

EU and US Antitrust Arbitration

EU and US Antitrust Arbitration

A Handbook for Practitioners

Volume 1

Edited by

Gordon Blanke
Phillip Landolt



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Chapter 2

Arbitration Clauses and Competition Law

by Phillip Landolt*

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I. INTRODUCTION

Introduction. The three principal competition law issues raised by arbitration clauses are **2-001** (1) whether they might be unenforceable as in violation of competition law, (2) whether the arbitration clause covers competition law questions and all matters relating to competition law, and (3) what might be done by drafters of an arbitration clause to increase or decrease competition law enforcement under it.

* The author would like to acknowledge the valuable research assistance of Lynne Gregory and Lucy Lillywhite both of Charles Russell LLP.

The general position on each of these matters may briefly be stated. First, while it is true that most legal systems now consider competition law to be arbitrable,¹ it nonetheless remains that an arbitration clause possessing certain features can be found unenforceable as in violation of competition law. Secondly, competition law will generally be treated as any other legal question and, by consequence, will generally be found to fall within the material scope of any tolerably broad arbitration clause. Thirdly, the enforcement of competition law through arbitration can be rendered particularly efficacious by judiciously selecting the location of the arbitration, relaxing confidentiality requirements, and ensuring that the arbitral tribunal possesses sufficient evidence-gathering powers.

2-002 Structure of this chapter. Section II is devoted to the assessment of arbitration clauses for compliance with competition law. Section III deals with the question of whether and, if so, what parts of competition law may fall within the material scope of an arbitration clause. Section IV concerns heightening or attenuating the enforcement of competition law by the drafting of arbitration clauses.

II. THE ASSESSMENT OF ARBITRATION CLAUSES FOR COMPLIANCE WITH COMPETITION LAW

2-003 Arbitrability. It does not ensue from the generalized acceptance of the arbitrability of competition law in most if not all major arbitration jurisdictions around the world that any particular arbitration clause is necessarily in conformity with relevant competition law. Conformity with relevant competition law is a matter that is completely independent of arbitrability. That said, if an arbitration clause is not in conformity with competition law, it will probably be invalid and unenforceable, which is of course the effect that would obtain due to lack of arbitrability.

Arbitrability is a determination that disputes over particular subject matter or involving particular persons can freely be subjected to arbitration. The consequence of lack of arbitrability, that the arbitral jurisdiction chosen falls away, ensues without the need for any substantive enquiry. The arbitrability determination entails no conclusion as to substantive consequences. On the other hand, the substantive application of competition law can of course lead to the unenforceability of an arbitration clause. So it would be very wrong to treat the virtually universal acceptance of the arbitrability of competition law as a guarantee of the validity of an arbitration clause.

2-004 Summary of competition law analysis applicable to arbitration clauses. Arbitration clauses are subject to the same competition law analysis as any other contractual clause in an agreement. In what follows, our concern shall be exclusively competition violations based on non-unilateral conduct. It is difficult to see how arbitration clauses might raise abuse of dominant position and monopolization problems.

2-005 The test under EU competition law. Article 101 TFEU (formerly Article 81 EC) requires a two-stage examination of the agreement: first, considering the ‘object’, and second, the ‘effect’, and concluding whether the agreement has as its ‘object or effect the prevention, restriction or distortion of competition’. The ‘object’ of the agreement is to be found by an

1. Chapter 1.

objective assessment of the aims of the agreement in question,² and it is unnecessary to investigate the parties' subjective intentions.³

If the object of an agreement is indisputably the distortion of competition, for example, by price-fixing, it is unnecessary to show that price competition has in fact been affected in order to establish an infringement, that is that the 'effect' of the agreement is to distort competition. This restricted analysis was set out by the European Court of Justice (ECJ) in *Consten and Grundig v. Commission*:⁴ 'there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition'. Agreements of this kind are often referred to as *per se* infringements of Article 101(1) TFEU (formerly Article 81(1)EC).⁵

In cases where it is not plain and obvious that the object of the agreement is to restrict competition, it will be necessary to consider the effects of the agreement in considerable detail.⁶ The effect of the agreement is to be judged by reference to the entire economic context in which competition would occur in the absence of the agreement in question.⁷ This hypothetical position is often referred to as the 'counterfactual', and the correct determination of what this position would be is critical to a proper assessment of the effect of the agreement.⁸

When considering the European analysis, it should be noted that although it has been stated by the European Union Courts that *per se* infringements do not require an analysis of the 'effects' of an agreement, in practice, even where the agreement obviously restricts competition, it is believed that some analysis of its actual or potential effects will be necessary to determine the following: first, whether the agreement satisfies the requirement of appreciable effect; second, whether the agreement affects trade between Member States; third, in the case of an infringement, the level of the fine; and fourth, whether the conditions for the application of Article 101(3) TFEU (formerly Article 81(3) EC) apply.⁹

Although not held always to be necessary, considerable analysis of the effects of the agreement is to be found in almost all the decisions of the Commission and European Union courts.¹⁰ Thus, in practice, the European analysis continues to use the two-stage examination as detailed under Article 101(3) TFEU (formerly Article 81(3) EC).

The US test. The US analysis of whether an agreement is anticompetitive uses the joint notions of a 'rule of reason' and '*per se*' illegality. As such, it has been stated that there are two complementary categories of antitrust analysis.¹¹ The rule of reason distinguishes between certain kinds of agreement that are illegal *per se* (e.g., price fixing) and other restrictive agreements that are illegal only if they are shown to be an 'unreasonable restraint of trade'.¹² US case law has stated that '[t]here is generally no categorical line to be drawn

2. Cases 29 and 30/83 *CRAM & Rheinzink v. Commission* [1984] ECR 1679.

3. Case 56/65 *Société Technique Minière v. Maschinenbau Ulm* [1966] ECR 235, 249.

4. Cases 56 and 58/64 *Consten and Grundig v. Commission* [1966] ECR 299.

5. P. Roth & V. Rose (eds), *Bellamy & Child: European Community Law of Competition*, 6th edn (Oxford: Oxford University Press, 2008), 164.

6. Case C-238/05 *Asnef-Equifax v. Ausbanc* [2006] ECR I-11125.

7. Case 31/80 *L'Oreal v. De Nieuwe AMCK* [1980] ECR 3775.

8. See Roth & Rose, *supra* n. 5, 166.

9. *Ibid.*, 165.

