EU and US Antitrust Arbitration

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A Handbook for Practitioners

Volume 1

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Chapter 15

The Application of EU Competition Law in International Arbitration in Switzerland

*by Phillip Landolt**

* This is a revised version of a speech made on 26 Sep. 2008 at the ASA conference in Berne, Switzerland on 'Managing Competition Law in International Arbitration in Switzerland'.

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I. INTRODUCTION

15-001 Introduction. There was a time in the not so distant past when Switzerland had the reputation of being a safe haven for cartelists and Swiss arbitration was part of their stock-in-trade.

A recent speech by Jan Paulsson contained a reminder of this perception of Switzerland, quoting the following excerpt from the *Yale Law Journal* of 1944:

> A nation such as Switzerland, for example, liberal in its treatment of cartels, may be entrusted with the task of appointing arbitrators. [. . .] A loose procedure of this kind seems only too easily to lend itself to the exercise of cartelized power.[1]

One may of course question the extent to which this perception of Switzerland reflected reality. As ever, it may convey a degree of economic rivalry or indeed envy. At the time when that *Yale Law Review* article was written, moreover, the acknowledged vital importance of undistorted competition was decades away from coalescing and achieving the widespread acceptance it enjoys around the world today. One would at minimum caution against any attempts to portray Switzerland of the past as a sort of Horn of Africa for cartelists.

Perhaps more importantly though, today one does not often hear this kind of allegation. This is of great credit to international arbitration practitioners in Switzerland, who today in large measure treat matters of competition law arising in arbitrations with appropriate concern, and concern in particular as to basis upon which they ought to apply competition law.

Of course, when the Swiss Supreme Court handed down its decision of 8 March 2006[2] effectively pronouncing competition law of any provenance, and in particular the EU and Italian competition law at issue on those facts, as not worthy of public policy protection, there were some discontented mutterings from the more 'rigoriste' of EU-based arbitration practitioners. But even they had to concede that the result of this position probably did not differ notably from the position in France under the Paris Cour d'appel's *La S.A. Thalès Air Defence v. Le G.I.E. Euromissile and La S.A. EADS France and La société EADS Deutschland GmbH* (hereinafter '*Thalès*')[3] decision, with its extreme caution against interfering with arbitral awards.

15-002 Structure of this chapter. In this chapter, first the concept and origin of mandatory norms will be canvassed. Next, reference will be made to the Swiss arbitration law statute (the 'PIL Act') as interpreted by case law, and as commented on in legal writings. Thirdly, it will be contended that although these sources are equivocal on the matter, the emerging consensus, and indeed the proper and legally indicated one, is that competition law is to be

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1. J. Paulsson, 'International Arbitration Is Not Arbitration', John E.C. Brierley Lecture, McGill University, Montreal, Canada, 28 May 2008, at 16, quoting H. Kronstein, 'Business Arbitration – Instrument of Private Government', Yale LJ 54 (1944): 36. See also C. Baudenbacher, 'Enforcement of EC and EEA Competition Rules by Arbitral Tribunals Inside and Outside the EU', in *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Laws*, eds C.-D. Ehlermann & I. Atanasiu (Oxford: Hart Publishing, 2003), 341 at 341 et seq. discussing this past reputation of Switzerland.
2. Decision 4P.278/2005 of 8 Mar. 2006.
3. *La S.A. Thalès Air Defence v. Le G.I.E. Euromissile and La S.A. EADS France and La société EADS Deutschland GmbH*, Case 2002/19606, decision of 18 Nov. 2004. In this case the court stated that it would not interfere with the assessment of EU competition law in an action to set aside an arbitration award unless the award constituted a 'flagrant, effective and concrete' incompatibility with EU competition law.

applied as a system of mandatory norms in arbitrations located in Switzerland, and perhaps more broadly. Lastly, a brief overview of the mechanics of applying mandatory norms will be provided, in particular in the EU competition law context.

In distinguishing a Swiss approach to the application of competition law, it is intended in this chapter not only to describe the requirements of Swiss law, such as they are, but also to describe relevant practices and observances by those active in arbitrations with a Swiss connection, whether that connection be the seat of the arbitration, the legal training of counsel or the arbitrators, the substantive law, or something else.

II. MANDATORY NORMS

Mandatory norms. As a general proposition, states are indifferent as to the matter of what law applies to parties' legal relations.[4] Accordingly, parties can generally choose the law applicable, and states will not seek to interfere with or curtail parties' choice. Where, on the infrequent occasion a norm expresses a state purpose of sufficiently cogent importance, a state may wish for this norm to apply notwithstanding any other consideration, including concerns to vindicate party autonomy. **15-003**

The origins of mandatory norms. The mechanism of 'mandatory norms' has developed in response to this exception to state indifference to applicable law. The origins of this development among countries of the European Union are described in the *Giuliano-Legarde Report on the Convention on the Law Applicable to Contractual Obligations*[5] (Rome Convention).[6] **15-004**

4. See P. Landolt, *Modernised EC Competition Law in International Arbitration* (The Hague: Kluwer Law International, 2006), at 113; P. Landolt, 'Basis for Application of Competition Law in Arbitration Proceedings', in *Practical Aspects of Arbitrating EC Competition Law*, eds T. Zuberbühler & Ch. Oetiker (Zurich-Basle-Geneva: Schulthess, 2007), at 4.
5. Convention done at Rome on 19 Jun. 1980.
6. Report on the Convention on the law applicable to contractual obligations by Mario Giuliano Professor, University of Milan (who contributed the introduction and the comments on Arts 1, 3–8, 10, 12, and 13) and Paul Lagarde Professor, University of Paris I (who contributed the comments on Arts 2, 9, 11, and 14–33), Journal official C282/1 of 31 Oct. 1980, commentary on Art. 7:

   > For example, the principle [of the application of foreign mandatory norms] was recognized in the abovementioned 1966 judgment of the Netherlands Supreme Court in the Alnati case (cited *supra*, commentary on Art. 3 (1)) in which the Court said that, although the law applicable to contracts of an international character can, as a matter of principle, only be that which the parties themselves have chosen, 'it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract.
   >
   > This judgment formed the basis for the second paragraph of Art. 13 of the non-entered-into-force Benelux Treaty of 1969 on uniform rules of private international law, which provides that 'where the contract is manifestly connected with a particular country, the intention of the parties shall not have the effect of excluding the provisions of the law of that country which, by reason of their special nature and subject-matter, exclude the application of any other law.
   >
   > The same attitude, at any event, underlies Art. 16 of the Hague Convention of 14 March 1978 on the law applicable to agency, whereby, in the application of that convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and to the extent that, by the law of that State, those rules are applicable irrespective of the law indicated by its conflict rules.

