Tobias Zuberbühler
Christian Oetiker (Eds.)

Practical Aspects of Arbitrating EC Competition Law

Schulthess § 2007

TRUONG Cam Quyen Corinne, Les différents liés à la rupture des contrats internationaux de distribution dans les sentences CCI, Litec 2002

VAN DEN BERG Albert Jan, The New York Arbitration Convention of 1958, The Hague / Deventer 1981

VAN HOUTTE Hans, Arbitration and Arts. 81 and 82 EC Treaty – A State of Affairs, ASA Bull 3/2005, 431–448 (cited VAN HOUTTE, Arbitration)

VAN HOUTTE Hans, L'arbitre, le vilain petit canard du droit européen de la concurrence, IAI conference on EC Law and arbitration, 2002 (cited VAN HOUTTE, L'arbitre)

VON MEHREN Robert, The Eco-Swiss case and International Arbitration, ArbInt 4/2003, 465–469

WADE Shai, Westacre v Soleimany: What Policy? Which Public?, IntALR 3/1999, 97

WAELBROECK Denis, New forms of settlement of Antitrust cases and procedural safeguards: is regulation 17 falling into abeyance?, ELR 4/1986, 268–280

WEIGAND Frank-Bernd, Evading EC Competition Law by Resorting to Arbitration?, ArbInt 3/1993, 249–258

WERNER Jacques, Application of Competition Laws by Arbitrators – The Step Too Far, JIntArb 1/1995, 21–26

WHITE & CASE, Paris Court of Appeal Refuses to Set Aside Arbitral Award for Public Policy Violation, International Dispute Resolution 4/2004

WILLHEIM Johannes Patrick, Enforcement of EC Competition Law in arbitration Proceedings, Global Counsel Competition Law Handbook 2002

ZEKOS Georgios, The treatment of arbitration under EU law, DRJ 1999 (May)

§ 1 Basis for Application of Competition Law in Arbitration Proceedings

Phillip Landolt

I. Introduction[1]

1. A Variety of Approaches

There are various bases upon which arbitrators might consider competition law for application. Schematically, one can present these bases as falling between two poles represented at the one end by party will and at the other by the will of the State whose competition law is at issue. 1

In rehearsing the possible bases one may move from the pure will of the parties to the pure will of the State sponsor of the competition law. For example, an arbitrator may apply competition law as part of the *lex contractus*. The *lex contractus* applies in turn as the law the parties actually chose, implicitely chose, or which they would most likely have chosen if they had put their minds to the question, as, for example, this law is closest to their contract. 2

Again, the arbitrator may determine that certain competition law applies because the *lex contractus* allows it to apply, or permits its application by analogy to the application of the competition law of the *lex contractus*. Here we see an amalgam of party will and the will of States animating the application of competition law. 3

At the other extreme, one may look to the State policy behind the competition law, and apply that competition law when the policy of the competitition law so requires. 4

2. What Happens in Practice

In practice, it often occurs that arbitrators apply these bases cumulatively, combining even those which conceptually contradict each other, and adopt the result which (conveniently) happens to ensue upon the operation of all of these 5

[1] This article draws from LANDOLT, *Modernised EC Competition Law in International Arbitration* (The Hague: Kluwer Law International, 2006).

bases, or a distinct majority of them. In a fairly recent ICC arbitration the tribunal reasoned thus:[2]

> "As regards [Art. 81 EC] we are of the opinion that we must take it into account and this for several reasons.
>
> The law of New York [the *lex contractus*] includes the doctrine embodied in the United States Supreme Court judgment in *Mitsubishi Motors Corp.* v. *Soler Chrysler Plymouth*, 105 S. Ct. 3346 (1985). In that judgment the Court held that an arbitral tribunal (Japanese) in considering a contract expressly governed by Swiss law had to take into account, on the grounds of international public policy, the anti-trust law of the United States. 'We conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [to arbitrate] even assuming that a contrary result would be forthcoming in a domestic context.' (p. 3355). By the same reasoning it appears to us that the law of New York requires that an arbitral tribunal wherever situated should take into account the anti-competition provisions of the Treaty of Rome and the relevant Regulations made thereunder. [...]
>
> If it is the *lex arbitrii* which applies, the same result is reached. We here refer to the decision of the Swiss Federal Supreme Court of 28 April 1992 *(G.S.A. contre V.S.p.a.,* DFT 118 II 193 cons. 5c bb.), which held that 'an arbitral tribunal which has to decide a dispute regarding the proper execution or non-execution of a contract is competent to examine whether this contract is valid within the meaning of [Art. 81 EC], notwithstanding that arbitral tribunals do not have the powers of state authorities of the Member States of the Union.'
>
> Furthermore, we are of the opinion that an arbitral tribunal should always be concerned with the effectiveness of its decisions. The Final Award in Case 8626, rendered in December 1996, extended from an arbitration seated in Geneva, Switzerland, involving a dispute over a licence contract, subject to New York law, between a US licensor and a German licensee. The German licensee raised an EC competition law defence. The arbitral tribunal accepted the applicability of EC competition law on the basis of the following: (1) the *lex causae*. This was the law of New York, which includes the decision of the US Supreme Court in *Mitsubishi Motors Corp.* v. *Soler Chrysler Plymouth* holding that public policy dictates the application of US antitrust law by a Japanese arbitral tribunal despite the fact that the *lex causae* (Swiss law) is not the law of a US State. New York law requires that *Mitsubishi Motors Corp* be applied by analogy to the present arbitration, and that public policy therefore necessitates the application of EC competition law; (2) the *lex arbitrii*: the Swiss Federal Tribunal has held that EC competition law may be applied by a tribunal seated in Switzerland; and (3) the ICC Rules in conjunction with the law of the place of probable enforcement (Germany): Article 26 of the ICC Rules requires arbitrators to make 'every effort to make sure that the award is enforceable at law'. German courts will not enforce it if it is contrary to Article 81 EC."[3]

[2] ICC Case No. 8626, cited in ICC Bull 2/2003, 53 at 55–59.

