

THE CHALLENGES
AND THE FUTURE
OF COMMERCIAL
AND INVESTMENT
ARBITRATION

Liber Amicorum
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COURT OF ARBITRATION
LEWIATAN

THE RELATIONSHIP BETWEEN THE EXTENSION OF ARBITRATION TO COMPETITION LAW AND THE PRIVATE ENFORCEMENT OF COMPETITION LAW

István Varga*

1. THE SIMULTANEITY OF, AND INTERACTION BETWEEN, PUBLIC AND PRIVATE ENFORCEMENT OF CLAIMS

More and more rights to enforce claims and initiate actions that typically have a public interest protection function, too, (consumer protection or competition law infringement sanctions) are viewed already as a trend in both Anglo-Saxon and modern continental civil procedures as enforceable not exclusively through an action in administrative proceedings or civil litigation initiated by a state actor but, in addition, as effective private enforcement of rights.²¹ In this sense, we can talk about the conscious decentralization of the enforcement of norms having a public interest protection component, too, as a direction of de-

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¹ Cf. re. most recent overview of the issue in the Hungarian legal literature: B. Bassola, G. Fejes, *Versenyjogi jogsértések esetén érvényesíthető magánjogi igények – Néhány alapvetés*, in: G. Boytha (ed.), *Versenyjogi jogsértések esetén érvényesíthető magánjogi igények*, Budapest 2008, p. 17 *et seq.*; re. enforceable claims: T. Polauf, *A teljesítésre kötelezés mint a versenyjogi jogsértések esetén alkalmazható polgári jogi jogkövetkezmény*, in: A. Kisfaludi (ed.), *Versenyjogi jogsértések – magánjogi jogkövetkezmények*, Budapest 2012, p. 211 *et seq.*; re. especially compensation claims: Á. Fuglinszky, *A versenyjogi jogsértések esetén alkalmazható polgári jogi jogkövetkezmények – A kártérítés mint magánjogi szankció*, in: A. Kisfaludi (ed.), *Versenyjogi jogsértések – magánjogi jogkövetkezmények*, Budapest 2012, p. 13 *et seq.*

velopment. The private law aspect of decentralization – in a broader sense²² – the so-called private law enforcement concept, carries a great potential to exploit, especially in the field of competition law, even if the enforcement of competition law regulation contents is still primarily a state responsibility, and within that, the responsibility of competition authorities. No doubt, historically, this division of tasks was first realized in the world of common law, within that the competition law regulation of the USA, and shifted towards the direction of private law enforcement of rights.²³ However, the private law enforcement serving the effective enforcement of competition law – and through that the inevitable auxiliary role of private law enforcement of rights – gets noticeably more and more emphasis in continental law and in the European Union itself.²⁴ All of this is based on the consideration that the protection of public interest and the protection of private law interest are not mutually exclusive, but rather mutually complementing and amplifying aspects.²⁵ This complementary role – at least in the legal literature of the past years – is now often discussed as an equal level of enforcement of rights mechanism,²⁶ and several documents of the Commission of the European Union have dealt with the need for the enforceability of competition law within the framework of private law and the necessity to eliminate the obstacles in its way.²⁷ In part,

²² For the latest good synthesis in a narrower sense, i.e. primarily decentralization of public law enforcement divided between competition authorities, cf. L. Wal-lacher, *Az uniós versenyjog érvényesítési rendszerének hatékonysági előnyei és hátrányai a Bíróság Tele2 Polska ügyben hozott ítélete fényében*, in: *Európai Jog* 2012, pp. 35–41.

²³ The provisions of the Sherman Act, which sanctions competition law infringements, are applied mostly in civil proceedings of individuals who were affected by cartels or sustained damage through their activities. Cf. this and the latest relevant differences in focus of the European and American enforcement of rights in the Hungarian legal literature: B. Berke, M. Papp Mónika, *Az Európai Unió gazdasági joga II. Az Európai Unió versenyjoga*, Budapest 2013, p. 141 and the additional literature and statistics referred to therein.

²⁴ See C. Bellamy, G. D. Child, *European Union Law of Competition*, 7th Edition (eds. V. Rose and D. Bailey), Oxford: Bellamy & Child 2013, 16.001–16.096.

²⁵ The jurisprudence of the European Court of Justice articulating the necessity of enforcement of claims had an influence in this direction. Cf. *Courage v. Crehan*, C-453/99 (ECJ 2001, p. I-6314) and *Manfredi v. Lloyd Adriatico Assicurazioni et al.*, C-298/04 (ECR 2006 I-6619).

²⁶ Cf. e.g. C. Seitz, *Public over Private Enforcement of Competition Law*, in: GRUR-RR 2012, pp. 137–142.

²⁷ After the *Courage v. Crehan* case, the following documents marked milestones chronologically: the so-called *Ashurst Study*: Study on the conditions

the same objective led to the promulgation of Regulation 1/2003/EC that serves the modernization of cartel rules and the relating procedural rules. At the level of Member State competition law legislation, in line with this trend, the legal framework, which guarantees both at the level of principle and detailed rules the simultaneous functioning of *public* and *private enforcement* in the name of beneficial interaction had to be ensured.²⁸ Not only the possibility of the simultaneous functioning of the two enforcement mechanisms became fundamental regulatory content, but also that within the scope of public and private enforcement of competition law the application of the law also has to be uniform. All this can be possible only through the sophisticated interaction between the application of the law by competition authorities and the courts.²⁹ All this is reflected in the traditional competition

of claims for damages in case of infringement of EC competition rules, prepared by D. Waelbroeck, D. Slater and G. Even-Shoshan, Brussels 2004. This was followed, most of all, by the Green and White Papers laying grounds for future legislative action regarding damages claims: *Green Paper – Damages actions for breach of the EC antitrust rules* COM(2005) 672 final (already in section 1.1: ‘The antitrust rules in Articles 81 and 82 of the Treaty are enforced both by public and private enforcement.’); *White paper on damages actions for breach of the EC antitrust rules* COM(2008) 165 final (section 1.2: ‘[...] the measures put forward in this White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardize, public enforcement.’). Finally, as the latest milestone of the preparatory activities materializing in these documents, the Commission published the results of the surveys and updated recommendations in June 2013 as the *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, COM(2013) final. The Proposal, which alongside with the earlier preparatory documents aims at ‘optimizing the interaction between the public and private enforcement of competition law’, contains as a novelty for the first time an explicit reference to competition law arbitration. According to the proposed *preamble paragraph* of the Directive, ‘Injured parties and infringing undertakings should be encouraged to agree on compensating the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements, arbitration and mediation.’

²⁸ Regarding the law of individual Member States and the materialization of interaction cf. B. Rodger (ed.), *Competition Law Comparative Private Law Enforcement and Collective Redress across the EU*, Alphen aan den Rijn 2014, which provides a comparative law analysis based on the most recent empirical research.

