The Impact of EU Public Policy on Annulment, Recognition and Enforcement of Arbitral Awards in International Commercial Arbitration

by

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ABSTRACT

This thesis seeks to ascertain the impact of EU public policy on annulment, recognition and enforcement proceedings of international commercial arbitral awards. It explores how the effectiveness of EU law can be reconciled with the nature of international commercial arbitration while accommodating party autonomy. Though the demands of these two competing legal orders may present a challenge, this thesis demonstrates that mitigating these tensions is not only desirable, but also possible. To this end, it provides a model for the CJEU and national courts to effectively implement a narrowly construed EU public policy exception in post-award proceedings, while encouraging arbitral tribunals to be pro-active in their application of EU public policy rules.

In Chapter 1, the author outlines the fundamental notions, introduces the topic and the major doctrines and issues, and sets out her methodology and structure of the work. Chapter 2 then discusses *why* and *how* EU public policy may have a profound and transformative impact on the content of Member States public policy. It concludes that the ECJ is able to shape the national mechanism of public policy through a broad and controversial interpretation of the twin principles of equivalence and effectiveness.

In the second part of this thesis, the author focuses on the content of EU public policy. It analyses the major ECJ decisions in the fields of competition law and consumer protection, in Chapters 3 and 4 respectively, as case-studies of the scope of EU public policy. These chapters establish that, in the hands of the ECJ, the public policy exception has become a tool to strengthen the effectiveness of EU law in the national legal orders, and confirm the findings in Chapter 2. Chapter 5 explains why the ECJ's broad notion of EU public policy risks to drastically alter the effectiveness of international commercial arbitration in the EU, and may ultimately undermine the proper functioning of the internal market. As a result, this chapter concludes that it is crucial for the ECJ to shape the content of EU public policy more narrowly and coherently than it currently does, and gives concrete advice on how it could do so.

The third part discusses the far-reaching implications of the broad scope of EU public policy for both national courts and arbitral tribunals. As explained in Chapter 6, the mission of balancing the broad scope of EU public policy with the effectiveness of international commercial arbitration is left to national courts. This chapter develops a model for national courts which favours a broad scope of judicial review in exceptional circumstances. The scope of post-award review under EU law operates commutatively as a constraint on arbitral tribunals. Chapter 7 examines the most desirable course of action for arbitrators when confronted to the application of EU public policy rules. It concludes that they should consider raising EU public policy rules, even *ex officio*, not only to uphold party autonomy or guarantee the effectiveness of the arbitral award in a specific dispute but also to ensure the sustainability of international commercial arbitration in the EU.

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TABLE OF ABBREVIATIONS AND SHORT TITLES

AAA	Amercian Arbitration Association
ABA	American Bar Association
AC	*The Law Reports: Appeal Cases (England)*
ADRLJ	*Alternative Dispute Resolution Law Journal*
AFDI	*Annuaire Français de Droit International*
AIR	*All India Reporter*
AJCL	*American Journal of Comparative Law*
AJIL	*American Journal of International Law*
ALI	*The American Law Institute*
ALJ	*Australian Law Journal*
All ER	*All England Law Report*s
ALR	*Australian Law Reports*
Am Rev Int'l Arb	*American Review of International Arbitration*
Ann IDI	*Annuaire de l'Institut de Droit International*
Arb Int	*Arbitration International*
ASA	Association Suisse de l'Arbitrage
ASDI	*Annuaire Suisse de Droit International*
ATF	*Arrêts du Tribunal Fédéral: Recueil Officiel (Switzerland)*
BGB	Bundesgesetzblat (Germany)
BGH	Bundesgerichtshof (Germany)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)
BLI	*Business International Law*
Bull ASA	*Bulletin de l'Association Suisse de l'Arbitrage*
Bull Civ	*Bulletin Civil* (France)
Bus Law	*Business Lawyer*
CA	Court of Appeal (or equivalent)
CCass	Cour de cassation (French Supreme Court)
Cass (It)	Corte di cassazione (Italy)
CCP	Code of Civil Procedure
Ch	*The Law Reports: Chancery Division* (England)
CJQ	*Civil Justice Quarterly*

CLC	*Commercial Law Cases*
CLJ	*Cambridge Law Journal*
Clunet	*Journal du droit international*
CMLR	*Common Market Law Reports*
Com LR	*Commercial Law Reports*
Cornell L Rev	*Cornell Law Review*
CPC	Code de Procédure Civile (French)
D	Dalloz
Dept St Bull	*Department of State Bulletin* (United States)
Disp Res J	*Dispute Resolution Journal* (AAA)
Doc	Document
DP	*Dalloz Périodique*
DPCI	*Droit et Pratique du Commerce International*
DRJ	*Dispute Resolution Journal*
EC Bull	*Bulletin of the Commission of the European Communities*
ECOSOC	United Nations Economic and Social Council
EC Bull	*Bulletin of the Commission of the European Communities*
ECR	*European Court Reports*
ed(s)	editor(s)
ETS	European Treaty Series
EU	European Union
European Convention	1961 Convention on the Execution of Foreign Arbitral Awards
FAA	United States Federal Arbitration Act
FSupp	*Federal Supplement* (United States)
Gaz Pal	*Gazette du Palais* (France)
Geneva Convention	1927 Geneva Convention on the Execution of Foreign Arbitral Awards
HL	House of Lords (England)
HR	Hoge Raad (Netherlands)
IBA	International Bar Association
IBL	*International Business Lawyer*
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICLQ	*International and Comparative Law Quarterly*

ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
Int'l ALR	*International Arbitration Law Reports*
JCI Arb	*Arbitration: The Journal of the Chartered Institute of Arbitrators*
JCI	*Jurisclasseur*
JCP	*Jurisclasseur Périodique - La Semaine Juridique*
JDI	*Journal du Droit International* (Clunet)
J Int'l Arb	*Journal of International Arbitration*
J Int'l Disp	*Journal of International Dispute Settlement*
JO	*Journal Officiel de la République Française*
LG	Landgericht (Germany)
Lloyd's Rep	*Lloyd's Law Reports*
LQR	*Law Quarterly Review*
Mealey's Int Arb Report	*Mealey's International Arbitration Reports*
Melb L J	*Melbourne Law Journal*
MLR	*Modern Law Review*
New York Convention 1958	New York Convention on the recognition and enforcement of foreign arbitral awards
NY L J	*New York Law Journal*
NYU L	*New York University Law Review*
OG	Oberster Gerichtshof (Austria)
OJ	*Official Journal of the European Communities*
OLG	Oberlandesgerichtshof
PC	Privy Council (United Kingdom)
QB	*The Law Reports: Queen's Bench Division*
RCADI	*Recueil des Cours, Académie de Droit International de la Haye*
RCDIP	*Revue critique de droit international privé*
RdC	*Recueil des Cours de l'Académie de Droit International de La Haye*
RDIC	*Revue de Droit International et de Droit Comparé*
Rev Arb	*Revue de l'Arbitrage*
RGDIP	*Revue Générale de Droit International Privé*
RIAA	*Reports of International Arbitral Awards*
RIDC	*Revue Internationale de Droit Comparé*
RTD Civ	*Revue Trimestrielle de Droit Civil*

RTD Com	*Revue Trimestrielle de Droit Commercial*
SC	Supreme Court
SCt	*Supreme Court Reporter* (US)
SJ	*La Semaine Juridique*
SchvZ	Neue Zeitschrift für Schiedsverfahren
Sp Arb Rev	*Spain Arbitration Review*
SR	Summary Record (in UN Documents)
Supp	Supplement
TGI	Tribunal de Grande Instance (France)
TPI	Tribunal de Première Instance
Tr Com Fr DIP	Travaux du Comité Français de Droit International Privé
Stockl Arb Rev	*Stockholm Arbitration Review*
UN	United Nations
UNCITRAL Model Law	1985 UNCITRAL Model Law on International Commerce
US	United States of America
YB Com Arb	*Yearbook on Commercial Arbitration*
WLR	*Weekly Law Reports*
YB PrIL	*Yearbook of Private International Law*
YCA	*Yearbook of Commercial Arbitration*
ZPO	Zivilprozessordnung (German)

TABLE OF LEGISLATION

European Union

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TABLE OF RESOLUTIONS, PROPOSED LEGISLATION, ETC

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Green Papers

Others

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INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL LAW ASSOCIATION

UNCITRAL

UNITED STATES

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ICSID

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AUSTRIA

BELGIUM

CANADA

DENMARK

FRANCE

Court of Appeal

Cour de Cassation

Other

GERMANY

OLG (Court of Appeal)

BGH (Supreme Court)

GREECE

INDIA

ITALY

LUXEMBOURG

UK

UNITED STATES

NETHERLANDS

SPAIN

SWEDEN

SWITZERLAND

CHAPTER 1 — SUBSTANTIVE EU PUBLIC POLICY IN POST-AWARD REVIEW

Introduction

The year 1958 marked a milestone for both EU integration and international commercial arbitration. It saw the entry into force of the Treaty of Rome,[1] predecessor to today's Treaty on European Union ('TEU'),[2] marking the beginning of what has now become the EU. The same year, on 10 June 1958, the United Nations diplomatic conference adopted a different type of international treaty, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the 'New York Convention', which became a pillar in the development of international arbitration in the commercial world.[3] These two treaties pursue their own distinct policy objectives supported by their own respective 'first principles'.[4] In the following decades the legal regimes based on both treaties thrived. The EU became an economic superpower of an unparalleled kind,[5] and international commercial arbitration became the preferred means of dispute resolution for cross-border trade.[6]

If, in theory, international commercial arbitration is just another means of solving EU law disputes between private actors,[7] until recently these two regimes hardly came into contact. They have been described as 'distant planets whose orbits hardly ever intersected'.[8] Three elements may

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1 Treaty Establishing the European Economic Community, 298 UNTS 3, Article 220(4).

2 Treaty on European Union (TEU), 1992 OJ C 191/1 (July 29, 1992). In fact, most matters traditionally covered in the Community treaties are now dealt with the Treaty on the Functioning of the European Union ('TFEU') 2010 OJ C 83 (March 30, 2010).

3 Julian Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Arbitration* (Kluwer Law International 2003) paras 2-18.

4 George Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 Arb Int'l 400.

5 Stefan Grundmann, 'The structure of European contract law' (2001) 4 ERPL 509.

6 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (Queen Mary University, 2015) 5.

7 Georgios Zekos, 'Antitrust/Competition Arbitration in EU versus US Law' (2008) 5(2) J Int'l Arb 29; Georgios Zekos, 'The Treatment of Arbitration Under EU Law' (1999) 54 Disp Res J 9.

8 Natalya Shelkoplyas, *The application of EC law in arbitration proceedings* (Groningen,2003) ix. See also Theodore Theofrastous, 'International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-Localization Debate' (1999) 31 Case W Res J Int'l L 455. Bermann (n4) 398.

explain this initial absence of interaction: first, the EU for many years refused to intervene in private international law, considering it a prerogative of the Member States; second, when the EU finally decided to adopt instruments coordinating the jurisdiction, recognition and enforcement of judgments in civil and commercial matters between Member State courts ('national courts'), it explicitly excluded arbitration from their scope;[9] and finally, the ECJ decided that arbitral tribunals could not make preliminary references to the ECJ on the meaning or validity of EU law measures.[10]

In recent years, however, EU law and international commercial arbitration have increasingly intersected. This evolution is due to the growing legal integration in EU economic regulation of issues connected to cross-border trade, the extension of the range of arbitrable matters in the EU legal landscape,[11] and the constant and ever-growing importance of international commercial arbitration as the favourite dispute resolution mechanism for solving cross-border disputes. As a consequence of the extension of the scope of EU economic regulation, a growing number of EU mandatory rules address private actors. These private actors, in general, prefer arbitral tribunals over State courts to solve their cross-border disputes,[12] and there is nothing to suggest that the mandatory substantive rules of EU law are inarbitrable *per se*.[13] In this context, one source of

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9 Brussels I Recast Regulation, Article 1(2)(d). See also Brussels I Regulation, Article 1(2)(d); Brussels Convention, Article 1(4).

10 Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co KG* [1982] ECR 1095, para 14 ('*Nordsee*').

11 Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR-I 3055 ('*Eco Swiss*'). With some precursors in individual Member States. E.g. for competition law German BGH, 25 October 1966, KZR 7/65; Paris CA, 19 May 1993, *Société Labinal v Société Mors et Westland Aerospace*.

12 Engelmann notes that 80 to 90% of international commercial contracts are assumed to include an arbitration clause. Jan Engelmann, *International Commercial Arbitration and the Commercial Agency Directive* (Springer 2017) 2. See also Klaus-Peter Berger, *International Economic Arbitration* (Wolters Kluwer Legal and Regulatory 1993) 8; Alessandra Casella, 'On market integration and the development of institutions: The case of international commercial arbitration' (1996) 40 EU Econ Rev 155.

13 E.g. Paris CA, 29 March 1991, *Ganz v Société Nationale des Chemins de Fer Tunisiens*; *Fiona Trust & Holding Corporation and Others v Privalov* (2007); *Premium Nafta Products Limited and others v Fili Shipping Company Limited and others* [2007] UKHL 40; Bundesgericht (Switzerland) 23 June 1992, *Fincantieri-Cantieri Navali Italian v Oto Melara and other* (1995). It has however been suggested that disputes for which Article 24 Brussels I Recast Regulation creates an exclusive jurisdiction in favour of national courts (e.g. disputes which have as their object rights in rem in immovable property, validity of patents, trademarks etc) may not be arbitrable. See Paschalis Paschalidis, 'Chapter 14: Challenges under EU Law to the Enforcement of Arbitral Awards under the New York Convention' in Katia Fach Gomez, Ana Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 231.

potentially dangerous intersection is the development of the European Court of Justice ('ECJ')'s broad notion of EU public policy which challenges a well-established axiom of international arbitration, namely that public policy must be narrowly construed when invoked as a ground for annulling, or denying the recognition or enforcement of an international arbitral award. This development has far-reaching consequences for both national courts and arbitral tribunals. When reviewing an arbitral award, national courts must take into account EU law rules that qualify as public policy for the purpose of post-award review. Arbitral tribunals, on the other hand, are primarily bound by the will of the parties, not by EU legislation or case law. It is therefore possible that parties might seek to circumvent EU regulation by including arbitration clauses in their contracts, although national courts may well annul or deny recognition and enforcement to an award that breaches EU public policy.

The purpose of this thesis is to investigate the tension between the demands of EU law and international commercial arbitration regarding EU law rules that qualify as public policy for the purpose of post-award review. Though the demands of these two competing legal orders may present a challenge, this thesis demonstrates that mitigating these tensions is not only desirable, but also possible. This thesis suggests a framework for the desirable system of review of arbitral awards that might breach EU public policy. To this end, one of the underlying research question of this thesis is whether the current regime for the protection of EU public policy at the post-award stage leads to an over- or under-enforcement of the respective provisions. For this purpose, this thesis explores the ECJ's standard of judicial review, its implementation in (selected) Member States, and assesses the observable aspects of arbitral practice.

The framework articulated in this chapter provides useful guidance for more elaborated and technical discussions on EU public policy thorough the thesis.

1. Thesis Research Questions

International commercial arbitration has only emancipated itself partially from the demands of nation States. The constraints that remain can be seen at two stages of the arbitration process: first when arbitrators are confronted with applying mandatory rules of public policy,[14] and second at the post-award stage when reviewing courts can annul, or refuse to recognise or enforce an award that violates their public policy. In this context, the relations between arbitration and the EU are unsettled for three main reasons.

First, the scope of EU public policy in post-award review remains imprecise considering that the ECJ has only rendered three judgments so far on this issue. It is therefore difficult to identify in advance the content of EU public policy, and to anticipate the consequences of its application. The objections raised here are to the unpredictability of the rule which risks undermining, among other things, parties' expectations. Besides, on the few occasions when the ECJ granted public policy status to EU mandatory provisions,[15] it has, at least on two occasions,[16] adopted a broader interpretation of public policy than is customary, hence contradicting the dominant approach that the public policy exception in international arbitration must be construed narrowly.[17] This tension is particularly well illustrated in the area of EU consumer protection. Traditionally, consumer protection rules qualify as mandatory rules that do not attain the kind of importance that the label 'public policy' is normally reserved for.[18] The ECJ, however, considered that Article 6 of Directive

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14 It happens in more than 50% of cases according to one account. See Mark Blessing, *Introduction to arbitration: Swiss and international perspectives* (Basel 1999) 228.

15 *Eco Swiss;* Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421 ('*Claro*'); Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-09579 ('*Asturcom*').

16 *Claro* and *Asturcom*.

17 For a commentary see Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 1710ff; Lew, Mistelis, Kröll (n3) 114ff; Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015) 10-51ff; Jean-François Poudret, Sébastien Besson, *Comparative Law on International Arbitration* (2nd ed, Sweet & Maxwell 2007) 933ff.

18 See Chapter 4.

93/13 on Unfair Terms in Consumer Contracts 'must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy'.[19] In light of these developments, in order to lay aside the criticisms of uncertainty attached to this important doctrine, it is essential to determine the content of EU public policy in international commercial arbitration.

Second, there is an unavoidable tension between party autonomy, which is the cornerstone of the arbitration project, and judicial review.[20] The former requires courts to limit the scope of their judicial review, while the latter pulls in the opposite direction. The balancing of these two interests becomes particularly difficult when public policy finds its source in EU law. The tension between party autonomy and the public policy exception is well illustrated in *Eco Swiss*, rendered in the area of EU competition law.[21] On the one hand, the ECJ held that in the 'interest of efficient arbitration proceedings […] review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances'.[22] On the other hand, it stressed that 'Community law must be observed in its entirety throughout all the territory of all the Member States; parties to a contract are not therefore free to create exceptions to it'.[23] National courts are therefore required to raise breaches of EU competition law *ex officio* ('of their own motion' in the terminology of the ECJ).[24] However, since the EU has not clearly established a standard of judicial review, this standard varies between Member States, creating inconsistent results. By way of example, this point can be illustrated by the *SNF/Cytec* case where Belgian and French courts reviewed the same award four times regarding an alleged breach of EU public policy.

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19 *Asturcom*, para 52.

20 Andrew Barraclough, Jeff Waincymer, 'Mandatory Rules of law in International Commercial Arbitration' (2005) 6 Melbourne J Int'l Law 206.

21 See Chapter 3.

22 *Eco Swiss*, para 35.

23 *Nordsee*, para 14.

24 Case C-430/93 *Van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten and Peterbroeck* [1995] ECR I-4705, para 22 ('*Van Schijndel*'). See more generally Chapter 3.

The Belgian courts intensely scrutinised the award but came to diametrically opposed conclusions: in 2007, the Brussels Tribunal of First instance[25] reached the conclusion that EU public policy had been breached, whereas the Brussels Court of Appeal,[26] two years later, came to the contrary conclusion. When the award was reviewed in France, the courts applied a different and narrower standard of review, pointing out that only breaches that are 'flagrante, effective et concrète'[27] would be considered. Both the Paris Court of Appeal[28] and the *Cour de cassation*[29] concluded that the award did not suffer from such a defect. The heterogeneity of standards of review between Member States can be illustrated in many other judgments.[30] The difficulty of anticipating the application of EU public policy ultimately creates unpredictability for the parties regarding the enforcement of an award in the Member States, encouraging reliance on this ground to resist or delay enforcement of an award.[31] In light of these developments, there is a need for uniform standards of review regarding EU public policy.

Third, the possibility of post-award review in Member States under the ground of EU public policy may be at the origin of a dilemma for arbitrators. On the one hand, if arbitrators do not take into consideration applicable mandatory rules of EU law that form part of EU public policy, they risk rendering an unenforceable award which can be incredibly damaging for an arbitrator seeking reappointment. The autonomy of arbitrators is therefore constrained by the system(s) of review if they want to render a final and enforceable award. On the other hand, arbitration is based on party autonomy. When the parties have chosen the law of a non-Member State, or have explicitly

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25 Brussels TFI, 8 March 2007, 2005/7721/A (2007) YB Com Arb XXXII 282-283.