The arbitral tribunal therefore concluded that it was under an obligation at least to consider EC competition law for application. Thereupon, it introduced a further (fourth) basis upon which to determine the applicability of EC competition law, which was the circumstances in which competition law is applied by courts of the US legal order and the EU legal order (which latter the arbitral tribunal correctly understood as comprising not only the Community courts in Luxembourg, but the national courts of the EU Member States). It determined that US antitrust law and EC competition law were respectively applied by these courts *"irrespective of the domicile of the parties, where the contract in question has had a direct effect on commerce within their respective jurisdictions"*.[4] It then found that the provision in question would *"have a direct effect in the European Union"* and was *"potentially capable of restricting trade between the Member States"*. 6

By use of this cumulative approach, arbitrators can remain agnostic about whether there is one correct basis for application, and which that might be. It is true too that this approach is consonant with the experienced arbitrator's inveterate sense of practicality. Where the result is consistent with the application of the greatest number of approaches to this question the danger must be minimised of an award being interfered with. Of course, where competition law is concerned, considerations of this order arise with particular poignancy. An experienced arbitrator may have lived a life of unusual devotion to data 7

[3] ICC Case 8626, *op. cit.* in note 2 at 56. On these matters see generally, LANDOLT.

[4] ICC Case 8626, *op. cit.* in note 2 at 56.

protection law or to quantity surveying, but on the outskirts of his conscience it will not fail to register that many States, an increasing number in fact, are uncomfortably stern about competition law.

3. The Proper Approach

8 As regards the application of competition law, it should be noted that, among the various approaches canvassed in Section 1 above, for once, the middle way is not the one to be preferred. Perhaps equally surprising, the extreme pole to be preferred is for once in arbitration not that represented by party will.

9 The proper impetus behind the application of competition law is in fact the will of the State alone that adopted that competition law. Such impetus is entirely independent of party will. Indeed, it may operate even in face of indications that parties had sought to exclude the application of competition law. This is not self-evident, even less so before arbitrators than before judges, and not entirely uncontroverted. A demonstration of the proposition is therefore indicated. As is conventional, the starting point is what judges do with competition law, and then conclusions drawn there are translated to the arbitration context. So once this first matter has been settled, discussion will move on to the application of competition law by arbitrators.

II. Mandatory Norms

1. Applicable Law – General

10 The basic proposition animating choice of law systems the world over is of course that of State indifference as to the law which is applied in contractual matters. The two most visible consequences of this are: i) almost universally, parties' choice of law is given effect, and the fundamental enquiry is as to what law the parties chose or would have chosen, and ii) where no choice of law can be found, so-called "bilateral" connecting factors are employed by private international law systems to determine the applicable law. They operate on an abstract basis, and therefore in no way precondition the application of a particular legal system. The court inserts the facts into a sort of black box, and out comes the applicable law.

11 States do not withdraw their interest in these matters for any vicious purpose, but rather to serve a constructive end, that is, to permit the expression of party autonomy. That of course is the positive reason why parties' choice of law is given effect. It also explains what little State interest there is here. At the highest, it might be said that States are only interested that some law apply to contractual matters. That latter element of course helps to render contracts efficacious and that too serves party autonomy.

12 It will not startle that States are not always indifferent to contractual matters. Here and there, one might say increasingly, States insert a norm into contractual matters which is meant to be held to by parties, so much so that, on occasion, parties are not permitted to derogate from it. That is why some of these norms are called mandatory norms.

13 The essential property of these norms is that they *override* and they do so because a State requires this. There are of course various degrees in which they may override, as determined by the will of the State sponsoring them, something that is not always easy for adjudicators to determine. To be a mandatory norm, in the acceptation of interest here, an overriding of a certain degree must obtain. At the lowest, there is overriding by way of the supplying of a certain contractual term in respect of a matter where the parties have made no provision. Then, the norm may override any variant positive disposition the parties may have made. Further, the norm may override even where that norm emanates from a legal system different from that generally applicable, indeed even where that legal system was expressly chosen by the parties. It is only where this third degree of overriding is intended by the State sponsoring the norm that the norm is said to be mandatory.

2. Justification for the Application of Mandatory Norms

14 The first reason why mandatory norms are applied by adjudicators is that to do so coheres with the essential scheme of conflict of laws systems. Generally the only interests determining which law applies are those of the parties, but on the relatively rare occasion that States' interests apply this is given voice.

15 Secondly, the fact that the interest behind the application of a norm is that of a State, and not that of parties, does not necessarily make that interest one unworthy of application. State interests may be acknowledged as of first order importance by the instance called upon to make the application decision.

