v. Benetton International*, Rek. Nr. 8850 (R96/57 HR), para. 4.2.

34 *Benetton*, *supra* note 32, para. 36.

35 *ibid.*, para. 40. *Benetton* appears to leave open the question whether Article 82 EC (the ban on abuse of dominance) is also a matter of public policy. It is true that arbitral tribunals cannot make referrals for preliminary rulings in such cases and that there is therefore a risk of inconsistent application of competition law, which is one of the grounds mentioned by the ECJ. But the main ground on which the ECJ

relies arguably does not apply to Article 82 cases: whereas Article 81 is crucial for the integration of the common market (as are the rules of free movement), and explicitly declares offending agreements null and void, that is not the case for Article 82. That provision is arguably more concerned with the structure of competition and the avoidance of foreclosure and exploitation than with market integration.

30 See e.g. case 174/84, *Bulk Oil (Zug) v. Sun Oil International*, [1986] E.C.R. 559.

31 L. Idot, *supra* note 11.

32 Case C-126/97, *Eco Swiss China Time v. Benetton International NV*, [1999] E.C.R. I-3055, case comments by L. Idot, [1999] Rev. arb. 631, and A. Komninos, [2000] C.M.L.Rev. 459. See also P. Lugard, ‘EC Competition Law and Arbitration: Opposing Principles?’, [1998] E.C.L.Rev. 295. *Benetton* concerned a trademark licence agreement for watches to be made by Eco Swiss and distributed by Eco Swiss and Bulova. A market sharing arrangement granted exclusive rights in Italy to Bulova and the rest of Europe to Eco Swiss. When Benetton terminated the agreement, Eco Swiss sued for unlawful termination, and prevailed. Benetton attempted to have the award annulled on the ground that the market sharing arrangement might have influenced the amount awarded. The

Must arbitrators raise competition law *proprio motu*?

The ECJ never answered the question, raised by the Hoge Raad whether arbitrators must raise competition law on their own initiative even if this means going outside the scope of the dispute before them. It held that there was no need to answer this answer in light of the reasoning set out above. This is generally considered to mean that arbitrators (at least if they have their seat in the EEA or if the award is to be executed there) have to raise European competition law issues, taking into account their obligation to make every effort to ensure that their award is enforceable at law.³⁶

It is interesting that the ECJ would appear to demand more in this respect from arbitrators than from national courts. It held in *Van Schijndel* that national courts must apply European competition law on their own initiative, unless in so doing they violate national rules of civil procedure. Courts are not, therefore, required to go outside the scope of the dispute by relying on facts and circumstances other than those invoked by the plaintiff.³⁷ Why arbitrators are asked to do more than national courts is not entirely clear. The ECJ was obviously concerned about the consistency of application of EC competition law, and worried about the rule that arbitrators cannot make references to the ECJ for preliminary rulings. It may be that the ECJ took into account the fact that few arbitral awards are subject to annulment proceedings and wanted to ensure that competition issues are brought up as soon as possible.

It is not clear what arbitrators should do where the parties agree specifically, either in the arbitration clause or subsequently, that antitrust issues shall not be arbitrable. Robert von Mehren has suggested that 'the arbitration should go forward and the arbitrators should discuss with the parties the difficulties that may be created if these issues are not dealt with in the arbitration. If the parties do not agree to include these matters in the arbitration, the arbitrators should advise them that any final award issued by the tribunal will include a provision to the effect that the award will not be final until the parties advise the tribunal that the impact, if any, of anticompetitive laws upon the award has been determined by judicial proceedings or in some other binding manner and reserving the jurisdiction of the tribunal to alter its award to take into account the impact of such laws as so determined.'³⁸ This is, in effect, how the parties agreed to proceed in the *Repsol/Arco* litigation, where the arbitration, dealing with all issues other than antitrust issues, took place in parallel with antitrust proceedings before the Commission and a national antitrust authority (see above).