10. *Ibid.*

11. Chief Justice Berger, dissenting, in *United States v. Topco Associates*, 405 US at 621, 92 S.Ct. at 1140.

12. See Roth & Rose, *supra* n. 5, 157.

between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment'.¹³ Under the rule of reason, 'relevant facts' are identified to aid the courts in making this distinction. Relevant facts are those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices. Most other facts are irrelevant.¹⁴

In addition, in order to determine the likely effects of an agreement or other restraints as efficiently as possible, the US courts go through a series of investigative steps. Cases that require a small number of steps are agreements generally labelled as 'per se'. Those that require more steps fall under the rule of reason.¹⁵ Therefore, as stated in *General Leaseways v. National Truck Leasing Assn*,¹⁶ 'if the elimination of competition is apparent on a quick look, without undertaking the kind of searching inquiry . . . the practice is illegal per se'.

It has been stated that the rationale for the per se rules is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is great.¹⁷ The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least a quicker) look, in place of a more sedulous one.¹⁸ The per se rule says that 'once we know a certain amount about a practice we can pass judgement on its legality without further inquiry'.¹⁹

Therefore, it is apparent that a tiered approach has been adopted by the US authorities in their analysis of whether an agreement is anticompetitive. The rule of reason represents the comprehensive test that should originally be applied in all cases; however, the development of the per se rule has allowed the US courts to reduce the time and cost of such an examination where the anticompetitive effect of the agreement is so obvious. The difference between a 'per se' and a 'rule of reason' standard lies in how much we need to know before we can make that decision.²⁰ However, similarity to the European analysis, in practice, courts and commentators often say that most agreements analysed as antitrust violations are considered under the 'rule of reason', with only a limited number falling under the 'per se' rule.²¹

2-007 Rare for arbitration clause to be per se anticompetitive. Arbitration is almost always selected for legitimate commercial reasons.²² It must therefore be only in the rarest of cases that the choice of arbitration alone would constitute a per se violation of competition law.

13. J. Stevens, in *FTC v. Superior Ct. Trial Lawyers Assn* [1990] 493 US 411, 432, 110 S.Ct. 768, 780.

14. See 11 Antitrust Law 1912b (2nd edn, 2005), and H. Hovenkamp, *Federal Antitrust Policy – The Law of Competition and Its Practice*, 3rd edn (Minnesota: West Group Publishing, 2005), 256.

15. See Hovenkamp, 2005, 260.

16. 744 F2d 588, 593 (7th Cir. 1984).

17. J. Stevens, in *Arizona v. Maricopa Cty. Med. Society* [1982] 457 US 332, 343–344, 102 S.Ct. 2466, 2473.

18. J. Stevens, in *FTC v. Superior Ct. Trial Lawyers Assn* [1990] 493 US 411, 432, 110 S.Ct. 768, 780.

19. See H. Hovenkamp, 2005, 255.

20. *Ibid.*

21. *Ibid.*

22. In this, arbitration is not different from any forum-selection clause. See *The Bremen v. Zapata Off-Shore Co.* [1972] 407 US 1, at 13–14, per Burger C.J. for the Court: 'It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes

Indeed, the fact that the Commission employs arbitration clauses in merger remedy cases must be an indication that the choice of arbitration itself is as a rule commercially legitimate and is, as a rule, no per se infringement.

In the *Centraal Bureau Voor De Rijwielhandel (CBR)*, OJ 1978 L20/18; case,²³ it was held that the ouster of national court jurisdiction may constitute an infringement of Article 101(1) TFEU (formerly Article 81(1) EC), but it is submitted that this will not be the case where that ouster is in favour of arbitration rather than, as there, an ouster without any replacement forum for the assertion of competition law rights.

Arbitration limited to competition law matters. On the other hand, a choice of arbitration the material scope of which is confined to competition law matters may be treated as per se anticompetitive, notably in the absence of any redeeming features. An example of such a clause is as follows: 2-008

The courts of England & Wales shall have jurisdiction except as regards matters directly related to EU competition law, which shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by a sole arbitrator in accordance with the said Rules.

To begin, in view of the parties' ordinary interest in one-shop adjudication,²⁴ it will be difficult to discern a valid commercial reason for such a substantively narrow arbitration clause.

Exclusion of competition matters from arbitration. Equally, but less compellingly, a choice of arbitration carving out competition law matters may also appear as anticompetitive. The inconvenience of litigating competition law questions in isolation from and often in addition to litigating all others elsewhere would generally act as a disincentive to enforcing competition law rights. Obviously such a charge would be met by a plea that the competition law carve-out seeks to ensure the jurisdiction over such matters of ordinary courts, with a view to the more efficient application of competition law. 2-009

arising during the tow. Manifestly, much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. . . . The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.' See the case of *Scherk v. Alberto-Culver Co.* [1974] 417 US 506, at 519 adopting this statement in the context of arbitration clauses.

23. *Centraal Bureau Voor De Rijwielhandel (CBR)*, OJ 1978 L20/18; *Common Market Law Reports* 2 (1978): 194.

24. See, e.g., Lord Hoffmann's speech in *Premium Nafta Products Limited et al. v. Fili Shipping Company Limited* [2007] UKHL 40 at para. 13: 'In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.' See also *Continental Bank v. Aeakos* [1994] 1 *Weekly Law Reports* 588, at 593, and D. Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (London: Sweet & Maxwell, 2005), at 110 et seq. See, however, the draft IBA Guidelines for Drafting International Arbitration Clauses of 9 Mar. 2010 at para. 13: 'In certain circumstances the parties may have good reasons to exclude some disputes from the scope of the arbitration clause. For example, it may be appropriate to refer pricing and technical disputes under certain contracts to expert determination rather than to arbitration. As another example licensors may justifiably wish to retain the option to seek orders of specific performance and other injunctive relief directly from the courts in case of infringement of their intellectual property rights or to submit decisions on the ownership or validity of these rights to courts'.

It is rare in practice to find a naked carve-out of competition law matters from arbitration. But one does find exceedingly and unaccountably often in practice references in arbitration clauses to the fact that the arbitrators' mission is confined to the 'interpretation, application and performance' of the contract or some such variation. Such a situation occurred in the case of *ET Plus v. Welter*,²⁵ for instance, and is discussed below.

It might be wondered why this sort of language is so commonly found in arbitration clauses. It is probably just a case of drafters gilding the lily. It is common currency in a great number of cases that could never raise competition concerns, for example, in sectors with innumerable players of modest size, and therefore cannot have competition law avoidance as its initial inspiration. Moreover, as admirably illustrated in the *ET Plus v. Welter* case, this sort of wording is generally attributed very little if any narrowing effect in practice.