In Switzerland, although views on mandatory norms in legal literature met with initial scepticism among legal commentators, they exerted great influence in the PIL Act, which entered into force on 1 January 1989 and is still in force today.[7]

See also N. Voser, Die Theorie der lois d'application immediate im Internationalen Privatrecht (Basle and Frankfort a. M.: Helbing & Lichtenhahn, 1993) at 7: The moment of birth of the doctrine of the application of mandatory norms is generally considered to be the appearance of Francescakis' work on renvoi in 1958 [Phocion Francescakis, La théorie du renvoi et les conflits de systèmes en droit international privé, Paris, 1958]. In the first chapter of this work Francescakis posed the question of the system of private international law and opposed the then dominant opinion in accordance with which private international law must necessarily be determined by use of conflicts of law rules. The basis of his critique was the fact that the conflicts of law rules of western European countries originated at a time when conflicts between statutes arose only in a limited scope of subject area and in respect of fundamentally comparable statutory regimes. The bilateral conflicts of law norms of Savigny moreover assumed 'a veritable pooling of certain juridical features with the aim of ensuring their effectiveness on an international level'. These were two features which Francescakis considered no longer to obtain. Francescakis' critique also rested upon the fact that the dominant conception of conflicts of law contradicted various features of internal French law. Moreover, foreign law was in respect to French law in a position of inferiority in that its application depended on the will of the parties. But the actual central thrust of Francescakis' theory was his observation of the practice of French courts. Although the dominant opinion considered public policy as a subsidiary means for the control of the results of the application of conflicts of laws rules, in numerous judicial decisions an entirely different use of public policy was made. This practice was based upon the conception that those internal provisions which had a public policy character 'applied as such and immediately to all situations considered under French law. Their use thus displaced the use of a conflicts rule'. Therefore in internal law there existed so-called 'mandatory norms' alongside provisions of private international law, in particular alongside conflicts of law norms. 'Als Geburtsstunde der Lehre der lois d'application immédiate wird im allgemeinen das Erscheinen des Werkes von FRANCESCAKIS über den Renvoi im Jahre 1958 betrachtet. Im ersten Kapitel dieses Werkes hat FRANCESCAKIS die Frage nach dem System des IPRs gestellt und ist der damals herrschenden Auffassung, wonach das IPR notwendigerweise mittels Kollisionsregeln operiere, entgegengetreten. Ausgangspunkt seiner Kritik bildete der Umstand, dass die Kollisionsnormen der westeuropäischen Länder einer Zeit entstammten, in der Gesetzeskonflikte nur in einem beschränkten Sachbereich und für im Grund vergleichbare gesetzliche Regelungen entstanden. Die zweiseitigen Kollisionsnormen von SAVIGNY würden zudem, 'une véritable mise en commun par les Etats de certaines institutions juridiques dont il s'agit d'assurer l'efficacité au plan international' voraussetzen. Zwei Umstände, die FRANCESCAKIS nicht mehr als gegeben erachtete. Die Kritik von FRANCESCAKIS gründete zudem darauf, dass die herrschende kollisionsrechtliche Auffassung verschiedenen Gegebenheiten des internen französischen Rechts in einer untergeordneten Situation (''condition inférieure''), als dessen Anwendung vom Willen der Parteien oder des Richters abhängig sei. Eigentlicher Hauptpfeiler der Theorie von FRANCESCAKIS bildeten jedoch seine Beobachtungen der französischen Gerichtspraxis. Obwohl die herrschende Lehre den ordre public als ein subsidiäres Mittel zur Kontrolle des Resultates der Anwendung der Kollisionsnorm betrachte, würde in zahlreichen Gerichtsfällen ein gänzlich anderer Gebrauch des ordre public gemacht. Diese Praxis ginge davon aus, dass diejenigen internen Vorschriften, welche ordre public-Charakter hätten, ''s'appliquent comme telles et immédiatement à toutes les situations considérées au regard du droit français. Leur mise en œuvre écarte de la sorte toute intervention d'une règle de conflit''. Deshalb existieren im internen Recht sog. ''règles d'application immédiate'' neben den Bestimmungen des internationalen Privatrechtes, insbesondere neben den Kollisionsnormen.'

7. N. Voser, in n. 28, at 25–27.

The most celebrated instance of the application of mandatory norms is Article 7(1) of the Rome Convention which reads as follows:

> When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

15-005 **The right of reservation with regard to Article 7(1) of the Rome Convention.** The Giuliani-Lagarde Report stated that Article 7(1) of the Rome Convention reflected principles widely accepted in private international law systems,[8] although, it conceded, not in England and Wales.[9] The United Kingdom, along with various other EU Member States, exercised its right of reservation in respect of Article 7(1) of the Rome Convention. But, in the United Kingdom's case at least, this was not due to any fundamental objection to the application of foreign mandatory norms but rather to concerns about the alleged uncertainty of its 'close connection' of the 'situation' test.[10]

15-006 **European Community Regulation Rome I.** The Rome Convention has now been abrogated (except as concerns Danish courts) by the European Community Regulation Rome I[11], which applies for contracts entered into after 17 December 2009.[12]

Article 9.3 of Rome I is the functional equivalent of Article 7(1) of the Rome Convention. It provides as follows:

> Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

15-007 **The introduction of a narrower category of mandatory norms.** Article 9.3 of Rome I contemplates a narrower category of mandatory norms than does Article 7(1) of the Rome Convention. First, the connection must be the country of the contractual performance. This is narrow since no knock-on effects are relevant. And any other connection will not suffice. Secondly, the mandatory norm must seek to render performance of the contract illegal. No other basis of nullity of the contract and no other legal effect sought will raise a norm to mandatory status under Article 9.3.

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8. Giuliano-Lagarde Report, in n. 28: 'The principle that national courts can give effect under certain conditions to mandatory provisions other than those applicable to the contract by virtue of the choice of the parties or by virtue of a subsidiary connecting factor, has been recognized for several years both in legal writings and in practice in certain of our countries and elsewhere.'
9. Report cited in n. 30: 'On the other hand, despite the opinion of some jurists, it must be frankly recognized that no clear indication in favour of the principle in question seems discernible in the English cases (*Ralli Bros v. Sota y Aznar; Regazzoni v. Sethia; Rossano v. Manufacturers Life Insurance Co*.).'
10. *Dicey, Morris and Collins on the Conflict of Laws*, 14th edn, ed. L. Collins (London: Sweet & Maxwell, 2006) at 1593, in particular quoting Professor Peter North: 'Art. 7(1) was opposed by the United Kingdom delegation, because it was a recipe for confusion, . . . for uncertainty . . . for expense . . . and for delay . . . .'
11. Regulation (EC) no. 593/2008 of the European Parliament and the Council of 17 Jun. 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L177/6 of 4 Jul. 2008.
12. Article 28 of Rome I.

15-008 EU competition law unlikely to be included within the narrower category. It may be noted, however, that Article 23 of Rome I provides that Rome I is subject to the 'application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations'. As will be discussed below, it is very likely that the application of EU competition law, subject as it is to its own conflict-of-law rules, would fall within Article 23 and therefore not be subject to Article 9.3. But, at all events as will be seen, EU competition law is treated by the EU legal order very much as a system of mandatory norms.