Special caution for consent awards – arbitrators' liability

The obligation to take account of competition law arises also if arbitrators are asked to enter a consent award. Awards on agreed terms can raise entirely new issues. In some cases in the past, they were notified and received a comfort letter.³⁹ This will no longer be possible under the new regime unless the matter raises novel issues of law.⁴⁰ In such a situation, the arbitrators should alert the parties, and either ask for the necessary information to assess the consent award under Article 81, or, if appropriate, make suggestions for modification. The latter may be sensitive, since it is not the arbitrator's role to negotiate a settlement for the parties. On the other hand, if the parties do not agree, and if there are good reasons to believe that the award does violate competition law, the arbitrators should consider whether they can sign it at all. This is in particular because, where a settlement has been reached, it is very unlikely

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See e.g. ICC Rules of Arbitration, Article 35. See also case comment by H.J.S. on *Benetton II*, HR 25 February 2000, NJ 2000, 340.

The duty to apply European competition law will be even clearer after 1 May 2004, when Article 1 of Regulation No. 1/2003 enters into force. Said Article 1 provides that: 'Agreements . . . caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty *shall be prohibited*, no prior decision to that effect being required. Agreements . . . caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty *shall not* be prohibited, no prior decision to that effect being required.'

The abuse of a dominant position referred to in Article 82 of the Treaty *shall* be prohibited, no prior decision to that effect being required.'

This is unambiguous, and prevails over any rule of national procedural or substantive law that is inconsistent with it. In other words, it leaves no freedom for arbitral tribunals in the EEA to ignore European competition law or Article 81(3), regardless of whether or not they have been raised by the parties.

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Joined cases C-430 and 431/93, *Van Schijndel*, [1995] E.C.R. I-4705.

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R.B. von Mehren, 'The *Eco-Swiss* Case and International Arbitration' (2003) 19 *Arbitration International* 465.

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See e.g. (1998) Comp. Rep. 174 (*Repsol/Arco*).

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In that case, the Commission in its discretion may issue an opinion (akin to a US 'business review letter'). The Commission prepared a sample business letter to illustrate the type of reasoning and analysis that the Commission would make in such an opinion. Interestingly, it used as its example the complaint relating to the *Repsol/Arco* arbitration.

that the award will be subject to review by the courts in annulment or exequatur proceedings.

Arbitral tribunals have some discretion in this matter: Article 26 of the ICC Rules of Arbitration, for instance, provides that ‘the settlement shall be recorded in the form of an Award made by consent of the parties’ only ‘if the Arbitral Tribunal agrees to do so’.⁴¹ Some arbitration rules allow arbitrators in international arbitrations to issue ‘minority opinions.’⁴² There is also a special role for the ICC International Court of Arbitration. Under Article 27 of the ICC Rules of Arbitration, the Court is required to review the draft award and ‘may also draw [the arbitral tribunal’s] attention to points of substance’. Article 6 of Appendix II to the ICC Rules of Arbitration provides that, to the extent practicable, the Court will take into account the requirements of mandatory law at the place of arbitration. It is recommended that it also take into account the requirements of European competition law if the award concerns an agreement (or agreements) to be implemented in the EEA.

Must arbitrators and courts outside Europe apply EC competition law?

A difficult question is whether arbitrators sitting outside the EEA have an obligation to raise and apply European competition law, and whether courts reviewing annulment requests must do so, if the agreement is entirely lawful under applicable contract law and in the country where the parties are located. This question in turn raises questions of applicable law and comity.

Applicable law – EC competition law is independent of the law governing the contract. Parties to an agreement have no right to contract out of European competition by selecting the law of a non-EEA country. European competition law applies to any agreement or conduct that ‘appreciably affects trade between Member States’. It is irrelevant whether the effect is positive or negative. In *Société Technique Minière*⁴³ the Court stated that:

it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.⁴⁴

The restriction of competition and trade must be ‘appreciable’,⁴⁵ and must be convincingly demonstrated when the conduct at issue is entirely lawful in the country where it occurred. Moreover, the assessment of the ‘appreciable effect’ requires consideration of ‘the position and importance of [the parties] on the market for the products concerned’.⁴⁶

The territorial scope of the EC competition rules was discussed in detail in the *Wood Pulp I* and *Gencor* cases, both of which concerned arrangements outside the EEA between foreign parties. *Wood Pulp I* related to an export cartel based in North America, while *Gencor* concerned a merger between two South African mining companies.