2-010 Other competition-relevant intrinsic features of arbitration. Various other features of arbitration may in and of themselves reinforce the appraisal that submission to arbitration is per se anticompetitive:

[C]ompetition law contains norms to protect the wider public interest and not just the interests of particular individuals or undertakings. The wide expression of party autonomy in arbitration seems ill suited to serve these interests. Secondly, competition law is not easy to apply. It often involves complicated economic determinations not just about one or two undertakings but about broad phenomena in markets. Arbitrators have limited fact-finding wherewithal and the parties themselves must foot the bill alone for expensive enquiries, not the public at large. Thirdly, competition law violations are at once generally hugely lucrative and notoriously difficult to detect. To those so minded, arbitration delivers a potent opportunity secretly to enforce contractual provisions which may be against competition laws and the private character of arbitration minimises and may even eliminate the opportunities for States to discover that their competition laws are being circumvented in this way.²⁶

2-011 Advantage of arbitrators' specialized knowledge. One intrinsic advantage of arbitration over court litigation in regard to the faithful application of competition law is that arbitrators with specific industry knowledge and even competition law experience can be selected.²⁷

2-012 Easier enforceability of arbitration awards. The relative ease with which arbitration awards can be enforced around the world, thanks to the New York Convention,²⁸ probably results on the whole in enhanced enforcement of competition law, taken in the round. It is true of course that enforcing courts may not always be solicitous to police the enforcement of foreign competition law through the public policy review under the New York Convention. But the fact of swift and trouble-free enforcement of arbitration awards means that competition law determinations within them are equally buoyed by this rising tide. By contrast, foreign judgments seem forever stuck in the doldrums.²⁹

25. *England & Wales High Court (Administrative Court) [Neutral Citation] [2005] 2115 (Comm)*.

26. Ph. Landolt, *Modernised EC Competition Law in International Arbitration* (The Hague: Kluwer Law International, 2006), 93.

27. See, e.g., *Mitsubishi v. Soler* [1985] 473 US 614, at 633 per Blackmun J.: 'In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal.'

28. Concluded in New York on 10 Jun. 1958.

29. See the Hague Choice of Court Agreements Convention (the equivalent of the New York Convention but in respect of court judgments) concluded on 30 Jun. 2005. This is not yet in force and has so far garnered only three signatures, although two of them are from major jurisdictions, the EU and the United States.

Stipulated features in arbitration clauses. Certain features of the arbitration stipulated in the arbitration clause may strengthen the conclusion that it is per se in violation of competition law. **2-013**

Place of the arbitration. The most significant of these features as far as the competition assessment is concerned will usually be the choice of place of arbitration. If that choice is a place outside of the jurisdiction of the competition law in question, this would tend materially to confirm any anticompetitive tendency in the very choice of arbitration. The operation of this phenomenon is not difficult to see. Actions seeking the annulment of arbitration awards are almost invariably heard by courts at the location of the arbitration.³⁰ Courts tend to be far less anxious about the application of foreign competition law than that of their own state. Coupled with a submission of only competition law to arbitration, a choice of arbitral seat in a jurisdiction outside that of the competition law would look decidedly suspect. **2-014**

Of course, the converse will generally hold true. A choice of place of arbitration within the jurisdiction of the competition law that will probably be at issue mitigates any anti-arbitration impression inherent in the choice of arbitration alone.

Stipulated features of the arbitration. It is unusual for particular features of an arbitration to be provided for in the arbitration clause itself. For this reason alone, any such stipulations in the arbitration clause tending to diminish the already intrinsic tendency of arbitration to attenuate the fact-finding process, and thus to lessen the likelihood of competition law offences being ascertained by the arbitral tribunal, may well confirm an anticompetitive object. For example, it might be provided that the arbitration is to proceed over a particularly short period and that no experts reports are admissible. **2-015**

Accelerated proceedings. On the other hand, a mere submission to a set of arbitration rules providing for an ‘accelerated procedure’ would in most cases be susceptible of legitimate commercial purposes and not a sufficient impairment of the fact-finding process to contribute to an anticompetitive conclusion. **2-016**

The WIPO Expedited Arbitration Rules. An example of such rules is the WIPO Expedited Arbitration Rules, which, by their Article 2, apply where the parties have specifically invoked them. The WIPO Expedited Arbitration Rules do indeed provide for expeditious proceedings. Deadlines for submissions are short, twenty days generally, and there is generally only one pre-hearing exchange of written pleadings.³¹ The date **2-017**

30. P. Landolt, ‘Limits on Court Review of International Arbitration Awards Assessed in Light of States’ Interests and in particular in Light of EU Law Requirements’ 23(1) *Arb. Int’l* 63 (2007). See, however, *Mitsubishi v. Soler* [1985] 473 US 614, at per Blackmun J. at fn. 19: ‘We merely note that, in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.’ This statement acknowledges that the combination of choice of arbitral law and choice of the *lex contractus* can be intended to procure the evasion of the application of competition law. Blackmun J. speaks of ‘public policy’ since in that case, the question before him is that of arbitrability, and Blackmun J. is saying that this potential means of evading competition laws should not prevent the arbitrability of competition law, since there can be a refusal to enforce the arbitration award based on the public policy exception of the New York Convention. The incompatibility with public policy is tantamount to a conclusion that such provisions concerning arbitration and applicable law, for such purposes, are in violation of competition law and, therefore, are unenforceable.

31. Article 10 of the WIPO Expedited Arbitration Proceedings provides that the Statement of Claim shall accompany the Request for Arbitration, and Art. 12 provides that the Statement of Defence

of any hearing is to be scheduled ('be convened') within only thirty days after the claimant receives the Statement of Defence, and the implication is that the hearing should be held as soon as possible consistently with 'adequate notice of its date, time and place' (all of this is in Article 47(b)). Post-hearing briefs may be submitted within a 'short period of time' as agreed by the parties or fixed by the arbitral tribunal. The evidential stage of the proceedings, that is, that following the completion of the pleadings stage and ending with the submission of any post-hearing briefs, is 'wherever reasonably possible' to be completed within three months and, again 'wherever reasonably possible', the award is to follow within a month (Article 56(a)).

Yet these rules contain sufficient protections such that difficult competition law determinations will not be rendered practically impossible to make. As has been seen, certain of them have contextually responsive short deadlines (e.g., the date of the hearing 'as soon as possible') and others expressly admit of extension in extraordinary circumstances (e.g., the evidential stage and the time for rendering the award). Importantly, moreover, the arbitral tribunal has general power under Article 32(c), 'in exceptional cases' and subject to the general requirement to ensure 'that the arbitral procedure takes place with due expedition', to extend any deadline of its own motion. In addition, even within the tight default time frame, the usual fact determination devices are fully represented. The arbitral tribunal has power to order the parties to produce documents (Article 42(b)), and experts' reports are envisaged, even their commissioning by the arbitral tribunal (Article 49). There is a hearing if a party requests one or if the arbitral tribunal so wishes (Article 47(a)) although '[e]xcept in exceptional circumstances', it can be of no longer duration than three days (Article 47(b)).