16 Thirdly, since, by definition, States actually care about the application of their mandatory norms, if these are not applied, the State may take action to ensure that this occurs. The weapons in States' arsenals are not few. States may for example ensure that there will always be jurisdiction of their courts or other organs to deal with matters relating to the mandatory norm. States may also refuse to recognise or enforce decisions made elsewhere which do not adequately express the policy behind that State's mandatory norm.

3. Application of Mandatory Norms by Courts

(a) General

17 Except in the rare case where a norm is accompanied by an authoritative statement that it is mandatory, it is generally open for courts to accept or deny that it has mandatory status. Where a court accepts such status, it will as a rule not fail to ensure the application of the mandatory norms of its domestic legal system. It is an organ of that State and as such it is commissioned to ensure that the will of that State is accomplished.

18 The application of foreign mandatory norms by courts is quite a different matter. Traditionally, courts were hesitant to apply foreign mandatory norms, because it was felt improper to be doing the bidding of a foreign State, and because such norms were viewed as non-neutral, or even political. Today, however, much of that initial reserve has dissolved. It is no longer considered absolutely impermissable for a court to apply such foreign mandatory norms. The enquiry today is as to the acceptability of the mandatory norm from the point of view of the court faced with applying the norm. The three principal reasons for this modern position were cited in Section 2 above.

19 The resultant position as far as the application of mandatory norms by courts is concerned is that domestic mandatory norms will be applied with a high degree of fidelity, and foreign mandatory norms will be applied or given effect on a discretionary basis, in accordance with a range of considerations, including, of course, the declared interests behind the mandatory norm and the stance of the domestic system of law of the court towards the interest behind the foreign mandatory norm.

(b) The Rome Convention

20 The Rome Convention on the law applicable to contractual obligations[5] is by far the broadest international convention on applicable law in contractual matters in operation. It is open for adoption by any EU Member State,[6] and has now been adopted by all twenty-seven. Art. 7 of the Rome Convention is an important expression of the treatment of mandatory norms. It provides as follows:

[5] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC).

[6] Art. 28 of the Rome Convention.

"Mandatory rules

1. 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.
2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."

21 The general principle under the Rome Convention is that adjudicators have a discretion to give effect to the mandatory rule of the law of another country if two cumulative conditions are fulfilled:

1. The law of the country from which the mandatory rule originates has a close connection to the situation.[7]
2. Under that law, the rule in question must be applied whatever the law applicable to the contract.

22 The first condition could hardly be less determinate. It is for the individual adjudicator to establish what a "close connection" is. Although under the First Protocol to the Rome Convention the European Court of Justice is empowered to provide authoritative interpretations of the Rome Convention, it has not yet had occasion to interpret this standard in Art. 7(1). It is also true that at such time as it may have occasion to do so, its interpretation will reflect the open-

[7] One might think from the text of Art. 7(1) of the Rome Convention that what must have the "close connection" with the situation is the *country* whose law seeks mandatory application. The *Giuliano-Lagarde Report* makes clear, however, that it is the *law* of this country which must have the close connection to the situation, and not the country itself. See Report on the Convention on the law applicable to contractual obligations by Professor Mario Giuliano, University of Milan (who contributed the introduction and the comments on Art. 1, 3 to 8, 10, 12, and 13) and Professor Paul Lagarde, University of Paris I (who contributed the comments on Art. 2, 9, 11, and 14 to 33): *"The connection in question must exist between the contract as a whole and the law of a country other than that to which the contract is submitted."*

textured nature of the standard, and will therefore leave a wide margin of discretion to adjudicators.[8]

23 The second condition, that the sponsoring State would have the norm in question applied no matter what the law otherwise applicable, makes no distinction as to whether the mandatory norm is within that law (the *lex contractus*) or not. It is the State will that is operative here, not party will in any regard, and that State will is of sufficient imperativity when it claims to override any private international law rules which would interfere with it.

24 Once the conditions for the giving effect to mandatory rules are in place, the adjudicator is faced with the question of what to do with the latter. The first point to be made is that Art. 7(1) of the Rome Convention provides the adjudicator with a double discretion, first as to whether he will actually give effect to a mandatory rule, and secondly, what effect that is.

25 The first discretion is structured by the non-exhaustive designation of factors which that adjudicator must take into account: the nature and purpose of the mandatory rules and the consequences of their application or non-application. Taking into account the "nature and purpose" of the mandatory rule is in effect to enquire into the worthiness of the policy goal which the rule seeks to express. So, to take two examples, a foreign court may treat competition rules as worthy of application, other things being equal, but misappropriation without proper compensation as not being worthy of application. Taking into account the consequences of non-application means in effect the consequences to the State sponsor of the norm but also to a party who may be benefitted by the application of the rules, and finally to the State whose court has refused the application. As will be indicated below, it also permits adjudicators to take into account the claims of contradictory mandatory norms emanating from still another State or other States.

26 Art. 7(1) of the Rome Convention does not speak of "applying" mandatory rules but of "giving effect" to them. When one *applies* a rule, one applies it according to its demands, and all of it. Appropriately, Art. 7(2) of the Rome Convention (which will be considered presently) uses the term "to apply" when refering to how *domestic* mandatory norms are treated. *Giving effect* is much more flexible. Since Art. 7(1) of the Rome Convention makes no specification as to the effect that may be given to mandatory norms, this matter is left entirely up to the adjudicator.