²⁹ Regarding the interaction between competition authority and judicial enforcement from the point of view of Hungarian law cf. Sections 86–88 of the Competition Act and the Hungarian Competition Authority basic prin-

law concept according to which the practical application and consistent enforcement of competition law regulations are based upon the task allocation and cooperation of the national courts and competition authorities. This reciprocity – which was reinforced by Regulation 1/2003/EC of the European Council on proceedings concerning Article 81 and 82 of the Treaty establishing the European Community (TEC) (currently Articles 101–102 of the the Treaty on the Functioning of the European Union (TFEU))³⁰ – significantly contributes to the uniform interpretation and enforcement of national and Community competition law.

2. THE EMERGENCE OF ARBITRATION ONTO THE STAGE OF PRIVATE LAW ENFORCEMENT

The demand for uniform application of European law would be impaired even with full implementation of the above described aspects if we restrict it to the cooperation between competition authorities and Member State courts. This is because we have to calculate more frequently with the tendency potentially resulting in the divergence and fragmentation of the application of the law, i.e. with the implementation of *private law enforcement* type competition law enforcement embedded in arbitration proceedings. Commercial arbitration tribunals play a significant role in the cooperation system mentioned above – at least in international practice – in the field of private law enforcement of competition law, because many legal disputes addressed to an arbitration tribunal inevitably carry competition law aspects too. Simultaneously and amplifying this direction of development, there is a continuing tendency for parties' preference to refer these legal disputes – typically containing international elements – to private (commercial) arbitration

principles regarding the freedom of competition (2007) pp. 34 and 76. Regarding the mutually strengthening and non-exclusive nature of public and private law enforcement cf. Section 88/A, the central section in this respect of the Competition Act: 'The competence of the Hungarian Competition Authority [...] for protection of the interests of the public shall not prevent the enforcement of the civil claims mentioned in Section 11(3) and Section 93 for any infringement of the provisions of Chapters III-V in court action.' Regarding the structure of the regulation and especially the notification and suspension obligations cf. C.I. Nagy, *Kartelljogi kézikönyv*, Budapest 2008, pp. 718–720 and K. Pázmándi (ed.), *Magyar versenyjog*, Budapest 2012, p. 311.

³⁰ Cf. e.g. K. Gombos, *Bírói jogvédelem az Európai Unióban – Lisszabon után*, Budapest 2011, p. 206 *et seq.*

tribunals.³¹ This is especially important, because these private law contracts often raise issues relevant from the perspective of the enforcement of competition law and constituting the substantive part of the adjudication of the legal dispute, which, thus, must be decided by arbitration tribunals.

In an international aspect, the factor that the parties (typically the 'foreign' party in relation to the forum) harbor some distrust as to the impartiality of state courts towards foreign parties, predominantly contributes to the growing trend of referring legal disputes to arbitration tribunals. By inserting an arbitration clause in their agreement, the parties can avoid the obstacles that would prevent the enforcement of the decisions of state courts qualifying as foreign from the perspective of the country of enforcement. In a general sense, with the arbitration clause the parties free the initial phase of the prospective litigation from potential jurisdictional disputes, as they actually 'contract out' of the national justice system, which is guided by the idea of jurisdiction and applies the rules of international and domestic procedural law.³²

The motivation for referring the concerned legal disputes to arbitration has its origin in some of the defining characteristics of the arbitration procedure. The following examples may be highlighted among these characteristics: contrary to civil procedures of national courts, the procedure of arbitration is essentially determined by the parties. In line with this, the parties may determine the place of arbitration, which is of key importance in several respects regarding the outcome of the proceedings, as well as the imperative norms, i.e. the norms that are part of public policy – thus, among others, competition law rules – that must be applied compulsorily by the arbitration tribunal. Within the UNCITRAL-harmonized legal systems, the generally accepted principle in accordance with the respective *lex fori* is that the place of arbitration is the connecting point through which the arbitration is bound to the national law of the given state: *Lex loci arbitri*

³¹ Cf. e.g. T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG für Schiedsverfahren*, *SchiedsVZ* 2006, pp. 5, 6 és 8; G. Blanke, *The role of EC Competition Law in International Arbitration: A Plaidoyer*, *European Business Law Review* 2005/16, pp. 169–181; S.I. Dempogiotis, *EC Competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission*, *Global Antitrust Review* 2008/1, pp. 135 and 139.

³² The jurisdictional problem should not be underestimated in the case of competition law infringements. See for the latest analysis of the 'private attorney general' in the context of competition law, with respect to state courts and related special jurisdictional problems: M. Weller, *Kartellprivatrechtliche Klagen im Europäischen Prozessrecht: 'Private Enforcement' und die Brüssel-I-VO*, *Zeitschrift für Vergleichende Rechtswissenschaft*, 2013, pp. 89–101.

defines the norms that cannot be derogated by the parties and determines the framework of the cooperation with and support of the justice system of the given state (legal assistance), and this defines in addition the scope of available remedies against the arbitral award as well as the rules of enforceability in that state. By determining the place of arbitration, the parties generally do not bind themselves to the substantive or procedural law of the given state, but to this special body of laws.³³ All this justifies the overview of the connecting points of arbitration proceedings and competition law within the topic of *private competition law enforcement*.

In addition to being able to determine the procedural rules, the parties can freely define the substantive law to be applied by the arbitration tribunal.³⁴ In doing so, they have an opportunity to subject the legal dispute arising between them to the law of the state they specified, but it is also possible to have the different claims arising from their legal relationship adjudicated under different laws. The freedom of the parties' autonomy is limited by national and international norms falling under certain rules of public policy, the application of which cannot be contracted out of even by the explicit agreement of the parties. These so-called imperative norms, considering above all a given state's social and economic interests, can limit or preclude the applicability of foreign laws or the enforcement or recognition of arbitral awards. Consequently, public policy norms provide priority to the interest of the state over the interest of the parties. This provision constituting an essentially substantial limitation is primarily binding for the arbitration tribunal, and, thus, in principle, the arbitration tribunal has to consider it regardless of the parties' choice of law, but primarily, in the absence thereof.³⁵

Another advantage of agreeing to arbitrate is that the parties can freely decide on the composition of the arbitration tribunal. Thus, they are free to opt for the adjudication of their dispute by reputable experts in the field of competition law or attorneys expert in competition law. Thus, it can be easier to ensure that an arbitration forum with appropriate expertise as

³³ Here is a demonstration through the Hungarian regulatory example: If the place of arbitration is in Hungary, then the procedural law applicable to the arbitration is determined by the Hungarian *lex fori*, that is, by Act LXXI of 1994 on Arbitration (the Arbitration Act). See Section 1 of the Arbitration Act defining its own territorial and subject matter jurisdiction.

³⁴ Section 49(1) of the Arbitration Act, Section 14(2) of the Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry; Section 1051(1) of the ZPO.