One aspect of arbitration under the WIPO Expedited Arbitration Rules that may give cause for concern is the fixed fee for the sole arbitrator, USD 20,000 for amounts in dispute below USD 2,500,000 and USD 40,000 for amounts in dispute between USD 2,500,000 and USD 10,000,000. The prospect of such modest fees may discourage particularly qualified and therefore in demand arbitrators from accepting such appointments or, if they do, may in practice maintain a proportion between their fees and the extent of work they perform in ascertaining the facts of the case and resolving it.

2-018 Accelerated procedure under the Swiss Rules. The choice of rules that direct a case to an expedited procedure if it presents certain features rationally connected to such treatment would also not generally cause competition law concern. An example here is the Swiss Rules, the accelerated procedure of which applies where the amount in dispute is less than CHF 1,000,000 (see Article 42(2), placing a discretion with the Swiss Chambers to derogate from this channelling rule 'taking into account all relevant circumstances').

2-019 Number of arbitrators. Stipulations as to the number of arbitrators or their required qualities may also be relevant ancillary aspects of the determination concerning the competition law treatment of an arbitration clause. A submission to a sole arbitrator might tend to diminish the prospects of that arbitrator being proficient in the application of competition law. As mentioned above (paragraphs 2-012–2-018), it is unlikely that competition law expertise will be the only criterion for the arbitrator. Moreover, in practice, the parties quite often cannot agree on the identity of the sole arbitrator, and this choice often devolves

shall accompany the Answer to the Request for Arbitration. Art. 37(b) invests the arbitral tribunal with discretion to allow or require further exchanges, and Art. 38 provides that amendments to the Statements of Claim and Defence are generally admissible.

upon an arbitration agency, such as the London Court of International Arbitration (LCIA)³² or the International Chamber of Commerce (ICC),³³ an appointing authority,³⁴ or even a court at the place of the arbitration.³⁵

Stipulated qualities of prospective arbitrators. It is not rare to find in arbitration clauses a requirement that the arbitrators to be appointed ‘have knowledge of the telecommunications industry’, or ‘are commercial men’, or even are members in good standing of some distinguished technical body. It is, however, decidedly uncommon to find in arbitration clauses a stipulation that the arbitrators have knowledge of some legal system or some area of law. This must be even more the case for a competition law knowledge prerequisite, since competition law will almost never be the sole instance of applicable law. There will be a *lex contractus*, which will almost invariably apply to various other questions, and even in relation to the application of competition law itself, for example, in relation to severability of anticompetitive contractual clauses.

2-020

One might identify a perfect candidate in advance, with industry knowledge, authority in relevant competition law, and proven ability to apply the *lex contractus*, as well as being in possession of the various other desiderata of the ideal arbitrator. But all commentators agree with the following proposition taken from the draft IBA Guidelines for Drafting International Arbitration clauses of 9 March 2010 at paragraph 71: ‘it is rarely advisable to specify in the arbitration clause the qualifications required of arbitrators. The parties are ordinarily in a better position at the time of the dispute to know whether expertise is required, and if so, which, and each remains free from at that time to appoint an arbitrator with the desired qualifications. Further a party intent on delaying the proceedings may challenge arbitrators on the basis of the qualification requirements.’ The danger here is less that it is difficult to predict the precise material properties of a dispute than that specific individual may somehow become incapacitated from serving as arbitrator when finally an arbitration materializes. In some circumstances, this might leave the arbitration clause ‘null and void, inoperative, or incapable of being performed’ within the meaning of the New York Convention. The same is true where too many qualities are stipulated for the arbitrator, a combination of competition law experience and an extensive list of others. This may in application yield an empty set.

Separability. The doctrine of separability of arbitration clauses would not aid such clauses in violation of competition law since the cause of their invalidity is the clause itself. Moreover, it is unlikely that competition law would consider the competition effect of an arbitration clause in isolation, abstracting the anticompetitive contribution of various other

2-021

32. See Art. 5.5 of the LCIA Rules: ‘The LCIA Court alone is empowered to appoint arbitrators.’

33. Article 8(2) and (3) provides as follows in material part: ‘If the parties fail to nominate a sole arbitrator within 30 days from the date when the Claimant’s Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.’

34. See, e.g., Art. 6(2) of the UNCITRAL Rules: ‘If within 30 days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party’s request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.’

35. See, e.g., Art. 179(2) of the Swiss *Private International Law Act*, Art. 18(2)–(5) of the English Arbitration Act, 1996.

clauses in a contract subject to arbitration and indeed the economic context of the contract. Thus it would be the cumulative anticompetitive effect of, for example, a clause resulting in the apportioning of markets with an arbitration clause restricting the evidence-gathering adopted by parties engaged in a highly concentrated industry that would weigh together in the competition assessment, just as it would if two separate contracts between the same parties each contributed an anticompetitive feature to a qualifying anticompetitive result in a particular market.³⁶

2-022 Severance of offending parts of an arbitration clause. On the other hand, depending on the law applicable to the arbitration clause, a matter of some complexity, the procedural aspects provided for in the clause may be severable from the rest of the arbitration clause,³⁷ and the resultant clause saved. Certainly, the intent to arbitrate would probably be considered to be sufficiently preserved despite the removal of the procedural features provided for. Only rarely would such procedural features be treated as being the primary motivation behind the submission to arbitration rather than avoiding letting state courts have jurisdiction. One possible exception to this rule would be stipulated brief periods for the arbitration proceedings. When parties go to the trouble of stipulating a particular period for their arbitration, there is generally a compelling commercial reason for this. The removal of such a brief stipulated period might eviscerate the intent to arbitrate and therefore prove unseverable.

Faced with such an offending or potentially offending clause, the arbitral tribunal would form a view of its jurisdiction under the clause. If it found the clause to be in violation of competition law and unable to be saved by severance, it would properly decline jurisdiction.

A court of a state signatory to the New York Convention would be entitled to treat an arbitration clause that is in violation of competition law as ‘null and void, inoperative, or incapable of being performed’. But there is a question as to the applicability of competition law from a state that is not that whose law governs the arbitration clause. Since the seat of an arbitration tends to be chosen for its neutrality, the chances are that the courts of the seat will prove to be unconcerned as to a violation of competition law of such a third state, that is, neither that of the seat nor that of the *lex causae*.

A court requested to enforce an arbitration award is also entitled to refuse enforcement of the arbitral award if they find that the arbitration clause was invalid under the law to which it was subjected by the parties, which rarely occurs, or under the law of the seat of arbitration. Again, it is doubtful that the competition law of the seat of the arbitration will be engaged, and therefore, a violation of competition law of a third state would not imperil the arbitration award on this basis, although it may well be on another of the few bases designated under the New York Convention, that is, as a violation of public policy.