26 Brussels TFI, 22 June 2009, 2007/AR/1742 (2009) Rev arb 574-575.

27 This standard can be traced back to CCass (France), 19 November 1991, *Société des Grands Moulins de Strasbourg c/ Société Continentale France* (1992) Rev Arb 76.

28 Paris CA, 23 March 2006 (2007) YB Com Arb XXXII 282-283.

29 CCass (France), 4 June 2008 (2008) YB Com Arb XXXIII 489-499.

30 See Chapter 6.

31 Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arb Int'l 255 ('ILA Final Report').

excluded the application of EU mandatory rules, if arbitrators raise EU public policy considerations, they risk disregarding the parties' will and exceeding their mandate. From the perspective of an arbitral tribunal two interests collide: the regulatory interest mandating compliance with EU public policy, and the private interest of the parties to use arbitration as a flexible and effective dispute resolution mechanism. When this tension arises, arbitrators consider whether they should uphold the will of the parties which appointed them or the will of the States which support them. Since the role of arbitrators in assessing public policy remains highly unsettled when reviewing EU public policy, determining their preferable course of action appears necessary and requires a detailed analysis.

This thesis addresses these three points and aims to provide a comprehensive framework for the ECJ, national courts and arbitrators when confronted with mandatory rules of EU law which form part of EU public policy in the context of post-award review (hereinafter 'EU public policy rules').

2. Scope of Inquiry

This thesis focuses on substantive EU public policy as a ground of post-award review of arbitral awards in international commercial arbitration. The following sub-sections specify the meaning of these different terms in order to clearly delimit the scope of the inquiry conducted in this thesis.

2.1. International Commercial Arbitration

This thesis focuses on international commercial arbitration as distinct from both domestic arbitration, and investment arbitration or inter-State arbitration.

Despite its importance, there is no general agreement on the meaning of *international* arbitration. The lack of internationally agreed definition of 'international' means that each State has its own test to determine whether an award is 'international', in the language of the New York

Convention 'foreign',[32] or 'domestic'. The distinction between domestic and international arbitration is particularly relevant considering that most countries differentiate between these two regimes, usually providing a more liberal approach to post-award review requirements in the context of international arbitration.[33]

At least three different approaches aim to answer the question whether an arbitration is international.[34] First, the objective theory analyses the nature of the dispute. Pursuant to this theory, an arbitration qualifies as international when the relationship of the parties giving rise to the dispute entails a cross-border economic transaction.[35] Second, the subjective theory emphasises the importance of the parties' domicile, place of business, residence or nationality.[36] This is the approach adopted under Article 1(1)(a) of the European Convention on International Commercial Arbitration ('EU Convention'). Finally, the third approach allows the parties to expressly agree that the subject matter of the arbitration agreement is 'international'.[37] For the purpose of this thesis, an arbitration is considered to be 'international' when at least one of the three criteria mentioned above is present: either it involves parties of different nationalities, or takes place in a country 'foreign' to the parties, or involves an international dispute. This wide definition can be found in Article 1(3) of the UNCITRAL Model Law.

Second, this thesis focuses on international *commercial* arbitration as a method of resolving disputes between private parties arising out of commercial transactions. Determining whether a legal relationship is commercial is essential since Article 1(3) of the New York Convention allows

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[32] New York Convention, Article 1(1). The Convention defines 'foreign awards' as awards that are made in the territory of a State *other* than that in which recognition and enforcement are sought – it adds to this definition awards that are 'not considered as domestic awards' by the enforcement State.

[33] For an overview of Member States that have enacted special arbitration laws for international commercial arbitration see Poudret, Besson (n17) para 22.

[34] Poudret, Besson (n17) paras 31-39.

[35] E.g. French CPC, Article 1504.

[36] E.g. Swiss PILA, Article 176(1); Belgium Civil Code, Article 1717(4).

[37] UNCITRAL Model Law, Article 1(3)(c).

any State to make a declaration that it will only apply the Convention to legal relationships considered as commercial under their national law. In practice, this permits signatories to the New York Convention to exclude certain matters from the scope of the Convention, e.g. consumer disputes (yet, as to date, only six of the 28 Member States have made this declaration).[38]

If none of the international conventions defines the meaning of 'commercial' arbitration, the draftsmen of the UNCITRAL Model Law defined the term in a footnote holding that:

> '[t]he term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.'[39]

This thesis adopts the broad definition used in the Model Law which covers all typical commercial disputes.

Furthermore, it is important to distinguish commercial arbitration between private parties from investment and inter-State arbitration regimes. Investment arbitration is a procedure to resolve 'legal dispute[s] arising directly out of […] investment[s]'[40] between foreign investors and host States. Inter-State arbitration, which has regained importance in international dispute settlement today,[41] is the international arbitration that has 'for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.'[42] In these two forms of

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38 To date only six of the 28 Member States have made this declaration (i.e. Cyprus, Denmark, Greece, Hungary, Poland and Romania).

39 UNCITRAL Model Law, footnote to Article 1(1).

40 ICSID Convention, Article 25(1). See Devashish Krishan, 'A Notion of ICSID Investment' in Todd Weiler (ed) *Investment Treaty Arbitration and International Law - Volume 1* (JurisNet 2008) 66; Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd ed, CUP 2009) 128-34.

41 Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (Wolfers Kluwer 2013) 111.

42 Convention for the Pacific Settlement of International Disputes, 29 July 1899 (Hague I), Article 15. See *inter alia* Geneva General Act for Dispute Settlement (1928) 93 LNTS 344, Articles 21ff; American Treaty on Pacific Settlement 'Pact of Bogotá', 30 April 1948, Articles 38ff; Council of Europe, European Convention on Dispute Settlement (1957) 23 European Treaty Series, Articles 19ff.

international arbitration, at least one party is a State. This thesis focuses on international commercial arbitration between private parties, investment arbitration and inter-State arbitration fall therefore outside the scope of the study.

2.2. Geographical and Temporal Scopes

This thesis focuses its geographical scope of inquiry on the EU, while covering the whole time period since 1958 which coincides to the coming into force of the first 'European' instrument, the Treaty of Rome, and the adoption of the New York Convention.

2.3. Post-Award Review

This thesis focuses on one specific stage of arbitration proceedings: post-award review. According to the 2008 Queen Mary International Arbitration Survey on enforcement, in almost 75% of cases the non-prevailing party voluntarily complies with the award.[43] If this result highlights the efficacy and integrity of the international arbitration system, it still means that one in four awards will ultimately be decided by courts. In this context, it is common for the losing party to rely on the public policy exception, which has been said to be argued 'when other points fail'.[44] Any court reviewing an award in the context of public policy is confronted to a dilemma. If it fails to identify a violation of public policy, the protective role enshrined therein is undermined. On the other hand, if the court detects a violation of public policy and therefore renders the award ineffective in its jurisdiction, the parties may lose the benefits of choosing arbitration instead of litigation.[45] This

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[43] 2008 Corporate Attitudes: Recognition and Enforcement of Foreign Awards (QMUL 2008) available at: http://www.arbitration.qmul.ac.uk/research/2008/ (last accessed 4 September 2019).

[44] *Richardson v Mellish* [1824] 2 Bingham 229, 252.

[45] The traditional advantages of arbitration are: flexibility, predictability, neutrality and minimisation of costs. See Eric Posner, 'Arbitration and the harmonisation of international commercial law: A defence of Mitsubishi' (1999) 39 Va J Int'l L 650.

dilemma manifests itself differently in the two different forms of post-award review: annulment, and recognition and enforcement proceedings. However, these two post-award review proceedings also share some common elements. After briefly describing the main characteristics of both forms of review in light of the public policy ground, the shared characteristics of these types of review will be described in a third part.

2.3.1. Annulment

As explained above, award-debtors generally comply voluntarily with the award. Nevertheless, there are instances in which the award-debtor seeks annulment of the award before the courts of the seat. The grounds which are available for annulling an international commercial award are set out principally, and arguably entirely, by the applicable arbitration law. The grounds for annulment may therefore vary between national laws. For instance, an award may be annulled in England if it suffers from a legal error,[46] or if it was obtained by fraud or corruption,[47] but these grounds are not always available in other countries. International instruments only have a limited and indirect influence on annulment proceedings. The New York Convention and the EU Convention only address annulment indirectly insofar as it can have an impact on recognition and enforcement of an award. Article V(1)(e) of the New York Convention provides that courts may refuse to recognise and enforce an award that has been annulled at the seat. The effect of this article is limited in States that are signatories to both the New York Convention and the EU Convention. Article IX(2) of the EU Convention limits the effect of Article V(1)(e) of the New York Convention to awards annulled on specified grounds, essentially identical to the grounds set forth in Article V(1)(a) to (d) of the New York Convention. Thus, it limits the effect of Article V(1)(e) to awards annulled under other grounds than lack of arbitrability or violation of public policy.

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46 Arbitration Act 1996 (England), Section 69.

47 Arbitration Act 1996 (England), Section 68(2)(g); Law Reform (Scotland) Act 1990, Article 34(2)(a)(v).

2.3.2. Recognition and Enforcement

Judicial enforcement is 'the ultimate sanction' against the losing party which does not voluntarily comply with the award.[48] It has been described as the process whereby 'a private act is being empowered by a public act'.[49] The winning party typically initiates proceedings for the recognition or enforcement of the award before the court(s) territorially competent to seize the losing party's assets. The existence of a possibility for courts to review the award at the enforcement stage is justified by the fact that recognising and enforcing an award implies allowing the seizure of assets or the stay of court action. The risk of having the enforcement of the award denied is the cost for the award to constitute *res judicata*.

International law has a more important effect on recognition or enforcement proceedings than on annulment proceedings. It is the primary object of the New York Convention which has, among other things, standardised and harmonised the (seven exhaustive) grounds for refusal of recognition and enforcement of an international award under Article V in 159 States, including the 28 Member States.

2.3.3. Common Grounds to Post-Award Review

Despite the difference between annulment and recognition and enforcement proceedings, there is an important parallel between them illustrated most notably in Article 34 of the UNCITRAL Model Law. Indeed, the six grounds for annulment in Article 34(2) of the UNCITRAL Model Law replicate almost completely the seven grounds of review for recognition and enforcement proceedings in Article V of the New York Convention.[50] The existence of a parallel between Article

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48 Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th ed, OUP 2004) 513.

49 Lew, Mistelis, Kroll (n3) 689.

50 With the exception of Article V(1)(e) of the New York Convention dealing with awards that are annulled at the arbitral seat.

34 of the UNCITRAL Model Law and Article V of the New York Convention is widely acknowledged,[51] and the Model Law's drafting history confirms it.[52] The language of both texts is almost identical. The rationale and objectives of the Model Law replicate the philosophy of the New York Convention, as the Model Law adopts the pro-enforcement policy of the New York Convention: international arbitral awards are presumed valid, and the grounds of review are exhaustively defined and narrowly construed.

The influence of the Model Law is important worldwide, as it has been adopted in 80 States and a total of 111 jurisdictions, but also at the EU level as it has been adopted in 18 of the 28 Member States (i.e. Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Germany, Greece, Hungary, Ireland, Lithuania, Malta, Poland, Slovakia, Slovenia, Spain, and the UK). However, even the ten Member States that have not adopted the Model Law have replicated its structural approach in their national arbitration laws (e.g. presumptive validity of awards, exhaustive grounds of review that replicate the grounds of Article V New York Convention).[53] Only in rare instances would a jurisdiction distinguish a ground of review in annulment from a ground in recognition and enforcement proceedings. Sometimes it may be public policy. Some courts have suggested that the concept of public policy in annulment proceedings does not need to be as narrowly construed as in recognition and enforcement proceedings.[54] In these jurisdictions, the required level of inconsistency with public policy would be lower in annulment proceedings.

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51 Berger (n12) 663; Lew, Mistelis, Kröll (n3) 25-32; Poudret, Besson (n17) 786.

52 See UNCITRAL, Report of the Secretary-General on the Possible Features of A Model Law of International Commercial Arbitration, UN Doc A/CN.9/207 (1981) XII YB UNCITRAL 75; UNCITRAL, Report of the Working Group on International Contract Practices on the Work of Its Fourth Session, UN Doc A/CN.9/232 (1983) XIV YB UNCITRAL 33.

53 See French CPC, Articles 1518, 1520, 1525(3). See Jean-Louis Delvolvé, Gerald Pointon, Jean Rouche, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd ed, Wolters Kluwer 2009) 377; Robert Kovacs, 'Challenges to International Arbitral Awards – The French Approach' (2008) 25 J Int'l Arb 426. In general see Gary Born, *International Commercial Arbitration* (2nd ed, Wolters Kluwer 2014) 3174.

54 E.g. German BGH, 30 October 2008 (2008) III ZB 17/08; *Oil & Natural Gas Corp Ltd v Saw Pipes Ltd* [2003] INSC 236 (Indian S.Ct).

2.4. Substantive EU Public Policy

This thesis focuses on one specific ground of post-award review: public policy, and more precisely substantive EU public policy. The New York Convention refers to the concept of 'public policy' without defining it. The concept has multiple meanings (i.e. domestic, international, transnational, regional or truly international public policy); however, this penumbra of meanings can produce inconsistent and unpredictable interpretation in the hands of different national courts.[55] It may also encourage the losing party to resist or delay enforcement. In order to tackle this challenging topic, a terminological clarification is imperative at the onset. This thesis adopts a functional definition of public policy, as a 'safety net'. Public policy may be viewed as counterbalancing the general principle of freedom of contract and party autonomy.[56]

2.4.1. Public Policy

The notion of public policy emerges in different areas of law in virtually all legal systems. In private international law, it allows the rejection of the otherwise applicable law, or foreign judgment, whenever they reflect values unacceptable to the legal system of the forum. Even Member States, despite the principle of 'mutual trust', retain the capacity to withhold recognition and enforcement to a judgment issued by another Member State court on the ground of public policy.[57] Similarly, the public policy of each Member State may constrain the application of the fundamental freedoms of the internal market (e.g. Article 36 TFEU[58] regarding the free movement of goods)[59] for the sake of safeguarding national interests in exceptional circumstances, if this goal

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55 ILA Final Report (n30) 23.

56 Horacio Grigera Naon, 'International Contract Law, '*Lois de Police'* and Self-applicating Rules: An Argentine Outlook' (1983) 19 Vortrdge, Reden undBerichteaus dem Europa-Institut 6-7.

57 Brussels and Lugano Conventions, Article 27(1); Brussels I Recast Regulation, Article 45(1).

58 TFEU, Article 36.

59 Christoph Liebscher, 'European Public Policy-a Black Box?' (2000) 17(3) J Int'l Arb 75-76.

cannot be achieved by more moderate measures. The application is however not without limit and a restrictive approach is favoured.[60] In international arbitration, it is a well accepted norm that a State has the ultimate right to refuse recognition and enforcement to an award when it would breach or undermine the fundamental values of the legal system of the forum.[61] This is known as 'the public policy exception'. It is enshrined in the New York Convention,[62] and the Model Law,[63] but also referred to in most enforcement instruments,[64] with the notable exception of the Washington Convention.[65]

The justification for the existence of public policy as a ground of post-award review is similar to the rationale in contract and private international law: delivering justice is a public affair and should therefore be monitored. Public resources cannot be employed for the execution of an agreement that is harmful to the public welfare and interests.[66] In international commerce, where members of the international business community enjoy a great level of freedom, public policy serves the important function of demarcating the limits of this freedom. It provides States with a tool for external constraint. The reality is that without Article V(2)(b) of the New York Convention, the Contracting States would not have accepted the obligations of the Convention.[67] It is indeed

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60 See e.g Case C-36/75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1219, paras 36-75; Case C-41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337; Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* et al [2001] ECR I-8615. See also Nikola Ikolaos, Apostolos Georgiadis, 'Derogation Clauses: The Protection of National Interests in EC Law' (Publication of the Hellenic Institute of international and Foreign Law 2006) 72.

61 See Audley Sheppard, 'ILA Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arb Int'l 217.

62 New York Convention, Article V(2)(b).

63 UNCITRAL Model Law, Article 36(1). See also Article 34 for a reference to public policy in setting aside procedures at the seat of the arbitration.

64 1975 Panama Convention, Article 5(2)(b); 1983 Riyad Convention, Article 37, both referring to public policy. The OHADA Convention, Article 25 sub-para 4 refers to 'international public policy'.

65 ICSID Convention, Article 52.

66 Elisha Greenhood, 'The Doctrine of Public Policy in the Law of Contracts: Reduced to Rules' (1886) 2.

67 Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Summary Record of the Seventh Meeting at 7, UN Doc E/Conf.26/AC.42/SR.7 (March 29, 1955) (comment of Mr. Wortley (United Kingdom)).

usually only at the enforcement stage of a dispute that the court may monitor arbitral proceedings and arbitral awards, ensuring that the reception of the arbitral award in the legal system of the forum does not endanger it.[68] The existence of the public policy exception reflects that justice cannot be entirely privatised. It also seeks to promote public trust in arbitration 'as an effective and fair means of dispute resolution'.[69] Public policy is therefore a tool, a 'safety-valve',[70] which crucially defines the outer limits of the 'tolerance of difference'[71] implicit in the rules governing recognition and enforcement of international awards. This function has long been performed and is gaining importance in our globalising world.[72]

If the function of the public policy exception as a 'safety net' is easy to comprehend, its content is difficult to apprehend due to its vagueness and relativity. In general, public policy encompasses the fundamental principles at the core of a given legal system. Cheshire and North refer to 'some moral, social or economic principle so sacrosanct […] as to require its maintenance at all costs and without exception'.[73] Public policy is therefore a vague concept, ultimately determined within a given legal order by its highest courts.[74] Courts have therefore an important margin of discretion at their disposal to determine whether a norm forms part of its public policy. It is dependent on the judgment of a determined legal community at a given time. What is considered as public policy in one State may not be considered as fundamental in another State (e.g. EU

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68 Convention on the Recognition and Enforcement of Foreign Awards, Travaux Préparatoires – Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards at 1, UN Doc E/2822/Add.6 Annex (July 16, 1956) (comment by the delegation for Yugoslavia) referring to 'public order'.

69 Michael Hwang, Amy Lai, 'Do Egregious Errors Amount to a Breach of Public Policy?' (2005) 71 Arbitration 4.

70 Reinmar Wolff, 'Public Policy, Article V(2)(b)', in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, A Commentary* (Hart 2012) 406.

71 Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 JPIL 1.

72 Alex Mills, 'The Private History of International Law' (2006) 55 ICLQ 40.

73 Paul Torremans, Uglješa Grušić et al, *Cheshire, North & Fawcett, Private International Law* (15th ed, OUP 2017) 123.

74 In most jurisdictions, the definition of public policy is established by case law. There are two notable exceptions: Australia (Australian Arbitration Act, Section 7), and UAE (Civil Transactions Law, Article 3).

competition law).[75] Similarly what was once forbidden in a State might be authorised subsequently, and the contrary is also true (e.g. the payment of bribes to obtain contracts in foreign countries which was not so long ago tax-deductible in many jurisdictions but is now, as a result of anti-corruption legislation, increasingly considered as contrary to public policy).[76] These changes are reflected in the law and may be influenced by numerous factors such as the nature of the political and legal system of the State, political decisions to promote certain policies such as the protection of the national economy, or on the contrary the promotion of international investments, regional developments such as the development of the EU, or international ones such as the adoption of the New York Convention. It is therefore generally acknowledged that '[c]onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution'.[77]

2.4.2. EU Public Policy

Chapter 2 will explain that the EU has been able to develop its own law (i.e. EU law). As any polity based on the rule of law, some of its norms are of such fundamental importance as to allow protection against the exercise of party autonomy. As such, EU public policy safeguards the application of the most fundamental principles of EU law.