15-009 The application of mandatory norms is driven by state policy. Mandatory norms therefore seek their application not by virtue of the parties' intentions, but by virtue of the state policy behind them:

> Mandatory norms are norms which, in accordance with the will of their State sponsor, are applicable independently of the *lex contractus*. They differ from other norms in that they receive not only a substantive treatment but also a (typically unwritten) conflict-of-laws treatment determining their spatial scope of application and which requires their precedence over the conflict-of-laws rules of the *lex fori*.[13]

Thus mandatory norms cannot be called into application by action of the parties but apply by virtue of the will of the state sponsoring them. This is because their whole *raison d'être* is to protect interests which are so important, that, exceptionally, parties cannot derogate from them.

15-010 Why mandatory norms characteristically apply on a spatial basis. Mandatory norms characteristically apply on a spatial basis. There are three reasons for this. First, it follows from their status as norms superior to all others – they apply unimpaired and uncurtailed by all competing norms. They do not need to be reconciled with and delimited by the application of other norms. Secondly, '[s]ince mandatory norms seek their application as a function of the policy objectives behind them, their application is for the most part a close approximation of situations where that policy objective is triggered'.[14] Thirdly, in practice, what tends to limit the application of mandatory norms is limits under public international law to states' legitimate claims to the application of their laws, which is the territoriality principle, itself a 'spatial' criterion.

15-011 How mandatory norms are identified. As indicated by Schramm in the quote in paragraph 15-009 above, status as mandatory norms is not usually expressly enunciated.[15] Usually, however, it is the importance of the purpose behind the mandatory norm which will identify it as a mandatory norm.[16] Consequently, mandatory norms tend to arise in respect to certain subject matter.

> [. . .] it is also true that, next to principles of public policy which traditionally have been imbued with ethical values, it is generally accepted that there exists a series of principles relating to 'economic public policy' which are equally as fundamental and inalienable for the State.[17]

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13. D. Schramm, *Ausländische Eingriffsnormen im Deliktsrecht* (Berne: Stämpfli Verlag AG, 2005) at 11.
14. See also P. Landolt, 2006, 161; P. Landolt, 2007, at 12.
15. See also P. Landolt, n. 36 above, at 6.
16. See P. Landolt, n. 36 above, at 6.
17. A. Bonomi, *Le norme imperative nel diritto internationale privato* (Zurich: Schulthess Polygraphischer Verlag, 1998) at 75. See also P. Mayer, 'Mandatory Rules of Law in International Arbitration', in *Arbitration International* 2, no. 4 (1986): 274 at 274 and the International Law

Courts must apply mandatory norms of their own state. Courts are organs of their state, and therefore they are under an obligation to apply the mandatory norms of their own state fully, protecting thereby the policy behind the mandatory norm in accordance with the will of the state. **15-012**

Courts have a discretion to apply foreign mandatory norms. Where, however, a court is faced with the application of foreign mandatory norms, it generally has a discretion as to whether it will apply the norm, and, if so, the degree to which it will give it effect. In making this determination it will verify that the case in question actually comes within the mischief against which the mandatory norm is ordained to protect, as well as the worthiness of the values behind the mandatory norm in question. The court may, for example, attenuate the application of a foreign mandatory norm if it considers the values behind it not to be of sufficient importance to displace the ordinary conflict-of-law rules, and in particular party autonomy. It may even decline to give any effect whatsoever to the foreign mandatory norm, if, for example, it is of the opinion that the values it seeks to protect are obnoxious. **15-013**

Competition law has traditionally been treated as within the subject matter areas where mandatory norms are found.[18]

The application of mandatory norms. The starting point in the mandatory norm analysis is the policy requirements of the state which has created the mandatory norm. The first aspect of these requirements is the scope of application of the mandatory norm. This will generally be responsive to the policy behind the mandatory norm and will therefore be fashioned so as to achieve such purposes. As has been noted above, characteristically this results in the so-called 'spatial' application of mandatory norms. Often states will not specifically enunciate the scope of application of their mandatory norms. But for mandatory norms serving economic regulation purposes, such a specific scope of application, application on a spatial basis is very often obtained. This is to favour certainty of application in the interests of economic actors. It is also in view of the fact that they are clear and easy to follow. **15-014**

III. APPLICABLE LAW IN SWISS INTERNATIONAL ARBITRATION

General. Today, the realization must be that Swiss arbitrators are vested with practically boundless freedom concerning what, if anything, they do about competition law and with EU competition law in particular. **15-015**

Association's definition of 'lois de police', also said to be known there as 'public policy rules', as: 'rules designed to serve the essential political, social or economic interests of the State [. . .]'. *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards by the Committee on International Commercial Arbitration of the International Law Association*, 2002, at 6 (Recommendation 1(d)). It is submitted that the sources of mandatory norms at the stage of application of law correspond to a certain degree to the sources of 'public policy rules' at the stage of enforcement of arbitral awards or foreign judgments. The difference in language properly reflects the difference in function as between the application of law and the control over enforcement exercises.

18. B. Goldman, 'L'arbitrage international et le droit de la concurrence', in ASA Bull. 3 (1989): 260, at 262; A. Bonomi, in n. 39 above, at 73–75.

15-016 The Swiss arbitrator as the sole judge of competition law. If a party invokes competition law, it will not do for a Swiss arbitrator to protest that he has no jurisdiction to entertain the plea.[19] Beyond this though, as far as the Swiss place of an arbitration is concerned, the Swiss arbitrator is sole judge of competition law. The Swiss supervisory court will not interfere with an arbitrator's failure to apply competition law (unless this failure extends from a denial of jurisdiction). It will not interfere with an incorrect decision to apply competition law for example on an erroneous basis. It will not interfere with an inaccurate application of competition law.[20]

15-017 Competition law must be an overriding concern for every arbitrator. With that expansive freedom comes great responsibility. It is not so much a responsibility borne of concern to render an enforceable award. *Thalès* (see paragraph 15-001 above) is lesson enough for this. It is that overriding concern of every arbitrator to be applying the law correctly and deciding a matter right. If in any case competition law has a legitimate claim to apply an arbitrator will properly apply it.

A. Legal Basis of Law Applicable by Arbitrators in Switzerland

15-018 The Swiss Private International Law Act. Article 187(1) of the Swiss PIL Act provides as follows:

> The arbitral tribunal shall rule in accordance with the rules of law chosen by the parties, or, in the absence of such a choice, in accordance with the rules of law with which the case presents the closest connections.

Article 187 of the Swiss PIL Act therefore directs arbitrators in the first instance to apply the rules chosen by the parties. From its wording, at least, we are to understand that the arbitrator is to apply such rules chosen by the parties to the exclusion of all others.