III. THE INCLUSION OF COMPETITION LAW WITHIN THE MATERIAL SCOPE OF ARBITRATION CLAUSES

2-023 The central role of the parties’ intentions in determining whether competition law claims are within the arbitration clause. Since arbitration is a creature of contract, it follows that the material scope of an arbitration clause is determined by answering the

36. See also para. 3-011 *infra*.

37. The invalidity and therefore severance of offending clauses of a contract alone satisfy the requirements of EU competition law, for instance. See Case 319/82 *Soc. de vente de ciments et betons v. Kerpen & Kerpen* [1983] ECR 4173, [1985] 1 CMLR 511, paras 11 and 12.

question, which disputes did the parties seek to submit to arbitration? This enquiry will generally need to be looked at through the prism of applicable law and, in particular, the rules of contractual construction under that applicable law. The determination of the law applicable to an arbitration clause is a matter of some complexity³⁸ and will not at any event be addressed here. Arbitration law also generally supplies an assembly of helpful presumptions

The non-contractual origin of competition law claims as basis for exclusion from the arbitration clause. Various characteristics of competition law might argue for its non-inclusion within the substantive subject matter of an arbitration. For one, all competition law rights find their origin in a source independent of the intentions of the parties, that is, the will of the legislator. A variation of such a view was presented before the US Supreme Court in *Mitsubishi v. Soler*.³⁹ Blackmun J., writing for the court, disposed of the objection as follows:

[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. . . . There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights. Some time ago, this Court expressed 'hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created', *Wilko v. Swan*, 346 US 427, 346 US 432 (1953) (footnote omitted); see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 US 117, 414 US 135, n. 15 (1973), and we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. Just last Term in *Southland Corp.*, *supra*, where we held that § 2 of the Act declared a national policy applicable equally in state as well as federal courts, we construed an arbitration clause to encompass the disputes at issue without pausing at the source in a state statute of the rights asserted by the parties resisting arbitration. 465 US at 465 US 15, and n. 7. [fn. 15] Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'. 9 USC § 2; see *Southland Corp.*, 465 US at 465 US 16, n. 11; *The Bremen v. Zapata Off-Shore Co.*, 407 US 1, 407 US 15 (1972). But, absent such compelling considerations, the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.

For Blackmun J. therefore, there is no distinguishing quality of statutory actions that would remove them from the general pro-arbitration stance employed in interpreting arbitration clauses under federal law.

Indeed many legal norms on subject matter routinely included under arbitration clauses arise from sources other than that of the parties' will. This occurs, for instance, where the parties have made no choice of substantive law as well as the application of mandatory norms and the application of tort law.

Again, it might be contended that since the material scope of an arbitration clause is almost invariably defined by reference to a relationship to a contract, competition law is external to this and should not be considered as contemplated within the selection of

38. For an excellent synthesis of the fundamental issues, see J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Thomson, 2007), 257–263.

39. [1985] 473 US 614.

matters submitted to arbitration.⁴⁰ This, too, is fallacious, since not only pure contract law determines contractual consequences. Competition law affects contract law where it applies and, as such, can be considered to be integrated within that contract law.

That there is nothing in principle rendering competition law more likely to fall outside of the material scope of arbitration is most simply evidenced in that competition law is an integral part of contract law in respect of its contractual consequences. As a result, the non-inclusion of competition law within the material scope of an arbitration clause would result in a failure of substantial justice. The Arbitral Tribunal would apply the law relating to the contract in the absence of competition law and produce an award possessing *res judicata*. There would be no opportunity for a court having residual jurisdiction, that is, jurisdiction to apply the competition law that was held to fall outside of the material scope of the arbitration clause, to interfere with the substantive result of this award.

2-025 Non-contractual effects of competition law. If by its very nature competition law is apt to fall within the scope of an arbitration clause, it must be noted that this does not obtain in respect of the entirety of competition law. As noted above, the material scope of arbitration clauses is almost invariably defined by reference to a relationship with a contract, and competition law has consequences extending beyond the mere contractual.

The archetypal contractual consequence of competition law is nullity of the contract. But competition law violations very often give rise to claims in damages. Indeed, in EU competition law, there is a requirement that an action lies for damages to repair competition law injury.⁴¹

While it is possible that an action seeking damages for competition law injury be contractual in nature, most often, such actions in damages are akin to actions for breach of a statutory duty, which in turn operate much like a civil law action for illicit harm, that is, tort or delict.⁴²

Again, upon the invalidity of a contract due to its incompatibility with competition law, a claim for restitution may arise. European Union law does not stand in the way of any such actions. Such an action seeking restitution may be characterized as contractual, but more often than not, it will sound in unjust enrichment.

The non-contractual character of these actions will therefore generate contentions that they do not fall within the material scope of the arbitration clause.

2-026 The presumption of material inclusivity. The beginning point in interpreting the material scope of arbitration clauses is the acceptance that, once it is certain that the parties intended the arbitration of their disputes, they intended to arbitrate all disputes arising upon a particular transaction or arrangement.

40. An argument of this sort was made in *ET Plus SA v. Welter* [2005] EWHC 2115 (Comm), at para. 38, per Gross J.: ‘For the Claimants, Mr. Englehart submitted that...[t]he claims advanced in the Claim Form and PoC by ET Plus against Eurotunnel were not based in any way on the contract. Cl. 24 could not be stretched to cover the tortious claims advanced here.’

41. Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297.

42. See Ph. Landolt, *Modernised EC Competition Law in International Arbitration* (The Hague: Kluwer Law International, 2006), at 339–340, referring to the English case of *Garden Cottage Foods v. Milk Marketing Board* [1984] 1 AC 130 (HL) and the German cases of (regarding Art. 81 EC [101 TFEU]) BGH, *BMW-Importe*, WuW/E BGH 1643; BGH *Cartier-Uhren*, WuW/E BGH 2541; OLG *Düsseldorf Metro-Cartier*, WuW/E OLG 4407 and (regarding Art. 82 EC [102 TFEU]) OLG Stuttgart, WuW/E OLG 2018; OLG *Düsseldorf Gleisanschluss*, WuW/E OLG 2325.

Economic basis for the one-stop adjudication principle. This acceptance operates across arbitration systems and systems of substantive contractual law as it is rooted in a fundamental reality the importance of which is often belied by the elliptical and formulaic manner in which it is typically expressed.⁴³ This reality is that dispute settlement is a dead-weight transaction cost. This is so even where the party that has successfully asserted its rights is awarded costs that approximate the capital value of its actual layout, since these costs must be financed over the period of the arbitration, and the practice is not only that no pre-award interest is applied to costs awards, but also, that none is ever even requested. Arbitration also constitutes an opportunity cost, since the resources tied up in contesting it, and made uncertain because of the inherent uncertainty of all adjudication, cannot be committed elsewhere. 2-027

Because dispute settlement entails such costs, parties are under economic incentives to minimize the cost of it. The fragmentation of dispute settlement by subject matter increases these transaction costs, since there is a certain incompressible cost to any dispute settlement proceedings, which does not decrease with a reduction in the number of issues that need to be dealt with or with the amount in dispute.