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75 For instance EU competition law was recognised as public policy in *Eco Swiss* but not recognised as forming part of the public policy of Switzerland by the Supreme Court in *Tensacciai Spa v Freyssinet Terra Armata Srl* (2006) 24 ASA Bull 550.

76 Giuditta Cordero-Moss, 'EU Overriding Mandatory Provisions and the Law Applicable to the Merits' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris 2017) 327; Martine Millet Einbinder, 'Writing of Tax Deductibility' (April 2000) available at: http://www.oecdobserver.org/news/archivestory.php/aid/245/Writing_off_tax_d eductibility_.html (last accessed 13 December 2018).

77 *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd* [1990] AC 295.

2.4.3. Substantive EU Public Policy

This thesis focuses on the substantive part of EU public policy, as opposed to its procedural counterpart. There is no doubt left that public policy is formed of substantive and procedural law.[78] Substantive public policy encompasses rights and obligations in connection with the subject matter of the award. It does not however mean that the party opposing recognition and enforcement has an opportunity to reargue the merits of the case or to allege that the case was wrongly decided.[79] Substantive public policy includes fundamental principles of law, national security, national and foreign interests and, significantly, essential mandatory rules of the forum.[80] Procedural public policy, on the other hand, encompasses basic and fundamental procedural rules. It guarantees parties the right to an independent judgment on their submissions and the facts submitted to the arbitral tribunal. Included in this category are issues of impartiality of the arbitral tribunal,[81] lack of reasons, or manifest disregard of the law.[82]

So far, the EU has rejected any attempt to harmonise the arbitration laws of the 28 Member States. Consequently, EU law does not intervene directly in the Member States arbitration procedural rules. Hence, international commercial arbitration procedure is governed by the parties' agreement, complemented by institutional rules and national arbitration laws when needed, not by EU law. The interaction between EU law and international commercial arbitration for the purpose of post-award review therefore only concerns substantive law. This thesis focuses on that substantive aspect of EU public policy.

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78 E.g. 'The United Kingdom and the UNCITRAL Model Law: the Mustill Committees' Consultative Document of October 1987 on the Model Law' (1987) 3(4) Arb Int'l 282.

79 See Chapters 5 and 6.

80 Federal Tribunal (Switzerland), 8 March 2006, *X SpA v Y Srl* (2006) Arrêts du Tribunal Fédéral 392.

81 E.g. in France CCass, 24 March 1998, *Excelsior Film TV, srl v UGC-PH* (1999) 24a YB Com Arb 643.

82 Stephen Schwebel, Susan Lahne, 'Public Policy and Arbitral Procedure' in Pieter Sanders (ed) *Comparative Arbitration and Public Policy in Arbitration* (Kluwer Law International 1986) 216.

3. Thesis

Important work has already been done on the public policy exception to the recognition and enforcement of arbitral awards.[83] This work, however, limits itself to certain aspects of EU law (e.g. EU competition law, EU consumer protection, the Commercial Agency Directive). This thesis is a first attempt to provide a more general understanding of the difficulties raised by EU public policy in international commercial arbitration while providing a model for the CJEU, national courts, and arbitrators which explores how the effectiveness of EU law can be reconciled with the nature of international commercial arbitration, and accommodates party autonomy. As explained above, the impact of EU public policy on international commercial arbitration remains unclear on three interconnected issues: first, the content of EU public policy in post-award review; second, the scope of the duty of national courts to consider EU law breaches upon judicial review of arbitral awards, particularly in circumstances where such allegations were not raised by the parties during the arbitral proceedings; and third, the existence of a similar duty for arbitrators. This thesis addresses these three points in turn.

First, this thesis addresses the issue of the content of EU public policy. So far, the ECJ has shaped the content of EU public policy on a case-by-case basis, adopting a broader interpretation than is customary in international commercial arbitration. This approach has introduced a high degree of uncertainty in arbitration since it is unclear which provisions of EU law form part of EU public policy and may therefore justify the annulment or refusal of recognition and enforcement of an award. Considering the constantly expanding range of topics falling in the purview of the EU, clarity on this point is greatly needed. This thesis proposes to identify the scope of substantive EU public policy. In doing so, and consistent with the pro-enforcement policy of the New York

[83] George Bermann, 'Reconciling European Union Law Demands with the Demands of International Arbitration' (2011) 5(34) Fordham Int L J 1193; Phillip Landolt, *Modernised EC Competition Law in International Arbitration* (Kluwer Law International 2006); Assimakis Komninos, Arbitration and EU Competition Law in Jürgen Basedow, Stéphanie Francq and Laurence Idot (eds), *International Antitrust Litigation, Conflict of Laws and Coordination* (Oxford, Hart Publishing 2011) 191.

Convention, this thesis argues in favour of a narrow interpretation of the content of EU public policy. To this end, Chapter 2 first clarifies the different approaches at play in the conceptualisation of EU public policy. This chapter explains how the EU, and more precisely the ECJ, has shaped the public policy of the Member States through the EU principles of direct effect, effectiveness and equivalence. It reveals the ECJ's broad interpretation of these principles which limits Member States' discretion when applying public policy in post-award review, and ensures the effectiveness of EU public policy.

The following three chapters, Chapters 3, 4 and 5, address the content of EU public policy. Since outlining the content of public policy in an abstract manner is a daunting task, these chapters will focus on the several occasions on which the ECJ has been confronted to the question whether an award should be annulled or denied recognition and enforcement on the basis of EU public policy. Through an analysis of the ECJ case law, they map the provisions of EU law that have been clearly and unmistakably identified as forming part of EU public policy for the purpose of post-award review. The underlying idea of this study is that the more precisely the content of public policy can be described, the less unpredictable and unruly the exception becomes. Chapter 3 focuses on the first of these rulings, *Eco Swiss*, and assesses the impact of the qualification of Article 101 TFEU as forming part of EU public policy for the purpose of post-award review. The following chapter, Chapter 4, turns to the two remaining rulings, *Claro* and *Asturcom*, which held that a consumer protection rule against unfair terms was equivalent to a national rule of public policy. If the qualification of a Treaty provision against cartels as EU public policy was (mostly) uncontroversial, the elevation of the protection of consumers against unfair terms was however met with skepticism. This study of the ECJ case law reveals a broad notion of EU public policy which leads to an abnormally high level of intervention in international commercial arbitration.[84] Besides,

[84] Bermann (n4) 397. See also Antoine Duval, 'The Court of Arbitration for Sport and EU law: Chronicle of an Encounter' (2015) 22(2) MJ 227-35.

the ECJ case law provides very limited guidance in this context for determining the public policy character of a EU mandatory provision. This uncertainty triggered a discussion between academics to identify which rules of EU law may have a public policy character.[85] Any approach of the content of public policy being casuistic, it cannot pretend to be exhaustive. It is generally agreed that an exhaustive definition of the content of public policy can only fail. It is ultimately for the CJEU to define the future content of EU public policy, and much will depend on the preliminary questions and the Court's future approach to inquiring into arbitral awards.[86] It would go beyond the scope of this thesis to scrutinise every EU provision in order to distinguish those that could potentially be part of EU public policy in the arbitration context. However, the difficulty to provide an exhaustive list of public policy provisions beforehand, does not mean that it should be impossible to draw some lessons from the ECJ case law. Based on these observations, and in order to alleviate criticisms attached to the lack of predictability of EU public policy, Chapter 5 asks which general conclusions may be drawn from these important decisions. It is submitted that the CJEU has developed, in the words of Bermann, an 'unusually robust notion' of public policy in international arbitration.[87] If a broad definition of public policy can guarantee the effective and uniform application of EU law, it can also undermine the finality of arbitral awards and ultimately the effectiveness of arbitration within the framework of EU law. Since arbitration is an indispensable means to facilitate dispute resolution within the EU, it is contended that the narrower construction of EU public policy would benefit not only commercial arbitration but also the interests of the EU.

When establishing an autonomous concept of public policy, the ECJ not only shaped the content of EU public policy, it also introduced procedural standards of review on national courts.

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85 Natalya Shelkoplyas, 'European Community Law and international arbitration: logics that clash' (2002) EU Bus Org LR 584.

86 Stephen Weatherill, *Principles and Practice in EU Sports Law* (OUP 2016) 31.

87 Bermann (n4) 397. See also Duval (n83) 227-35; Directorate-General for Internal Policies, 'Legal Instruments and Practice of Arbitration in the EU – Study for the Juri Committee' (2014) 15, 200 available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf (last accessed 10 October 2019).

Chapter 6 therefore examines the insurmountable conditions set up by ECJ rulings and their consequences on Member States' procedural law. This part has intertwined goals: determining whether EU public policy is over or under-enforced in post-award review, and establishing the preferable standard of post-award review in Member States. This thesis focuses on two main aspects of post-award review: first, whether national courts have to raise EU public policy considerations *ex officio*; and, second, the necessary scope of judicial review of arbitral awards. Chapter 6 first focuses on the duty of national courts to raise EU public policy considerations *ex officio* in post-award review. If reviewing courts traditionally retain the authority to determine whether a national norm is sufficiently undermined to justify raising the public policy defence into play, the ECJ prescribes the *ex officio* application of EU public policy by national courts. This standard of review has far reaching consequences on the principle of *res judicata*. Nothing short of the finality of awards is assumed to be at stake. This chapter aims to reconcile EU law demands with the nature of international arbitration. Chapter 6 then elaborates on the desirable scope of post-award review. The ECJ has failed so far to clearly address the appropriate scope of judicial review. As a result, each reviewing court will necessarily have to work out for itself the appropriate scope of judicial review. This creates uncertainty for the parties, and does not effectively protect EU public policy. A study of Member States' case law reveals that a limited scope of control of arbitral awards is largely inefficient. This thesis argues that only a detailed examination of the facts and law of the case may allow a court to establish whether the award is contrary to public policy and therefore effective in protecting the internal market.

Finally, Chapter 7 analyses the consequences of the ECJ rulings for arbitrators. The ECJ never directly addressed this point since arbitral tribunals are not considered to be 'courts and tribunals of a Member State' within the meaning of the Article 267 TFEU,[88] and therefore fall outside of the purview of the EU. In the absence of effective arbitral and national regulations on this

[88] *Nordsee*, para 10.

topic, Chapter 7 seeks to identify the considerations which might argue for or against the application of EU public policy rules that rise to the level of EU public policy by arbitrators. This thesis establishes that three main elements constrain the decision of arbitrators to apply mandatory rules. First, arbitration is a creature of contract. This requires arbitrators to decide the dispute that is referred to them within the limits of the arbitration agreement (their contractual mandate).[89] Second, the applicable substantive law and conflict of law rules also constrain the arbitrators. Third, the decision whether to apply a mandatory rule to render a final and enforceable award also depends on the different systems of review. This explains how the standard of judicial review of EU public policy in Member States turns into the standard of application of EU public policy rules in arbitration. An analysis of the interaction of these three constrains shapes the application of EU public policy rules in arbitration proceedings. This thesis argues that when certain conditions have been met, arbitrators should consider applying EU public policy rules, even *ex officio*.

4. Methodology

This thesis encompasses qualitative research of a doctrinal and comparative nature. Part of the research of this thesis is conducted using a doctrinal methodology. This involves an analysis of the legal rules of both EU and international arbitration instruments, and their interaction through the examination of the relevant cases and arbitral awards. For this approach, the main sources of data from a EU law perspective can be found in the TFEU, TEU, as well as the relevant mandatory provisions of directives and regulations that were qualified as forming part of EU public policy (e.g. Directive on Unfair Consumer Terms), and the CJEU and Member States' cases generated on this topic. From an international arbitration perspective, this research strategy enables a critical analysis of the meanings and implications of the main international arbitration instruments on annulment,

[89] See ILA Final Report, 19; Julian Lew, 'Chapter 5 – The Tribunal's Rights and Duties: What do Parties and Arbitrators Bargain for' in Bernard Hanotiau, Alexis Mourre (eds), *Players Interaction in International Arbitration* (2012) 9 Dossiers of the ICC Institute of World Business Law 47.

recognition and enforcement on the public policy exception, as well as available arbitral awards. On this note, it should be kept in mind that any study on international commercial arbitration is confronted to the scarcity of published awards. This made the assessment of arbitrators' conduct regarding EU mandatory rules in Chapter 7 particularly difficult. In order to circumvent this difficulty, this thesis also examined statistics of the main European arbitral institutions (i.e. ICC, LCIA, and SCC), as well as unpublished awards referred to in the literature on the topic. However, this is insufficient to identify the general principles that underpin the impact of EU public policy on international commercial arbitration. It is therefore also necessary to examine the existing literature on the topic. The existing commentaries on EU public policy, the public policy exception more broadly, or the interaction between the EU and international arbitration allow first, an insight on the meanings of ambiguous wording and phrases, and the possible underlying principles of these legal rules; second, a classification of the various issues within clearly defined parameters; and, finally, the possibility to assess the similarities and differences between the conclusions reached in this thesis and the findings of other legal scholars. The doctrinal approach allows an approach that is not only descriptive but also normative. It is descriptive since it is based on an analysis of the relevant EU and international arbitration instruments, the case law, and the literature on the topic. Yet, it is also normative as the doctrinal approach provides a sound structural basis from which the thesis can proceed to a critical analysis of the implications of EU public policy for international commercial arbitration.

This thesis also adopts a comparative method. The existence of multiple legal orders in the EU, extended by international commercial arbitration suggests, instinctively, a comparative legal analysis. However, it is more appropriate to speak here of a method rather than a methodology since the research questions or hypothesis put forward in this thesis do not focus on comparing legal systems. Instead, comparative law as a method is used, when relevant, to establish how different Member States have taken into account EU public policy in post-award review. The comparative

analysis therefore depends on the availability of case law on this specific topic. It enables the examination of the implementation of the duty for national courts to raise EU public policy considerations *ex officio*. It is also essential to assess the scope of post-award review in different Member States to determine its concrete implications, and conclude whether a narrow or a broad scope of review is most desirable.

CHAPTER 2 — EU PUBLIC POLICY: ENRICHING AND RESTRICTING NATIONAL PUBLIC POLICY

Introduction

At first glance, the flexibility of the content of public policy would apparently put it out of reach of deliberate harmonisation efforts. As a vector of inward-looking national values, this 'cultural island fortress', as described by Horatia Muir Watt,[1] was traditionally indifferent to the context, European or not, in which it was invoked. It could even be argued that as a defensive mechanism of the fundamental values of a society, public policy is entirely antinomic with the very idea of European integration. This is no longer the case. It has indeed become manifest that it is no longer possible for Member States to envisage private law without referring to EU law sources, whether of hard or soft law, secondary EU law, regulations with direct effect, or national provisions implementing EU directives. As a result, it appears almost inevitable to find a legal translation and a legal protection of the fundamental political, economic, and social principles of the EU in the public policy of the Member States. However, transposing at the Member States' level what is referred to as 'EU public policy' inevitably provokes a series of theoretical and methodological questions that this chapter seeks to address.

First, referring to EU public policy presupposes that the EU, the international organisation created by the Member States, is an autonomous legal order that has developed its own concept of public policy. The first step of establishing a valid theory on EU public policy therefore requires linking the autonomous character of the EU legal order to the existence of an autonomous EU public policy. In the light of the arguments put forward in Section 1, the conclusion is that the EU necessarily has a proper concept of public policy. However, the existence of EU public policy inevitably provokes further questions regarding its impact on the Member States, and requires

[1] Horatia Muir Watt, 'Evidence of an Emergent European Legal culture: Public Policy Requirements of Procedural Fairness under the Brussels and Lugano Conventions' (2001) 26 Texas Int'l LJ 543.

scrutiny of the relationship between the EU and its Member States. Developing a theory on EU public policy entails analysing how the EU interacts with the national legal orders of the Member States in order to understand how EU public policy interacts with Member States' public policy. In that regard, a distinction must be made between the impact of EU public policy on the content of Member States public policy, and on the national mechanism of public policy. Section 2 argues that the EU may impose its concept of public policy on Member States relying on two fundamental principles of EU law: direct effect and primacy. The aim of this section is to answer the questions of *why* and *how* EU public policy may have a profound and transformative impact on the content of Member State public policy.[2] Section 3 then explores how the ECJ shapes the national mechanism of public policy through the twin principles of equivalence and effectiveness.

1. The EU: a *Sui Generis* Legal Order Capable of Developing its Own Concept of Public Policy

The EU is a *sui generis* system of law with its own discrete legal postulates that separates it from the corpus of international law.[3] As explained by Bellamy and Castiglione, 'there [is] something fundamentally new, or, as is often said, *sui generis*, in the constitutional structure of the European Union, and […] such novelty is captured by neither federal nor nation-based forms of political architecture'.[4] The *Van Gend en Loos* case is generally seen as the first decision that distinguishes between the EU legal order and the traditional international legal order. The ECJ recognised the EEC Treaty as 'a new quality in the international legal order', and explained that the EU is 'more than an agreement which merely creates rights and obligations between the contracting states', it is

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2 Mario Giuliano, Paul Lagarde, 'Report on the Convention on the law application to contractual obligations' (1980) OJC 282, 1 ('Giuliano Lagarde Report') with respect to the public policy provision in Article 16 Rome Convention: '[i]t goes without saying that this expression includes Community public policy, which has become an integral part of the public policy ('ordre public') of the Member States'.

3 Richard Bellamy, Dario Castiglione, 'Building the Union: The Nature of Sovereignty in the Political Architecture of Europe. Law and Philosophy' (1997) 16(4) Constructing Legal Systems: 'European Union' in Legal Theory 441.

4 Ibid.

an 'autonomous legal order'.[5] The recognition of the autonomy of EU law denotes that this legal order does not derive its justification from the legal orders of the Member States. It is self-validating.[6] At least, it is how the ECJ portrays EU law. The Treaties are silent about it, and at the national level, this is accepted in practice but not in principle.[7] That is to say that no Member State accepts that EU law enjoys self-validating authority.[8] Instead, they root EU law's authority in national constitutional law which, in 28 different ways, admits that EU law shall be applied within the domestic legal orders. This observation does not affect however the arguments on the content of EU public policy submitted in this thesis.

The idea of the EU as a legal order finds its source in the establishment of institutions endowed with sovereign rights, exercised independently of the Member States as explained a year after *Van Gend en Loos* in the landmark case *Costa v ENEL* where the ECJ held: '[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system', 'a Community of unlimited duration, having its own institutions, its own legal capacity and capacity of representation

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5 On this point see Case C-26/62 *NV Algemene Transport en Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 ('*Van Gend en Loos*'); Case 6/64 *Costa v ENEL* [1964] ECR 585 ('*Costa v ENEL*'). Later references may be found in Opinion 1/91 (EEA Agreement) [1991] ECR I-6079; Opinion 1/00 (ECAA Agreement) [2002] ECR I-3493; Case C-459/03 *Commission v Ireland* [2006] ECR I-4635; Joined Cases C-402/05 and C-415/05 *P Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351. See also René Barents, *The Autonomy of Community Law* (Kluwer Law International 2004).

6 Although the ECJ emphasised the autonomous nature of EU law in many other judgments, it did not however offer further explanations for its meaning. The ECJ simply treated the autonomy of EU law axiomatically. See Jean Boulouis, Roger-Michel Chevalier, *Grands arrêts de la Cour de justice des communautés européennes* (6th ed, Broché 1994) 140; Jan Wouters, 'National Constitutions and the European Union' (2005) 27 Legal Issues of Economic Integrations 66.

7 Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 154ff.