15-019 Does the PIL Act exclude the application of competition law as mandatory rules? Where an actual party choice of applicable rules can be discerned, read literally, Article 187(1) of the Swiss PIL Act, would seem to authorize the arbitral tribunal to apply only those legal rules chosen, and no others. This would therefore appear to exclude the application of EU competition law as mandatory rules. As will be noted in section 4 below, mandatory norms seek their application not by virtue of the parties' intentions, but by virtue of the state policy behind them.

On the other hand, where the parties have made no choice of applicable legal rules, Article 187(1) of the Swiss PIL Act would appear less categorically to exclude the application of mandatory norms by arbitrators.

15-020 Some connection is ensured through the territoriality principle governing mandatory norms. The French text of Article 187(1) speaks of 'closest connections' in the plural.

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19. ATF 118 II 193.
20. Swiss Federal Supreme Court, *X S.p.A. v. Y.S.r.l.*, 4P. 278/2005, 8 Mar. 2006, [2006] ASA Bull. 363, Ph. Landolt, Note 4P. 278/2005, [2006] ASA Bulletin 2413, 538–548. It should be mentioned that an effective control over a Swiss arbitrator's treatment of competition law may later be exercised by enforcement courts. The courts of some EU Member States, for example, have treated the EU law requirements extending from Eco Swiss as being significantly higher than the French courts have. See Court of Appeal of The Hague, *Marketing Displays International Inc. v. VR Van Raalte Reclame BV*, Case No. 04/694 and 04/695.

The German and Italian texts proceed upon a singular closest connection.[21] If there is one and only one connection, mandatory rules outside of the *lex contractus* could never apply. Moreover, the 'closest connections' requirement under this alternative scenario under Article 187(1), with its exacting superlative 'closest', would seem a potentially significant incursion into the scope of application of mandatory norms on their usual spatial criterion. Certainly the territoriality principle governing the application of mandatory norms would ensure some connection, but most mandatory norms seek their application on a wider basis than that of their being among the closest connections to the case.

15-021 **The effect of applying the arbitrator's discretion.** It is true that the requirements of the state sponsoring a mandatory norm are only the beginning point in the analysis as to what if any effect to give to mandatory norms. The arbitrator's discretion in this relation is a significant second step having the virtually invariable consequence of limiting the scope of application and attenuating the effect of the mandatory norm. But to impose such an incursion into the requested scope of application of mandatory norms up front would seem to denature them as mandatory norms.

15-022 **In the application of mandatory norms, competition law is at best *praeter legem*.** On the face of Article 187 of the PIL Act, therefore, in that article's first scenario (a choice of law by the parties), the application of mandatory norms competition law is at best *praeter legem*. The statutory language surely does not contemplate the application of laws upon the model of mandatory norms. On the alternative basis, at best they may be applied, but this application is mutated vis-à-vis the basis they seek.

1. Case Law

15-023 Where there is a party choice of law, is the application of competition law as mandatory norms even *contra legem*?

15-024 **Little guidance as to the treatment of competition law is provided by case law.** The case law of the Supreme Court relating to arbitrators' treatment of competition law has been mainly concerned with and fashioned by questions of jurisdiction. This has indirectly determined what little the Supreme Court has said in relation to the available bases for applicable law.[22]

15-025 **Arbitrators do have jurisdiction to consider if a contract is contrary to EU competition law.** In a 1992 case, the Supreme Court held that in an international arbitration located in Switzerland, arbitrators have jurisdiction to consider a plea that a contract is contrary to EU competition law and that their failure to do so, upon the erroneous belief of lack of jurisdiction over the matter, is a basis for the invalidation of their award.[23]

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21. 'è più strettamente connessa', 'am engsten zusammenhängt'.
22. P. Karrer, *Basler Kommentar zum IPRG*, vol. 2 (Basle: Helbing & Lichtenhahn, 2007), at 1715: 'Is it, however, permissible for an arbitral tribunal (where there has been a choice of law) to apply or even to consider mandatory norms emanating from a legal system other than that chosen by the parties. In Swiss arbitration practice there does not (yet) exist any published case in which an arbitral tribunal has decided as much [. . .].' ('Ist es aber für ein Schiedsgericht möglich, trotz einer Rechtswahl (bei subjektiver Anknüpfung) Eingriffsnormen, die einem anderen Recht zugehören, anzuwenden oder bloss zu berücksichtigen, als dem von den Parteien gewählten? In der schweizerischen Schiedspraxis sind (noch) keine Fälle publiziert, woe in Schiedsgericht so entschieden hat [. . .]'.)
23. ATF 118 II 193.

15-026 **The basis on which the Tribunal is to apply EU competition law is uncertain.** Although the report of that decision does not indicate the *lex contractus*, other published sources indicate that the *lex contractus* was Belgian law.[24] EU competition law is of course part and parcel of Belgian law. Consequently, the basis upon which arbitral tribunals are to apply EU competition law when invoked by parties is uncertain. It might be that EU competition law applies pursuant to supposed party choice. It might be that EU competition law applies as mandatory norms.

15-027 **Is EU competition law to be applied as mandatory norms?** The fact that the Supreme Court was content to omit any reference to the *lex contractus* in this case may be taken as an indication that its holding applies irrespective of whether competition law is or is not part of that. On the other hand, surely the stronger inference runs the other way: the fact that Swiss arbitrators only ever have to apply EU competition law when it is invoked by parties indicates that it cannot apply as mandatory norms. The latter apply independently of party will and seek to apply in accordance with the will of their state sponsor.

15-028 **Compulsory examination under Article 81 EC [101 TFEU].** In an unreported decision of 13 November 1998,[25] the Supreme Court made its clearest statement on the acceptable bases for applicable law as follows:

> It is generally recognized that Swiss civil courts or arbitrators, when deciding the validity of a contractual agreement affecting the EU market, shall examine this issue in the light of Art. 85 EC Treaty [citations omitted] They shall do so even if the parties have contractually agreed to apply Swiss law to their contractual relationship [citations omitted]. This examination is compulsory where a party invokes the nullity of the contractual agreement before the court or the arbitrator.[26]

It is clear that, in this decision, the Supreme Court drew the applicable law consequences of its 1992 decision that arbitrators may not deny their jurisdiction to apply EU competition law.

15-029 **Arbitrators have equal jurisdiction.** Significantly in this passage, arbitrators are placed on the same footing as Swiss courts as concerns the application of foreign competition law. Swiss judges applying the non-arbitration chapters of the PIL Act are of course subject to Article 19 of the PIL Act,[27] which authorizes the application of legal rules on a basis clearly different than those set forth in Article 187 of the PIL Act. The Supreme Court's statement that Swiss courts and arbitrators have power to apply EU competition law even where Swiss law is the *lex contractus* logically entails the acceptance that arbitrators sitting in Switzerland are permitted to apply legal rules on bases other than the two alternatives expressly set forth in Article 187 of the PIL Act.