³⁵ For the detailed analysis of such contents of norms in relation to arbitration proceedings cf. J. Beulker, *Die Eingriffsnormenproblematik in internationalen Schiedsverfahren*, Tübingen 2005.

well as outstanding specialized knowledge and experience make decisions on issues of competition law relevance between the parties. Such special expertise cannot necessarily be guaranteed by state courts, and, what is more, the time factor associated with multi-instance adjudication before these tribunals further makes enforcement of claims less attractive compared to private law fora. It is in the parties' paramount economic interest that their dispute be adjudicated in a fast and competent manner. Consequently, it is also very important for the parties that arbitration proceedings are for the most part single-instance proceedings.³⁶ National arbitration laws provide only a limited range of remedies against arbitral awards.³⁷ At the same time, the recognizability and enforceability of arbitral awards are more widely guaranteed than those of the decisions of (Member) State courts.³⁸ Finally, another characteristic of arbitration and, at the same time, one of its greatest advantages in contrast to court proceedings, is the confidential nature of arbitration proceedings, in which the parties' interest in the confidentiality of the proceedings and the adjudication of the legal dispute shielded from the public can prevail to the greatest extent, which in the case of competition law has a significant importance.

Based on these considerations, the growing importance of the institution of arbitration, which gives the parties autonomy for the enforcement of rights in the given field, is understandable. Of course, it cannot be stated even when opting for arbitration that the enumerated interests and advantages would automatically apply. This requires the effective cooperation of the parties and the arbitration tribunal. This kind of cooperation at the same time is built upon the autonomy provided to the parties opting for the route of arbitration, as well as upon the fulfillment of the requirements set for the arbitration tribunal. In the case of the former, we need to think about the determination by the parties of the place of arbitration, the composition of the arbitration tribunal, and the applicable procedural law during the proceedings as well as the substantive law applicable to the adjudication of the merits of the dispute, while in the case of the latter, we need to think about the requirement set for

³⁶ With the caveat that the parties may agree also at any time on an arbitration forum of appeal. As an exception, we can find statutory reference to this option, too, for example under Dutch regulation, which expressly provides that the parties may stipulate also to designate an 'appellate arbitration tribunal.'

³⁷ Section 55 of the Arbitration Act.

³⁸ See the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958 (the New York Convention), ratified by more than 150 states. Conversely, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies only to the Member States.

the arbitration tribunal that it should settle the dispute between the parties with a valid and enforceable arbitral award.

3. SUB-ISSUES OF THE ENFORCEMENT OF COMPETITION LAW THROUGH ARBITRATION

3.1. The objective arbitrability of competition law claims

It was long disputed in judicial practice and in the legal literature whether private claims arising from the violation of antitrust law can be brought to an arbitration tribunal or can only be adjudicated by state courts.³⁹ As it is also indicated by the jurisdiction and arbitrability provisions of arbitration laws, deviation from the traditional method of private law protection that is civil litigation, is only possible if it is so authorized by the state. Subject to certain guaranteed conditions, modern states traditionally allow in all private law cases the subject matter of which the parties can freely stipulate that the parties have their disputes adjudicated by one or more individuals they appoint and empower by contract to decide their cases instead of state courts.⁴⁰

According to the long-standing view in international practice, private law claims⁴¹ based on the violation of antitrust law create a category

³⁹ For American and European history – partially divided by countries – leading to today's general acceptance of objective arbitrability of competition law claims cf. J.F. Poudret, S. Besson, *Droit comparé de l'arbitrage international*, Zürich 2002, pp. 315–321.

⁴⁰ For the richest historical survey to date cf. T. Fabinyi, *A választottbíráskodás* (második bővített kiadás), Budapest, 1926.

⁴¹ Mainly the primary antitrust sanctions, the active or passive procedural introduction of invalidity, or similarly, demanding damages, injunction, refraining from actions, and performance may be considered as claims. However, it must be appreciated that exactly because of the confidential nature of the arbitration process and the exclusion of the public, it is not possible to draw a precise (statistical) picture of what sort of cases are brought before arbitration tribunals, and, therefore, only personal experience and references in the legal literature – which are also based on such experiences – could provide some guidance. According to experience, invalidity plays the predominant role, while in the case of other claims, the probability of entering *ex post facto* into an arbitration contract is less likely. Emphasizing the same cf. T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG...*, pp. 5 and 7; and identically C. Liebscher, P. Oberhammer, W. H. Rechberger (Hrsg.), *Schiedsverfahrensrecht I*, Vienna – New York 2012, 3.102.

of claims the evaluation of which – due exactly to the dominance of public policy and with this the limitation of autonomy – belongs exclusively to the jurisdiction of state courts. The reason for this was the belief that special public policy linked to the enforcement of antitrust law could not completely prevail in arbitration proceedings – as opposed to state court adjudication – through the rules of competition law vindicating unconditional prevalence.⁴²

In the United States, the Supreme Court has rendered this approach unequivocally obsolete with respect to international arbitration in its well known opinion expressed in *Mitsubishi v. Soler*⁴³, and with this made a contribution at an international level to the reinforcement of the position according to which private law claims arising from the infringement of antitrust laws may be submitted for arbitration.⁴⁴ The Supreme Court explained in its opinion that '[t]here is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism' for the enforcement of antitrust rules. It is because by submitting the adjudication of private law claims arising from antitrust law infringements to arbitration, the parties do not automatically give up their rights afforded to them by competition law, but they simply agree to the adjudication of the dispute arising between them by a private instead of a public forum.⁴⁵ Furthermore, if the parties agree on arbitration,

⁴² For the American history of the turn of jurisprudence of the treatment of arbitrability from a restrictive tendency to a more and more liberal direction (certain selected milestones of the path from *judicial hostility* towards a *policy favoring arbitration*) in cases of competition law and other cases invoking the public interest cf. *Wilko v. Swan*, 346 U.S. 427 (1953); *American Safety Equipment Corp. v. J P Maguire & Co American Safety*, 391 F.2d 821 (2nd Cir. 1968); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991, age discrimination, statutory suits); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983, '[...] questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.');

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995, punitive damages).

⁴³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

⁴⁴ Actually, the first and thus pioneering court decision, however, which preceded the *Mitsubishi* opinion by about ten years was a Swiss cantonal court decision: Tribunal Cantonale Vaudois 1975, *Journal des Tribunaux* 1981 III 71. Referring to this as a pioneering decision cf. J.F. Poudret, S. Besson, *Droit comparé...*, p. 315.

⁴⁵ In the *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) decision, referring back to the *Mitsubishi* case, the Supreme Court stated the following: 'Its (Federal Arbitration Act's) purpose was to reverse the longstanding judicial hostility to arbitration adopted by American courts [...] In these cases we recognized

in contrast to civil proceedings conducted by state courts, the litigants can determine the composition of the arbitration tribunal entitled to adjudicate the legal dispute arising between them, and this contributes to a significant extent to the competent adjudication of the dispute, because in the course of the appointment of the arbitrators, the parties can consider the expertise necessary for the adjudication of the disputed questions, as well as the special knowledge required by the subject matter of the dispute. Moreover, in arbitration proceedings, both the parties and the arbitrators have the option to involve experts, if such additional questions were raised during the proceedings whose adjudication exceeds the competence of the arbitration tribunal.