In *Wood Pulp I*, the Commission concluded that it had jurisdiction to apply Article 81 to price fixing arrangements between 41 wood pulp producers and two of their trade associations – all having their registered offices outside the EU – on the

⁴¹ See also the Rules of Arbitration of the Netherlands Arbitration Institute (NAI Arbitration Rules), Article 54(1).

⁴² See e.g. NAI Arbitration Rules, Article 48(4). These are not part of the award, but may be shared with the other arbitrators and the parties.

⁴³ Case 56/65, *Société Technique Minière v. Maschinenbau Ulm GmbH*, *supra* note 20.

⁴⁴ *ibid.* at 249.

⁴⁵ ECJ, joined cases 177 and 178/82, *Van de Haar and Kavaka*, [1984] E.C.R. 1797, para. 11. See also ECJ, case 5/69, *Völck v. Verwaerde*, [1969] E.C.R. 295. See also Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), O.J. 2001 C 368/13 (applying a 10% market share threshold for horizontal agreements and a 15% market share threshold for vertical agreements, provided that they do not contain ‘hardcore’ violations such as price fixing, output restrictions, or market sharing).

⁴⁶ *Société Technique Minière*, *supra* note 20, para. 2-105.

ground that the agreements had effects that were ‘not only substantial but intended’ and ‘the primary and direct result’ of the agreement.⁴⁷ The ECJ did not deem it necessary to address this so-called ‘effects doctrine’, and instead held that:

an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. *The decisive factor is therefore the place where it is implemented.*⁴⁸

In *Gencor*, the Court of First Instance (CFI) ignored this implementation doctrine and agreed with the Commission’s ‘qualified effects’ doctrine.⁴⁹ According to this approach, Community competition law applies to conduct wholly outside of the EEA that produces ‘direct, substantial and foreseeable’ effects within the EEA. *Gencor* concerned merger control, but the holding of the CFI applies more broadly and there is no reason to limit it to merger control cases. The CFI stated:

Application of the [Merger] Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.⁵⁰

Comity – It is submitted that, given the territorial scope of application of EC competition rules, parties should not be allowed to use arbitration proceedings outside the EEA to avoid the consequences of doing business in Europe.

The question is relatively easy for arbitral tribunals whose awards are to be implemented in the EEA. They have to exercise best efforts to ensure that their awards are enforceable at law, which they will not be if they breach EC competition law. The same applies to arbitration involving one or more EEA businesses. As explained below, an EEA party attempting to enforce such an award is exposed to infringement proceedings and fines. The question is more difficult for non-EEA awards between non-EEA parties concerning agreements with effects in the EEA. It is submitted that, pursuant to general principles of international comity, the *Van Schijndel* rule is appropriate in such cases: unless applicable arbitration laws prohibit arbitrators from raising European competition law on their own initiative, they should do so if they are convinced that it applies (see discussion under Applicable law, above). The same arguably applies to all other applicable foreign laws of direct application that are considered to be rules of public policy in the territory where the agreement has immediate and substantial effects.

In this respect, the Swiss Federal Tribunal led the way in 1992 by setting aside an incorrect award in a case concerning a Belgian joint venture between a Belgian and an Italian firm.⁵¹ However, the same court subsequently held that ‘it appears doubtful that national or European competition law are part of the fundamental legal or moral principles recognized by all civilized nations to such an extent that their breach should be regarded as contrary to public policy.’⁵² The result appears to be that arbitrators sitting in Switzerland must apply European competition law, but that the award will not be annulled if they fail to do so, or if they get it wrong.⁵³

⁴⁷ Commission decision, para. 79, cited in joined cases 89/85 etc., *A. Abström Osakeyhtiö and others v. Commission*, [1988] E.C.R. 5193 (*Woodpulp I*) at para. 3. The Commission had already espoused the ‘effects doctrine’ in earlier cases. See e.g. *XIth Report on Competition Policy* (1981), points 34-42, and the Commission’s decision in *Aluminium Products*, O.J. 1985 L92/1. See also joined opinion of Advocate General Mayras in case 48/69 and others relating to dyestuffs, [1972] E.C.R. 619.