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24. Karrer, 2007, at 1711; *Yearbook of Commercial Arbitration*, ed. A.J. van den Berg (The Hague: Kluwer Law International, 2000), vol. XXV, 443, at 534; L. Idot, 'Note – Tribunal Fédéral Suisse 28 Avril 1992 – *Société G. (de droit belge) v. société V. (de droit espagnol)*', in *Revue de l'arbitrage*, no. 1 (1993): 128, at 128; *Revue de l'arbitrage*, no. 1 (1993): 124, at 124 (in the headnote).
25. See the English translation of this decision in the Yearbook of Commercial Arbitration, ed. A.J. van den Berg, vol. XXV (2000) 443.
26. In n. 11, at 513.
27. See s. para. 15-033 below.

Subsequently in that decision, the Supreme Court observed that,

> [i]n any case, we may not compel an arbitrator who has been requested to apply Swiss law to take into account a foreign law which would normally be applicable when, as is the case here, the parties have not relied on this law or on the nullity of the agreement.[28]

Since mandatory norms apply without regard to the parties' intentions, this latter statement would appear to indicate that whatever basis for the application of legal norms which the Supreme Court had in mind, it was not precisely that of mandatory norms.

Is competition law a public policy matter under the PIL Act? The Supreme Court's most recent treatment of applicable legal rules in international arbitration is its 8 March 2006 judgment concerning whether competition law is public policy within the meaning of Article 190(2)(e) of the PIL Act. There the Supreme Court recalled its famous *Westland Helicopters Ltd v. Arab Organization for Industrialization*, judgment of 19 April 1994: **15-030**

> [. . .] in its *Westland* judgment the Supreme Court indicated that it was appropriate to disassociate public policy within the meaning of Art. 190(2)(e) of the PIL Act from that which falls to be considered in the application of law by the arbitral tribunal. [. . .] In other words, the arbitrator's public policy is not the public policy of the judge in an action to set aside.[29]

In the *Westland* judgment, the reference was as follows: 'on the other hand, the arbitral tribunal is required, in all cases, to comply with the public policy of the country whose law it is applying'.[30] Support for this proposition is ascribed to Professor Anton Heini's chapter on Article 190 of the PIL Act in the 1993 edition of the *Zürcher Kommentar*.[31]

Professor Heini took the view there that the public policy of the *lex contractus* must be observed as '[n]ot infrequently the matter in dispute will be most closely connected – within the meaning of Article 187 of the PIL Act – precisely with that legal order whose 'lois de police' are in question'.[32]

In this context,[33] therefore, Professor Heini appears to be accepting that 'lois de police' (which we will understand to equate to 'mandatory norms') do not apply on any basis other than that expressly set out in Article 187(1) of the PIL Act, that is, the parties' choice as closest connection and notably not *qua* mandatory norms.

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28. In n. 11, at 515.
29. '[. . .] dans son arrêt *Westland*, le Tribunal fédéral a indiqué qu'il convenait de dissocier l'ordre public, au sens de l'art. 190 al. 2 let. e LDIP, de celui qui entre en ligne de compte dans l'application du droit par le tribunal arbitral (ATF 120 II 155 consid. 6a p. 168 in limine). En d'autres termes, l'ordre public de l'arbitre n'est pas l'ordre public du juge du recours'. See decision of the Supreme Court of 8 Mar. 2006; 4P 278/2005.
30. ATF 120 II 155 at 167.
31. A. Heini, *Zürcher Kommentar zum IPRG* (Zurich: Schulthess Polygraphischer Verlag, 1993), at 1588.
32. Heini, 1993, in n. 17, at 1588. In the 2004 edition of the Zürcher Kommentar, Professor Heini's views are substantially unchanged. See A. Heini, *Zürcher Kommentar*, 2nd edn (Zurich: Schulthess, 2004), at 2075.
33. It should be noted that elsewhere in the 1993 edition of the *Zürcher Kommentar* Professor Heini appears to accept the application of mandatory norms by Swiss arbitral tribunals qua mandatory norms: 'It is true that Article 19 of the PIL Act does not have direct application as far as arbitral tribunals are concerned [citations omitted]. Yet its central inspiration [. . .] may also be appealed to by an arbitral tribunal. [. . .]' ('Zwar gelangt Art. 19 IPRG für ein Schiedsgericht nicht direct zur Anwendung. [. . .] Doch kann sein Grundgedanke [. . .] auch von einem Schiedsgericht herangezogen werden [. . .]'.

So if the Supreme Court was following Professor Heini's reasoning in that edition of the *Zürcher Kommentar*, it would be to go too far to assert that *Westland* is any basis for the proposition that arbitral tribunals sitting in Switzerland are permitted to apply or otherwise give effect to mandatory norms *as mandatory norms*.

It is perhaps significant, however, that Professor Heini appears to speak generally in enunciating this proposition and does not limit the application of mandatory norms to cases where a party choice of law is absent. Moreover, he speaks in this general fashion while expressly aware that the coincidence between party choice of legal rules and 'closest connection' is no higher than 'not infrequent[. . .]' and is certainly not an invariable one.[34]

It might therefore be contended that Professor Heini, as the Supreme Court with him, accepts in principle that, where there is a party choice of applicable law, Article 187(1) of the PIL Act accommodates an additional unwritten basis for applicable legal rules alongside party choice, namely rules satisfying the 'closest connection' criterion.

If that is so, this is some indication that in principle the Supreme Court accepts that the letter of Article 187(1) of the PIL Act does not exhaust the acceptable bases upon which arbitrators may find applicable legal rules.

15-031 Arbitrators may apply legal rules which are additional to those expressly provided for by statute. The high-water mark as regards Supreme Court dicta that the expressly-stipulated bases for the application of legal rules in Article 187 of the PIL Act may be supplemented by arbitrators is therefore the decision of 13 November 1998, which simply draws out the applicable law consequences of the Supreme Court's former decision on arbitrators' jurisdiction to apply competition law. From that 1998 decision the Supreme Court distinctly appears to accept the application of legal rules by arbitrators on bases additional to those expressly provided for by statute.

In its 8 March 2006 decision, however, the Supreme Court certainly did not go out of its way to reiterate this proposition, which at all events did not arise as an issue on the facts then before it. There may be some concern, nonetheless, that the reference in this case to public policy applied by arbitrators reaches back to a view which only ambiguously, at best, accepts the proposition that applicable law may find its source elsewhere than as expressly provided for in statute. Yet in the final analysis one might observe that if the Supreme Court were not willing to countenance the application of legal rules by arbitrators upon any other basis than that set out *ipsissimis verbis* in Article 187(1) of the PIL Act it would have taken care to say so. Across a multitude of opportunities it has forborne to do so.