8 National courts have expressed concerns on the primacy of EU law and competing constitutional claims of ultimate authority. See e.g. for Germany, Case C-11/70 *Internationale HandelsgesellschaftmbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] CMLR 540; Case C-9/72 *Brunner v The European Treaty* [1994] CMLR 57. For a criticism of the decision see Manfred Zuleeg, 'The European Constitution Under Constitutional Constraints: The German Scenario' (1997) 22 EULR 19; Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?' (1999) 36 CMLR 351; Karen Alter, *Establishing the Supremacy of European Law* (OUP 2001) 65ff; for Italy, e.g. Corte costituzionale, 27 December 1973, Decision No 183/1973 (1974) EuR 255 ('*Frontini*'); Corte costituzionale, 30 October 1975, Decision No 232/1975 (1975) 45 Rac uff 395 ('*Industrie Chimiche*'). See for further discussion Oreste Polliciono, 'The Italian Constitutional Court and the European Court of Justice: A Progressive Overlapping Between the Supranational and the Domestic Dimension' in Monica Claes et al (eds) *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 105; for England and Wales, *Macarthys Ltd v Smith* (No.2) [1980] EWCA Civ 7; *R v Secretary of State for Transport ex p Factortame Ltd* (Interim Relief Order) [1990] UKHL 7; for France, Conseil constitutionnel, 9 April 1992, *Traité sur l'Union européenne* [1992] DC JORF 5354; Conseil d'état, 20 October 1989, *Nicolo* (1990) 1 CMLR 173.

on the international plane'.[9] Besides, the Lisbon Treaty has given the EU full legal personality. Indeed, Article 47 TEU explicitly recognises the legal personality of the EU, making it an independent entity in its own right. A new public authority has thereby been created, autonomous and independent *vis-à-vis* the public authorities of each Member State. Its acts do not require approval or ratification by the Member States, nor can they be annulled by them. Indeed, if EU law derived from national law, it would carry the implication that EU law was incapable of conceiving genuine obligations that bind Member States, even against their will. EU law that conflicts with Member State law would have to be regarded as invalid or non-existing. This restraint makes it insurmountable to conceive the EU as a legally co-ordinated order comprising 28 Member States of equal legal standing.[10] The EU instead forms its own legal order.

As a legal order, it can be said that the EU has at its core a set of fundamental values, a public policy. This conclusion rests on the normative idea that the EU entails a project that goes beyond a regulatory model, beyond the regulation of the markets, as the ECJ explained when it distinguished the EU from other international trade regimes, such as the sophisticated EEA.[11] The development of the three pillars, a bill of rights, and the European citizenship are further elements which confirm that the EU cannot be reduced to a regulatory model.[12] However, even a regulatory model has at its core certain norms which may justify a protection similar to the one afforded under public policy.[13] Besides, since every Member State has developed its own concept of public policy, even the most restricted vision of the EU legal order justifies the development of a theory that

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9 *Costa v ENEL*.

10 Neil MacCormick, *Questioning Sovereignty* (OUP 2002) 137-143.

11 Opinion 1/91 Draft agreement relating to the creating of the EEA [1991] ECR I-6079. See also Case C-270/80 *Polydor* [1982] ECR 329, paras 15-16.

12 George Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 Arb Int'l 410-411.

13 Ibid. See also Francesca Bignami, 'Creating European Rights: National Values and Supranational Interests' (2005) Columbia J EU Law 241ff.

articulates the different claims these legal orders may have on the basis of their concept of public policy.[14]

The EU as an autonomous legal system has been able to develop its own law, EU law, adopted and interpreted by its own organs. In this context, the emergence of a notion of public policy particular to the EU is not, in the words of Bermann, 'particularly remarkable'.[15] As any polity based on the rule of law, some of its norms are of such fundamental importance as to allow protection against the exercise of party autonomy. As such, EU public policy safeguards the application of the most fundamental principles of EU law. Besides this traditional function, EU public policy also serves an additional function within the EU, namely reinforcing the primacy of EU law.

2. Europeanisation of the Content of the Member State's Public Policy

If, as explained in the previous section, the emergence of EU public policy should logically flow from the existence of the EU legal order, texts of national laws, international agreements, as well as EU regulations, when dealing with the public policy exception, always refer to the public policy of the State of recognition, never to EU public policy. The public policy exception traditionally protects the values and principles of the national legal system where the judgment or arbitral award is sought to be given effect. According to the ECJ's judgments in *Krombach* and *Renault v Maxicar*,[16] public policy is a concept that belongs to the internal private international law of each State, and national courts must determine its content. There was an attempt to formalise that notion in the Commission Proposal for the Rome II Regulation that referred to 'Community public policy'

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14 See e.g. Bignami (n13) 241.

15 Bermann (n12) 410. See also Marc Fallon, 'Les conflits de lois et de juridictions dans un espace économique intégré – l'expérience de la Communauté européenne' [1995] Collected Courses of the Hague Academy of International Law 255.

16 Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-01935 ('*Krombach*'); Case C-38/98 *Renault v Maxicar* [2000] ECR I-2973 ('*Renault v Maxicar*').

concerning 'non-compensatory damages' in Article 24.[17] The presence and tenor of this proposed article has been analysed as reflecting the anxiety at the EU level to control, and add a new substantive quality to the Europeanisation of the conflict of laws.[18] However, the proposal was ultimately rejected by the European Parliament, and was not included in the final text of the Regulation.[19] Therefore, one of the disputed issue surrounding the public policy exception relates to the question of whether it refers to fundamental principles of the domestic laws of the Member States and/or to EU principles. The short answer to the question is that it refers to both. As pointed out in the Giuliano Lagarde Report, '[i]t goes without saying that this expression includes Community public policy, which has become an integral part of the public policy ('ordre public') of the Member States of the European Community'.[20] There is no doubt that there is an Europeanisation of the content of the public policy of the Member States.[21] The public policy exception of the Member States has therefore (at least) two sources: national law and EU law.

The aim of the following sections is to explain *how* these two sources of public policy interact with each other. To answer this question, one must take into consideration the interrelationship between the EU and the Member State's legal orders. Section 2.1 briefly recalls that the capacity of the EU to shape the content of the Member State public policy is limited to the domain of transferred competence. In that circumscribed domain, the EU has the ability to complement, and even correct the content of Member State public policy. In order to do so, the EU may rely on the dual principles of primacy, and uniform interpretation of EU law which will be

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17 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II') COM/2003/0427.

18 Janeen Carruthers, Elizabeth Crawford, 'Variations on a theme of reflections on proposed choice of law rules for non-contractual obligations: Part I' (2005) 9 Edinburgh L Rev 95.

19 Adrian Briggs, 'Memorandum for the Select Committee on European Union Written Evidence' (2004) para 16 available at: https://publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/66we05.htm (last accessed 22 December 2018).

20 Giuliano Lagarde Report, Article 16.

21 E.g. Case C-681/13, *Diageo Brands BV v Simiramida* [2015] ECR I-471 ('*Diageo Brands*'), Opinion AG Szpunar, para 39.

studied in Sections 2.2 and 2.3 respectively. Section 2 overall argues that within the EU, and especially for the CJEU, EU public policy also serves an additional function, namely reinforcing the primacy of EU law.[22]

2.1. The Principle of Conferral: Limitation of the Scope of EU Public Policy

When creating the EU, Member States accepted to limit their sovereign rights, albeit in limited fields.[23] In so doing, they have created a legal order that binds both individuals and the Member States themselves,[24] where institutions can act independently from the Member States.[25] This has two main implications regarding Member State public policy. First, since EU integration is not complete, the public policy of the Member States retains a national source. Indeed, the competence of the EU is more limited than that of the Member States, as Loughlin observed: '[t]here is no question that the power of member states is considerably greater than the resources under the control of EU institutions; without the power of taxation or control of military forces, there can be no functional equivalence'.[26]As the EU is founded on the competences that have been attributed by the Member States through the Treaties, EU law cannot complement or take precedence over national law in a field where it lacks competence, nor does it possess the competence to extent its own competence.[27] This is an essential constitutional principle known as the principle of conferral.[28] The EU has obviously not replaced the Member States, which remain, albeit usually

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22 Bermann (n12) 410-411.

23 *Van Gend en Loos*.

24 See e.g. Daniel Bethlehem, 'International Law, European Community Law, National Law: Three Systems in Search of a Framework' in Martti Koskenniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International 1998) 169.

25 Koenraad Lenaerts, Piet Van Nuffel, 'Constitutional Law of the European Union' in Robert Bray (ed), *European Union Law* (3rd ed, Sweet & Maxwell 2011) 12.

26 Martin Loughlin, 'Constitutional pluralism: An Oxymoron?' (2014) 3(1) Global Constitutionalism 18.

27 Stephen Weatherill, *EU Consumer Law and Policy* (2nd ed, Elgar European Law 2005) 306.

28 TEU, Article 5(2). See also TEU, Article 4(1).

within certain margins drawn by EU law, competent in some of the most value-driven areas, such as family law, education, health care, or taxation. As a result, the public policy of the Member States retains a national source. The result is a possible variance in national approaches and values of public policy.[29]

Second, in the domains in which Member States have accepted to limit their sovereign rights, and where the EU institutions can act independently from the Member States,[30] the EU has the possibility of supplementing their public policy. The unique function of the EU has indeed propelled it to develop certain substantive rules, and identify them as fundamental for the functioning of the EU (e.g. the protection of the fundamentals of intra-EU competition).[31] Accordingly, public policy, which traditionally protects the values and principles of the national legal system, is increasingly filled with EU law.[32] Theoretically, the EU might have an harmonising effect on both the content of public policy, and the procedural conditions of post-award review in the Member States.

It can be said that there is direct Europeanisation of the content of Member State public policy when a EU rule refers to a fundamental value or objective that belongs to the domain of conferred competence, and consequently determines at least one aspect of Member State public policy. In this regard, Mayr states that a double reference frame must be considered when assessing the conformity of an arbitral award with public policy: on the one hand, the arbitral award must not

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29 Albeit limited, see TEU, Article 2.

30 Lenaerts, Van Nuffel (n25) 12.

31 See the detailed analysis developed in Chapter 3.

32 See Jürgen Basedow, 'Recherches sur la formation de l'ordre public européen dans la jurisprudence' in Marie-Noëlle Jobard-Bachellier and Pierre Mayer (eds), *Le droit international privé: esprit et méthodes: Mélanges en l'honneur de Paul Lagarde* (Dalloz 2005) 55.

contradict the fundamental values of the national legal system, and on the other hand, it must not contradict the fundamental legal principles of EU law.[33]

2.2. Primacy of EU Law: Imposing the Prevalence of EU Public Policy

In order to guarantee the autonomy of the EU legal order, the Member States have 'limited their sovereign rights'.[34] The diminution of the sovereignty of the Member States was accompanied by the principle of primacy of EU law as highlighted in *Costa v ENEL*:

> [t]he transfer by the States from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[35]

The ECJ even considered the principle of primacy a matter of '*ordre public communautaire*'.[36]

The ECJ makes three, interconnected, claims of primacy:[37] firstly, that it has the power to definitively answer all questions of EU law;[38] secondly, that it is entitled to determine what constitutes an issue of EU law;[39] and, thirdly, that EU law has primacy over all conflicting national laws.[40] The latter characteristic denotes, in the domain of transferred competence, the capacity of a norm of EU law to overrule inconsistent norms of national law in domestic court proceedings, and

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33 In order to enhance accuracy, Basedow suggested that explicit references to EU public policy should be included in the EU regulations containing references to the public policy exception. This, he argues, would highlight that within national public policy, the components originating from EU legal sources also have to be protected. Basedow (n31) 74.

34 *Van Gend en Loos*.

35 *Costa v ENEL*. See also Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I-114, paras 3-4 ('*Internationale Handelsgesellschaft*'); Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 49 ('*Simmenthal*').

36 Case C-9/65 *San Michele v High Authority* [1965] ECR 27, para 30. The principle of primacy was never introduced in the Treaties themselves but is expressly referred to in the Declarations annexed to the Final act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

37 Karen Alter, *Establishing the Supremacy of European Law* (OUP 2001); Joseph Weiler, *The Constitution of Europe* (CUP 1999) 1.

38 EC Treaty, Article 234.

39 Weiler (n37) 21. Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR I-4199.

40 *Costa v ENEL*.

not to be overridden by domestic legal provisions, however framed,[41] without being deprived of its character and without the legal basis of the EU itself being called into question. It entails duties for the various national authorities. For the national legislator, it implies a prohibition on enacting laws that are inconsistent with binding rules of EU law, and a duty to rescind national legislation that is inconsistent with EU law obligations. Concretely, for national courts, respecting the principle of primacy means that, when a EU rule applies in a given case, any conflicting national law should be set aside, even if adopted subsequently to the EU rule,[42] even if it has constitutional status.[43] From the perspective of the CJEU, the doctrine of primacy is essential to ensure the uniform application and interpretation of EU law. Establishing the primacy of EU law *vis-à-vis* the law of the Member State was necessary in order to guarantee the success of the EU by establishing a strong and effective autonomous legal system. The kind of primacy EU law has managed to establish is therefore unique. No other international or supranational legal system is based on the principle that, in case of conflict with national or municipal law, the international/supranational norm prevails, and makes the principle part of municipal law both in theory and in practice.[44]

Since EU law prevails over Member State law in the domain of transferred competence, in case of conflict, EU public policy should prevail over contrary national public policy. As a result, the CJEU can request Member States not to invoke the public policy exception to uphold national values at the expense of fundamental EU principles. It may also require national courts to protect EU principles through public policy.[45] However, the question of the absorption of national values by

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41 EU law should take precedence over all provisions in national law whatever their legal status, even the Member State's Constitution. *Internationale Handelsgesellschaft*.

42 *Simmenthal*.

43 *Internationale HandelsgesellschaftmbH*.

44 Piet Eeckout, 'The Growing Influence of European Union Law' (2011) 22(5) Fordham Int'l Law Journal 1512. At least, this is how the ECJ portrays the articulation between EU law and national law. As explained above, Member States root the authority of EU law in national constitutional law. See more generally Weatherill (2016) (n7) 154ff.

45 See Dominique Bureau, Horatia Muir Watt, *Droit international privé, Tome I, Partie générale* (PUF 2007) 273. Jerca Kramberger Škerl, 'European Public Policy' (2011) JPIL 461, 477, 480. See also Peter Schlosser, 'The Abolition of Exequatur Proceedings – Including Public Policy Review?' (2010) 2 IPRax 102ff. See the detailed analysis in Chapter 5, Section 2.

EU values can only arise when, with regard to the same situation, both legal systems form a precise conception of the importance of certain values. In other words, this question does not concern the situation where a specifically EU value is intended to be conveyed through the public policy exception, as it was the case for instance in *Renault v Maxicar*, where the question arose as to the penalty imposed for a breach of EU competition law and the principle of free movement of goods in the State of origin.[46]

2.3. Consistent and Uniform Interpretation

Judicial cooperation between national courts and the CJEU is one of the hallmarks of EU law.[47] National courts are under the duty of interpreting their national law consistently with EU law. This is known as the doctrine of consistent interpretation.[48] Along the lines of this doctrine, the ECJ has repeatedly affirmed that every provision of EU law should receive uniform interpretation regardless of the circumstances in which it is applied to avoid discrepancies in its interpretation.[49] The mechanism of a preliminary reference plays a central role in that regard. Under Article 267 TFEU, national courts are entitled to refer to the ECJ for preliminary ruling in cases where a question of interpretation, which is new and of general interest for the uniform application of EU law, is raised, or where the existing case-law does not provide enough guidance. It shifts to a mandatory duty when, in last instance, a question of interpretation essential to decide the case arises. As demonstrated in Section 3 below, this mechanism proved to be an important procedural interface between the ECJ and national courts engaged in post-award review to identify EU law provisions

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46 *Renault v Maxicar*.

47 Case C−284/16 *Slovak Republic v Achmea* [2018] ECR I-158, para 37 (‘*Achmea*’); Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014 [2014] ECR I-2454, para 176.

48 Case C-14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalenvon Colson* [1984] ECR 1891, para 28; Case C-106/89, Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para 8.

49 Case C-88/91, *Federazione Italiana dei Consorzi Agrari v Azienda di Stato per gli Interventi nel Mercato Agricolo* [1992] ECR I-4035, para 7; *Eco Swiss*, para 40.

that form part of EU public policy. As national courts are explicitly called upon to ensure the uniform application of EU law in international arbitration,[50] the preliminary reference procedure ultimately shapes the content of EU public policy.

The mechanism of preliminary ruling is however constrained in three ways. First, a preliminary ruling is only binding, strictly speaking, on the national court that submitted the question, which limits its reach. It is generally accepted, however, that ECJ rulings have an authority similar to the authority of national supreme courts to review (and, if need be, to set aside) primary legislation. Hence, national courts interpreting EU law should, and do, take ECJ rulings into account.[51] For instance in *Eco Swiss*, the ECJ characterised Article 101 TFEU as public policy because of its fundamental character for the functioning of the internal market. Following this ruling, Article 101 TFEU has been considered as forming part of national public policy, and individuals have been able to assert that right not only before the *Hoge Raad* (i.e. Supreme Court of the Netherlands), which referred the question to the ECJ, but before all national and EU courts.[52] Other examples include, for secondary law, the obligation of national authorities to sanction, in principle, the unfairness of an arbitration clause under Directive 93/13/EEC, as part of their public policy mechanism in arbitration.[53] Thus, when the ECJ, through the mechanism of preliminary ruling, qualifies a mandatory rule of EU law as amounting to EU public policy, it should also become part of the national public policy of the Member States.

Second, until the EU explicitly identifies in Treaties, Regulations, or Directives provisions that qualify as EU public policy, the mechanism of preliminary ruling is the only mechanism

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50 *Eco Swiss*, para 40.

51 On validity, Case C-66/80 *ISpA International Chemical Corporation v Amministrazione delle finanze dello Stato* [1981] ECR 1191; on interpretation, Joined Cases 28, 29, and 30/62 *Da Costa & Schaake NV* [1963] ECR 31. See Weatherill (2016) (n7) 155: 'This is not a system of binding precedent but it does mean that rulings of the Court radiate beyond the limits of the case at hand: the value for money of a single preliminary ruling is increased.'

52 E.g. Court of the Hague (Netherlands) 24 March 2005, *MDI Inc v VR Van Raalte Reclame BV* (2006) XXXI YB Com Arb 808-809; CCass (France) 4 June 2008 (2008) YB Com Arb XXXIII 489-499; Brussels CA (Belgium), 22 June 2009, 2007/AR/1742 (2009) Rev arb 574-575.

53 See Section 3 below.

allowing the identification of EU law provisions as forming part of EU public policy in post-award review. As a result, EU public policy can only be shaped on a case-by-case basis when a national court reviewing an arbitral award asks the ECJ, directly or indirectly, whether a provision of EU law qualifies as public policy. This limit is amplified in international commercial arbitration since arbitrators cannot dispel uncertainties through a referral to the ECJ.[54] As a result, so far, only three EU law provisions have been clearly and unmistakably identified as forming part of EU public policy: Articles 101 and 102 TFEU, and Article 6 Directive 93/13. It undoubtedly creates uncertainties regarding the contour of the concept of EU public policy.

Finally, at the stage of post-award review, substantive EU law may come into play in a restricted way. In *Eco Swiss*, the ECJ held that national courts should be able to refer preliminary questions to the ECJ 'in order to obtain an interpretation or assessment of the validity of provisions of Community law which they may need to apply when reviewing an arbitration award.'[55] The ECJ further noted that despite the incapacity for arbitral tribunals to request preliminary ruling on questions of interpretation of EU law, 'it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied'.[56] The ECJ's reasoning implies that the arbitral tribunal's lack of access to the preliminary ruling procedure can be compensated by the powers of national courts exercised over the arbitral award in the context of post-award review under the ground of public policy.[57] It is submitted that this implication is problematic, and needs to be clarified.