Following the Supreme Court's opinion handed down in the *Mitsubishi v. Soler* case, the courts of the United States in their jurisprudence consistently recognize up to date the jurisdiction of international and national arbitration tribunals for the adjudication of private law claims filed because of a violation of antitrust rules.⁴⁶ The *Mitsubishi v. Soler* decision had a definitive influence on the recognition of competition law arbitration also in Europe,⁴⁷ if at least on the solidification of what is now an international consensus that the private enforcement of competition law is not an obstacle but, in addition to private interest, it strengthens the enforcement of the public interest, too.⁴⁸

In Germany, representing the family of continental laws, the discussion of the issue followed a different route than the American practice, but considering the result, it reached the same conclusion in this respect, too, where by the comprehensive modification of the German Competition Law Act⁴⁹ in 1998, the obstacle was cleared concerning the opportunity for the adjudication of private law claims arising from antitrust law violations by arbitration tribunals.⁵⁰ As a result of the ZPO amending act of 1997, which amended the provisions of the German code of civil procedure concerning arbitration proceedings – extending to competition law regula-

that by agreeing to arbitrate a statutory claim, a party doesn't forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'

⁴⁶ See e.g. the summary of the relevant case law in this regard, too: *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (U.S. 2010).

⁴⁷ G. Blanke, *The role of EC Competition Law...*, pp. 169 and 172.

⁴⁸ Cf. also W.W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12(3) *Brooklyn Journal of International Law* pp. 629–674, 1986.

⁴⁹ *Gesetz gegen Wettbewerbsbeschränkungen* ('GWB').

⁵⁰ The prohibiting provision was Section 91 of the previous GWB 91.

tion too – the provisions relating to the jurisdiction of arbitration tribunals cover private law claims arising from competition law violation, exactly because of clearly basing objective arbitrability on autonomy.⁵¹ In other European countries,⁵² judicial practice acknowledged progressively that private law claims derived from competition law infringements can be arbitrated, because the parties can freely dispose of the mentioned claims defined by civil law.⁵³

In Hungary, the adjudication by arbitration tribunals of private law claims arising from antitrust violations is also supported by the Hungarian regulation. Under Act LXXI of 1994 on Arbitration (Arbitration Act) instead of court proceedings, disputes may be adjudicated through arbitration if the parties have the right to freely dispose of the subject matter of the proceedings.⁵⁴ In other words, the statute primarily allows the settlement through arbitration agreements of legal disputes subject to civil procedure, that is, it permits the substitution for litigation. Although the Arbitration Act itself⁵⁵ or specific statute⁵⁶ may exclude certain cases referring to the special nature of certain legal relationships from the scope of arbitration, Act LVII of 1996 on the Prohibition of Unfair Market Practices and Unfair Competition (the Competition Act) does not contain such restrictive provisions. Thus, nothing prevents arbitration tribunals to settle private law claims between the parties in the subject matter of violations of antitrust rules, also especially because these claims qualify, among other things, as legal disputes sub-

⁵¹ Section 1030 of the ZPO.

⁵² In France, private law claims can be referred to arbitration since 1989. In Switzerland, this option is available since 1975, and in Austria, the former prohibiting provision of Section 124 of the *Kartellgesetz* was repealed in 2005. Cf. J.F. Poudret, S. Besson, *Droit comparé...*, pp. 315–321, and for the Austrian regulation C. Liebscher, P. Oberhammer, W.H. Rechberger (Hrsg.), *Schiedsverfahrensrecht I*, Vienna – New York 2012, 3.102.

⁵³ See e.g. for the French judicial practice F. Niggemann, *Europäisches Wettbewerbsrecht und Schiedsgerichtsbarkeit: Eco Swiss und europäischer Ordre Public in der praktischen Anwendung in Frankreich*, *SchiedsVZ* 2005, pp. 265–273. For the Swiss judicial practice see M. Meinhardt, J.M. Ahrens, *Wettbewerbsrecht und Schiedsgerichtsbarkeit in der Schweiz – Eine Würdigung des Entscheids des Bundesgerichts vom 8. März 2006*, *SchiedsVZ* 2006, pp. 182–188 (184). And for the effect of the *Mitsubishi vs. Soler* decision on the international and European arbitration practice cf. e.g. T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG...*, pp. 5 and 9.

⁵⁴ Section 3(1)(b) of the Arbitration Act.

⁵⁵ Cf. the new Sections 2–4 of the Arbitration Act that excludes arbitrability of several causes of action concerning national assets.

⁵⁶ Thus, e.g. Section 17(3) of Act CXCVI of 2011 on National Assets.

ject to civil procedure, in the case of which the law specifically permits the referral of these disputes to the competence of arbitral tribunals.⁵⁷ This option is not affected by the fact that procedural regulations concerning arbitration and arbitration laws mention *commercial* arbitration.⁵⁸ The term 'commercial' in the context of arbitration indeed should be interpreted in the widest possible sense including every private law relationship, be they contractual or non-contractual, regardless of whether the parties belong to the scope of commercial law of a state based on the laws of that given state – thus, whether they qualify in this sense as merchants – or not.⁵⁹ The drafters of the UNCITRAL Model Law – which serves as a basis for several arbitration statutes and procedural regulations – emphasized the international nature of the regulation with that they did not make the substantive completion of the term 'commercial' conditional upon the regulation of any state law. By this, the UNCITRAL Model Law and the harmonized national arbitration laws made a great leap forward to expand the scope of arbitrable disputes.⁶⁰

In summary, the referenced liberal interpretation of a 'commercial matter' leads to a situation whereby private law claims arising from anti-trust law infringements (primarily, the invalidity defense on the passive

⁵⁷ Cf. the explanations accompanying Sections 3–5 of the Arbitration Act.

⁵⁸ See the European Convention on International *Commercial* Arbitration, Geneva, 1961; Arbitration Rules of International *Commercial* Court of the International Chamber of Commerce, Paris; UNCITRAL Model Law of International *Commercial* Arbitration.

⁵⁹ The outdated rule of Section 3(1)(a) of the Arbitration Act in the Hungarian regulation, considered with this respect an exception, somewhat makes this picture relative, as it defines subjective arbitrability narrowing it down to the business entities involved in a legal relationship: 'at least one of the parties is professionally engaged in business activities.'

⁶⁰ Cf. Article I(3) of the New York Convention and Article XVI(2) of Law-Decree No. 25 of 1962 implementing the Convention with the footnote to Article I of the UNCITRAL Model Law. According to the text of the footnote: 'The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.'

side, but also damage claims or injunctive relief or performance) can be arbitrated.⁶¹

3.2. Competition law specific application of the doctrine of separability

Similarly to arbitrability, the principle of separability also prevails without essential alteration in arbitration cases concerning competition law. According to it, the invalidity of the contract does not automatically entail the invalidity of the arbitration clause, if the ground for invalidity concerns competition law content and, thus, it is null and void typically due to competition law infringement.⁶² Likewise, just as in the case of traditional commercial arbitration (not having any competition law aspect), it only occurs as an exception that the grounds for the invalidity of the contract coincide with the grounds for the invalidity of the arbitration clause (e.g. the entire contract was made under duress), but this can be the least plausible reason for invalidity based on competition law.