[8] See PLENDER / WILDERSPIN, 188 for further guidance on the treatment of the term "close connection".

27 Art. 7(1) of the Rome Convention makes no distinction between mandatory norms in accordance with whether they are domestic or foreign. So this basic treatment is ordained under Art. 7(1) of the Rome Convention for both. That will prove significant when it comes time to deal with the position of arbitrators, who "have no forum". But Art. 7(2) provides that Art. 7(1) of the Rome Convention does not affect how domestic mandatory norms may be treated. Art. 7(2) of the Rome Convention contains the same condition as Art. 7(1) in relation to qualification for mandatory norm status: the legal order in question must require their application no matter what the law otherwise applicable (they are "mandatory", which must mean as understood in Art. 7(1) of the Rome Convention which contains this definition). Therefore the Rome Convention permits adjudicators to treat domestic mandatory norms more deferentially, although in no way imposes this. In point of fact, however, under most EU Member States' law domestic mandatory norms are fully binding upon domestic courts, as mentioned in Section (a) above.

28 Art. 7 of the Rome Convention contains no express reference to the situation where not one but two or more States claim the application of one of their norms on a mandatory basis, and the "close connection" criterion is satisfied in more than one case. Clearly, if domestic mandatory norms are among those claiming application, the result by operation of Art. 7(2) of the Rome Convention combined with EU Member State laws as they are generally found, would on most occasions be an entire vindication of the domestic mandatory rules and, to the extent of any inconsistency, the banishment of the foreign rules. Where, however, all candidates for application are foreign mandatory norms, the solution under the Rome Convention must play itself out at the level of the adjudicator's discretion to weigh up consequences.[9] Since under Art. 7(1) of the Rome Convention the adjudicator is also to advert to the "nature and purpose" of the mandatory norm, there may be some possibility to confer more deference upon a norm with a purpose which the adjudicator, or the adjudicator's domestic legal system, considers more worthy than the purpose behind the other mandatory norms. But in practice this will occur only in cases of trenchant disequilibrium between the relative value of two or more mandatory norms, in the eyes of the adjudicator, since courts as State organs will be disinclined to engage in the often invidious exercise of assigning relative values to foreign

[9] The *Giuliano-Lagarde Report, op. cit.* in note 7, identifies the consequences assessment as the principal *locus* where competing mandatory norms from two or more foreign sources are to be mediated: "[…] *the judge must be given a power of discretion, in particular in the case where contradictory mandatory rules of two different countries both purport simultaneously to be applicable to one and the same situation, and where a choice must necessarily be made between them.*"

State purposes. It might also be considered whether the degree of closeness of a situation to the law of one country over the degree of closeness of that situation to the law of that other State may aid in this determination. The better view, however, is that the closeness of connection criterion operates as a sort of light-switch, binary criterion to determine whether or not an adjudicator has such a discretion. It is not intended directly to have an impact upon the exercise of the discretion once conferred. On the other hand, there is no doubt that, generally speaking, the closer the connection a situation has to a particular State (as contrasted to its law), indeed, usually to its territory, the more significant the consequences of the application or non-application of that State's mandatory rules will be.

(c) Art. 19 of the Swiss PILS

29 Art. 19 of the Swiss PILS is very similar to Art. 7(1) of the Rome Convention. It provides:

> "1. When interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to in this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law.
>
> 2. In deciding whether such a provision is to be taken into consideration, one shall consider its aim and the consequences of its application, in order to reach a decision that is appropriate having regard to the Swiss conception of law."

30 The major difference vis-à-vis Art. 7(1) of the Rome Convention is the fastening of Art. 19 PILS onto the Swiss point of view. So discretion only arises if in the Swiss point of view it ought to, and the outcome of any exercise of discretion must be appropriate in the Swiss point of view.

31 The truth is that for most of the life of this provision it has been more respected in the breach than in the observance. But recently, in reliance upon this provision, the influential Zurich Commercial Court applied EC competition law as mandatory norms.[10]

[10] Blätter für Zürcherische Rechtsprechung (ZR) 104 (2005), No. 27 at 97.

(d) Art. 7 of Rome Convention as Reflective of Generally Accepted Principles

The *Giuliano-Lagarde Report* commented as follows on the extent to which Art. 7(1) of the Rome Convention codified principles generally accepted in private international law systems in Europe: 32

> "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."

The taxonomy of legal systems as civilian or common law is widely treated, not entirely without justification, as a *summa divisio*. We have seen how Switzerland, a civil law country, treats foreign mandatory norms. Moreover the *Giuliano-Lagarde Report* traces the idea behind Art. 7(1) of the Rome Convention back to the Netherlands, and to the German *Sonderstatut* theory.[11] Again, a majority of signatory States of the Rome Convention are civil law countries and indeed both the UK and Ireland opted out of Art. 7(1) of the Rome Convention. Therefore one must enquire as to the position under the common law tradition. The *Giuliano-Lagarde Report* concluded as to English law as follows: 33

> "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.) [...]."