Moreover, the existence of two or more separate adjudicative proceedings each to deal with a portion of the legal questions arising upon the same factual matrix may result in delays. Rather than one adjudicator examining all legal issues simultaneously and composing them into a coherent whole, a determination in one proceeding may often prove to be prerequisite to an adjudication on other issues, with the result that the relevant legal issues will be heard in sequence rather than in parallel. In the result, there is a cost in time and efficiency.

Moreover, the substantive subject matter that is the subject of one dispute settlement process may well impinge upon the treatment of the substantive subject matter of another dispute settlement process, especially when they both arise out of the same factual matrix. Consequently, the failure to deal with all substantive subject matters arising in connection with a single factual matrix may result in a failure of substantive justice.

In view of this, the presumption of substantive inclusiveness is a fairly powerful one and operates widely.⁴⁴ As a rule then, competition law questions, even in respect of actions for damages for competition law injury and actions seeking restitution upon the declaration of the nullity of a contract vitiated by its incompatibility with competition law, will be found to lie within the material scope of arbitration clauses.

The English case of *ET Plus v. Welter*. The case of *ET Plus v. Welter*⁴⁵ provides valuable guidance as to whether non-contractual claims and competition law claims in particular may be treated as within the material scope of an arbitration clause. 2-028

43. The English cases, for instance, do not fail to present the audience with that familiar and versatile figure of the man on the Clapham bus, here attired as a businessman. See, e.g., *ET Plus v. Welter* at para. 43 the references to the ‘reasonable businessman’.

44. For example, for Switzerland, ATF 116 Ia 56 at c. 3(b), ATF 129 III 675; for England and Wales, *Premium Nafta Products Limited et al. v. Fili Shipping Company Limited* [2007] UKHL 40, at para. 13, per Lord Hoffmann, cited in *supra* n. 27.

45. [2005] EWHC 2115 (Comm).

The arbitration clause to be construed read as follows:

The Parties hereby agree to submit any potential disputes regarding the performance or the interpretation of this Contract to an arbitration tribunal constituted under the aegis of the International Chamber of Commerce of Paris. . . .⁴⁶

2-029 Expansive and constrictive wording. Gross J. observed that the wording ‘any potential disputes’ tended to broaden but the wording ‘performance or the interpretation’ tended to narrow the scope of the arbitration clause.⁴⁷

Gross J. first adverted to the presumption under English law in favour of ‘one-stop adjudication’.⁴⁸ Next Gross J. compared the instant wording of the arbitration clause, in particular the term ‘regarding performance of the contract’, with past judicial considerations of such wording.

2-030 Claims in tort included. From this, he concluded that the arbitration clause extended beyond purely contractual matters and notably included claims in tort, providing that they were sufficiently connected to the non-performance of the contract.⁴⁹

2-031 The competition law claims in particular. The narrowing wording ‘performance or interpretation’ caused Gross J. particular concern regarding the arbitration of the competition law claims in the case, much more so than in his analysis of whether tort claims were included. He nonetheless stated that, upon closer inspection, he was satisfied that this narrowing wording would not exclude the competition law claims.

This must be understood on the particular facts of the case. The substance of the claim was that certain defendants had misused confidential information (client lists) that certain claimants contended belonged to them. A certain clause of the contract between the parties conferred upon the defendants concerned a right to at least some information of the defendants (‘sales and financial information concerning the business carried out . . .’).

The issue was therefore whether this clause as properly construed covered the information that the claimants alleged the defendants had no entitlement to receive. Gross J. was able to find that the competition claims were covered since they were in his opinion ‘a variant on the familiar fact theme: the misuse of confidential information’.⁵⁰ Gross J. accepted that the competition claims ‘do raise considerations distinct from those of the other tortious claims’ and referred the competition claims to arbitration.

Gross J.’s analysis of the application of the arbitration clause to the competition law claims is remarkable in particular in his treating the reference ‘the performance and interpretation’ as having a meaningful restrictive effect on the material scope of the arbitration clause. As pointed out above (paragraph 2-009), this sort of wording is, however, fairly common in arbitration clauses, and to the extent that it is attributed any meaning (it usually is not, and properly will not be, especially after *Fiona Trust Holding Corp. v. Privalov*), it is treated as exhausting the field of possible claims and therefore of no constricting effect.

46. At para. 10.

47. At para. 40.

48. At para. 42. It is noted that although, as the judge accepted, the arbitration clause was to be interpreted in accordance with French law, the judge proceeded upon the assumption, not contested by counsel resisting the arbitration, that French law on the subject was not different from English law. See para. 44.

49. At para. 45.

50. At para. 51.

Second, having laid this unpropitious ground, Gross J.'s reasoning that the competition law claims are within the clause is unconvincing. Those claims raised more than mere interpretation points, as Gross J. himself seems to acknowledge in finding them not to be identical with others. As arbitral jurisdiction rests upon the consent of the parties, it cannot be said that some issues are attracted into the scope of the arbitration clause by virtue of their neighbouring issues that are really included. One needs to find some other mechanism for this. The *Fiona Trust* assumption of one-stop shop is the usual mechanism, but this is no more than implicit in this part of Gross J.'s reasoning.

Clearly, after *Fiona Trust*, less emphasis will be placed on the actual terms of an arbitration clause in defining its material scope. But the case of *ET Plus v. Welter* instructively conveys the issues arising in relation to the inclusion of competition law claims within the material scope of an arbitration clause.

The US case of *JLM Industries, Inc. v. Stolt-Nielsen SA*. The case of *JLM Industries, Inc. v. Stolt-Nielsen SA*⁵¹ raised vital questions as to the compellability of class action arbitrations against a respondent that has entered into identical arbitration clauses with a multitude of potential claimants, albeit no mention of arbitration joining the 'hundreds' of claimants is found in the arbitration clause. The case is currently before the US Supreme Court.⁵² **2-032**

But this case also considered whether competition claims fell within the material scope of the arbitration clause.

In the United States, it is generally the court that makes the determination as to whether a particular subject matter is within an arbitration clause.⁵³ The Court of First Instance, the District Court for the District of Connecticut, ruled that claims for damages due to a horizontal price-fixing conspiracy contrary to the Sherman Act, Connecticut statutes, and the common law were outside of the scope of the arbitration clause, which reads as follows:

24. ARBITRATION. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final.

The District Court's decision is unreported, but the Circuit Court's decision summarizes it as follows:

The district court denied these motions in an unreported opinion, concluding that price-fixing allegations against the Owners fall outside the scope of the arbitration clause. Specifically, the district court held that it would be improper to compel arbitration because 'JLM's [Sherman Act] claim in no way depends upon interpretation, construction, or application of any provision of the [particular type of contract of affreightment]'. The district court did not rule on JLM's remaining claims.⁵⁴

51. 387 F3d 163 (2d Cir. 2004).