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54 *Nordsee*, para 10.

55 *Eco Swiss*, para 33.

56 *Eco Swiss*, para 33; Case C-88/91 *Federconsorzi* [1992] ECR I-4035, para 7.

57 Natalya Shelkoplyas, 'European Community Law and International Arbitration: Logics That Clash' (2002) 3 Eur Bus Org L Rev 585.

Arbitral tribunals are not able to directly refer preliminary questions to the CJEU when they are applying EU law provisions, and arbitrating parties do not benefit from the mechanisms of cooperation between national courts and EU institutions.[58] Hence, arbitral tribunals may apply EU law but do not have the tools to secure its uniform interpretation, ensure its consistency, its full effect, and its autonomy, nor are they compelled to guarantee its effectiveness,[59] contrary to national courts. Post-award review is therefore the only stage where a preliminary ruling may be requested from the ECJ. Consequently, it is also the only stage where the uniform interpretation and effective application of EU law may be guaranteed. However, even when national courts raise EU public policy *ex officio*, they cannot substitute their own judgment for that of the arbitral tribunal.[60] Arbitral proceedings are the only instance where the application of substantive EU law may take place. National courts can only either recognise and enforce the arbitral award, or reject it. Modern arbitration law is indeed dominated by the principle that reviewing courts cannot review the merits of an arbitral award. This means that they cannot rehear or reopen a case, or perform any type of substantive revision. Under these circumstances, it is unclear what the ECJ is referring to when it evokes the application of EU law at the post-award stage. It appears that national courts can only use the mechanism of preliminary ruling to ask the ECJ whether certain provisions of EU law can be regarded as forming part of EU public policy.[61] Depending on the ECJ's answer they can either grant recognition and enforcement, or on the contrary, deny it or annul the arbitral award. However, they cannot substantively review or correct the arbitral award. It is left 'in a state of uncertainty'.[62] Hence the mechanism of preliminary ruling in post-award proceedings cannot be used to guarantee

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58 *Nordsee*. See also *Eco Swiss*, para 34; Case C-125/04 *Denuit and Cordenier* [2005] ECR I-923, para 13; C-536/13 *Gazprom* [2015] ECR I-316, para 36; *Achmea*, para 37. See also Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, ECL I-2454, para 176 (and the case law cited therein).

59 See Chapter 7.

60 Shelkoplyas (n57) 585.

61 Ibid 586; For a similar conclusion, albeit in the context of recognition of foreign judgments opposed on the public policy ground, see *Renault v Maxicar*, Opinion AG Alber, para 87.

62 Shelkoplyas (n57) 586.

that every EU provision will be given uniform interpretation and effective application. The arbitral tribunal's lack of access to the preliminary ruling procedure can only be compensated in a very limited way by national courts during post-award review.

2.4. Intermediate Conclusion

The above reasoning has established that the combination of the principles of primacy of EU law, and consistent and uniform interpretation allows the EU to complement, shape, and even correct the content of national public policy in the domain of conferred competence, albeit only on a case-by-case basis. There is a direct interaction between the two public policies: the more precise and complete EU public policy becomes, the less free and flexible Member States are in shaping the content of their public policy. As pointed out by Muir Watt, the definition of, at least some of, the requirements of EU public policy 'no doubt augurs the correlative disappearance of local idiosyncrasies'.[63] She further adds that 'the symbolic significance [of EU public policy] resides in the fact that by integrating national public policy, EU principles are deliberately placed at the heart of national values'.[64] Denominating a particular EU law norm as 'EU public policy' enhances its status, and reinforces the prevalence of EU law in the legal order of the Member States.[65]

3. Interaction of EU Law with Member State's Public Policy Mechanism

The above section has explained how the EU may shape the content of national public policy through the principle of primacy in the domain of transferred competence. This section now focuses on the impact of EU law on the Member State's public policy mechanism in the context of post-

63 Muir Watt (n1) 552.

64 Ibid.

65 Bermann (n12) 411.

award review. Section 3.1 explains how the exclusion of arbitration from EU instruments allows Member States to determine the procedural conditions governing actions at law intended to ensure the protection of EU public policy. The general rule on the application of EU law in the Member States is indeed that, unless the procedural issue is directly regulated in EU primary or secondary law, the Member States possess 'procedural autonomy'. This gives each Member State the freedom to use its own solutions in applying EU law in the absence of specific EU procedural rules pre-empting this discretion. However, the procedural autonomy of the Member States is limited. Like all measures for the enforcement of EU law, the systems of post-award review adopted by the Member States have to respect two principles: the national provisions cannot render the EU norms obsolete (principle of effectiveness), and they cannot place national claims in a better position than the EU ones (principle of equivalence). Besides, concurrently, the CJEU and other EU institutions recognise the appeal and effectiveness of arbitration as an alternative means of dispute resolution.[66] The way in which the effectiveness of EU law is balanced with the effectiveness of international arbitration can impact a number of factors in the review mechanisms, most prominently the scope of judicial review.[67] This section aims to show how the ECJ influences the national mechanisms of post-award review through the application of the principles of equivalence and effectiveness, which are examined below in Sections 3.2 and 3.3 respectively.[68] If it is true that it can be challenging to establish a general model when considering ECJ case law – the answer of the ECJ to each preliminary question depends on how the question is asked and the specific facts and applicable national procedural law – this section tries to show how the use of the combination of the principles

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66 *Eco Swiss*, para 35; Proposal for a Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004; European Parliament, Resolution on encouraging recourse to arbitration to settle legal disputes, A3-0318/94 [1994] OJ C-205/519-521; see also the Commission's use of arbitration clauses as commitments in merger control starting with Commission decision, 4 September 1992, IV/M.235, *Elf Aquitaine-Thyssen/Minol* [1992] OJ C-232/14.

67 See Chapter 6.

68 See also Hanna Schebesta, 'Does the National Court Know European Law? A Note on Ex Officio Application After Asturcom' (2010) 18(4) ERPL 847.

of effectiveness and equivalence may have far-reaching consequences[69] resulting in higher standards of procedure to uphold EU public policy than national public policy,[70] and ultimately limiting national procedural autonomy.[71]

3.1. Constraints on EU law's influence on Post-Award Review: the Principle of Procedural Autonomy

The EU has refused so far to adopt instruments on international arbitration. According to the different reports on the Brussels Convention[72] and to the ECJ,[73] the exclusion of arbitration from EU instruments is due to the existence of different international conventions regulating the recognition and enforcement of arbitral awards which provide a satisfying framework to ensure the proper and effective development of international arbitration in the EU. The requirement laid down under Article 220 EC urging 'simplification of formalities governing the reciprocal recognition and enforcement […] of arbitral awards' was therefore considered as fulfilled. Consequently, the Brussels I Recast Regulation,[74] as did its predecessors,[75] leaves Member States free to regulate the recognition and enforcement of arbitration agreements and arbitral award autonomously in accordance with their international obligations. The mechanism of the public policy exception is therefore national, not European. In the absence of a dedicated EU mechanism, it is thus for the

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69 Takis Tridimas, *The General Principles of EC Law* (2nd ed, OUP 2007) 423.

70 Sacha Prechal, 'Community Law and National Courts: The Lessons from Van Schijndel' (1998) 35 CMLR 686.

71 See also Verica Trstenjak, Erwin Beysen, 'European consumer protection law: Curia temper debit remedium?' (2011) 48(1) CMLR 121.

72 See Paul Jenard, Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 5 March 1979 (1979) OJ C 59, 13 ('Jenard Report'); Peter Schlosser, Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol of its Interpretation by the Court of Justice of 5 March 1979 (1979) OJ No C 59 ('Schlosser Report'); Evrigenis Report (1986) OJ C2984/1. For a commentary see Dominique Hascher, 'Commentary on the European Convention on Commercial Arbitration' (1990) 15 YBCA 619.

73 Case C-190/89, *Marc Rich & Co. AG v Società Italiana Impianti PA* [1991] ECR I-3855, para 17 ('*Marc Rich*').

74 Brussels I Recast Regulation, Article 1(2)(d) and Recital 12.

75 Brussels I Regulation, Article 1(2)(d); Brussels Convention, Article 1(4).

national legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of EU public policy.[76] The Member States possess a so-called 'procedural autonomy'.[77]

Procedural autonomy is a direct consequence of the incompleteness of the EU legal order, in that it does not contain exhaustive legislation on procedural issues, neither does it have a complete system of courts at its disposal. As a result, EU public policy can only protect its final addressees by incorporation into the national legal orders of the Member States. In the absence of specific EU procedural rules governing recognition and enforcement, each Member State has, in principle, the freedom to determine the competent courts and the procedural conditions governing the enforcement of EU law[78] (e.g. national requirements of proof, limitation periods, rules of *res judicata*, and rules regarding the passivity of the judges).[79] Procedural autonomy also comes into play when national courts review an arbitral award under the ground of public policy, and enforce a mandatory rule of EU law.[80]

Procedural autonomy is not intended, however, to grant a free pass to Member States on matters of procedural law. Any additional procedural difficulty under which a substantive EU right is enforced ultimately impacts the substantive right itself, and may render excessively difficult, or

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76 Sacha Prechal, Natalya Shelkoplyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond' (2004) 5 ERPL 589.

77 A term coined by the ECJ itself in Joined Cases C-152/07 and 154/07 *Arcor AG & Co KG and Others v Bundesrepublik Deutschland* [2008] ECR I-5959, para 170.

78 The landmark case in this regards is: Case C-33/76, *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989, para 5 ('*Rewe*'). See also *Van Schijndel*, para 17; Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan* [2001] ECR I-6297, para 29. For a general discussion and an analysis of the various cases on procedural autonomy, see Koen Lenaerts, Dirk Arts, *Procedural Law of the European Union* (Sweet & Maxwell 1999) 57–76; Paul Craig, Grainne de Burca, *EU Law. Text, Cases and Materials* (3rd ed, OUP 2008) 306–9; Thomas Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 14 CMLR 1199–246; Sacha Prechal, 'Judge-made harmonization of national procedural rules: a bridging perspective', in Jan Wouters, Jules Stuyck (eds), *Principles of proper conduct for supranational, state and private actors in the European Union: towards a Ius Commune* (Intersentia 2001) 39; Prechal (1998) (n57) 681; Grainne de Burca, 'National Procedural Rules and Remedies: the Changing Approach of the Court of Justice' in Julian Lonbay and Andrea Biondi (eds), *Remedies for Breach of EC law* (John Wiley and Sons 1997) 37.

79 *Van Schijndel*, para 22; Case C-242/95 *GT-Link A/S v De Danske Statsbaner* [1997] ECR I-4449, para 27; *Asturcom*, para 37.

80 E.g. Case C-295/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619 ('*Manfredi*').

virtually impossible, the exercise of substantive rights conferred by EU law.[81] Accordingly, procedural autonomy needs to be restricted to allow individuals to assert the full enforcement and protection of their rights under EU law. Procedural autonomy finds general restrictions in the principles of primacy and direct effect of EU law,[82] but also in the principle of sincere cooperation which obliges national courts to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU, and to refrain from any measure which could jeopardise the attainment of the EU's objectives.[83] It also finds specific restrictions in the gradually more interventionist approach of the ECJ regarding the twin principles of equivalence and effectiveness. In order to determine whether a national procedural provision limits the effect of EU law, provisions of national law are therefore examined in the light of these two principles.

3.2. Application of the Principle of Effectiveness to Post-Award Review under the Ground of Public Policy

The principle of effectiveness is grounded in the principle of sincere cooperation of Member States towards the EU expressed in Article 4 TEU.[84] It requires making available to individuals who are invoking EU law rights in national courts the procedures and remedies necessary to guarantee the benefits of those rights.[85] Thus, it prohibits procedural rules of national law that would render the exercise of rights conferred by EU law virtually impossible or excessively difficult in practice.[86] The procedural diversity of the Member States' judicial systems renders the principle of

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81 *Van Schijndel*, para 17.

82 The principle of direct effect allows individuals to assert their rights before national and EU courts in the domain of attributed competence. However, individuals may only invoke, before national or EU courts, EU legal norms that are clear, precise, unconditional and that do not call for additional measures of implementation. See *Van Gend en Loos*.

83 TFEU, Article 4(3).

84 See for more on the principles of equivalence and effectiveness, Prechal, Shelkoplyas (n57) 590ff.

85 *Eco Swiss*, para 45. See also Case C-45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ('*Comet*') ECR 2043, paras 12-16.

86 See in this regard *Comet*, paras 12-16.

effectiveness a fundamental structural feature for the functioning of the EU.[87] However, if applied in full, it also has the capacity to be very intrusive to national law and to disregard national procedural autonomy. When examining whether a national procedural rule fulfils the EU law requirement, the ECJ in *Van Schijndel* made clear that the interests served by the national procedural rule at issue (e.g. protection of the rights of the defence, the principle of legal certainty, the proper conduct of procedure) must be balanced against the interests served by the EU law rule.[88] This procedural 'rule of reason' gives the ECJ some guidance on assessing whether national procedural autonomy shall be reduced.[89] Further, in a number of more recent cases, the ECJ has developed a formula within which it requires that any assessment of the role of the national provision conducted in the name of effectiveness shall include an assessment of 'its progress and its special features, viewed as a whole, before the various national bodies'.[90] As Weatherill points out, this case-by-case inquiry is flexible, but also unpredictable.[91]

If, as explained above, there is no EU law rule directly regulating post-award review, the EU's efforts in the context of competition law[92] and consumer protection have indirectly interfered with the national systems of post-award review. This section explains how the principle of effectiveness may influence post-award review under the ground of EU public policy. From the ECJ's perspective, a light standard of review may make it excessively difficult to rely on a breach of substantive EU public policy. On the other hand, an intense standard of review risks undermining

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87 *Van Schijndel*, para 17. See also Jan Engelmann, *International Commercial Arbitration and the Commercial Agency Directive* (Springer 2017) 71.

88 Prechal (1998) (n57) 690.

89 This rule was stated in: *van Schijndel* (n58), para 14. See also Prechal (2001) (n65) 39.

90 E.g. *Asturcom*, para 39; Case C-34/13 *Monika Kušionová* [2014] ECR I-2189, para 59; Case C-449/13 *CA Consumer Finance SA* [2014] ECR I-2464, para 25.

91 Weatherill (2016) (n7) 183.

92 See Natalya Shelkoplyas, *The Application of EC Law in Arbitration Proceedings* (Europa Law Publishing 2003) 213.

the effectiveness of arbitration, and contradicts the pro-enforcement policy of the New York Convention.

This section demonstrates that the ECJ's intrusion in national procedural law depends of the interest at stake. Three cases illustrate this point: *Eco Swiss*, *Claro*, and *Asturcom* which are detailed below in Sections 3.2.1, 3.2.2 and 3.2.3 respectively. In these three cases, the ECJ confrontedpreliminary questions which arose because the losing party had failed to raise substantive mandatory rules of EU law during the arbitration proceedings. Thus, the ECJ had to decide whether national procedural rules precluding parties from doing so at the post-award stage were compatible with the effectiveness of EU law. As explained in Section 3.2.2, in *Claro* the ECJ stretched the principle of effectiveness too far. However, in *Eco Swiss* and *Asturcom*, the principle of effectiveness has been set aside by the 'rule of reason'. It reveals a certain degree of restraint both in regard to competition law and consumer protection (Sections 3.2.1 and 3.2.3 respectively).[93]

Before proceeding further, a clarification is necessary. *Claro* and *Asturcom* were concerned with purely domestic arbitrations between Spanish parties. To that extent, these decisions are not squarely precedents for international arbitration proceedings, and the conclusions drawn from these decisions are necessarily inferential in nature. Yet, considering that the ECJ in these cases does not appear to dwell on whether the arbitral proceedings in question were domestic or international; and considering that in both *Claro* and *Asturcom* the ECJ referred to *Eco Swiss* which referred to the New York Convention and characterised Article 101 TFEU as public policy for the purpose of recognition and enforcement of foreign arbitral awards,[94] it could be expected that these decisions provide useful guidance for international commercial arbitration.

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[93] This chapter does not address the desirable level of post-award scrutiny under the ground of EU public policy, nor does it elaborate on the degree of violation a substantive mandatory EU law rule requires to justify the setting aside of an arbitral award. Both issues are discussed in Chapters 5, Section 4, and Chapter 6.

[94] *Claro*, para 34, 36 and 37; *Asturcom*, para 37.

3.2.1. *Eco Swiss*: Weighing the Principle of Effectiveness against *Res Judicata*

In *Eco Swiss*,[95] an Italian company, Benetton, concluded a licensing agreement for a period of eight years with Eco Swiss, a company based in Hong Kong, and with the US company Bulova Watch Company Inc ('Licensing Agreement'). The Licensing Agreement was in fact a market sharing agreement not covered by a block exemption and which had not been notified to the European Commission under Regulation 17. During the arbitration proceedings, which took place in the Netherlands under Dutch law,[96] neither the parties nor the arbitrators considered EU competition law despite its manifest breach. The interim and final awards both held Benetton liable for the anticipated cessation of the agreement and the payment of millions of dollars in damages.[97] Benetton later sought to annul the awards before the courts of the seat of the arbitration but it was out of time for the interim award.[98] Under Article 1064(3) of the Dutch Code of Civil Procedure, Benetton had only three months after the date of deposit of the interim award to make an application for annulment. Instead, it let the time-limit lapse. The interim award had become final, and had acquired the force of *res judicata*. However, the Supreme Court was uncertain whether the principle of effectiveness precluded national courts from applying such a procedural rule where, as in the present case, the subsequent arbitration award, the annulment of which had been applied for in proper time, proceeds upon an earlier arbitration award. The interim award held the Licensing

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95 *Eco Swiss* discussed by Diederick de Groot, 'The Impact of the Benetton Decision on International Commercial Arbitration' (2003) JIA 365; Laurence Idot, 'Comment' (1999) Rev arb 639; Yves Brulard, Yves Quintin, 'European Community Law and Arbitration. National Versus Community Public Policy' (2001) JIA 533; Prechal, Shelkoplyas (n63); Georgios Zekos, 'Eco Swiss China Time Ltd v Benetton International NV. Courts Involvement in Arbitration' (2000) JIA 91.

96 According to Arbitration Clause 26.A of the Licensing Agreement 'all disputes or differences arising between the parties are to be settled by arbitration in conformity with the rules of the Nederlands Arbitrage Instituut (Netherlands Institute of Arbitrators) and that the arbitrators appointed are to apply Dutch law'.

97 23 750 000 USD to Eco Swiss and 2 800 000 USD to Bulova. *Eco Swiss*, para 13.

98 Article 1064 of the Dutch Code of Civil Procedure:

> (3) An application for a reversal may be made as soon as the award has acquired the force of res judicata. The right to make an application shall be extinguished **three months** after the date of deposit of the award with the Registry of the District Court.

All elements in bold, italics or underlined have been added, unless stated otherwise.

Agreement valid in law when it was in reality void under Article 101 TFEU [then Article 85 EC Treaty]. Hence, the Dutch Supreme Court asked the ECJ whether the effectiveness of Article 101 TFEU required a national court to disapply a national procedural rule on *res judicata*, on the basis of an argument that had not been raised by the parties or the arbitrators during the arbitration proceedings.