That view appears accurate. At most, English law would refuse to give effect to a contractual stipulation which is contrary to a qualifying mandatory law of the *lex loci solutionis*. So one might say that English law accepts the principle behind Art. 7(1) of the Rome Convention. But it requires one particular connecting factor (place of performance), and only envisages one particular effect (nullity) for and of the application of mandatory norms. 34

The UK, Germany, Ireland, Luxembourg, Portugal, Latvia and Slovenia exercised their right to opt out of Art. 7(1) of the Rome Convention. The UK opt-out, at least, was not ascribed to a problem in principle with Art. 7(1) but with the fact that the criterion "close connection" was not sufficiently certain. It remains, however, that the principles behind Art. 7(1) of the Rome Convention, while now firmly and widely established in Europe, are not universally subscribed to. 35

[11] See also PLENDER / WILDERSPIN at 184-187 and BAUDENBACHER / SCHNYDER.

So when one speaks of "the proper approach" in Section I.3 that is in some portion hortatory.

(e) Spatial Criterion of Application

36 Since mandatory norms seek their application as a function of the policy objective behind them, their application is for the most part a close approximation of situations where that policy objective is triggered. Nonetheless, there is no perfect identity between the two, for two specific reasons. First, even mandatory norms are limited by public international law requirements as regards State sovereignty. Although the adequate achievement of a policy objective behind a mandatory law, viewed in isolation, may require a certain broad application of that mandatory norm, regard for other States will trace limits to the extent to which a State will claim the mandatory application of any of its norms. In this context respect for State sovereignty expresses itself as a territorial limitation to the application of mandatory norms. Secondly, the actual application of the mandatory norm may be a complex determination. As will be seen in Section III.1 below, one of the two general categories of mandatory norms, the most common nowadays, is norms relating to the economic ordering of a State. Such matters are usually not susceptible of determatological appraisal. Therefore mandatory norms seek their *prima facie* application upon some more easily determined proxy, which will capture all cases where qualifying effects are felt on the State's territory and which might, upon closer inspection, reveal the mischief behind the mandatory norm to be engaged. In the result, mandatory norms usually apply *prima facie* where there are effects of a certain minimum magnitude upon the territory of the State sponsoring them.

4. Application of Mandatory Norms by Arbitral Tribunals

(a) Treatment of Applicable Law by Arbitral Tribunals – General

37 It is generally the position under systems of arbitration law that arbitrators are not subject to the private international law of the place where they are sitting.[12] The first rule of arbitration practice is of course to fulfil the will of the parties, since it is the parties who have called the arbitral tribunal into being, and, in the

[12] See MAYER, Reflections: *"For a long time, arbitrators adopted the same approach [as judges]. They applied the rule of conflict of laws of the seat of the arbitration, thus more or less assimilating such law to the lex fori. They did so because of their apprehension, now recognized as misconceived, that they were under a duty to do so."*

absence of any other countervailing interests (generally speaking, there will be none), arbitrators heed the mutual wishes of the parties. A choice of law generally comes within this category, since, as noted in Section 1 above, usually the only interests at stake in the determination of the applicable law are those of the parties.

Where the will of the parties as to the law which is to be applied is not expressed, arbitrators in practice resort to one or more of the following three methods of ascertaining the law applicable:[13] 38

- the cumulative application of systems of conflicts of law engaged on the facts;
- reference to general principles of private international law;
- the "direct method", also known under its name in French, "*voie directe*".

The direct method entails an arbitrator simply designating the applicable law upon objective or subjective criteria. For example, Art. 187(1) PILS provides a celebrated instance of direct method upon an objective criterion, in default of party choice: *"[t]he arbitral tribunal shall decide the dispute according to [...] the rules of law with which the case has the closest connection."* 39

Some conceive an arbitrator's application of certain legal rules in conformity with the parties' choice of law as being in execution of one (or more) of the above three methods. It is, however, not necessary to attach such a result to these methods. General arbitration law principles suffice. The hegemonic view among arbitration practitioners and theorists is that, as far as possible, the arbitrator's task is to act in accordance with the legitimate expectations of the parties and this notion is held to govern arbitrators' behaviour in relation to determining applicable law. 40

So that all is the normative framework which arbitrators generally encounter when they are called upon to determine the applicable law. There is no doubt that under this framework arbitrators enjoy a great deal of freedom in determining the applicable law. Many arbitration laws provide a means to challenge obvious failures to apply the law expressly chosen by the parties. But that is in reality the extent of the constraints usually facing arbitrators in dealing with what law to apply. If an arbitrator is really intent on getting around a choice of law she can usually find an effective way to do so, for example by determining that the choice was invalid on some basis or another, or is limited in scope.[14] 41

[13] MAYER, Reflections; DERAINS, L'ordre public, 375.

[14] MAYER, Reflections.

(b) Mandatory Norms before Arbitral Tribunals

42 So far, there has not been seen within this normative framework any concern as to States' claims to the application of their mandatory laws. What do arbitrators do in those cases where they encounter States' claims to the mandatory application of their laws? The reason why the Rome Convention is binding on courts of the EU Member States is that it is inserted into the private international law of those States, and those courts are commissioned to uphold the law.[15] Arbitrators, however, as we have just seen, are under no such constraints.

43 States' claims to the application of their mandatory norms constrict the expression of party will. An extreme view holds that such claims have no place in arbitration which is a matter of private justice. More moderate thinkers analyse these State claims as part of the enquiry into parties' legitimate expectations. They argue that in face of mandatory norms expressing valid State concerns (valid in this sense generally meaning consistent with the values of international commerce) parties can have no legitimate expectation of the application of legal norms, even of their own choosing, at variance. But that is already to accept a basis for the application of mandatory norms which emanates from a source other than the parties.