⁴⁸ *Woodpulp I*, *supra* note 47, para. 16. Emphasis added.

⁴⁹ Case T-102/96, *Gencor v. Commission*, [1999] E.C.R. II-753.

⁵⁰ *ibid.*, para. 90.

⁵¹ Federal Tribunal, 28 April 1992, [1993] Rev. arb. 124 (Annot. L. Idot).

⁵² Federal Tribunal., 1 February 2002, 4P.226/2001, *X Ltd v. final award of July 15, 2001 in X Ltd v. Y BV*, (2002) 20 ASA Bulletin 337. This case ostensibly involved a Dutch BV, and the competition law arguments were wholly unsubstantiated.

⁵³ In ICC case 10246, which involved a dispute between a French claimant and a Swiss respondent, an arbitral tribunal with its seat in Geneva regarded EC competition law as applicable even though the contract was governed by Swiss law. It reasoned that one of the parties was established in the EC and the agreement had effects there, and that the EC therefore had a legitimate interest to have its law apply to the competition aspects of the contract. However, this did not lead the arbitral tribunal to find that a non-compete clause in the contract was null (on the basis of reasoning that, in the light of the available information, might be questioned). See E. Jolivet, *supra* note 5. See also ICC case 8626, *supra* note 23, where an arbitral tribunal with its seat in Geneva regarded itself as ‘bound to consider the applicability of Article 85’.

Commission oversight of arbitral awards ignoring competition law

Although the Commission now accepts that arbitration is a viable procedure for the proper enforcement of competition law, it has reserved the right to exercise oversight. Whether the Commission will interfere will depend on the circumstances.

- (1) Arbitral awards that under Article 81(1) EC annul restrictive clauses that should have fallen under Article 81(3) cannot on that basis be set aside, nor can exequatur be denied. The Commission is unlikely to have an interest in such awards, because they would normally not result in a restriction of competition. Even if the Commission did have an interest, there is no procedure for it to take action against such awards.
- (2) Arbitral awards rendered in the EEA that enforce clauses that should have been annulled under Articles 81 or 82 EC must be set aside under *Benetton*.
- (3) Awards rendered outside the EEA that enforce clauses that should have been annulled under Articles 81 or 82 EC must be denied enforcement in the EEA. Courts asked for exequatur must raise the issue *proprio motu* if the defendant does not raise it, in accordance with the ECJ's holding in *Benetton*.
- (4) Arbitral awards that find an abuse of dominance where there is no abuse or no dominance raise a difficult issue. A firm with a dominant position is required to refrain from a variety of conduct that may be perfectly legal for non-dominant firms. This has consequences in particular for pricing policies, since Article 82 EC prohibits, for instance, price discrimination, discounting without objective justification, pricing below cost, price tying, price squeezing and excessive pricing. It could be argued that an award finding dominance and abuse when there is none therefore violates public policy because it restricts the normal commercial freedom of the firm in question, thus facilitating price increases in the market. In exceptional cases, the Commission may have an interest in intervening in order to preserve the competitive freedom of market players.

If the parties decide to agree with the award in case (2), (3) or (4) or, worse, if the award is obtained to cloak collusion with the appearance of legitimacy, the Commission may have a real interest in taking action. It has no right to apply for annulment of the award, but as of 1 May 2004 it may file amicus curiae briefs in annulment or exequatur proceedings. It also has the right to send requests for information to the parties and, if need be, open an investigation and send a Statement of Objections.⁵⁴ The statute of limitations is five years from the award. The Commission has in past cases reserved the right to open an investigation, which it would be entitled to do on the ground that (i) the arbitral award is based on an arbitration clause (an 'agreement' for purposes of Article 81), and (ii) acquiescence in the award may be found to constitute a 'concerted practice' for purposes of Article 81. The sanctions may be an order to cease enforcement and the imposition of fines. In addition, private parties who suffer damage as a result of the award may sue for compensation under the *Crehan* rule (see below).