The ECJ applied the procedural rule of reason set out in *Peterbroeck*.[99] It held that the three-month limitation period for an annulment action was a reasonable time limit on bringing actions to annul arbitral awards, even under the ground of public policy.[100] The Court considered that the limitation period, the expiry of which produces *res judicata*, was justified by the general interest in having an effectively functioning arbitration procedure, and the principle of legal certainty.[101] Finally, the ECJ ruled that, EU law does not require a national court to refrain from applying a domestic rules of procedure conferring *res judicata* effect to a decision, even if doing so would allow it to rectify an infringement of EU law.[102] The Dutch limitation period passed the rule of reason test. The principle of *res judicata* can only be set aside in exceptional cases to give full effect to the primacy of EU law (e.g. recovery of illegal State aid,[103] judgments contrary to EU Tax Law having a binding authority to other cases with the same matter in respect of the same taxpayer).[104] The ECJ ruling in *Eco Swiss* reveals an appreciation of a certain degree of restraint when applying

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99 Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-04599 (‘*Perterbroeck*’).

100 *Eco Swiss*, para 45.

101 *Eco Swiss*, paras 45-46.

102 Confirmed in Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECR I-2585, para 21 (‘*Kapferer*’).

103 Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* [2007] ECR I-6199. See Case C-2/08 *Amministrazione dell’Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl* [2009] ECR I-7501, para 25 where the ECJ held that *Lucchini* concerned a ‘highly specific situation, in which the matters at issue were principles governing the division of powers between the Member States and the Community in the area of State aid.’

104 *Fallimento Olimpiclub*, para 25. In this case, the ECJ ruled that final judgments which are contrary to EU Tax Law cannot have a binding authority to other cases with the same matter in respect of the same taxpayer, but relating to a different tax year.

the principle of effectiveness. This general line of reasoning is echoed in *Asturcom*, but challenged in *Claro*.

It is noteworthy, before moving to these cases, to add that the ECJ in *Eco Swiss* also declares that:

> it is manifestly in the interest of the Community legal order that, in order to forestall differences if interpretation, every Community provision should be given a uniform interpretation […] It follows that […] Community law requires that questions concerning the interpretation of the prohibition laid down in Article 81(1) EC should be opened to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.[105]

This ruling suggests that national law must allow the examination of EU law's application in the course of post-award review and, if necessary, subject it to a reference to the ECJ for a preliminary ruling.[106] In *Eco Swiss*, the public policy exception in Dutch law fulfilled this requirement. However, if national law does not recognise intervention under the ground of public policy, the principle of effectiveness would mandate national courts to intervene regardless in order to verify whether the award complies with fundamental provisions of EU law.[107] However, this is an unlikely scenario in the context of international commercial arbitration since all the Member States are party to the New York Convention. They are therefore all well-equipped to safeguard EU public policy. The situation is different in the context of investment arbitration, particularly regarding ICSID awards. Investment treaties usually do not allow for review on the basis of public policy, except when specific provisions are added to them;[108] and ICSID awards are not subject to any form of

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105 *Eco Swiss*, para 40. For a similar requirement see *Claro*, paras 34-39; *Achmea*, para 54.

106 *Eco Swiss*, paras 35, 36, 40; *Claro*, paras 34–39; *Achmea*, para 54.

107 *Manfredi*, para 31. See Stephen Weatherill, *Principles and Practice in EU Sports Law* (Oxford EU Law Library 2017) 31.

108 E.g. US Model BIT (2012), Articles 12–13; Indian Model BIT (2015), Articles 32–33. For the incompatibility of such mechanism in intra-EU BITs with EU law see *Achmea*, para 60. See more generally Pascalis Paschalidis, 'International Investment Law and EU Law: Are There Systemic Conflicts and Incompatibilities?' (2018) 11 IAI Series on International Arbitration 169.

review by the courts of any State.[109] It could therefore be argued that such provisions are incompatible with the principle of effectiveness of EU law because they do not comply with the requirement that the application of fundamental provisions of EU law can be raised, at least once, before an instance that has the power to make a preliminary reference to the ECJ.

3.2.2. *Claro*: an Extensive Application of the Principle of Effectiveness

In *Claro*, the ECJ rendered a decision that questions how far the EU may challenge a Member State procedural autonomy in order to secure effective consumer protection. As demonstrated below, the principle of effectiveness is stretched and not set aside by the rule of reason, not leaving much room for the principle of national procedural autonomy.

In *Claro*, a Spanish telecom company, Movil, had initiated arbitration proceedings against one of its customers, Ms Mostaza Claro, for failure to observe the minimum subscription period. According to the subscription contract, Ms Claro had ten days to reject the arbitration proceedings and to choose instead to go to court. She did not avail herself of this offer. Instead, she presented a defence on the merits, and failed to raise any jurisdictional objection. Having lost in the arbitration, she sought annulment of the award before the Audience Provincial de Madrid, arguing, for the first time, that the arbitration agreement was invalid given the unfair nature of the arbitration clause in light of the EU Directive on unfair clauses in consumer contracts ('Directive 93/13'). The argument relied on the breach of the consumer's right to a fair hearing that had – allegedly – been seriously compromised by the term at issue. The annulment court shared the consumer's view that the arbitration clause was unfair since it allowed the consumer only ten days to refuse arbitration which

[109] ICSID Convention, Articles 52–53.

was very short and therefore potentially unfair. The Spanish court's assessment[110] of the unfairness of the arbitration agreement is however questionable since that period was not too short for the consumer to submit arguments on the merits of the dispute.[111]

Yet, according to the applicable Spanish law at the time, objections of this nature should have been made by the parties with their first submissions.[112] The Spanish court therefore decided to stay the proceedings and requested a preliminary ruling to interpret national procedural law in conformity with Directive 93/13. The question was whether a national court hearing an action to annul an arbitral award is required to determine whether an arbitration agreement is unfair under Directive 93/13, even if the consumer failed to raise that issue in the arbitration proceedings.

The ECJ began by reiterating the principle of procedural autonomy, and recognised that it is for Member States to set out the procedural protections of the rights individuals acquire under EU law. The ECJ, however, referring to the principle of effectiveness,[113] held that the consumer's effective protection of her rights under Articles 6 and 7 Directive 93/13, which is of 'public interest',[114] would be undermined if the reviewing court was unable to assess whether the arbitral award should be annulled for the sole reason that the consumer had failed to plead the unfairness of the arbitration agreement during the arbitration proceedings.[115] Hence, the consumer's right to an

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110 Pursuant to Article 4(1) Directive 93/13, it is for the national courts to evaluate the unfairness of an arbitration agreement, taking into consideration all the circumstances attending the conclusion of the contract. See e.g. Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, para 22; *Claro*, paras 22, 23; Jürgen Basedow, 'Recherches sur la formation de l'ordre public européen dans la jurisprudence' in Marie- Noëlle Jobard-Bachellier and Pierre Mayer eds., *Le droit international privé: esprit et méthodes: Mélanges en l'honneur de Paul Lagarde* (Dalloz 2005) 55ff.

111 *Claro*, para 17. See also Andreas von Goldbeck, 'Consumer Arbitration in the European Union' (2018) 18(2) Pepperdine Disp Res L J 286.

112 *Claro*, Opinion AG Tizzano, para 50.

113 The Court in *Claro* built upon its prior decision. See Chapter 4, Section 1.

114 *Claro*, para 38.

115 *Claro*, paras 30-31

effective protection against unfair contractual terms cannot normally be waived.[116] According to the ECJ, the imbalance between the parties to a consumer contract both in terms of bargaining power and level of knowledge needs to be corrected by some positive action to guarantee the consumer's effective protection (e.g. the national court's power to examine *ex officio* whether a contractual term is unfair).[117] Thus, even if a consumer had failed to challenge the unfairness of an arbitration agreement during the arbitration proceedings, the court where annulment is sought is still under the obligation to entertain this challenge. This result has considerable implications for Member State procedural law, and the effectiveness of arbitration.

This far-reaching intervention in Member State procedural law in the name of an expanded version of the principle of effectiveness had had a previous occurrence in the field of consumer protection.[118] In *Cofidis*, the ECJ held that Article L311-37 of the French Consumer Code which prevented French courts from finding a term unfair, *ex officio* or following the plea raised by the consumer after the expiry of a two years time period after the occurrence of the event giving rise to the claim, could impair the effectiveness of Articles 6 and 7 Directive 93/13. The ECJ ruled that this time limit would 'deprive consumers of the benefit of that protection, sellers or suppliers would merely have to wait until the expiry of the time limit fixed by the national legislature before seeking enforcement of the unfair terms they would continue to use in contracts'.[119] Ultimately, the French Consumer Code had to be amended with a time limit more favourable to the consumer.

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[116] See Christopher Drahozal, Raymond Friel, 'Consumer Arbitration in the European Union and the United States' (2002) 28 NC J Int'l L & Com Meg 357; Donna Bates, 'Note: A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?' (2004) 27 Fordham Int'l LJ 823; Maud Piers, 'Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations' (2011) 1(2) J Int'l Disp S 209; Jean Sternlight, 'Is the U.S. Out on a Limb? Comparing the US Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World' (2002) 56 U Miami L Rev 831.

[117] *Claro*, para 27. This point had been made previously in *Océano* where the ECJ ruled that the national court had the power to determine ex officio whether a term is unfair. Joined Cases C-240-44/98, *Océano Grupo Editorial SA v Rocio Murciano Quintero* [2000] ECR I-4941, para 28.

[118] *Océano*, para 28. However, see also the less pro-active approach of the ECJ in Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG. v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-03403. On this point, see Hannes Unberath, Angus Johnston, 'The double-headed approach of the ECJ concerning consumer protection' (2007) 44 CML Rev 1266.

[119] Case C-473/00, *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875, para 35 ('*Cofidis*').

In *Cofidis*, the ECJ noted that an assessment of the national rule of procedural law needs to be made 'on a case by case basis'.[120] This requires an analysis of the factual and legal context. However, in neither *Cofidis* nor *Claro* did the ECJ analysed these elements.[121] This makes the application of the rule of reason test in these two rulings questionable. In *Cofidis*, the ECJ did not balance effective consumer protection with legal certainty. Similarly in *Claro*, the Court only briefly raised the theory of efficient arbitration proceedings, without applying it to the factual and legal elements of the case.[122] Unsettlingly, the ECJ appears to justify the absence of the rule of reason test in *Claro* by the fact that the new Spanish procedural rule, inapplicable to the case, 'no longer requires an objection to the arbitration, in particular on the grounds of the invalidity of the arbitration agreement, to be raised at the same time as the parties make their original claims'.[123]

In these two rulings, the ECJ seems to favour absolute consumer protection under Directive 93/13 at the expense of legal certainty. The ECJ reasonings are based exclusively on the effective protection of the consumer against unfair contract clauses[124] which obstructs the application of national procedural constraints, and justifies an intrusion into national procedures. The ECJ decision in *Claro* challenges the delicate balance between the effectiveness of arbitration and the effectiveness of the protection of substantive rights of EU law granted to the parties involved in the arbitration.[125] However, the ECJ had the opportunity in *Asturcom* of introducing an important reservation to its position.

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120 *Cofidis*, para 37

121 After *Cofidis* the lack of consideration for the national rule was severely criticised: Cyril Nourissat, *Droit communautaire et forclusion biennale: l'étrange effet utile de l'esprit de la directive 'clauses abusives'!* (Dalloz 2003) 486.

122 *Claro*, para 37.

123 *Claro*, para 32.

124 See *Océano* but also Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] ECR I-9305.

125 Engelmann (n74) 73.

3.2.3. *Asturcom*: Echoing *Eco Swiss*

The facts in *Asturcom* are similar to those in *Claro*, except that (1) the consumer, Ms Rodriguez Nogueira, had not become involved in the arbitral proceedings, the arbitral tribunal therefore rendered an arbitral award in favour of the Spanish telecom company, Asturcom, by default; (2) she failed to bring an action for annulment before the Spanish court of the seat; and (3) the telecom company brought an action for enforcement before the Spanish judge. The enforcement court was of the view that the arbitration clause was unfair for different reasons, including the inaccessibility of the arbitration proceedings for the consumer. However, under the applicable Spanish rules of procedure,[126] the arbitral award was considered final and had *res judicata* effect since the consumer had failed to initiate proceedings for annulment within two months from the date of notification of the award. The judge decided to stay the proceedings and asked the ECJ whether, in the absence of the consumer, and to guarantee the effective protection of her rights under EU law, it could invoke Directive 93/13 on the consumer's behalf to determine *ex officio* whether the arbitration agreement was unfair, and accordingly annul the award.

The ECJ examined whether the time-limit to file an annulment imposed by the principle of *res judicata* respected the principle of effectiveness of EU law. To answer this question, the ECJ applied the procedural rule of reason test set out in *Peterbroeck*.[127] It ruled that, in the interests of legal certainty, reasonable limitation periods for bringing an action are generally compatible with the principle of effectiveness of EU law. This point had been previously made in *Rewe* and *Comet*. In the present case, the ECJ held that the time-limit was unlikely to render the exercise of the rights of Directive 93/13 excessively difficult or virtually impossible. The Court reasoned that since the limitation period started at the date of the notification of the arbitral award, it was impossible for the

126 Spanish law 60/2003 on Arbitration, Article 41(4).

127 *Peterbroeck*.

consumer to find herself in a situation in which the limitation had expired without being aware of the existence of an unfair arbitration clause.[128] It concluded that to require the Spanish court to raise and entertain the unfairness of the arbitration agreement *ex officio*, when the award was final, would undermine the principle of *res judicata*. The ECJ concluded that the principle of effectiveness cannot be stretched so far as to request a national court to compensate for the total inertia of the consumer.[129] Hence, the Spanish rule implementing the principle of *res judicata* met the standard of effectiveness.

It is interesting to note that AG Trstenjak in her Opinion reached the opposite conclusion, in line with the ECJ reasoning in *Claro*. She argued that the need for effective consumer protection under Directive 93/13 made it necessary for the national court to raise the unfairness of the arbitration agreement *ex officio* and to disregard the principle of *res judicata*.[130] An interpretation to the contrary would mean that the unfair nature of the arbitration agreement would prevail definitively and irrevocable to the detriment of the consumer.[131]

Ultimately, in *Asturcom*, the ECJ ruled that consumers are not afforded absolute protection under Directive 93/13.[132]

3.2.4. Intermediate Conclusion: Context-Specific Application of the Principle of Effectiveness

In *Claro*, the rhetoric of the ECJ does not leave much room for national procedural autonomy in the application of substantive mandatory rules of EU law in post-award review. However, this section also demonstrates that the intrusion in the national procedural law depends on the context. As illustrated in *Eco Swiss*, and subsequently in *Asturcom*, there are limits to the extent to which the

128 *Asturcom*, para 45.

129 *Asturcom*, para 47.

130 *Asturcom*, Opinion AG Trstenjak, paras 58ff.

131 Ibid, para 61.

132 *Asturcom*, para 34. See Case C-412/06 *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-2383, para 39.

ECJ is willing to intrude on national procedures to uphold EU law. The principle of effectiveness is set aside by the rule of reason when the time-limit, the expiry of which produces *res judicata*, is not so short as to deprive the parties from challenging the arbitral award, and pursues the legitimate goal of guaranteeing legal certainty. The effective application of EU law cannot systematically justify setting aside the finality of arbitral awards. EU law is not to be upheld at all cost, and the ECJ is not blind to legal certainty.[133]

3.3. The Principle of Equivalence or the Use of Public Policy as a Trojan Horse

It appears that the principle of effectiveness left untouched the national procedural rules conferring finality to an arbitral award. However, the ECJ relied on the principle of equivalence and on a broad interpretation of the national concept of public policy to answer questions of foreclosure and judicial passivity. According to the principle of equivalence, Member States are barred from discriminating procedurally against legal claims derived from EU law as compared to analogous claims based on national law.[134] Thus, while Member States enjoy basic 'procedural autonomy', that is, the right to determine the ways in which their authorities – notably courts – implement and enforce the law, including EU law, they must not discriminate against EU law-based claims by comparison with analogous domestic law claims. In other words, Member States must accord EU law-based claims what might simply be called 'national treatment'. Accordingly, the ECJ stated in *Eco Swiss* and in *Claro* that:

> where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on *failure to observe national rules of public policy*, it must also grant such an application where it is founded on failure to comply with [EU law rules of this type].[135]

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[133] See Weatherill (2017) (n94) 33; Bermann (n12) 417-418.

[134] *Rewe,* para 5; *Van Schijndel*, paras 13, 17. For an example of the application of that principle, see e.g. Case C-453/00 *Kiikne & HeitzNVv. Produktschap voor Pluimvee en Eieren* [2004] ECR I-837.

[135] *Eco Swiss*, para 37; *Claro*, para 35.

Before proceeding any further, a clarification is however necessary regarding the terminology used by the ECJ. Neither Dutch nor Spanish procedural law (or any other procedural law to my knowledge) requires the annulment (or refusal of enforcement) when the arbitral award fails to observe the rules of public policy.[136] Hence, it is not *per se* the failure to observe public policy rules that would trigger annulment, or the refusal to enforce the award, but an effective and concrete breach of public policy.[137]

The ECJ repeatedly held that substantive mandatory rules of EU law are 'equivalent' to national rules of public policy. In the field of international arbitration, the case law of the ECJ therefore unequivocally admits that national courts must deny effectiveness to an arbitral award that breaches fundamental rules of EU law on the basis of their national public policy mechanism based on their principle of equivalence. The reasoning of the ECJ is clearly illustrated in *Eco Swiss* and *Asturcom* which are detailed below in Sections 3.1.1 and 3.1.2 respectively. As explained in Section 3.1.3, a broad application of the principle of equivalence may have far reaching consequences for the Member States, and a potentially deep impact on the effectiveness of international arbitration.

3.3.1. *Eco Swiss*: Stretching the Principle of Equivalence and Indirectly Undermining Judicial Passivity

In *Eco Swiss*, neither the parties nor the arbitrators had pointed out that the Licensing Agreement might violate Article 101 TFEU until the annulment proceedings.[138] However, under Dutch procedural law, Dutch courts were unable to entertain an application for annulment on points of law put forward for the first time at such an advanced stage, nor to rely on facts and circumstances

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136 Natalya Shelkoplyas, European Community Law and International Arbitration: Logics That Clash (2002) 3 Eur Bus Org L Rev 576.

137 See Chapter 5, Section 4.

138 *Eco Swiss*, para 14.

which had not been established by the arbitral tribunal.[139] This clearly raises procedural problems, notably with regard to the principle of judicial passivity. The *Hoge Raad* therefore asked the ECJ, in its second question, whether the procedural provision which states that Dutch courts are unable to consider pleas on points of law put forward for the first time in annulment proceedings is compatible with Article 101 TFEU, or whether EU law obliges Dutch courts to allow the proceedings for annulment nonetheless.[140] The ECJ answered the question on judicial passivity indirectly,[141] relying heavily on the principle of equivalence.[142] Since Dutch law[143] and the New York Convention[144] allow courts to review an award for a potential breach of public policy *ex officio*,[145] and since Article 101 TFEU is 'equivalent' to a provision of public policy,[146] the ECJ concluded that it did not need to answer the *Hoge Raad* question on judicial passivity.[147] This qualification allowed the ECJ to achieve the desired result (i.e. the effective and uniform application of Article 101 TFEU) without touching upon Dutch procedural law. A reasoning based only on the principle of effectiveness would have been very disruptive for national procedural law, since it would have meant adding a new ground for post-award review when Article 101 TFEU is breached.[148] Instead, qualifying Article 101 TFEU as forming part of EU public policy

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139 *Eco Swiss*, Opinion AG Saggio, para 12.

140 *Eco Swiss*, para 30.

141 *Eco Swiss*, Opinion AG Saggio, para 13. It is answered 'indirectly' because the ECJ answered the third question by reference to the second question referred to by the *Hoge Raad*.

142 *Eco Swiss*, paras 37, 42.

143 *Eco Swiss*, paras 24, 39.

144 New York Convention, Article V(2)(b).

145 Ibid.

146 *Eco Swiss*, para 41.

147 *Eco Swiss*, para 42.