44 The incidence of actual sanction upon arbitrators for not applying mandatory norms is fairly limited, even more so than sanction for failure to comply with party will. Generally speaking, the sole mechanism at work serving this purpose is the public policy ground for setting aside and for refusing to recognise or enforce. Since, as was seen in Section 3(a) above, States are hardly required to be fanatical about the application of *foreign* mandatory law – there is almost never more than a mere discretion as to both its application and how it is applied –, the risk of any interference with an arbitral award only really occurs where the mandatory law which the arbitral tribunal failed to apply or failed to apply appropriately, happens to extend from the State of the court assessing compatibility with public policy.[16] Even then, it is no certainty that the court will find an offence to public policy since its ability to reverse such incompatibility will usually be circumscribed by procedural rules and institutional limitations (such as an inability to hear the matter *de novo*).

[15] MAYER, Reflections.

[16] With some mandatory norms, however, including competition law in principle, there is also the chance that an administrative authority, specifically commissioned to enforce matters of a category into which the mandatory norms in question fall, will interfere with an award which fails to heed domestic standards in relation to that category of matters.

45 In the end, arbitrators are really only motivated to apply mandatory norms for the three reasons designated in Section 2 above. In reference now to the three methods by which arbitrators determine the applicable law, which were set out earlier in this Section (a), arbitrators may properly form the view that employing an analysis upon the model of Art. 7(1) of the Rome Convention is legally indicated.[17] First, this coheres with the fundamental scheme of the choice of law exercise, and sufficiently accounts for all interests at issue, in particular the legitimate interests (as determined by the arbitrator) behind the mandatory norm. Secondly, because arbitrators "have no forum", Art. 7(1) of the Rome Convention recommends itself particularly to them as a model because of its undifferentiated approach to both "domestic" and "foreign" mandatory norms. A further aspect of Art. 7(1) of the Rome Convention, which is particularly adapted to the international arbitration context is that, as was mentioned in Section 3(c) above, unlike Art. 19 PILS, Art. 7(1) of the Rome Convention is neutral as to the source from which values to assess mandatory norms are to be drawn.

46 It should be mentioned here that, as regards the third reason in Section 2 above motivating the application of mandatory norms, where arbitrators are concerned, they act not only to preserve their award, but to preserve the institution of arbitration and the generally benevolent stance States adopt towards it.

III. Competition Law

1. Mandatory Norms

47 There are various ways in which States declare that their competition law is intended to apply without regard to the law otherwise applicable and is thus to qualify as a set of mandatory norms. For US competition law (generally referred to in the US as "antitrust" law), there is an actual statement to this effect, in a

[17] Recently, the Swiss Federal Tribunal appears to have espoused the view that arbitrators, at least those sitting in Switzerland, must apply mandatory norms as such (on the facts there, EC and Italian competition law), that is, irrespective of the *lex causae* and, consistent with such a treatment of mandatory norms, probably of their own motion. See decision of the Swiss Federal Tribunal of 8 March 2006, DFT 132 III 389: *"3.3 Selon la jurisprudence, l'arbitre chargé de se prononcer sur la validité d'une entente contractuelle affectant le marché de l'Union européenne examinera cette question à la lumière de l'art. [81 EC], même si les parties ont conventionnellement admis l'application du droit suisse à leurs relations contractuelles; cet examen s'imposera en tout cas si la nullité du contrat est invoquée devant lui par l'une des parties."*

footnote of the US Supreme Court decision in *Mitsubishi Motors Corp.* v. *Soler Chrystler-Plymouth, Inc.*[18] For EC competition law, the position is also fairly explicit. In *Eco Swiss* the European Court of Justice held that EC competition law is of such importance to the Community legal order that Member State courts having power to annul arbitration awards on public policy grounds must treat a *"failure to comply with the prohibition laid down in Art. 81(1) EC"*[19] as a violation of public policy justifying the annulment of the award. In that case the *lex causae* was Dutch law, a constituent part of which is EC competition law, but the Court of Justice made no reference to any requirement that EC competition law must be within the *lex causae* for it to be against a Member State's public policy to fail to apply EC competition law.

48 As seen in Section II.3(e) above, a further indication, virtually infallible, that States sponsoring competition law seek the application of the latter on a mandatory basis is that, in the case of US antitrust law and EC competition law at least (see Section 2 below), these States seek the application of this law in any instance, within the confines of international law, where it is reasonably possible that the mischief it is ordained to regulate is engaged (so-called "spatial criterion" of application).

49 The strongest and most generalised statement of the mandatory nature of competition law is, however, that its purpose falls within a category of purposes which is characteristic of mandatory norms (that of "economic public policy"). Indeed, norms seeking their application on an imperative basis can be divided into two categories, the second of which developed subsequent to the first:

> "[...] 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."[20]

[18] *Mitsubishi Motors Corp. v. Soler Chrystler-Plymouth, Inc.*, 473 U.S. 614 (1985) at 637 (footnote 19).

[19] Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, [1999] ECR I-3055 at par. 37, and, to the same effect, at par. 41: *"a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article [81] of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy"*.