Modernization of EC competition law and its implications for arbitration

The Commission has become concerned that it has insufficient resources to enforce competition law effectively and efficiently. As of 1 May 2004, a new procedural regulation for the enforcement of Articles 81 and 82 will come into effect. The objectives are to:

- ♦ **harmonize competition laws** in Europe, by requiring national courts and national competition authorities to apply EC competition rules over national law (although stricter national laws may still apply to unilateral conduct). Although arbitral tribunals are not mentioned, the same applies to arbitral tribunals that have their seat in the EEA;
- ♦ **facilitate private litigation** by empowering national authorities, courts and arbitral tribunals to apply Article 81(3) directly, ending the Commission's monopoly on application of Article 81(3);
- ♦ **prohibit prior notifications for exemption**, in order to free up Commission resources, thus forcing parties to assess internally the competition implications of their practices;
- ♦ **increase the EC Commission's powers** of investigation and enforcement, allowing it to impose structural remedies, adopt interim measures and accept commitment decisions; and
- ♦ **establish a network** for coordination and information exchange between national authorities and courts and the Commission.

The adoption of Regulation No. 1/2003 is the capstone of a wholesale modernization of EC competition law. Other changes include a proposal for a new procedural regulation,⁵⁵ a revised merger regulation (adopted by the Council of Ministers on 20 January 2004 and due to enter into force on 1 May 2004),⁵⁶ the adoption of a new vertical restraints block exemption regulation,⁵⁷ new guidelines on vertical agreements that are not covered by the block exemption,⁵⁸ new block exemption regulations on research and development (R&D) agreements⁵⁹ and specialization agreements,⁶⁰ new guidelines on horizontal cooperation agreements not covered by these block exemptions,⁶¹ a new notice on agreements of minor importance (*'de minimis notice'*),⁶² a notice on market definition and a new technology transfer block exemption regulation.⁶³ The Commission has also published draft notices and guidelines on: the application of Article 81(3) EC;⁶⁴ the concept of 'trade between member States' (a condition for application of European competition law);⁶⁵

These are scheduled to enter into force by 1 May 2004.

64 Draft Guidelines on the application of Article 81(3) of the Treaty, O.J. 2003 C 243/62, <http://europa.eu.int/comm/competition/antitrust/>

[legislation/procedural_rules/art_81_3_en .pdf](http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/art_81_3_en.pdf)

65 Draft Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty,

O.J. 2003 C 243/45, http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/effect_on_trade_en.pdf

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Draft Commission Regulation relating to proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2003 C 243/3, http://www.europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/regulation_en.pdf

56

Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, O.J. 2004 L 24/1.

57

Commission Regulation No. 2790/1999 for vertical agreements, O.J. 1999 L 336/21.

58

Commission Notice – Guidelines on Vertical Restraints, O.J. 2000 C291/1.

59

Commission Regulation No. 2790/2000 for research and development agreements, O.J. 2000 L 304/7.

60

Commission Regulation No. 2658/2000 for specialization agreements, O.J. 2000 L 304/3.

61

Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements, O.J. 2001 C 3/2.

62

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), O.J. 2001 C 368/13.

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Published for consultation on 1 October 2003, O.J. C 235/10.

cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 (still not referring to arbitration);⁶⁶ cooperation within the network of competition authorities;⁶⁷ informal guidance letters relating to novel questions concerning Articles 81 and 82 that arise in individual cases;⁶⁸ and complaints.⁶⁹ These new regulations, guidelines and notices are intended to help courts and tribunals to apply EC competition law in a consistent manner.

Application of Article 81(3) by arbitral tribunals

At the core of the reform is the plan to free up the Commission's resources. To this end, the regulation eliminates the possibility of notifying restrictive agreements to the Commission for exemption under Article 81(3) EC.⁷⁰ This has several consequences for arbitration practice.

Tribunals can apply Article 81(3) – Article 1 of Regulation 1/2003 provides that:

Agreements . . . caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty *shall be prohibited*, no prior decision to that effect being required.