148 Assimakis Komninos, 'Commentary on Eco Swiss v Benetton' (2000) 37 CMLR 473.

automatically incorporated that provision into national public policy, allowing the ECJ to protect the effectiveness of EU law without affecting, at least directly, national procedural law.[149]

Problematically, however, the ECJ did not apply the principle of equivalence correctly. A correct application of the principle of equivalence in this context would have been to consider whether Dutch competition law was part of Dutch public policy for the purpose of post-award review, then in application of the principle of equivalence, EU competition law could have been considered as forming part of Dutch public policy for the same purpose. However, Dutch law did not regard competition law as a matter of public policy.[150] In application of the principle of equivalence, the ECJ should have therefore abstained from characterising Article 101 TFEU as forming part of Dutch public policy. Instead, the ECJ integrated into the Dutch definition of public policy its own autonomous definition. This goes beyond a mere understanding of the principle of equivalence.

3.3.2. *Asturcom*: Another Broad Application of the Principle of Equivalence

The ECJ returned to the application of the principle of equivalence to public policy in arbitration in *Claro*. As established above in Section 3.2.2, relying on the principle of effectiveness, the ECJ set aside the Spanish rule of judicial passivity. The ECJ however also relied on the principle of equivalence, holding that national courts must respect rules of EU public policy as much as national rules of public policy:

> [w]here its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award, and where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with Community rules of this type.[151]

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149 *Eco Swiss*, Opinion AG Saggio, para 33.

150 *Eco Swiss*, para 24.

151 *Claro*, para 35.

The ECJ did not, however, go further. It simply held that Article 6 Directive 93/13 is 'mandatory',[152] without explaining why, and 'essential to the accomplishment of the tasks entrusted to the Community',[153] which could be said of any EU law measure.[154] The ECJ clarified its qualification in *Asturcom* where it relied, this time, on the principle of equivalence to call for an exception to the rule of procedural autonomy.[155]

In *Asturcom*, the ECJ held that: 'Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.'[156] This allowed the ECJ to bypass the question of judicial passivity as Spanish courts are 'required […] to assess of [their] own motion'[157] the unfairness of an arbitration clause to Article 6 Directive 93/13 even when the arbitral award has become final. Without the public policy qualification, the ECJ could not have obtained this result.[158] The ECJ, however, made no reference to the status of the protection of consumers against unfair terms under Spanish law in its reasoning. Problematically, and unlike competition law, consumer protection rules are not commonly categorised in Member States as forming part of their public policy for the purpose of enforcement of arbitral awards.[159] Hence, the issue is that EU consumer protection against unfair terms might have been granted a status that its national equivalent under Spanish law did not possess. As explained above in Section 3.3.1 regarding competition law, if a national court reaches the conclusion that under its national law mandatory rules of national consumer law do not rise to the

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152 *Claro*, para 36.

153 *Claro*, para 37.

154 Bermann (n12) 417.

155 Piers (n100) 224.

156 *Asturcom*, para 52.

157 *Asturcom*, para 59. See also *Claro*, para 38.

158 Piers (n100) 224ff.

159 Mark Ebers, 'From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata' (2010) 18(4) ERPL 823. See e.g. BGH (Germany), 13 December 2005 (2006) BGHZ 248; ÖOGH, 22 July 2009, docket no. 3 Ob 144/09m. This point is developed in Chapter 4 under Section 2.1, pp. 107ff.

level of public policy, the principle of equivalence could not, at least in a strict sense, require national courts to reach that conclusion for its EU law equivalent. Otherwise, the ECJ would effectively be rewriting the content of national public policy under the guise of the principle of equivalence.[160] In that regard, the ECJ's application of the principle of equivalence in *Asturcom* is comparable to *Eco Swiss*.[161] The ECJ's reasoning highlights that the status of national laws has no bearing on whether a EU law provision is EU public policy, based on the principle of equivalence. The existence of a public policy mechanism in the national procedural law is sufficient.

The ECJ also went beyond a mere application of the principle of equivalence in another respect. The Spanish Government explained to the ECJ that, under Spanish procedural law, the enforcement court had the power to assess the validity of the arbitration agreement regardless of whether the concerned party had participated in the arbitration or court proceedings as a matter of (national) public policy.[162] Under the principle of equivalence, the same national procedural rules apply to the enforcement of national public policy and EU public policy. In other words, if a national court can review whether an arbitral award complies with national public policy, the court can also review the compliance of the arbitral award to Article 6 Directive 93/13, the nature of which is similar to public policy. However, the ECJ went a step further. Under Spanish procedural law, Spanish courts only have the *power* to assess the conformity of an arbitral award to national public policy. Yet, the ECJ ruled that they have the *obligation* to do so with respect to EU public policy.[163]

The ECJ's judgment is based on older case law and should be read in conjunction with its earlier rulings on choice-of-court agreement in consumer contracts. Choice-of-court agreements and arbitration agreements are certainly different but share some identical features such as their purpose

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[160] Trstenjak, Beysen (n58) 121.

[161] *Eco Swiss*, paras 36, 39.

[162] *Asturcom*, Opinion AG Trstenjak, para 38.

[163] *Asturcom*, Opinion AG Trstenjak, para 59.

and nature. The ECJ had previously established this rule in *Océano Grupo* regarding a court's *power* during litigation to examine *ex officio* the validity of a choice-of court agreement in a consumer contract in sight of Directive 93/13. The *Océano Grupo* ruling was subsequently confirmed in other judgments such as *Cofidis*, *Pannon*, and *VB Pénzügyi Lizing*.[164] In these cases, the ECJ emphasised that an unfair contract term is not binding on the consumer. Besides, since *Pannon*, the ECJ clearly stated that the role of the national court under EU law is not a mere power to rule on the alleged unfairness of a contractual term, but creates an obligation to examine that issue *ex officio* when the necessary legal and factual elements are available.[165] It is therefore unsurprising that the ECJ ruled in *Asturcom*[166] that the best way to protect consumers from an – allegedly – unfair arbitration clause is by denying enforcement to the award, even if the consumer did not raise that claim at any point of the proceedings. *Asturcom* therefore illustrated how the ECJ, under the pretence of the principle of equivalence is actually impacting Member State's procedural autonomy as it would under the principle of effectiveness.

3.3.3. Impact of the Broad Application of the Principle of Equivalence on Procedural Autonomy and International Arbitration

In general, EU law penetrates deeper into national law through the principle of effectiveness.[167] However, when EU law provisions acquire EU public policy status, the principle of equivalence can become 'as sharp a sword' as the principle of effectiveness, because domestic law always provide

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[164] Case C−137/08, *VB Pénzügyi Lízing Zrt v Ferenc Schneider* [2010] ECR I-659.

[165] In *Tomášová*, the ECJ recognises the past inconsistency in its case law but states that it has been clear since 2009 that it is in fact a duty not a power, referring to *Pannon* as the key clarifying case. Case C-168/15, *Milena Tomášová v Slovenská republika* [2016] ECR I-692, paras 28-31 and Opinion AG Wahl, para 65.

[166] Admittedly in paragraph 38 of *Claro*, the ECJ acknowledged that, the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers could even justify the national court being required to assess on its own motion whether a contractual term is unfair. However, this issue was not central to the case since in that ruling it was a question of whether a consumer may invoke the invalidity of an arbitration agreement, and not about the *ex officio* powers of national courts. See *Tomášová*, para 29.

[167] Michal Bobek, 'Why there is no principle of 'Procedural Autonomy' of the Member States' in Hans Micklitz, Bruno De Witte (eds), *The European Court of Justice and The Autonomy of the Member States* (Intersentia 2012) 305; Andreas von Golbeck, 'Consumer Arbitration in the European Union' (2018) 18(2) Pepperdine Disp Res LJ 288.

for the possibility of refusing enforcement to an award which violates national public policy.[168] By relying on the principle of equivalence to elevate EU provisions to public policy, the ECJ boosts EU provisions without giving the impression that it is undermining the principle of procedural autonomy. Yet, the ECJ reasoning breaches the traditional use of the principle of equivalence. The ECJ grants public policy status to EU provisions that equivalent national provisions do not have. In *Eco Swiss*, *Claro* and *Asturcom*, the ECJ did not leave the Dutch and Spanish courts to decide whether a particular provision of EU law fitted the concept of national public policy. Instead, the ECJ simply put an equals sign between Article 101 TFEU or Article 6 Directive 93/13 and national public policy. In doing so, the ECJ interpreted the content of Member States' national law which is wholly outside its attributions in preliminary ruling procedures. The ECJ is effectively rewriting the content of national law and introduces uniform standards for those EU law provisions that must be regarded as rules of EU public policy.[169] The combination of the principles of effectiveness and equivalence has a profound impact on post-award review procedures,[170] resulting in an (unwarranted?) violation of national procedural autonomy.[171]

The ECJ's application of the principle of equivalence entails particularly high stakes regarding the nature of international arbitration for two main reasons.[172] First, as further explained in Chapter 5, the ECJ has consistently broadened the traditionally narrowly defined scope of the public policy exception. The logic of the ECJ which favours a broad notion of public policy to maximise the effectiveness of EU law therefore undermines the logic of international arbitration which favours a narrow definition of public policy to maximise the finality of arbitral awards. The consequences are even greater regarding annulment proceedings. If an arbitral award is annulled on

168 Von Goldbeck (n147) 288.

169 See also Schebesta (n55) 847; Marie Jull Sørensen, 'In the Name of Effective Consumer Protection and Public Policy!' (2016) 5 ERPL 818.

170 Tridimas (n56) 423.

171 Sørensen (n149) 798. See also Trstenjak, Beysen (n58) 121. As implied in Piers (n100) 227.

172 Bermann (n12) 414.

the ground of public policy (or on any ground), on one view it becomes a 'nullity'[173] and cannot be recognised or enforced in a third State.[174] An annulment decision may therefore affect an arbitral award's capacity to be recognised in New York Convention States.[175] The broader the grounds of annulment, or the exceptions to recognition and enforcement, the more likely arbitral award will be set aside or denied recognition and enforcement. By broadening the (traditionally narrow) scope of public policy to integrate EU law considerations, the ECJ increased the likelihood that an award will be successfully challenged. Indirectly, it impacts the principle of finality of arbitral awards.

Second, as further explained in Chapter 6, the ECJ effectively transformed the public policy exception into a duty to police, not a power to be exercised. It is generally accepted that the public policy ground in post-award review is discretionary. Improbable as it may be, according to the New York Convention and the Model Law, on which many Member States have designed their arbitration laws, reviewing courts 'may' refuse to annul an award, or recognise and enforce it, even when it violates their public policy. However, the ECJ held that national courts '*must* grant [the] application',[176] or '*must* […] annul [the] award'[177] once the ground is established. In a later judgment, the ECJ even stated that 'Articles 81 and 82 EC [Article 101 and 102 TFEU] are matters of public policy which *must automatically* be applied by the national court'.[178] This trumps the discretion of national courts to uphold an award which would offend EU public policy.[179]

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173 Peter Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 6 Neth ILR 43.

174 Some New York Convention signatories such as the UK or Germany sometimes interpret the word 'may' of Article V(1)(e) New York Convention as a mandatory provision. For UK e.g. *Yukos Capital SARL v OJSC Rosnef Oil Co* [2012] EWCA Civ 855; for Austria e.g. Austrian Supreme Court, 20 October 1993 and 23 February 1998 [1999] 24 YB Com Arb Int 919; for Germany, e.g. OLG Rostock, 28 October 1999, 1 Sch 03/99.

175 New York Convention, Article V(1)(e).

176 *Eco Swiss*, para 41.

177 *Claro*, para 39. See also *Asturcom*, para 59.

178 *Manfredi*, para 31; Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 49.

179 As implied by Piers (n100) 227. See also Bermann (n12) 420.

To that extent, EU public policy risks undermining the proper functioning of international arbitration.

Conclusion

Public policy is a necessary tool for any legal order to grant protection to its most fundamental values. In this context, the emergence of a notion of public policy particular to the EU should not be considered particularly remarkable. The ECJ took the opportunity of the preliminary questions in *Eco Swiss, Claro,* and *Asturcom* to categorise certain norms of EU competition and consumer protection law as fundamental to the proper functioning of the internal market. These judgments provide an illustration of how substantive EU law may interfere with national procedural laws.[180] EU public policy not only widens the content of national public policy, it also affects the role of reviewing courts. The ECJ has put itself in the position of reinterpreting the procedural conditions of post-award review under the guise of the ground of public policy established in national procedural laws and international conventions to guarantee the effectiveness of EU law. This way, it ensures that no national procedural impediment may limit the effective application of EU law in post-award review. By consistently ruling that the public policy exception is applicable in every decision on post-award review, the ECJ found a way to strengthen the effectiveness of EU law in national legal orders. In this context, public policy cannot be assumed to have the exceptional character generally assigned to it in international arbitration.[181] EU public policy is above all a tool that ensures the effectiveness of EU law in post-award review. The principle of effectiveness indeed seems always to prevail, and to systematically justify an intrusion in national procedural autonomy,

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180 Piers (n100) 227.

181 Bermann (n12) 420.

whether it is applied directly, or indirectly through the principle of equivalence.[182] In doing so, the ECJ not only undermines the principle of procedural autonomy, it also risks undermining the principle of finality of arbitral awards, and as a result the effectiveness of international arbitration.

[182] The ECJ's disrespect for national procedural autonomy has been criticised even by members of the institution. See Case C-169/14, *Juan Carlos Sánchez Morcillo, María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* [2014] ECR I-2110, Opinion AG Wahl.

Introduction to Chapters 3 to 5

The previous chapter argued that public policy is a necessary tool for any legal order to protect its most fundamental values. It contended that the ECJ made the public policy exception into a tool to strengthen the effectiveness of EU law in the legal orders of Member States. Chapter 2 concluded that in this context, public policy cannot be assumed to have the exceptional character generally assigned to it in international arbitration. The following three chapters develop this point through a study of the content of EU public policy. As highlighted in *Eco Swiss* and *Claro*, parties are not required to raise EU public policy arguments before the arbitral tribunals in first instance, but can instead reserve them to challenge an unfavourable award. To this extent, the broader the scope of EU public policy, the more it is likely to undermine the effectiveness of the international arbitration regime. Consequently, as noted by Bermann, disparities between the scope of EU public policy and international arbitration regimes cannot be dismissed as of academic interest only.[1]

[1] George Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 Arb Int'l 420.

CHAPTER 3 — EU COMPETITION LAW RULES AS PUBLIC POLICY IN POST-AWARD REVIEW: AN ACCEPTED QUALIFICATION WITH DEEPER RAMIFICATIONS

Introduction

To this day, *Eco Swiss* is the only ECJ judgment which has explicitly addressed post-award review in the area of EU competition law.[2] In *Eco Swiss*, the ECJ elevated Article 101 TFEU to the rank of public policy for the purpose of annulment of foreign arbitral awards. The ECJ acknowledged the importance of Article 101 TFEU which 'constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community, in particular, for the functioning of the internal market'.[3] The Court then linked Article 101 TFEU to national public policy through a (questionably) broad application of the principle of equivalence.[4] One can reasonably assume that the ECJ was influenced in its reasoning by the practice of some Member States which had already considered, prior to *Eco Swiss*, EU competition law to be part of their public policy exception.[5] Two years prior to *Eco Swiss*, Schlosser even wrote: 'it is common ground that arbitral awards can not be recognised should they have disregarded Article 85 [now Article 101 TFEU] of the Treaty of Rome.'[6] However, it would be going too far to speak of a consensus with regard to the public policy character of competition law, as far as EU law is concerned. The preliminary questions referred to

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2 The ECJ did not take the opportunity in *Genentech* to rule on this issue despite the Opinion of AG Wathelet. See Chapter 5.

3 The ECJ in *Eco Swiss* was directly influenced by *Van Schijndel* which held that Member States must take EU law into account in determining what constitutes public policy within their legal order. *Eco Swiss*, para 30.

4 *Eco Swiss*, para 37. See Chapter 2.

5 *Eco Swiss*, Opinion AG Saggio, para 38: 'This view that the rules on competition are part of the 'public economic policy of the Community' finds wide support in the legal literature and in the case-law of many Member States.' See e.g. BGH (Germany), 25 October 1983, KZR 27/82; BGH (Germany), 31 May 1972, KZR 43/71; BGH (Germany), 27 February 1969, KZR 3/68; BGH (Germany), 25 October 1966, KZR 7/65; OLG Dresden (Germany), 20 April 2005, 11 Sch 01/05; OLG Düsseldorf (Germany), 21 July 2004, VI-Sch (Kart) 1/02. See also for France e.g. Paris CA, 14 October 1993, *Société Alpix v Société Velcro* (1994) Rev Arb 165; for Belgium, Civ Bruxelles, 15 October 1975 (1976) 91 RIT 49; for Austria, Austrian Supreme Court, 23 February 1998, cited by Assimakis Komninos, 'Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, Judgment of 1 June 1999, Full Court' (2000) 37(2) CMLR 474.

6 Peter Schlosser, 'Arbitration and the European Public Policy' in Robert Briner, Yves Derains et al (eds) *L'Arbitrage et le Droit Européen* (Bruylant 1997) 86.

the ECJ by the Dutch Supreme Court demonstrate the uneasiness of some national courts with this notion.[7] The first objective of this chapter is therefore to explain why, according to the ECJ, an arbitral award that violates Article 101 TFEU ought to be refused recognition and enforcement in a Member State under Article V(2)(b) of the New York Convention. Besides, one of the questions these rulings left unanswered is whether the entire field of EU competition law falls within the domain of public policy as suggested by some commentators,[8] or the Commission in *Electrabel SA v Hungary* regarding Treaty provisions.[9] Ultimately, it will be for the CJEU to determine this point. Until then, the situation remains uncertain for parties, arbitrators and national courts. Since few studies have been conducted on this specific topic,[10] this chapter conducts an analysis to remedy this gap and alleviate uncertainty.

In *Eco Swiss*, the ECJ explained the public policy characterisation of Article 101 TFEU through a broad approach which focused on the general objectives of EU competition law. It therefore appears essential to first explain why EU competition law is essential to the EU since it is the only way to understand why Article 101 TFEU was characterised as forming part of EU public policy; and anticipate the ECJ's future application of the concept. Section 1 explains how the importance of EU competition law and its overall arbitrability led the ECJ to consider it as forming part of its public policy for the purpose of post-award review. However, it cannot be the case that every provision of EU competition law forms part of EU public policy. Taking into consideration

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7 The Supreme Court of the Netherlands reiterated that Article 6 of the Dutch Competition Act, a provision substantially similar to Article 101 TFEU is not a rule of public policy post-*Eco Swiss* in Case no C07/170HR, 16 January 2009, *De gemeente Heerlen v Whizz Croissanterie VOF*. See also Natalya Shelkoplyas, 'European Community Law and International Arbitration: Logics That Clash' (2002) 3 Eur Bus Org L Rev 590.

8 For example see Georgios Zekos, 'Antitrust/Competition Arbitration in EU versus U.S. Law' (2008) 25(1) J Int'l Arb 24; Luca Radicati di Brozolo, 'Chapter 22: Court Review of Competition Law Awards in Setting Aside and Enforcement Proceedings' in Gordon Blanke and Philip Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International 2011) 758.

9 EU Commission Submission, 12 June 2009, *Electrabel SA v Hungary*, paras 135-136. This arbitration was, of course, an international arbitration under the ICSID Convention, which contains no similar provision on public policy. See ICSID Case No ARB/07/19, *Electrabel, AES, and EDF v Hungary*; ICSID Case No ARB/07/22, *AES Sumnit Generation Ltd and AES-Tisza Erömü Kft v Hungary*.