52. Certiorari granted, 548 F3d 85 (2d Cir. 2008), 15 Jun. 2008; See Chapter 34, *infra*.

53. W.W. Park, *Arbitration of International Business Disputes* (New York: Oxford University Press, 2006), 82; *Howsam v. Dean Witter Reynolds, Inc.* 2002 537 US 79, 84, 123 S.Ct. 588, 154 LEd2d 491. It is true that under US Federal law, the question of the subjective scope of an arbitration clause can be for the arbitrators, providing an intention of the parties is clearly evidenced.

54. At para. 11.

Interestingly therefore, the District Court took the view that subject matters within an arbitration clause, even one as broadly formulated as the one in question, need to bear a particular close relationship with the contract, that is, they must relate to the ‘interpretation, construction, or application’ of the contract.

2-033 Competition law claims as ‘collateral matters’. The Circuit Court overturned that decision, finding that the District Court had applied the wrong test and identifying the test to be applied as the following: the court is to determine whether an arbitration clause is narrow or broad, and if it is the latter, whether ‘collateral matters’ are within it.⁵⁵ The Circuit Court then observed that ‘[o]ur Circuit has not precisely defined this phrase’ but that:

We have made it plain, however, that where the arbitration clause at issue is a broad one, it is presumptively applicable to disputes involving matters going beyond the ‘interpret[ation] or enforce[ment of] particular provisions’ of the contract which contains the arbitration clause. *Oldroyd*, 134 F.3d at 77. We have said that ‘[i]f the allegations underlying the claims touch matters covered by the parties’ contracts, then those claims must be arbitrated, whatever the legal labels attached to them’.⁵⁶

To ‘touch’ a matter *relating to* the contract is a wide net. If a subject can thus be at two removes from the contract and still be within its arbitration clause, then the relation with the contract can clearly be even a fairly tenuous one. The Circuit Court acknowledged that the test is an indeterminate one, but it provided some guidance as to outcomes in directing that the test focuses on the facts of the contested subject matter and not the cause of action.⁵⁷ This too is expansive, since an approach focusing on the cause of action might exclude all non-contractual claims, and competition law claims often originate in statute and often also sound in tort.

The court next compared the facts of the present case to the facts of three other cases featuring broad arbitration clauses and competition law claims. The court concluded that:

We believe that *Mitsubishi*, *Genesco*, and *Kerr-McGee* provide a firm basis for the conclusion that JLM’s claims regarding a conspiracy among the Owners in violation of the Sherman Act are arbitrable. As in those three cases, we deal here with a broad arbitration clause and the question of its applicability to a dispute resting on factual allegations which concern matters beyond the making of a particular contract between the parties and the performance of its terms.⁵⁸

From the context, it is clear that the court is using the term ‘arbitrable’ in the sense of within the parties’ consent to arbitration, that is, the so-called ‘subjective’ acceptance of the term. The lesson from these decided cases is that there is no difficulty in finding competition law claims within an arbitration clause even though the treatment of those claims will bring the arbitral tribunal to make determinations beyond the mere interpretation of contracts.

55. At para. 38, basing itself upon *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F3d 218, 224 (2d Cir. 2001) where the notion of collateral claim was treated as including at least claims ‘implicat[ing] issues of contract construction or the parties’ rights and obligations under it’.

56. At para. 38.

57. At para. 40.

58. At para. 54.

‘Without which not’ test. Finally, the court accepted that the necessary link was a sort of ‘without which not’ test of causation. Without the contract, there would have been no competition claim on any of the four bases.⁵⁹ **2-034**

The ‘without which not’ approach is apt to cast the net extremely broadly and, in the result, to gather most competition issues the within an arbitration clause, at least as far as parties to the contract are concerned. The limitation on competition law matters that may be dealt with in an arbitration because of constrictions as to the parties subject to an arbitration clause is a very different matter.

It emerges from these principles and these decided cases that, in the usual case, all competition law questions will materially fall under an arbitration clause, barring a particularly obvious expression of intent of the parties otherwise.

IV. STRATEGY IN DRAFTING ARBITRATION CLAUSES IN VIEW OF COMPETITION LAW ISSUES ARISING

Predicting the arising of competition law issues. It is, of course, not always possible to determine at the outset of any contractual negotiation that a competition law aspect is likely to arise. It may be that there are no obvious aspects of the contract that indicate that a competition law defence will be raised at a future date. However, there are certain industries in which competition law breaches tend to be more prevalent – industries that are typically targeted by competition authorities include manufacturers of cement, vitamins, and pharmaceuticals. The telecommunications industry is another where competition issues often arise (because prior to market liberalization, there was a dominant incumbent). Similarly specific types of agreements (exclusive arrangements, IP licenses, pub ties) are more likely to give rise to competition concerns. **2-035**

Power to influence the drafting of arbitration clauses. The practical reality is that it is the party with more negotiating power in relation to the contract and arbitration clause at issue that is likely to have market power. It is therefore the party that has more influence in determining the terms of the contract and its arbitration clause that wants to minimize, attenuate, if not altogether exclude the application of competition law in an arbitration. **2-036**

Is it contrary to competition law to seek to diminish its enforcement by choice of features of the arbitration clause? It may be asked whether it is a legitimate exercise for a party fearing the application of competition law to use arbitration and craft its features with a view to insulating itself in whole or in part from the effects of competition law. **2-037**

This is no easy question to answer. It is nonetheless clear that one cannot invoke the fact that private enforcement of competition law is left to the discretion of private actors, whether or not to assert their rights, to justify any attempt to attenuate the possible application of competition law by virtue of an arbitration clause. This is because such a discretion is permitted to operate by systems of competition law on the basis that the proper enforcement of competition law is consistent with incentives upon private actors. Indeed, competition law systems seek to enhance those incentives, to ensure the efficiency of private enforcement. Thus competition law systems may allow more generous damages assessments for competition injury than for losses occasioned on other bases. This occurs, for example, under US antitrust law where triple damages are provided for under statute.

59. At para. 54.

It also occurs where damages for competition law injury are passed on to other potential claimants in the form of higher prices but the competition law system allows their recovery nonetheless. Thus competition law systems may decree that time limitation periods may only start to run once a public agency has come to a determination on competition law, such determinations may be held binding on the private law adjudicator.

By contrast, actors with market power have an incentive to attenuate the application of competition law by, among other things, the design of their arbitration clause.