Agreements . . . caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty *shall not* be prohibited.

The abuse of a dominant position referred to in Article 82 of the Treaty *shall* be prohibited, no prior decision to that effect being required.⁷¹

By virtue of this provision, Article 81(3) EC will become directly applicable, thus empowering arbitral tribunals to examine restrictive agreements under that provision. A new Notice on the Application of Article 81(3) EC is being prepared to provide guidance.⁷²

As a result of this change, selection of expert counsel and arbitrators will become crucial, since EC competition case law is not always easy, and there are a number of economist schools with different views. These range from the Chicago School, which takes a strictly economic approach and leaves maximum play for contractual freedom and market forces, via the post-Chicago School, which takes a less theoretical and more realistic approach to markets, to the Freiburg 'ordo-liberal' school, which applies EU competition law with a view to maintaining political freedom and the social responsibility of large undertakings, and which takes a dimmer view of contractual restrictions of competition. While Articles 81 and 82 EC have not changed for many decades, their interpretation has changed quite radically over the years and especially recently. Arbitral tribunals will be well advised to ask whether the parties wish to present or appoint economic experts (or have the tribunal do so) so as avoid a challenge at a later stage.

Burden of proof – Article 2 of Regulation No. 1/2003 allocates the burden of proof as follows:

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

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Draft Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, O.J. 2003 C 243/20, http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/cooperation_with_courts_en.pdf

67

Draft Commission Notice on the cooperation within the Network of Competition Authorities, O.J. 2003 C 243/11, http://www.europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/cooperation_network_en.pdf

68

Draft Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), O.J. 2003 C 243/42, http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/guidance_letters_en.pdf

69

Draft Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, O.J. 2003 C 243/30, http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/notice_on_complaints_en.pdf

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There is a very limited exception under Article 10 of the new Regulation to obtain 'findings of inapplicability' as well as an informal plan to issue 'guidance letters' on certain issues, but there is no right to request such a decision or letter, and the Commission will issue them only where there is a public interest at stake. The Commission has published a draft notice giving guidance as to when it will issue such letters. See *supra* note 67.

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Emphasis added.

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A draft of this notice has been published. See *supra* note 64.

This provision applies ‘in any national or Community proceedings’. There is no specific reference to arbitral proceedings, and arbitration is not a ‘national’ proceeding but rather a consensual one, based on the arbitration rules created or selected by the parties. Accordingly, this provision does not appear to bind the hands of arbitrators who wish to allocate the burden of proof otherwise, or appoint an economic expert.⁷³

Parallel application of national and EC competition law

One of the objectives of Regulation No. 1/2003 was to harmonize competition rules in Europe by requiring courts and national competition authorities to apply EC competition law in all cross-border cases. This goal was achieved only partially. While application of EC rules is still mandatory in all cross-border cases, Article 3 of Regulation No. 1/2003 does not exclude parallel application of national and EC competition rules. Courts and national authorities may apply national competition law in parallel, provided that (i) they must not authorize agreements or conduct prohibited by EC law and (ii) national law must not prohibit agreements permitted by Article 81(3). With regard to unilateral conduct, tribunals must apply Article 82 EC to abuses of dominance, but may also apply more restrictive national law to abuses of dominance or unfair trade practices. This may be relevant in particular in countries such as Germany, the United Kingdom, France and Spain.

Article 3 applies only to ‘competition authorities of the Member States or national courts’. There is no reference to arbitral tribunals. Arbitrators are already required under the *Benetton* ruling to apply EC competition law to agreements that have an appreciable impact on trade between Member States. They can therefore ignore Article 3 of Regulation No. 1/2003.

Rules to facilitate litigation

Regulation No. 1/2003 provides for close cooperation between the Commission and national competition authorities. For this purpose, it has established a ‘network of competition authorities’ aimed at an efficient allocation of cases and preventing or minimizing duplication of proceedings. Articles 11 and 12 provide for an extensive exchange of confidential and other information between competition authorities. None of this applies to arbitral tribunals. The most interesting rules are set out in Articles 15 and 16, concerning cooperation with national courts.