[20] BONOMI, 75: *"Ed è vero altresi che, accanto ai principi di ordine pubblico tradizionalmente intrisi di valori etici, si ammette in genere l'esistenza di una serie di principi di 'ordine pubblico economico', altrettanto fondamentali ed irrinunciabili per lo Stato."*

2. Spatial Criterion

Both US antitrust law and EC competition law seek their respective application in accordance with spatial criteria. In the US, the "qualified effects test" is applied. It was early established that an effects test should determine the application of the *Sherman Act* of 1890, but the question which arose was how to limit this test with a view to co-existence with other States and in particular their competition laws. Congress intervened, with the adoption in 1982 of the *Foreign Trade Antitrust Improvements Act (FTAIA)*, amending the *Sherman Act* and the *Federal Trade Commission Act* in relation to export commerce and conduct that occurred entirely outside of the US. Henceforth US courts and authorities would only apply US antitrust laws in such cases where there was a "direct, substantial, and reasonably foreseeable" effect on US domestic commerce or on US export commerce. The more recent career of these amendments is as follows:[21] 50

> "In 1993, the US Supreme Court had occasion to consider the application of its antitrust law in *Hartford Fire Insurance Co.* v. *California*.[22] On the facts of that case, a number of US State attorneys general and various private claimants sued a group of insurers and reinsurers, some of whom were based in London, England. These insurers had agreed to standardise certain policy terms and exclude coverage for certain risks, including by collective refusal to deal. For the 5-4 majority, Souter J. concluded that US antitrust law extended to the English defendant companies, and there was a discretion upon the US judge to apply that law or not, to be exercised in accordance with considerations of 'international comity'. On the facts, the majority held, it was a proper exercise of that discretion not to apply US antitrust law. Writing for the minority, Justice Scalia argued that US antitrust laws are to apply in a substantially more restrictive manner. In particular, in cases involving foreign-located defendants with chiefly foreign activities engaged in conduct abroad, there is no discretion as to the application of US antitrust law – it does not apply. When the majority approach was broadly followed by a lower court in *United States* v. *Nippon Paper Industries, Co.*,[23] the US Supreme Court refused to review.[24] Accordingly, since 1982 with the FTAIA,

[21] LANDOLT, N 7–11.

[22] 509 U.S. 764 (1993).

[23] 109 F.3d 1, 8–9 (1st Cir. 1997), *rev'd* 944 F. Supp. 55 (D. Mass. 1996).

[24] 118 S. Ct. 685 (1998).

the US has sought the application of its antitrust law based on the qualified effects criterion, with residual discretion being given to US judges to disapply, in the event of excessive inconvenience to another country. Recently, the scope of application of the *Sherman Act* under the *FTAIA* amendments came up again for consideration by the Supreme Court in *F. Hoffmann-LaRoche, Ltd* v. *Empagran S.A.*[25] The question in that case was whether, under the *FTAIA*, once the required qualified effects on US markets are established, injury independent of those domestic effects caused outside of the US is actionable under US antitrust law. The court below held that this was so, provided that at least one claimant existed who was affected within the US by the impugned conduct. On 3 February 2004, the UK, Ireland and the Netherlands jointly entered an *amicus* brief opposing the application of US antitrust laws on this basis. Part of the argument asserts that such an application of US law violates the 'territoriality' principle of public international law.[26] The unanimous Supreme Court[27] found that this independent harm suffered abroad by the claimant was not within the US antitrust acts for two reasons: the first, of interest here, was foreign comity, and the second was in relation to the legislative intention behind these acts. As regards the first ground, the court simply followed the well established principle of construction of statutes to avoid unreasonable interference with the sovereign authority of other nations. The broader view of the scope of the US antitrust acts would interfere with foreign nations' ability independently to regulate its own commercial affairs. The concurring opinion based itself on this ground exclusively."

[25] *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 204, decision of 14 June 2004.

[26] At page 19 of this Brief: *"By contrast a state's authority to exercise jurisdiction extraterritorially is much more limited, the most widely recognized cases being (i) a state's powers to extend the application of its law to its nationals wherever they may be (the 'nationality principle'), and (ii) a state's power to protect its own vital security interests when threatened by the activities of foreigners outside its territory (the 'protective principle'). In addition, (iii) the more controversial 'effects doctrine' suggests that in certain circumstances a state may exercise jurisdiction over events that have a clear effect in its territory, even if the planning and execution takes place elsewhere."*

[27] Justice Breyer delivering the opinion for the Court, Justices Scalia and Thomas concurring, and Justice O'Connor taking no part in the consideration of the decision.

EC competition law reflects the usual preoccupations of mandatory laws, and therefore operates upon a spatial criterion of application. Its particularity is, however, that it equally seeks to cohabitate with the competition law of EU Member States. For decades the Commission has been urging the adoption of an effects-type test for the application of EC competition law. Under the EU legal order, however, it is not the Commission which authoritatively interprets EU law, including EC competition law, but the Community courts. In *Woodpulp*[28] the European Court of Justice proceeded upon an *"implementation test"*. It found that EC competition law applied since the foreign companies involved had subsidiaries within the EU territory, and these subsidiaries implemented the impugned measures. In *Gencor*[29], however, a case under the 1989 European Merger Control Regulation (the 1989 EMCR), the Court of First Instance ("CFI") intoned that, under public international law, competition law can only be applied by a State where the *effects* of conduct are *"immediate, substantive and foreseeable"*.[30] *Gencor* leaves some doubt as to how far the Community Courts have gone in recognising an effects test to determine the *prima facie* application of EC competition law, for two reasons. First, the 1989 EMCR laid down an explicit effects test for its application (i.e. the achievement of certain turnover thresholds within the EU territory). So perhaps the *Gencor* reasoning does not apply to EC competition law outside of merger control. Secondly, in *Gencor* the CFI expressly refused to jettison concerns about implementation. 51