2. Legal Literature

15-032 The majority opinion. The legal literature discloses a fundamental divide on the matter of whether arbitrators sitting in Switzerland may apply legal rules on any basis (and in particular as mandatory norms) other than those expressly designated in Article 187(1) of the PIL Act. The distinct majority, however, accepts this proposition.[35]

15-033 Swiss judges' discretion to apply mandatory norms should be applied to Swiss arbitrators. In a 1993 article, some four years after the entry into force of the PIL Act,

34. For a contrary view, that the law chosen by the parties may be considered that of the 'closest connection', by virtue of the choice itself, see Karrer, 2007, in n. 10, at 1716.
35. The principal exponent of the contrary position is Karrer, 2007, in n. 8, who at 1722 argues for the application of 'mandatory norms' in accordance with the closest connection criterion in Art. 187(1) of the PIL Act, on which basis he equally considers party choice of law to operate.

Professor François Knoepfler[36] argued that the rule found in Article 19 of the PIL Act, affording Swiss judges a discretion to apply foreign mandatory norms, ought to be applied by Swiss arbitrators by analogy. Professor Knoepfler reasoned that not to do so would jeopardize international arbitration, as states observed their important policies being evaded.[37]

Legal coherence and mandatory norms. A few years later, in 1996, Carl Baudenbacher and Anton K. Schnyder argued that it is coherent with important state policy norms that adjudicators apply them as mandatory norms and incoherent to subject them to the usual private international law treatment involving bilateral connecting factors.[38] The authors went so far as to state that the view they were contending for was the dominant one in the legal literature, and it applied not just to judges, but also to arbitrators.[39] **15-034**

Summary. In the result, the legal literature, while exhibiting the same concerns as one sees in the case law, goes further than the case law in accepting more forthrightly that arbitrators are entitled to apply legal rules on bases other than those expressly articulated in Article 187 of the PIL Act. **15-035**

On the basis of these considerations, one might conclude that under Swiss law there is general openness to the proposition that Article 187(1) of the PIL Act easily accommodates the application of competition law by arbitrators as systems of mandatory norms.

IV. THE STANCE OF ARBITRATORS SITTING IN SWITZERLAND AS REGARDS THE APPLICATION OF EU COMPETITION LAW

In view of this openness in Swiss arbitration law about the bases upon which arbitrators may apply the law, arbitrators will simply seek to use the most legally coherent basis for the application of laws. Thus, the case for applying competition law as mandatory norms may be stated succinctly. **15-036**

The inclusion of mandatory norms. Provisions such as Article 7 of the Rome Convention, Article 19 of the Swiss PIL Act and Article 9.3 of Rome I are testimony to the fact that mandatory norms have won a place in mature systems of conflicts of law thinking. **15-037**

Fundamental principles of conflicts law require the application of mandatory norms. Indeed the application of mandatory norms is coherent with fundamental principles of conflicts of law. The reason for the widely accepted use of bilateral connecting factors, which are indifferent as to which country's law will apply in the result, is the realization that for the most part the only interests at stake are those of the parties and their commercial arrangements. For the most part, states have no legitimate concern to see their own law **15-038**

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36. F. Knoepfler, 'L'article 19 LDIP est-il adapté à l'arbitrage international?', in *Etudes de droit international en l'honneur de Pierre Lalive*, eds Ch. Dominicé, Robert Patry & C. Reymond (Basle and Frankfort a. M.: Helbing & Lichtenhahn, 1993), 531.
37. Karrer, 2007, in n. 8, reviews the various positions taken on this approach at 1718.
38. C. Baudenbacher & A.K. Schnyder, *Die Bedeutung des EG-Kartellrechts für Schweizer Schiedsgerichte* (Basle and Frankfort a. M.: Helbing & Lichtenhahn, 1996). For a recent opinion accepting the arbitrators' application of EC competition law as mandatory norms, see U. Weber-Stecher, 'Schiedsgerichtsbarkeit und Kartellrecht', in *Zürcher Kommentar zur KG*, at 24.
39. Baudenbacher & Schnyder, 1996, in n. 24, at 54.

applied. States are usually concerned at the very most that some law applies to render private arrangements efficacious.

15-039 Considering state interests. Since the very foundation of conflicts rules is responsive to interests at stake, it is fitting that, on the rare occasion that state interests are undeniably at stake, the analysis should account for them. That is the role of mandatory norms analysis, which seeks to introduce state interests into the mix.

Arbitrators are commissioned by the parties to resolve their dispute. Why, it may be asked, should arbitrators concern themselves with any interests other than those of the parties?

15-040 Risk of non-enforcement. It is true that a failure to apply mandatory norms runs the risk that an award may not be enforced if the state requested to do so feels that it is contrary to its public policy.

15-041 Arbitral freedom could be curtailed if arbitrators do not apply mandatory norms. Moreover any systematic failure on the part of arbitrators to apply mandatory norms may, over time, lead states to reduce the scope of arbitral freedom, perhaps by means of the creation of non-seat challenges to awards, more intensive scrutiny upon enforcement requests, or even denunciations of the New York Convention.

15-042 The application of mandatory norms is legally indicated for arbitrators. The main reason for arbitrators to concern themselves with interests beyond those of the parties before them is, however, that in arbitration, as in court litigation, it is legally coherent to do so.

In this relation, there is nothing special about arbitration which would attenuate the duty to apply mandatory norms vis-à-vis judges' application of foreign mandatory norms. For example, the reasons for judges to apply foreign mandatory norms are never ascribed to a hoped for reciprocity, that is, that judges of other states will apply the mandatory norms of a judge's state in exchange. Indeed, on the contrary, to arbitrators no law is truly 'foreign'. Mandatory norms emanating from any source therefore have equal claim to apply as far as arbitrators are concerned. In reference to the fundamental exercise behind conflicts of law and the ubiquity of the applicability of mandatory norms in conflicts of law systems, arbitrators will recognize that the application of mandatory norms is legally indicated.

V. THE APPLICATION OF EU COMPETITION LAW AS MANDATORY NORMS

15-043 EU competition law as mandatory norms. The first question for an arbitrator when considering the application of EU competition law as a set of mandatory norms is whether the EU legal order, their sponsor, wishes them to be treated as such. For the EU legal order, the test is surely that enunciated in its instrument, Article 7 of the Rome Convention on the law applicable to contractual obligations and Article 9.3 of Rome I:[40] Does the EU legal order require the application of EU competition law 'whatever the law applicable to the

40. The Rome I test adds a number of other conditions. But these can be considered to be the result of political compromise to obtain wide acceptance of the mandatory norms provision amount Member States and not in any way a reflection of generally prevailing principles on the application of mandatory norms. It will be noted, nonetheless, that EU competition law is not subject to Art. 9.3 of Rome I, in that by Art. 23 of Rome I, it applies in accordance with more specific principles, in derogation to Art. 9.3.

contract'? The entry into force of the EU instrument Rome I leaves this test effectively unmolested.