Article 15(1) – information from the Commission – National courts will be able to ask the Commission to transmit to them information in its possession or to give its opinion on questions concerning the application of the Community competition rules.

There is no provision of a similar right for arbitral tribunals. That is not to say that such requests will always go unheeded. Since the mid-1990s, the Commission has occasionally answered requests for information from arbitral tribunals. The Commission may have a wealth of information that may be useful for the assessment of agreements under competition law – especially if this is done *proprio motu* or to supplement party-provided data. Information may be specific (relating to the parties or their agreement, resulting from Article 18 requests for information) or industry-wide (obtained from sector inquiries under Article 17 of Regulation No. 1/2003).

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See e.g. ICC case 10704, hereafter, pp. 66-77, where the arbitral tribunal ruled that the burden of proof with respect to a non-compete clause lay with the party asserting that it was enforceable.

Clearly, arbitrators and the Commission must be extremely careful with such requests. Business secrets and legal privilege must be respected,⁷⁴ as well as the right to be heard. The latter is a particularly sensitive issue if a tribunal asks the Commission for assistance on legal issues. The Commission will most likely not have heard the parties before expressing its view. The tribunal must therefore review any Commission opinion (or expert report under Article 20 of the ICC Rules of Arbitration) carefully and critically.

Article 15(2) – judgments database – Member States will be required to forward to the Commission copies of judgments on issues of European competition law. Again, there is no similar provision for arbitral tribunals or secretariats. This does not, however, mean that the Commission would not welcome submission of well-reasoned arbitral awards. ICC, LCIA, NAI and other arbitration associations should consider contributing to the proposed judgments database.

Article 51(3) – amicus curiae briefs – National competition authorities and the Commission will have the right to submit amicus briefs to national courts. There is no scope for doing this before an arbitral tribunal without the parties' consent – which is unlikely to be given. If the tribunal wishes to invite an amicus brief from the Commission, it might request an expert report, or (more likely) one of the parties will do so and submit the brief with one of its pleadings.

Article 16 – consistent application – National courts cannot take decisions running counter to decisions of the Commission on agreements, decisions or practices under EC competition law.⁷⁵ They must even avoid rendering decisions that would conflict with decisions 'contemplated by the Commission in proceedings it has initiated' and, if need be, stay their proceedings. Arbitrators, by contrast, have the right to ignore the opening of Commission proceedings in competition cases. They need not suspend their proceedings. Since they must make best efforts to ensure that their award is enforceable, however, it is strongly recommended that they avoid issuing awards that conflict with Commission decisions.

Greater scope for private damages actions

Since national courts will be able to apply Article 81(3) EC, companies should expect more litigation involving competition law questions. These may, for instance, arise in connection with disputes about the validity of restrictive clauses in agreements, or private damage claims. In *Courage Ltd v. Bernard Creban*,⁷⁶ the Court of Justice recognized a substantive right under Community law to bring a claim for damages against third parties for breaches of EC competition law. The case involved a claim for damages resulting from a breach of Article 81, although the same reasoning would almost certainly apply to Article 82. Damages have been awarded in only a limited number of cases, but the number of claims is expected to grow rapidly. It is also to be expected that a substantial proportion of such claims will be brought before arbitral tribunals.⁷⁷

Further measures may be necessary to facilitate private damages claims further, and to address potentially difficult issues such as standing, the 'passing through' defence (which currently tends to limit the possibility to recover damages in price-fixing cases), causality and quantification of damages.

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Even if the Commission reserves the right, for instance, to use legal advice from in-house counsel in *AM&S* (currently being reviewed in *AKZO v. Commission*), that does not justify arbitral tribunals using such materials.

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See draft Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, cited *supra* note 66.

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Case C-453/99 *Courage Ltd. v. Creban*, [2001] E.C.R. I-6297.

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Indeed, the Supreme Court's landmark decision on arbitration and antitrust in the United States, *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), arose in the context of a claim for treble damages. The Supreme Court held that such a claim was arbitrable. For a comparison of the *Mitsubishi* decision and the *Eco-Swiss* decision, see R.B. von Mehren, *supra* note 38.