3.3. The minimum standard of consideration of competition law rules by arbitration tribunals

The European Court of Justice considered for the first time in depth the relationship between arbitration and Community competition rules in the *Eco Swiss*⁶³ case and, thus, the requirement of the application of Article 101(1) of the TFEU [ex-Article 81(1) TEC] by arbitration tribunals. The Court in its judgment confirmed the importance of the sanction of nullity in the legal order of the European Community, declaring that nullity is the specific legal consequence if an agreement violates Article 101(1) of the TFEU [ex-Article 81(1) TEC]. In the case, the Dutch Hoge Raad asked the European Court of Justice to decide the question as to whether the provisions of the TFEU could be regarded as public policy rules, and whether they can be mandatorily applied by the arbitration tribunal also in cases where the parties have not made specific references to them and the arbitration tribunal has not taken a position in such question either. Considering that Dutch law allows for setting aside arbitral awards for public policy violations, the outcome of the lawsuit for the annulment and, with that,

⁶¹ For the acceptance of arbitral enforcement of private law claims arising from antitrust law infringements in the European legal practice cf. T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG...*, pp. 5 and 6 *et seq.*

⁶² Cf. Bellamy & Child 16.098.

⁶³ *Eco Swiss China Time Ltd v. Benetton*, C-126/97 (ECR 1999 I-3055).

the integrity of the arbitration proceedings and the award handed down as a result, partially depended on the answer to this question.

In its decision, the European Court of Justice considered the competition law rules set forth by the TFEU to be provisions of fundamental importance that are indispensable for the performance of tasks provided for the Community and especially from the perspective of the operation of the internal market, which should therefore be viewed as norms that are part of Community public policy. Consequently, if the procedural law of a Member State allows for setting aside an arbitral award on public policy grounds, then this rule must be appropriately applied when the annulment of the arbitral award is requested on the ground of Community competition law infringements – in this case, the violation of Article 101(1) of the TFEU [ex-Article 81(1) TEC]. At the same time, the Court declared also that the option to appeal against an arbitral award cannot be limitless, and, thus, the procedural laws of a Member State, which prescribe a time limit for the appeal, do not violate the interest in the enforcement of Community competition rules, provided that the time-limits stipulated by the procedural laws of the Member State do not infringe the requirement of effective enforcement of competition rules.

The decision of the European Court of Justice does not contain any explicit provisions for the consideration of Community competition rules by the arbitration tribunal, but, nevertheless, it indeed plays a prominent role as a connection between arbitration and competition law. On the one hand, it indirectly endorsed the confirmation of the practice and opinion on a European level that private law claims arising from Community competition law infringements can be arbitrated. On the other hand, the content of the decision can be interpreted as a paradigm shift in the context of competition law arbitration. The essence of this is that the presence of public policy norms itself is not a factor excluding arbitration, but ignoring or violating them qualifies as such a grave error of the arbitration proceedings or arbitral award that can provide ground for an action of annulment based on the violation of public policy.⁶⁴ It can be concluded from the decision accordingly that the European Court of Justice – even if not nominally – effectively and substantively requires the application of Community competition rules by the arbitration tribunals (*de facto* obligation).⁶⁵

Nevertheless, it remains the question whether arbitration tribunals are obligated to examine the Community competition rules *ex officio* or only in the event of a (documentation expanding action) request by the parties, and if so, then to what extent. The obligation of an *ex officio* consideration

⁶⁴ T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG...*, pp. 5 and 9.

⁶⁵ G. Blanke, *The role of EC Competition Law...*, pp. 169 and 175.

of Community competition law is supported by the fact that arbitration tribunals must always consider the parties' contractual will leading to arbitration. The primary motivation of the latter is the generation of a final, valid, and enforceable award. This kind of obligation of arbitration tribunals requires the consideration and respect of norms – applicable in the given proceedings – within the scope of public policy, as these norms represent the fundamental limits of the leeway provided for arbitration tribunals, the disregard or violation of the limits of which may result at the end in the annulment of the award of the arbitration tribunal, which would circumvent the parties' claims.⁶⁶

Thus, the arbitration tribunal must consider the Community antitrust regulation in every case, when the proceedings pending before it has, due to certain circumstances, a connection with the European Union or with the commerce between Member States. Such an obligation lies with the arbitration tribunals in the case, for example, if the agreement underlying the dispute between parties is governed by the laws of one of the Member States of the European Union. The latter obligation is also supported by, among other things, the primacy of the Community law over the Member State's law, too. The obligation of the application of Community competition laws also exists in the case when the agreement subject to the arbitration proceedings may affect commerce between two or more Member States; however, Community antitrust rules must be also considered if, although the contract subject to the dispute is governed by third country law, the legal relationship between the parties is connected at several points to a Member State.⁶⁷ It is especially true in the case when – in absence of the parties' express choice of law – the arbitration tribunal itself has to determine the law applicable to the legal dispute between the parties. In this case, the arbitration tribunal specifies the applicable law based on relevant international private law principles, which – as in both the traditional collision provisions and in the new generation collision regulations of the EU – usually prescribe the mandatory consideration of imperative norms.

Therefore it can be ascertained that the parties – in the case of connection points towards two or more Member States – cannot use the option of arbitration to evade the scope of Community competition law rules. Considering that the mandatory examination of Community antitrust

⁶⁶ Cf. *ibid.*, pp. 169 and 171 *et seq.*

⁶⁷ For the scope of competition laws, and, thus, for the question of extraterritorial application, cf. e.g. R. Streinz, *Europarecht*, 9, Heidelberg: Auflage 2012, Rn. 1020; B. Berke, M. Papp, *Az Európai Unió gazdasági joga II. Az Európai Unió versenyjoga*, Budapest 2013, p. 144 *et seq.*

rules by the arbitration tribunals serves basically the future enforcement of the arbitral award, that cannot contradict by definition the freedom of autonomy provided to the parties either.⁶⁸ According to a clearly more proactive approach, which goes definitely further, if the parties want to circumvent the application of Community competition rules by choosing the law of a third state, the arbitration tribunal must expressly seek to comply with the Community competition law.⁶⁹

This picture, however, is altered by the fact that by the proper interpretation of the case law of the European Court of Justice, the obligation of arbitration tribunals for an *ex officio* application of Community competition rules cannot be unrestricted either. Community law cannot impose more serious obligations on arbitration tribunals than it does on Member State courts. The European Court of Justice in its decision handed down in the *van Schijndel* case found that Member State courts only have to consider, if necessary on their own motion (*ex officio*), Community competition rules in the case where their domestic laws prescribe the necessity of an *ex officio* consideration of certain circumstances. They are not obliged to break the passive role conferred on them by domestic – mostly procedural – rules by exceeding the claims of the parties in the action.⁷⁰ Based on the decision of the European Court of Justice and the functional equivalency of arbitration and state court proceedings, it would be wrong to expect more from arbitration tribunals than what Community law requires from Member State courts.