Moreover, one cannot invoke states' allowing arbitration and permitting parties to craft arbitration clauses as they will in defence of attempts to interfere with the full enforcement of competition law. Arbitration is permitted by states for compelling commercial reasons, and states always reserve the possibility of refusing enforcement of arbitration awards if, because of how they treat competition law, they are contrary to public policy.

The most that may be argued in favour of the legitimacy of attempts by arbitration to evade competition law is that states and other legal orders, in particular the EU legal order, have studiously neglected to concern themselves with the enforcement of competition law within arbitration. Thus there are no preliminary references under Article 267 TFEU from arbitrators to the European Court of Justice for an authoritative interpretation of community competition law.⁶⁰ Thus the EU regulations on the private enforcement of EU competition law only address themselves to the activities of Member State courts. By consequence, arbitral tribunals are not guaranteed the assistance of the Commission, Member State competition authorities, and Member State courts. Again, the Commission's work on damages in competition cases with a view to enhancing private enforcement is silent as to how any proposed measures may apply in arbitration, perhaps with the implication that they do not. So it might be said that by increasing incentives for competition law enforcement before Member State courts while leaving arbitration unaffected, the community legal order is inviting strategic behaviour concerning competition law enforcement.

2-038 Dangers of discussing the influence of arbitration clauses on the enforcement of competition law. In view of the illegality of any effective attempt to diminish the enforceability of competition law by drafting of arbitration clauses, it may be enquired whether it is appropriate even to broach the subject here. The first point to be made is that clearly, there is no intention to encourage such attempts. Second, it is of course a legitimate exercise to point out to drafters of arbitration clauses how the enforcement of competition law may be reinforced by virtue of certain features of the arbitration clause. While it is true that this knowledge can equally be turned to illegitimate ends, it must be observed that the information provided here is hardly a guide to enriching uranium. This knowledge is readily available to any lawyer who wishes to enquire after it.

As will be evident from the first section of this chapter, there is much opportunity for such a party to use arbitration and to select the particular features of its arbitration for these ends. Because arbitration and the usual array of procedural features of arbitration can ordinarily be passed off as in service of important legitimate commercial ends, it is only the most crassly transparent exclusions of competition law in arbitration that will be readily nullified as contrary to competition law.

60. Case C-102/81 *Nordsee Deutsche Hochseefischerei v. Reederei Mond Hochseefischerei Nordstern AG & Co.* [1982] ECR 1095.

It may equally be observed that, despite the immense opportunity for mischief, arbitration and its features seem distinctly rarely in practice to be enlisted into the service of evading competition law. This may be due to a laudable spirit of competition law compliance, but it is more likely on account in large part of a combination of other factors. These include the proverbial inattention of contract drafters to dispute settlement clauses, the fact that it may be difficult to attenuate the enforcement of competition law in arbitration while ensuring that the arbitral tribunal has the required wherewithal to apply other relevant law in the arbitration proceedings, and perhaps even an ignorance of the full extent of the possibilities arbitration offers in this relation.

It is, however, very much a legitimate enquiry how features of arbitrations that might be stipulated for in an arbitration clause might enhance the application and therefore the enforcement of competition law in an arbitration. It might be retorted, however, that it is not a very practical enquiry, since the party hoping to sharpen competition law enforcement features in arbitration will very often have little bargaining power and therefore little opportunity to influence the arbitration clause.

The primordial role of the place of the arbitration in the enforcement of competition law. 2-039 As seen above, perhaps the most important feature in determining the level of enforcement of competition law is the place of the arbitration. Arbitrators are more likely to apply the competition law of the place of the arbitration since courts hearing applications to annul the arbitration award on the basis that it is repugnant to public policy are more likely to apply their own competition law than that of any other legal order and to apply it with greater anxiousness.

Confidentiality as influenced by the law of the place of the arbitration. 2-040 Also, the place of the arbitration affects confidentiality protections. Most jurisdictions have express or implied duties of confidence and privacy in arbitration proceedings, but some do not.⁶¹ Arbitral hearings are private in the sense that no one but the tribunal, parties, their representatives, and witnesses may attend. The obligation of confidentiality means that parties should not disclose to third parties information or documents generated during the arbitration nor, indeed, the award itself. Some arbitral rules also expressly provide for confidentiality – see, for example, Article 30 of the LCIA Rules, and Article 34 of the SIAC Rules.

The relationship between confidentiality and competition law enforcement. 2-041 The greater the confidentiality, the less effective the competition enforcement. This is because confidentiality can act as a barrier to the involvement of competition law authorities as *amici* or even as simple information providers. Confidentiality might be thought to prevent a party from bringing an arbitration or an arbitration award that offends against competition law to the attention of competition law authorities. But confidentiality strictures generally entail an exception, express or tacit, for the divulgence of information for the purposes of a legal defence.

Fact-finding powers. 2-042 As seen above, ensuring that the arbitrators enjoy extensive fact-finding powers can be a vital component of the enforcement of competition law through arbitration.

Burden and standard of proof. 2-043 One crucial aspect of private enforcement of competition law is the rules on burden and standard of proof. This is the subject of a chapter in its own right.⁶²

61. E.g., Sweden and Australia do not provide for arbitrations to be confidential in the absence of party agreement.

62. Chapter 5.

The burden of proof is a problematic area in all arbitrations let alone those relating to competition. Competition violations are difficult to prove as they rely on complex economic data. In merger control commitments, some arbitration clauses specify that the third party need only establish a prima facie case, it is then up to the ‘infringing’ party to prove the contrary. This approach may be worth adopting in private arbitration clauses to overcome problems of access to information.

V. CONCLUSION

2-044 Given the wide recognition of the commercial usefulness of arbitration, it will be a rare occurrence for an arbitration clause to venture into unenforceability because of its repugnance to competition law.

One can also feel fairly safe that competition law questions will be subject to arbitration along with other matters in connection with a contract. Nonetheless, it is advisable to avoid the verbal surplussage of arbitrations extending to ‘the interpretation, application, and performance of a contract’. This may complicate the one-stop adjudication, which will otherwise almost universally be supposed.

Advising on the enhancement of the enforceability of competition law through judicious drafting of arbitration clauses is hardly a guide to the perplexed. In fact, the rarity of such an enterprise in practice is probably due to the fact that it will be comparatively rare for a party concerned to ensure the enforcement of competition law to have sufficient bargaining power to influence the drafting of the arbitration clause.

The crucial factor as far as enhancing the enforcement of competition law is concerned is the place of the arbitration. Locating the arbitration in the state whose competition law is likely to be at issue is the single greatest factor in ensuring that this competition law will be fully enforced, by the arbitral tribunal, and, failing that, in an action for annulment in a court at the place of the arbitration.

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