It has never been doubted that competition law is a matter of shared competency as between the EU and Member State legal orders. In *Wilhelm* v. *Bundeskartellamt*[31] the ECJ confirmed that EC competition law did not exclude Member State competence. Secondly, it determined that the wording in Art. 81 EC *"may affect trade between the Member States"* was to serve as the test limiting the application of EC competition law. Thirdly, the ECJ stated that Member State competition law could apply concurrently with EC competition law, providing it did not interfere with the full and uniform effect of EC competition law, and the effect of acts in execution of EC competition law. Since Art. 82 EC contains the same wording in relation to "effect on trade", this reasoning applies equally to that article. As of 1 May 2004, however, a Community legislative instrument makes provision in relation to the relationship between EC competition law and Member State competition law: 52

[28] C-89/85, *A. Ahlström Osakeythiö v. Commission*, [1988] ECR 5193.

[29] Case T-102/96, *Gencor v. Commission*, [1999] ECR II-753.

[30] See LANDOLT, N 7–18 – 7–20, and BLESSING, Kartellrecht, 38–43.

[31] Case 14–68, *Walt Wilhelm et al. v. Bundeskartellamt*, [1969] ECR 1.

> "The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings."[32]

53 This provision clarifies the relationship between Art. 81 EC and Member State competition law in that it interprets the *Wilhelm* case as requiring that Member State competition law may not prohibit what Art. 81 EC has allowed. A matter which remains uncertain is whether Member State competition law can add conditions to what Art. 81 EC allows. Where, however, Art. 82 EC permits certain conduct of a single firm (unilateral conduct), Member State competition law may still prohibit that conduct. *A fortiori* it can impose conditions upon that unilateral conduct.

54 The "effect on trade" concept in Community law is not a model of limpidity. The Commission has, however, greatly clarified matters in relation to its application in a notice, which came into force on 1 May 2004.[33] Helpfully, this notice establishes a negative and a positive presumption in relation to whether conduct may have an effect on trade. The negative presumption is set forth in paragraph 52 of this notice in the following terms:

> "The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between 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

[32] Article 3(2) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty; OJ 2003 L 1/1 of 4 January 2003.

[33] Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty; OJ 2004 C 101/7 of 27 April 2004.

> 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. [...] 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."

55 Paragraph 53 of this notice contains the positive presumption, expressed in the following terms:

> "The Commission will also hold the view that where an agreement by its very nature is capable of affecting trade between 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 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 [...]"

56 In the result, practically speaking (the positive presumption is "rebuttable"), as soon as either a 5% market share is reached or 40 million euros of turnover is involved, the agreement in question will need to be analysed individually to see if it may affect trade between the Member States, but if neither marker is exceeded then the negative presumption applies, that that agreement is not covered by Art. 81 EC.

3. *De Minimis* Requirements – a Practical Limitation on the Application of Competition Law

57 So far, the basic principles governing the *prima facie* applicability of competition law have been adumbrated. In practical terms, however, a discussion of the application of competition laws would not be complete without some brief remarks on *de minimis* requirements for the actual application of competition law. *De minimis* requirements serve to withdraw the ordinary application of competition law in particular cases which the legal order deems not to be of sufficient concern to go through the trouble of applying the law. If it deems this so in regard to its own courts, this is the position *a fortiori* for other adjudicative instances, such as arbitral tribunals.

58 In US antitrust law there is no generalised *de minimis* principle in operation, but both legislative amendment and the activity of the courts have developed topical *de minimis* limitations. An example is Section 1 of the *Sherman Act* in relation to foreclosure. The assessment is whether a total amount of business that is *"substantial enough in terms of dollar-volume so as not to be merely 'de minimis' is foreclosed"*.[34]

59 Under EC competition law there exists an instrument of general application, a Commission notice[35], laying down the application of *de minimis* principles. The first point to be made is that this notice does not apply in relation to so-called hardcore violations of EC competition law, that is behaviour of a type recognised as so pernicious to competition that a fairly forceful presumption of a restriction to competition arises. Otherwise, according to this notice, where in a vertical relationship a market share of the party imposing conditions not exceeding 15% is at issue this is deemed *de minimis*. For horizontal relationships, where the parties' combined market share does not exceed 10% this is treated as *de minimis*.

[34] *Fortner Enterprises v. U. S. Steel Corp.*, 394 U. S. 495 (1969); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1341 (9th Cir. 1984).

[35] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community *(de minimis)*, OJ 2001 368/13 of 22 December 2001.

IV. Conclusion

60 Like all other areas of mandatory norms, competition law requires its application by arbitrators. More than any other area of mandatory norms, however, competition law attaches to the very sinews of international commercial dealings. As such, knowledge of this area of law is part of the standard skill set of international arbitration professionals. While specialised assistance in the application of competition law may be commissioned, it is necessary for arbitration professionals themselves to know how to determine on what basis competition law is to apply, and whether it applies.