In conclusion, the arbitration tribunal is obliged to consider and properly apply Community antitrust rules, if the parties expressly request it, or they actually turn to the arbitration tribunal for the determination of the incompatibility of an agreement with Community competition laws, or when they invoke Community competition law infringement during the proceedings ('Euro-defence').⁷¹ This obligation further strengthens in cases where the arbitration tribunal has to expect with great certainty that its award will be enforced in another Member State. The assessment

⁶⁸ *Nordsee, Deutsche Hochseefischerei GmbH v. Germany and Land Rheinland-Pfalz*, C-122-73, (ECR 1973 01511) par. 14.

⁶⁹ See G. Blanke, *The role of EC Competition Law...*, pp. 169 and 178.

⁷⁰ *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, joined cases C-430/93 and C-431/93 (ECR 1995 I-04705).

⁷¹ These are the most frequent cases in arbitration practice. Cf. F. Heukamp: *Kartellrecht im Schiedsverfahren – Neuorientierung durch VO 1/2003 und 7. GWB-Novelle?*, *SchiedsVZ* 2006, pp. 94–95; for a rare occurrence of delictual private law claims arising from the violation of community antitrust law cf. T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG...*, pp. 5 and 7.

of the obligatory application in the absence of reference by the parties is not so clear cut; we will address the different positions on this below.⁷²

Finally, regarding the extent of the obligation of arbitration tribunals, the majority position⁷³ represents the opinion that it extends not only the consistent application of Article 101(1) of the TFEU [ex-Article 81(1) TEC], but it includes the provisions within Articles 101 and 102, and, thus, it incorporates the entirety of Community antitrust law regulation. The enforcement of this position comes with the consequence for the arbitration tribunals that in the case of the application of Community antitrust rules, they also have to consider the conditions for exemption contained in Article 1(2) of Regulation 1/2003;⁷⁴ to disregard the latter, like ignoring Article 101(1) of the TFEU [ex-Article 81(1) TEC], could put into question the enforceability of the award of the arbitration tribunal and would necessarily bear the undesirable possibility of the annulment of the decision.

3.4. The procedural connection of arbitration tribunals in the application of EU competition law

At the Community level, the Regulation was meant to ensure the uniform application and consistent enforcement of antitrust rules, which contains basic provisions with respect to the cooperation among competition authorities of Member States, the Commission, and Member State courts, providing with it the opportunity for competition authorities and the Commission to influence the application of antitrust rules by the courts.⁷⁵ It is not obvious, at the same time, that the obligation on arbitration tribunals to consider Community antitrust law rules automatically entails the extension of procedural cooperation obligations under the Regulation to arbitration tribunals. The Regulation, however, – understandably – does not contain any provisions relating explicitly to arbitration tribunals, which

⁷² Cf. the discussion at the introduction of the minimalist and maximalist position below at section 3.5.

⁷³ Cf. e.g. S.I. Dempogiotis, *EC Competition law and international commercial arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission*, *Global Antitrust Review* 2008/1, pp. 135 and 139.

⁷⁴ 'Agreements, decisions and concerted practices 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.'

⁷⁵ See Articles 5–6, 11, and 15–16 of the Regulation and cf. for this as well as the interpretation and practical implementation of the regulation L. Wallacher, *Az uniós versenyjog érvényesítési rendszerének hatékonysági előnyei és hátrányai a Bíróság Tele2 Polska ügyben hozott ítélete fényében*, *Európai Jog* 2012, pp. 35–41.

means that there is no direct legal ground that would mandate or allow the application of the Regulation by arbitration tribunals.

The absence of express Community regulation concerning arbitration tribunals is primarily legitimated by the principle previously clarified in the practice of the European Court of Justice, according to which arbitration tribunals do not qualify as Member State courts from the perspective of the application of Community law.⁷⁶ Furthermore, in addition to this, the obligations imposed by the Regulation on Member State courts were designed to fit fundamentally state actors, and, therefore, they are partially incompatible with the nature of arbitration. Nevertheless, the absence of direct authorization does not exclude the possibility for the competition authority of a certain Member State – primarily determined by the place of the *situs arbitri* and the potential *exequatur* – or even directly the Commission to lend legal assistance to arbitration tribunals. It could be especially justified in cases, where the interpretation or application of Community antitrust rules becomes necessary in the arbitration proceedings. The assistance can be envisioned primarily in the form of expert or witness evidence, or, in some constellations, in the form of legal assistance concerning documentary evidence.⁷⁷ But it is not impossible either that the arbitration tribunal in an issue it has specifically formulated requests written or other form of information from the competition authorities. In the latter case, however, the tribunal must respect the confidential nature of the proceedings and the parties' related statutory interests. Accordingly, as a general rule, any request for legal assistance submitted to the competition authority can only take place based on the parties' joint motion, and in such a manner (primarily in anonymized form) that does not compromise the confidential and non-public nature of the arbitration proceedings.

At the same time, the cooperation in the evidentiary proceedings can be imagined in another, indirect way, which despite its indirectness, in essence, can create a complete procedural connection. The conceptual precondition for this indirect route is to start from the functional equivalency of arbitration tribunals and state courts mentioned above: If the *lex fori arbitrationis*, in other words, procedural law governing the arbitration proceedings contains proper enabling provisions, the arbitration tribunal can turn for (evidentiary) legal assistance to the state court of the state where

⁷⁶ *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, C-102/81 (ECR 1982 01095).

⁷⁷ Commission officials have often participated in arbitration proceedings as experts. See T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG...*, pp. 5 and 12.

the arbitration takes place. For example, the Hungarian *lex fori arbitrationis* also contains such enabling provisions and, with that, a legal assistance obligation of state courts,⁷⁸ although, with a hard-to-explain and illogical limitation – in contrast with injunctive relief – only for the purpose of domestic arbitration.⁷⁹ In other legal systems, the carrying statute separates the relevant legal assistance rule from the principle of territoriality.⁸⁰ The courts of such states with such liberal legal assistance rules are obligated to provide legal assistance to foreign arbitration tribunals, too. The state courts, on the other hand, fulfill the request by the application of the *lex fori*, the effective code of civil procedure governing their own procedure.⁸¹ In the course of this, for the effective assistance to be provided to the arbitration tribunal, the (Member) State courts may even contact the EU competition authorities. Finally, of course, it is also possible that in the course of the fulfillment of the request, they turn to the European Court of Justice for a preliminary ruling or fulfill the request of the arbitration tribunal by involving the courts of other (Member) States applying the legal assistance sources of law⁸² applicable to them, thus placing

⁷⁸ Section 37(3) of the Arbitration Act.

⁷⁹ Cf. Section 1, Section 37, and Section 46(2) together.

⁸⁰ Thus, for example, the arbitral procedural law integrated into the German code of civil procedure: ZPO Section 1025 and Section 1050 together.