Pronouncements in the EU courts are frequent that EU competition law is of fundamental importance to the EU, in particular for its services in removing private barriers to the integration of the Common Market and also for its salutary efficiency effects. In *Eco Swiss*, for instance, the ECJ pointed to the fact that 'according to [Article 3(1)(g) of the EC Treaty . . .] Article 81 EC [101 TFEU] Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market [. . .]'. The problem with this reasoning is, however, that not only is the designation 'fundamental' not found in Article 3(1) but virtually all of the material scope of EU law is listed in that article. Now, with the Lisbon Treaty, competition policy has been moved out of the equivalent of Article 3(1) EC and placed in a mere 'protocol'.

Moreover, one cannot scan the decisions of EU Member State courts for evidence that they are applying EU competition law as mandatory norms. This is because a separate and sufficient basis for that application is these courts' Article 10 EC duties (as they were before the Lisbon Treaty) to apply EU law faithfully with precedence over their purely national law. Arbitrators, clearly, whether sitting within the EU or outside, are not subject to Article 10 EC duties.

Although these various factors would tend to obscure whether EU competition law is expected by the EU legal order to be applied as mandatory norms, there can be no real doubt that that is in fact the position. To begin, competition law is a classic subject for mandatory norms – economic regulation of critical importance. Secondly, the test for its application under EU law is a spatial one, that is, it enquires not whether EU competition law has been chosen by the parties, but whether there is a particular connection with the EU territory. Spatial tests for application are a sure indication that the norm in question is intended to be a mandatory norm.

15-044 **Equal treatment for all of EU competition law.** It should also be mentioned that there is no indication in EU law that any part of EU competition law is supposed to be more mandatory than any other, for example, hard core prohibitions. As far as the EU is concerned, EU competition law is all of a cloth, to be applied in its entirety. Take, for example, the matter of actions for damages due to competition law violations. That might seem to be on any periphery of imperativity.[41] But in the 2001 *Courage v. Crehan*[42] case, the ECJ made clear: '*any individual* can rely on a breach of Article [81(1)] of the Treaty [101(1) TFEU] before a national court [. . .]'.[43] Actions for damages are just as important

41. See, for example, *SNF v. Cytec*, decision number 680 of 4 Jun. 2008 of the French Cour de cassation: 'the company SNF could have sought damages in accordance with the requirements of the principle of effectiveness of Community competition law and since such damages are not within the scope of review under Article 1502-5 of the Civil Procedure Code to protect fundamental principles, the findings of the arbitral tribunal in the award of 28 July 2004 are not susceptible of reassessment by the Court of Appeal'. '[. . .] la société SNF ayant pu demander réparation selon ce que commande le principe d'effectivité du droit communautaire et ces réparations n'entrant pas dans le cadre du contrôle exercé au titre de l'article 1502-5° du code de procédure civile pour la protection des principes fondamentaux, les conclusions du tribunal arbitral dans la sentence du 28 juillet 2004 n'avaient pas à être rediscutées devant la cour d'appel.
42. (C 453/99), European Court of Justice, 20 Sep. 2001.
43. At para. 24.

as declarations of nullity, all the more so in that private enforcement is the only means by which to obtain the former, unlike the latter.

15-045 A mandatory norms analysis will require a consideration of EU competition law. No one would contend that in the mandatory norms analysis there is an absolute requirement to apply EU competition law, although an arbitrator will want to have fairly compelling reasons not to give it much, if not all, of the effect it seeks. Arbitrators are on the whole aware of the salutary effects of competition policy, furthering both allocative and productive efficiency, and of the role of EU competition law in promoting the integration of the Common Market. Arbitrators might also wish to advert to the effect of this application on the parties. EU competition law is a well-established and well-developed body of law, which is predictable in its application to a large degree. There are no real concerns about the parties somehow being surprised by its application or by its application somehow singling these parties out for special treatment.

15-046 The position in an arbitration setting. On the other hand, in the arbitration setting, there may be real issues as to an arbitrator's *objective* wherewithal to apply EU competition law. Even with the best knowledge of this body of law, an arbitrator may feel unable to do so since he lacks evidence-gathering powers, such as the power to compel the parties or others, or perhaps because a novel legal question arises and the arbitrator cannot make a preliminary reference to the ECJ for an authoritative interpretation on it (*Nordsee*[44]), and the European Commission will not provide an opinion on the matter since it wishes to husband its scarce resources for activities which will have a broader impact. The arbitrator may, in short, be conscious that the imperfect application of EU competition law will be likely to have an anti-competitive effect. So the arbitrator's response may well be that if the EU legal order seeks the mandatory application of EU competition law it must first give arbitral tribunals the tools, and only then will they get on with the job.

VI. THE MECHANICS OF DETERMINING THE APPLICATION OF EU COMPETITION LAW AS MANDATORY NORMS

15-047 The two aspects to the mandatory norms analysis. For EU competition law, there are two aspects to this analysis. There is not just the straight connection test, but one must also deal with the delimitation between EU competition law and the application of Member State national competition law.

15-048 The connection test. The more easily satisfied of the tests is the connection test. In essence, this test seeks to draw the outer limits on any claims which EU competition law might have to apply. Then the test arbitrating the respective application of EU competition law and Member State competition law operates to further refine the analysis and of course further restrict the application of EU competition law.

The traditional connection test for EU competition law is the 'implementation' test enunciated by the ECJ in its 1989 *Woodpulp I* decision:

> The decisive factor is therefore the place where [the agreement] is implemented.
>
> The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents,

44. *Nordsee Deutsche Hochseefischerei GmbH* v. *Reederei Mond Hochseefischerei Nordstern AG & Co KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, [1982], Case 102/81.

sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.[45]

15-049 **The implementation test versus the straight effects test.** What is implementation, and what distinguishes it from a test focusing on effects? It may well be that this test was taken from the test for the territorial application of English law, which goes by that same name. If so, there is an element of both objective effects, and subjective intention to produce such effects, or at least awareness that they would or even might be produced on a certain territory.

On the other hand, in the CFI's 1999 merger decision *Gencor v. Commission*[46] a straight effects test was deployed. It has been frequently contended that this is no reflection of the requirements of general EU competition law since the merger regulation contains its own turnover-based criteria for application, and existing turnover is totally independent of any intention the parties to an agreement might have in respect of that agreement.

It would seem, however, that if in *Gencor* the EU did not effectively change horses, adopting the qualified effects test in place of the implementation test, that is what has ineluctably occurred. This is because the purpose of competition law is to protect markets, and this purpose operates independently of parties' intentions. The *Woodpulp* implementation test is only correct insofar as it concentrates on effects.

15-050 **The application of Rome I.** In connection with the connection test, a word may be said about the new EU instrument on the law applicable to contractual matters, the regulation known as Rome I which applies where EU Member State courts deal with contracts entered into after 17 December 2009.

It is Article 9 of Rome I which concerns us. Among other things, Article 9 of the regime under the Rome Convention concerns application to mandatory norms. It defines them narrowly as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation [. . .]'. It also of course defines the connection prerequisite to the discretion to give effect as *the place of performance*.