⁸¹ The intensity and the scope of evidence, accordingly, may be different from one legal system to another depending on the rules of evidence the court contacted in the *lex fori* observes. While in the common law family, and primarily in the USA, it includes rules available and thoroughly researchable within the framework of pre-trial discovery without further ado (cf. e.g. Rule 26 and following rules of the Federal Rules of Civil Procedure), in the continental legal systems this option is not given, even if the parties to the arbitration proceedings stipulated otherwise in their own procedural rules (for example, with the modification of the IBA Rules on the Taking Evidence liberalized in an Anglo-Saxon direction). A quick and misguided move in this direction in the field of competition law, as it occurs from time to time, thus, e.g., most recently: K. Gombos, *Bírói jogvédelem az Európai Unióban – Lisszabon után*, Budapest 2011, p. 216, which, because of the deep-rooted differences among procedural law cultures, should be rejected. In contrast to European procedural laws – and within those, specifically, evidentiary proceedings – even the effective legal protection requirements formulated by the European Court of Justice do not go so far as to require Member State procedural laws to move towards the direction of discovery. Cf. *Pfleiderer AG v. Bundeskartellamt*, C-360/09 (ECR 2011 I-5186).

⁸² At a global level, with the help of the Hague Evidence Convention of 1970, and at the EU level, with Council Regulation (EC) No. 1206/2001 on cooperation in the taking of evidence.

competition law cooperation for private enforcement on an international basis in several directions.

Although, arbitration tribunals – contrary to the obligation of (Member) State courts under Article 16 of the Regulation⁸³ – are not obliged to consider the simultaneous proceedings conducted by the Commission or by a competition authority of a Member State, and they are not bound by their decisions,⁸⁴ arbitration tribunals will typically strive to comply with their obligation towards the parties, according to which they make decisions that are enforceable and whose validity is not threatened (i.e. they do not carry any reasons for annulment based on Community competition law violations). It is also in the interest of the arbitration tribunal itself to render decisions that comply with the decisions of the Commission and are free from competition law challenges. And for ensuring that this interest properly prevails, it may become necessary to await the results of at least the simultaneous proceedings conducted by the Commission or the relevant proceedings of (Member) State courts or competition authorities. In such cases, the suspension of the arbitration proceedings until the settlement of the prejudicial competition law question by the authority or state court should be taken into consideration.⁸⁵

The option and necessity of the suspension of the arbitration proceedings are also supported by the judicial practice of the European Union, according to which, the appellate court is also bound by the decision of the Commission, if the lower court reached a conclusion contrary to this before the issuance of the decision of the Commission.⁸⁶ Even though arbitration tribunals do not qualify under Article 257 of the TFEU [ex-Article 234 TEC] as state courts⁸⁷, in other words, they cannot be considered in the reflection of the *Masterfoods* case as lower courts, the ob-

⁸³ What is more, according to Member State judicial practice, the interpretation of the obligation set forth under Article 16(1) of the Regulation must be extended to all forms (follow-on and individual claims) of legal protection. Cf. e.g. *Toshiba Carrier UK v. KME Yorkshire* (2011) High Court 2665, par. 44.

⁸⁴ Cf. T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG...*, pp. 5 and 12. For the opposite position cf. F. Heukamp, *Kartellrecht im Schiedsverfahren...*, pp. 94–95.

⁸⁵ Suspension is further indicated by the mandatory cause for suspension typically assigned to state courts. This obligation in Hungarian law – which was not modified substantially by the last amendment of the Competition Act by Act CCI of 2013 either – although naturally pertains only to state courts, too, the functional equivalency between the two proceedings does not exclude either its – obviously facultative – application in arbitration proceedings. Cf. Section 88/B(6)-(6a) of the Competition Act.

⁸⁶ *Masterfoods Ltd v. HB Ice Cream Ltd*, C-344/98 (ECR 2000 I-11369).

⁸⁷ See above the referenced *Nordsee* case.

ligation of Member State courts, however, according to which they, as reviewing courts, are obligated to enforce competition law rules⁸⁸, would enable the courts to annul, or deny the enforcement of, the decisions of arbitration tribunals that are later deemed to have infringed Community competition law. Thus, suspension, which is also permitted by arbitration rules – typically, of course, in the case of such agreement between the parties – may be exceptionally justified. The necessity of legal assistance should be provided by the Commission or Member State competition authorities is also supported by the factor – already referred to above in another context – that arbitration tribunals are not entitled to turn directly to the European Court of Justice in preliminary ruling proceedings in order to preliminarily clarify as to how the provisions concerning the Community antitrust regulations should be interpreted in the proceedings pending before them. At the same time, it should be possible through the indirect approach described in this section in connection with functional equivalence and evidentiary legal assistance that the arbitration tribunals, in an indirect manner, within the framework of legal assistance that should be provided by state courts, initiate preliminary ruling proceedings before the European Court of Justice.⁸⁹ However, in practice, the time-intensity of the preliminary ruling proceedings is a dissuasive force.

3.5. Remedies against arbitral awards based on competition law

Following the decision of the European Court of Justice handed down in the *Eco Swiss* case, arbitration practice and related literature started to analyze the question how national courts relate to the application of Community competition law by the arbitration tribunals.⁹⁰ Simultaneously, there was an increasing number of cases in which the parties challenged arbitral awards invoking infringements of Community antitrust rules before Member State courts and demanded their annulment (or the denial

⁸⁸ See section 21 of the preamble to the Regulation.

⁸⁹ In addition to this, the demand to allow arbitration tribunals to directly initiate preliminary ruling proceedings before the European Court of Justice is present in the legal literature. Thus, e.g., S.H. Elsing: *References by Arbitral Tribunals to the European Court of Justice for Preliminary Rulings*, Austrian Yearbook on International Arbitration 2013, Vienna 2013, pp. 45–59.

⁹⁰ See e.g. the new, comprehensive analyses G. Blanke, P. Landolt (eds.), *EU and US Antitrust Arbitration*, Biggleswade 2011; G. Blanke, *The Application of EU Law to Arbitration in the UK*, European Business Law Review, 2014, pp. 1–66.

of their enforcement) based on violation of public policy.⁹¹ During the adjudication of these lawsuits, there are two conflicting interests significant from the perspective of Community legal system: On the one hand, the interest in the efficiency of arbitration proceedings and the finality of arbitral awards; and, on the other hand, the need for the primacy of Community competition law and its efficient and uniform implementation.

In the related judicial practice and the connected literature, we can find an outline of two types of approaches, which are distinguished from each other primarily by scope and intensity of the analysis of the ignoring of competition law, as a reason for annulment and refusal of enforcement based on the violation of public policy: while the so-called minimalist approach regards the state court review of arbitral awards as reasonable by state courts justifiable only to a limited extent, the so-called maximalist approach would demand it as a general rule that the *merits* of arbitral awards should be reviewed based on competition law (*révision au fond*).⁹²

The representatives of the *maximalist*⁹³ approach primarily emphasise the necessity for a substantive review of arbitral awards arguing that the primacy of Community law demands the unconditional application of Articles 101 and 102 TFEU [ex-Articles 81 and 82 TEC], and, what is more, irrespective of the place of arbitration and of the law applicable to the legal dispute between the parties.⁹⁴ The starting point is that the Community an-

⁹¹ Cf. the review of the cases, e.g. G. Blanke, *The Application of EU Law...*, pp. 1–66; G.C. Economou, *Arbitration and competition law*, Offshore Investment, Nov. 2013, pp. 19–22.

⁹² In this sense, the two positions are differentiated by the interpretation intensity of the ‘state courts’ second look’ doctrine articulated in the US Supreme Court’s *Mitsubishi* opinion. Cf. W.W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, Brooklyn Journal of International Law 12(3), 1986, pp. 629–674.

⁹³ The German and Belgian jurisprudence demonstrate this type of tendency. For the German practice cf. T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG...*, pp. 5 and 16. Likewise, F. Heukamp, *Kartellrecht im Schiedsverfahren...*, pp. 94–95. For a differing opinion, B. Kasalowsky, M. Steup, *Révision au fond – Einheitliche europäische Maßstäbe bei der Überprüfung von Schiedssprüchen auf kartellrechtliche ordre public-Verstöße?*, SchiedsVZ 2008, pp. 73–76. For the Belgian practice see *ibid.* the description of *SNF SAS v. Cytec Industries BV*, Tribunal de première de Bruxelles, March 8, 2007.

⁹⁴ Substantive law – specified by the parties, or in absence of an agreement between the parties, by the arbitration tribunal – applicable to the legal dispute means the private law statutory provisions directly governing the legal relationship, and not the norms belonging in the scope of public law. The application of imperative norms belonging in the scope of public law – Community as well as national competition law norms also belong in this realm – may not be excluded by the parties.

titrust rules are imperative norms that are simultaneously part of Community public policy and Member State public policy, and, thus, their content must be fully enforced in arbitration proceedings. Consequently, according to the maximalist approach, state courts fulfill the basic requirements of Community law, when in the course of their annulment or enforcement proceedings, they conduct substantive review of the application of Community competition law by arbitration tribunals. According to the maximalist approach, state courts must observe the requirement level according to which arbitration tribunals, while applying Community competition law, must strive for the discovery of all possible competition law infringements, or, in other words, this maximalist requirement level stems from the ideal of an activist arbitration tribunal in the field of competition law. The logical consequence of this approach is that the arbitration tribunal may not deviate from the practice or decision of the Commission established in the given subject. The broader interpretation of Community competition rules would be permitted only if the Commission or the European Court of Justice had not adopted an opinion regarding the given issue. Consequently, it follows from this activist-maximalist position that beyond the complete disregard of Community antitrust rules, their inappropriate interpretation or incorrect application alone should already result in the annulment or refusal of enforcement of the award of the arbitration tribunal.

The *minimalist*⁹⁵ approach, on the contrary – while acknowledging the imperative nature and the significant importance of Community competition rules – does not demand the general, comprehensive, and substantive review of the arbitral awards as a general rule. Only the violation of Community competition rules amounting to the magnitude of breach of *ordre public* could result in an annulment or refusal of enforcement, and this is only if the violation is flagrant, effective, and concrete (*flagrant, effective et concrète*⁹⁶). The minimalist approach further narrows

⁹⁵ Examples for this are French, Swiss or Hungarian jurisprudence. For the French practice see primarily the decision of the Cour de Cassation viewing state judicial review explicitly restrictively in *SNF v. Cytec Industries*, in: *Revue de l'Arbitrage*, 2008, 473, as well as F. Niggemann, *Europäisches Wettbewerbsrecht...*, pp. 265 and 267; for the Swiss practice see M. Meinhardt, J.M. Ahrens, *Wettbewerbsrecht und Schiedsgerichtsbarkeit in der Schweiz...*, pp. 182–188 (187); for the Hungarian jurisprudence cf. Decision No. Gfv. XI. 30.226/2005 (EBH 2006. 1429) of the Hungarian Supreme Court, Decision No. Gf. VI. 33.072/1997 (EBH 1999. 37) of the Hungarian Supreme Court, furthermore, the ministerial comments to Sections 54–57 of the Arbitration Act.

⁹⁶ Cf. the decision representing the restrictive French practice of the Paris Cour d'Appel handed down in the *Thalés Air Defense v. Euromissile* case dated November 18, 2004, in: *Revue de l'Arbitrage*, 2005, 271.

down the intensity of the requisite review that it demands: the clear violation of public policy must be apparent from the arbitral award itself. This means that a violation of the public policy clause can only arise from the result of a concrete competition law infringement of the arbitral award and not from the manner of the arbitration proceedings.⁹⁷ Within this framework, the annulment or exequatur court must primarily examine whether the arbitration tribunal seriously violated the mandatorily applicable Community competition law. It does not qualify, however, as a ground for annulment if the arbitration tribunal interprets an issue or a statutory provision incorrectly or draws the wrong conclusion from a factual element. Still, it is a reason for annulment even according to the minimalist approach, if the conclusion of the arbitration tribunal drawn in this manner grossly violates norms belonging in the public policy of the given state. Because of the above described approach, the more nuanced and therefore, in the opinion of the author of this article, generally more preferable minimalist view greatly contributes to the enforcement of the finality of arbitral decisions, as well as the integrity of arbitration proceedings.

The fact in itself that in certain Member States of the European Union and also outside the EU the two trends presented can be found indicates that since the *Eco Swiss* case neither judicial practice nor theory is uniform regarding the question of the assessment (annulment or refusal of the enforcement) of such arbitral awards that become the subject matter of state judicial reviews by reference of the violation of competition law rules. However, it can be regarded as the common denominator of the two approaches that one of the guarantees of the integrity of arbitration proceedings and the effectiveness and finality of arbitral awards is the consideration and appropriate application of competition rules carrying public policy content.

4. CONCLUSION

Arbitration tribunals play an increasingly important role in the enforcement of private law claims arising from the violation of competition rules. In international commercial and economic practice, parties take their legal dispute with competition law relevance more and more often before arbitration tribunals, which offers substantial advantages compared to state court proceedings. The autonomy of the parties is not without limits in the cases involving competition law aspects and, hence, affecting

⁹⁷ Cf. the decision referenced above (note 57) of the Tribunal de première instance de Bruxelles handed down in the *SNF SAS v. Cytec Industries BV* case.

internal state public policies, as well as, in the case of any connection with the internal market, pertaining to public policy level interests of the European Union. Arbitration indeed cannot serve as a way of exemption from binding competition law rules. At the same time, Member State judicial practice and the legal literature are not uniform in the assessment of certain details of issues regarding the relationship of competition law with arbitration, thus, primarily, the intensity and extent of competition law based state judicial control. However, it can be stated as a matter of principle that the fundamental guarantee of the integrity of arbitration proceedings and the effectiveness and finality of arbitral awards is the *ex officio* consideration and appropriate application by arbitration tribunals of competition laws of public policy nature. Actually, the public policy aspect and, with this, the fundamental absence of party disposition tip the scale in favor of *ex officio* consideration.