15-051 **Rome I of little influence on Swiss arbitrators.** It may be argued, however, in the determination of whether EU competition law applies, Rome I should have little if any influence on Swiss arbitrators. Article 23 of Rome I makes Rome I subsidiary to the application of provisions of EU law which ordain other conflicts rules. When one has regard to the broad meaning of 'provisions' in EU law, it is fairly apparent that *Woodpulp I* and *Gencor* constitute such provisions having precedence over Rome I.

Even if Rome I does limit the scope of application of EU competition law as to contractual matters, which is disputed, there is little cogency in a Swiss arbitrator saying that the limited scope of application of foreign mandatory norms under Rome I expresses generally accepted principles. It does not. Rather, the tightening of the connection test is specifically to deal with British concerns about the wide discretion on connection enunciated in the Rome Convention. Despite recital 45 to the contrary, the UK is in the process of opting in. Article 9.3 of Rome I certainly is no argument to the contrary. Its narrower scope reflects what is thought to be the result under English law (*Ralli Bros. v. Cia*

45. Case C-89/85, *A. Ahlström Osakeythiö v. Commission*, [1988] ECR 5193.
46. Case T-102/96, *Gencor v. Commission*, [1999] ECR II-753.

Naviera Sota y Aznar[47] and *Foster v. Driscoll*[48]) albeit not the legal thinking behind that result.

15-052 The demarcation between EU and Member State competition law. Now on to the demarcation between Community and Member State competition law. In the early case of *Consten v. Grundig*,[49] the ECJ determined that competition law was a shared competency as between the Community and Member State national legal orders. Moreover, in that case the court stated that it was the requirement *in the text* of both Article 81 EC and Article 82 EC [101 TFEU and 102 TFEU] that the conduct 'may affect trade between the Member States', which formed the limitation on the application of EU competition law. Where EU competition law applies, Member State competition law must generally avoid interfering with its result. For the sake of completeness, with unilateral conduct, that is, dominant position-type situations, this requirement is, however, less absolute.

15-053 Effect on Trade Notice. There has been a great deal of case law on the question. With a notice of April 2004[50] the European Commission has now set out its synthesis of this case law and has added a so-called negative presumption, that is, a presumption that EU competition law does not apply, as well as a somewhat weaker positive presumption, that is, a presumption that EU competition law does apply.

15-054 The duty placed on Member State competition authorities. It is worth mentioning the reason for the Commission's solicitude suddenly to provide clarity on the concept of affecting trade between the Member States. As of 1 May 2004, with the inauguration of the modernization of EU competition law, with a view to unburdening the European Commission, the Member State competition authorities, such as the independent-minded Bundeskartellamt, gained powers and indeed were placed under a duty to apply EU competition law. So the Commission wanted to tighten up these national competition authorities' room to wriggle out of the application of EU competition law, which, as mentioned before, conditions the result of the application of their own national competition law.

15-055 The Notice provides guidance as to the application of the test. Whatever one might think about the timing of this Notice or the Commission's motives, the Notice is generally accepted as being a fair statement of the case law on the test for the application of EU competition law. So the international arbitration practitioner will look first to this Notice for guidance as to the application of the test and in all but the most difficult cases will not need to look any further.

15-056 The 'may affect trade' test. There are three concepts in the 'may affect trade' test. Two are obvious: the concept of trade between the Member States and the concept 'may affect'. The Community courts added the third, namely a requirement that the effect be 'appreciable'.

Trade between the Member States is a concept which is broader than mere trade in goods and services between at least two Member States. Rather, it must be understood

47. [1920] 2KB 287
48. [1929] 1KB 470
49. Cases 56 & 58/64, *Consten v. Grundig*, [1966] ECR 299.
50. Guidelines on the effect on trade concept under Article 81 EC and Article 82 EC [101 TFEU and 102 TFEU], Commission Notice, OJ 2004 C101/81.

against the backdrop of the Treaty objectives to promote the free movement of goods, services, persons and capital.

The Court of Justice has also repeatedly expressed that trade encompasses cases where the 'competitive structure of the market' may be affected. This boils down to the enquiry whether a competitor might be eliminated since its activities would be removed from trade.

The concept 'may affect' entails that 'it is possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.

The crucial notion here is 'pattern of trade'. This entails that 'trade between the Member States is likely to develop differently with the agreement or practice compared to the way in which it would probably have developed in the absence of the agreement or practice'.

Appreciability depends on the nature of the agreement or conduct concerned, the products concerned, and the strength of the market position of the undertakings concerned.

The negative presumption. Paragraph 52 of the Notice contains the Commission's negative presumption: **15-057**

> The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between the Member States when the following cumulative conditions are met:
>
> (a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%, and
> (b) In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million euro. In the case of agreements concerning the joint buying of products the relevant turnover shall be the parties' combined purchases of the products covered by the agreement.
> (c) In the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro. In the case of licence agreements the relevant turnover shall be the aggregate turnover of the licensees in the products incorporating the licensed technology and the licensor's own turnover in such products. In cases involving agreements concluded between a buyer and several suppliers the relevant turnover shall be the buyer's combined purchases of the products covered by the agreements.

The positive presumption. The Commission's less categorical positive presumption that trade may in fact be affected between the Member States is found at paragraph 53: **15-058**

> [W]here an agreement by its very nature is capable of affecting trade between the Member States, for example, because it concerns imports and exports or covers several Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement [. . .] exceeds 40 million euro. In the case of agreements that by their very nature are capable of affecting trade between the Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5% threshold set out in the previous paragraph. However, this presumption does not apply where the agreement covers only part of a Member State [. . .].

Cumulative application of both tests. These two tests, connection and effect on trade, applied cumulatively, determine the scope of application of EU competition law. But within that scope, there are cases which the EU legal order treats of such slight importance **15-059**

that it does not care to exert its regulatory power. These unimportant cases are defined in the Commission's 2001 *de minimis* notice.[51]

15-060 The *De Minimis* Notice. In brief, the Commission, and, it may be said, EU law with it, does not seek to interfere with the non-unilateral horizontal conduct of undertakings who together hold 10% or less of a combined market share and with the non-unilateral conduct of undertakings where the party imposing restrictions holds 15% or less market share.

15-061 Why do courts and arbitral tribunals not just apply one *de minimis* test in determining whether EU competition law applies? Since both the affect on trade test and the *de minimis* tests are based on market shares, and they must both be satisfied for EU law to apply, why does one not just start with the test requiring the larger market shares, that is, the *de minimis* test? The answer is that one is rarely perfectly certain about the market definition one uses to determine market share, so it is almost always better to err on the side of caution. Secondly, the *de minimis* exclusion does not apply in the case of hard core restrictions, whereas in principle the effect on trade limitation does. Thirdly, especially the positive presumption that trade may be affected is a fairly weak one, and it is sound law and practice to back conclusions there up with conclusions that, at all events, the *de minimis* exclusion applies.

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