10 See however the very detailed analysis of Damien Geradin, 'Public Policy and Breach of Competition Law in International Arbitration' (2016) 27 Spain Arb Rev 133ff.

the ECJ rulings, Section 2 argues that only fundamental rules of EU competition law, understood narrowly, may form part of EU public policy. Moreover, and in addition to the fundamentality of a rule, in order for it to form part of EU public policy, its function and purpose should also be in the interest of third parties or the public in general and not merely of the person directly concerned.[11] As a result, few EU competition law provisions may form part of EU public policy in post-award review. Finally, Section 3 highlights the main difficulties raised by *Eco Swiss*, namely, that the ECJ did not rely on clear cut criteria to explain the qualification of Article 101 TFEU as EU public policy. Instead, it relied on the notion of 'fundamentality' which can be used to construe EU public policy broadly.

1. The Fundamentality of EU Competition and its Arbitrability: Prompting its Qualification as Essential to the Functioning of the Internal Market

To answer the *Hoge Raad*'s second question on the public policy nature of Article 101 TFEU, the ECJ adopted a teleological approach focusing on the general aims and objectives of EU competition law rather than on the specific role or the wording of Article 101 TFEU. It held that:

> according to Article 3(g) of the EC Treaty, Article 85 of the Treaty [Article 101 TFEU] 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.[12]

The ECJ's analysis of the importance of EU competition law is limited and does not provide any real explanation. It is therefore essential to first clarify why EU competition law is essential to the functioning of the internal market. As explained in Section 1.1, competition is an essential policy

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11 Sarah Prechal and Natalya Shelkoplyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and beyond' (2004) 5 ERPL 610.

12 *Eco Swiss*, para 36. This expression was used subsequently to describe Article 101 TFEU in *Courage v Crehan*, para 20; Case T-82/96 *ARAP and Others v Commission* [1999] ECR II-1889, Opinion AG Geelhoed, para 189; Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH, Akzo Nobel NV* [2015] ECR I-335 ('*CDC*'), Opinion AG Jääskinen.

goal of any market economy. However, it is submitted in Section 1.2 that competition is particularly important in the EU as its goals are closely interrelated to the creation of the internal market. Besides, Section 1.3 demonstrates that most provisions of EU competition law are arbitrable. This, Section 1.4 argues, might have prompted the ECJ to qualify EU competition law as forming part of its public policy in the context of post-award review.

1.1. Competition: a Basic Mechanism of the Market Economy

There is a general opinion among countries that have adopted the market economy as their economic model that competition produces various benefits.[13] Competition is believed to encourage companies to offer goods and services at the most favourable terms. The underlying idea is that sellers and buyers act antagonistically to each other. Sellers prefer prices as high as possible, and buyers as low as possible.[14] In a market where sellers and buyers meet, competition encourages lower prices, a broad range of choices for consumers, but it is also believed to lead to cost efficiency and innovation. In order to be effective, competition requires companies to act independently of each other while at the same time being subordinated to the competitive pressure exercised by the others.[15] In the model of perfect competition, the output decision of any company does not affect the market price. Instead, companies are assumed to be price takers and adjust their own output so as to maximise profits.[16] Perfect competition is ideal from a social welfare perspective. On the other end of the market array lies the economic model of monopoly.[17] In a

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13 Julia Dietrich, 'Chapter 1: Economic and legal foundations of EU competition law' in Mortiz Lorenz (ed) *An Introduction to EU Competition Law* (CUP 2013) 1.

14 Ibid 2.

15 DG COMP website available at http://ec.europa.eu/competition/antitrust/overview_en.html (last accessed 5 September 2019).

16 On the model of perfect competition, see e.g. Robert Frank, *Microeconomics and Behaviour* (8th ed, McGraw-Hill 2010) 333ff; Stephen Martin, *Industrial Economics: Economic Analysis and Public Policy* (2nd ed, Prentice-Hall 1994) 14ff.

17 Lorenz (n13) 9.

situation of monopoly, there is only one supplier offering the good in question who does not face any competition. The output decision of the monopolist automatically has an impact on the market price since it acts as the price setter. As a result, prices will be higher, and cost efficiency and innovation will not be achieved. This significantly impacts society's welfare, and particularly consumers' welfare. However, most markets are not at either end of this spectrum but rather in-between. They are best characterised as oligopolies (i.e. a market structure in which a few firms dominate). The firms in an economic model of oligopolistic competition compete with each other, and should therefore not be confused with cartel behaviour.[18]

In this context, the policy objective of market economies is to achieve a satisfying degree of 'workable competition',[19] or 'effective competition',[20] between the different firms in an existing market. Competition therefore needs to be regulated through the adoption of competition law which is crucial to ensure that the market mechanisms function effectively, and that society as a whole[21] can receive its benefits.

1.2. The Essential Role of EU Competition Law in Achieving the Growth of the Internal Market

The protection of EU competition law is a cornerstone of EU policy in a broad, political sense as it is central in achieving the growth of the internal market. Market integration has been at the root of the EU since its creation.[22] The objective of the internal market is to comprise an area 'without

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18 Simon Bishop, Mark Walker, *The Economics of EC Competition Law* (3rd ed, Sweet & Maxwell 2010) 336ff; Frank (n16) 434ff; Martin (n16) 132ff.

19 John Clark, 'Toward a Concept of Workable Competition' (1940) 30 Am Ec Rev 241.

20 The term 'effective competition' is mentioned in Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] 24 OJ 1, Article 2, para 3. However, there is no clear definition of what it means. For a possible explanation see Bishop, Walker (n18) 16ff.

21 Competition does not necessarily seek to protect individual competitors. See Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] 45 OJ 7, para 6.

22 Paul Craig, 'The Treaty of Lisbon: Process, Architecture and Substance' (2008) 33 EULR 137.

internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'.[23] This implies that Member States shall not shield their domestic market from cross-border influxes.[24] Market integration is essential to achieve 'conditions similar to those of a domestic market',[25] and implies that competition shall not be distorted.[26] As a result, EU competition law is particularly sensitive to practices which undermine the goal of market integration.[27] This is emphasised in *Eco Swiss* where the ECJ stated that: 'Article 85 of the Treaty [Article 101 TFEU] 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*.'[28] As a direct consequence, a regulatory framework which upholds effective competition increases the competitiveness of European industry. As is now generally accepted, a competitive economy not only benefits consumers and society as a whole but also ensures the optimal functioning of the internal market and the competitiveness of European industry.[29] In this context, the main objective of competition law is to prevent and remove distortions of competition resulting from the actions of private companies or public authorities, thus enabling the market to function more effectively.[30] EU competition law is therefore not an end in itself but rather an instrument towards the fundamental goals laid out in the EU Treaties (i.e. the establishment of a

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23 See definition TFEU, Article 26(2).

24 Lorenz (n13) 25.

25 Case C-26/76 *Metro SB-Grobmärkte GmbH & Co KG v Commission of the European Community* [1977] ECR 18750, para 20.

26 Renato Nazzini, 'Article 81 EC between Time Present and Time Past: A Normative Critique of "Restriction of Competition" in EU Law' (2006) 43 CMLR 527.

27 Lorenz (n12) 29.

28 *Eco Swiss*, para 36.

29 Speech made by Commissioner Mario Monti at the CBI Conference on Competition Law Reform London, 12 June 2000 available at: https://ec.europa.eu/competition/speeches/text/sp2000_008_en.html (last accessed 1 September 2019).

30 Stephen Weatherill, *EU Consumer Law and Policy* (2nd ed, Elgar European Law 2013) 308.

common and open market, the promotion of economic expansion, the increase of living standards, and the development of a closer relationship between Member States).

Hence, although the reference in Article 3(1)(g) EC to the necessity for the Community to set up 'a system ensuring that competition in the internal market is not distorted', disappeared in the Lisbon Treaty, and the reference to a 'high degree of competitiveness' in Article 2 EC Treaty has been replaced by a less explicit reference to the objective of a 'highly competitive social market economy aiming at full employment and social progress' in Article 3 TEU, competition remains essential to the EU's economic agenda and the creation of the internal market.[31] Member States are still bound to conduct their economic polices 'in accordance with the principle of an open market economic with free competition' pursuant to Articles 119(1) and 120 TFEU. The importance of the protection of free competition is further underlined in Protocol 27 on the Internal Market and Competition which forms an integral part of the EU Treaties.[32] It states that: 'the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted'. These different Treaty provisions demonstrate that the creation of an internal market with undistorted competition is essential to the EU.

To guarantee 'effective competition', EU competition law aims at ensuring that the overall benefits of competition stated above will be achieved (i.e. lower prices, cost efficiency, more choice for consumers, and innovation). In order to do so, it: (i) prohibits agreements between undertakings that could restrict competition (Article 101 TFEU); (ii) prohibits the abuse of a dominant position by an undertaking (Article 102 TFEU); and (iii) prevents mergers leading to a change of market structure that would lead to a significant imputation of competition (EU Merger Regulation). These three areas are commonly referred to as the 'three pillars' of competition law. These rules are supplemented both by other Treaty provisions as well as secondary legislation: Articles 107 to 109

31 TFEU, Article 26(2).

32 TEU, Article 51.

TFEU prohibit State subsidies that would create distortions in the internal market (i.e. State aids); a number of implementing regulations and soft law instruments provide guidance on the application of these provisions;[33] additional regulations cover procedure in competition cases;[34] and finally, in individual cases, the Commission may take decisions which are addressed and binding only on the individual.

1.3. EU Competition Law Provisions as Public Policy: a Direct Consequence of their Arbitrability

Since arbitration is a creature of contract, and the mission of arbitrators is to resolve disputes between parties in a manner that is convenient to them,[35] historically, many countries were reluctant to allow arbitral tribunals to decide competition law issues as there was a concern that arbitration may be used to circumvent the applicable competition laws.[36] It was not that long ago that the Commission saw arbitration as a means for avoiding EU competition rules.[37] The main cause for concern was the confidential nature of the arbitral proceedings:[38] there being some friction between arbitral confidentiality and the public mission of competition law.[39] As a result, early national court

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33 Herwig Hofmann, 'Negotiated and Non-negotiated Administrative Rule-Making: The Example of EC Competition Policy' (2006) 43 CMLR 153.

34 E.g. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] 123 OJ 18; Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] 171 OJ 3.

35 Julian Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 255.

36 See Frank-Bernd Weigand, 'Evading EC Competition Law by Resorting to Arbitration?' (1993) 9 Arb Int'l 249; Gordon Wade, 'The Arbitrability of EU Competition Law Disputes Revisited: Support from the Continent' (2014) 35(6) ECLR 310.

37 The negative attitude of the Commission towards arbitration in general is illustrated by its decision in IV/30.437 *Rockwell v Iveco* [1983] OJ L224/19 and IV/93 EMO [1979] OJ L11/16.

38 It was clearly disclosed by Jacques Werner (former Vice Chairman of the ICC Commission on the Law and Practices Relating to Competition) when he reported discussions he had with officials from the DG Comp. See Jacques Werner, 'Application of Competition Laws by Arbitrators: The Step Too Far' (1995) 12 J Int'l Arb 23; Wade (n36) 310.

39 Hamid Gharavi, 'The proper scope of arbitration in European Community Competition Law' (1996) 11 Tulane EU Civ L Forum 202ff.

judgments consistently challenged the arbitrability of EU competition law claims,[40] as did (perhaps less clearly) arbitral tribunals.[41] Over time, however, the Commission, influenced by the developments in the United States,[42] and also in the Member States,[43] expressed a more positive attitude towards arbitration. It even began to use arbitration as a tool for monitoring and enforcing certain exemption decisions.[44] Over the past twenty-five years,[45] the Commission has adopted international arbitration as a procedural mechanism to monitor the implementation of different behavioural commitments in the sphere of merger control.[46] In approving the arbitration clauses submitted by undertakings in their proposed commitments, the Commission appears to approve the speed and expertise of arbitral tribunals as well as the ease of enforcement of any arbitral award under the New York Convention.[47]

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40 See e.g. Bologna Tribunale (Italy), 18 July 1987 (1992) XVII YB Com Arb 534; Swiss Federal Tribunal, 28 April 1992 (1993) XVIII YB Com Arb 143ff. See also Denis Bensaude, 'Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law' (2005) 22 J Int'l Arb 239; Diederik de Groot, 'The Impact of the Benetton Decision on International Commercial Arbitration' (2003) 20 J Int'l Arb 365; Sotiris Dempegiotis, 'EC Competition Law and International Arbitration in Light of EC Regulation 1/2003' (2008) 25 J Int'l Arb 365; Assimakis Komninos, 'Chapter 12: Arbitration and EU Competition Law', in Jurgen Basedow, Stéphanie Francq, Laurence Idot (eds), *International Antitrust Litigation – Conflict of Laws and Coordination* (2012) 192; Christoph Liebscher, 'Arbitration and EC Competition Law – The New Competition Regulation: Back to Square One?' (2003) Int'l Arb L Rev 84; Christoph Liebscher, 'European Public Policy After Eco Swiss' (1999) 10 Am Rev Int'l Arb 81; Luca Radicati di Brozolo, 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators' (2011) 27 Arb Int'l 1.

41 See e.g. ICC Case No 1397, in Jean-Jacques Arnaldez, Yves Derains, Dominique Hascher (eds), *Collection of ICC Arbitral Awards 1974-1985* (Kluwer 1994) 181. Compare ICC Case No 7673 (1995) 6(1) ICC Ct Bull 57; ICC Case No 7097 (1993) ICC Ct Bull Spec Supp 38; ICC Case No 4604 (1985) 112 JDI 973; ICC Case No 2811 (1979) 106 JDI 984.

42 *Mitsubishi v Soler-Chrysler-Plymouth*, 473 US 614 (1985) ('*Mitsubishi*').

43 See e.g. Bologna Court of Appeal (Italy), 11 October 1990 (1993) Rev Arb 77.

44 Council Regulation 4064/89 of 21 December 1989, as amended. For further detail, see Gordon Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies* (Europa Law Publishing 2006); Gordon Blanke, 'The use of arbitration in EC merger control: latest developments' (2007) EUCLR 673; Marc Blessing, 'Arbitrating Antitrust and Merger Control Issues' (2003) 14 Swiss Com L Series 3; Luca Radicati di Brozolo, 'Arbitration in EC Merger Control: Old Wine in a New Bottle' (2008) 19(1) EUBLR 7.

45 For a descriptive historical narrative, see in particular Komninos (2012) (n40) 433ff.

46 For some important cases involving arbitration commitments, see the following Commission Decisions: Commission Decision 2 September 2003, Case No COMP/M.3083 *GE/Intrumentarium*; Commission Decision 29 September 2003, Case No. COMP/M.3225 *Alcan/Pechiney*; Commission Decision 11 February 2004, Case No. COMP/M.3280 *AirFrance/KLM*; Commission Decision 26 April 2006, Case No COMP/M.3916 *T-Mobile Austria/ Telering*; Commission Decision 19 May 2006, Case No. COMP/M.3998 *Axalto/Gemplus*; Commission Decision 14 November 2006, Case No COMP/M.4180 *Gas de France/Suez*.

47 Blessing (n44) 23. Dempegiotis (n40) 145.

There are few areas of EU competition law that remain non-arbitrable.[48] On top of the list can be found EU State aid and EU merger control but only insofar as they fall within the sphere of public enforcement which is part of the exclusive prerogative of public powers of the Commission, or in light of the Modernisation process, the national competition authorities (e.g. fines, acceptance of commitments).[49] Beyond these restrictively defined areas, the arbitrability of EU competition law related disputes is now undisputed. Although there is no ECJ decision explicitly recognising EU competition law as arbitrable,[50] this can be indirectly inferred from the jurisprudence of the ECJ, primarily *Eco Swiss*,[51] and *Cartel Damage Claim*.[52] More explicitly a number of national court judgments have repeatedly held that EU and Member State competition claims may validly and

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48 For a comprehensive study, see Alexis Mourre, 'Chapter 1: Arbitrability of Antitrust law from the European and US Perspectives' in Blanke and Landolt (n7) 3ff.

49 On the arbitrability of EU merger control, see Blanke (2007) (n44) 673; Blessing (n44) 3; Gordon Blanke, 'International Arbitration and ADR in Conditional EU Merger Clearance Decisions' in Blanke and Landolt Vol II (n7) 1605ff. On the arbitrability of EU State aids, see Leigh Hancher, 'Chapter 28: Arbitrating EU State Aid Issues' in Blanke and Landolt Vol 1 (n7) 965ff. Certain aspects of exclusive or special rights in relation to public undertakings that do not fall within the exclusive prerogative of the European Commission within the context of Article 106 TFEU are also arbitrable; see Piet Jan Slot, 'Chapter 29: Arbitrating Competition-Law-Related Issues under Articles 3(1)(b) TFEU, 4(3) TEU, and 106 TFEU' in Blanke and Landolt Vol I (n7) 1017ff. Roberto Cisotta, 'Chapter 11: Some considerations on arbitrability of competition law disputes and powers and duties of arbitrators in applying EU competition law' in Mel Marquis, Roberto Cisotta (eds) *Litigation and arbitration in EU competition law* (Edward Elgar Publishing 2015) 288. For a discussion of the application of Article 101(3) by arbitrators, see Laurence Idot, 'Arbitration and the Reform of Regulation 17/62 Courts' in Claus-Dieter Ehlerman and Isabela Atanasiu (eds), *Effective Private Enforcement of EC Antitrust Law: European Competition Law Annual 2001* (Hart Publishing 2003) 287.

50 Competition law, as a system of mandatory rules, is primarily enforceable by designated regulatory bodies and national courts. Nevertheless, competition law may be subject to private enforcement. Competition law arbitration arises theoretically in two types of disputes: (i) situations where the dispute does not concern competition law issues *prima facie* but competition law rules impacts the validity of the underlying contract subject of arbitration, and (ii) when parties decide to arbitrate obligations arising out of statutory rules. However, in most cases, competition law claims would arise in the context of tortuous claims for damages caused by an anticompetitive behaviour. Arbitration in this situation seems poorly suited since it is difficult to imagine that the party claiming damages for a competition tort would manage to reach an agreement with its counterpart to arbitrate the claim. Therefore, in practice, competition law issues arise as a defense, and not in actions for damages which are actions in tort.

51 *Eco Swiss*. See also Robert von Mehren, 'The Eco-Swiss Case and International Arbitration' (2003) 19 Arb Int'l 465; Gordon Blanke, 'Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law' (2006) 23 J Int'l Arb 249; Georgios Zekos, 'Eco Swiss China Time Ltd v. Benetton International NV – Courts' Involvement in Arbitration' (2000) 17(2) J Int'l Arb 91.

For comparative purposes see *Mitsubishi*.

52 *CDC*, paras 63–72.

enforceably be the subject of an international arbitration agreement.[53] This principle is so well established that the Supreme Court of Sweden recently declared it unnecessary to request a preliminary judgment from the ECJ to guide its review on the issue of arbitrability of EU competition law claims.[54] Similarly, the English High Court in *Microsoft* stayed proceedings in which infringement of competition law was claimed, in favour of arbitration. The English court premised its decision on the CJEU's decision in the *Cartel Damages* case, reasoning that 'nothing in the decision of the [CJEU requires the English court] to displace the effect of the arbitration clause as something inimical to EU law'.[55]

Simultaneously, both the ECJ and national courts emphasised that arbitral awards deciding EU competition law claims will be subject to subsequent judicial review,[56] analogous to *Mitsubishi*'s 'second look test' in the United States.[57] As some commentators have observed, allowing national courts to control the application of EU competition law at the reviewing stage, through the public policy exception, can be seen as the logical consequence of the acceptance of arbitrability of competition law.[58] If disputes in which competition law is to be applied are capable of being submitted to arbitration, it is ultimately for State courts to assess the application of

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53 See e.g. for France, CCass, 4 June 2008, *SNF v Cytec* (2008) Rev arb 473; Paris CA, 18 November 2004, *SA Thalès Air Défense v GIE Euromissile* (2004) Rev arb 986; Paris CA, 14 October 1993, *Société Aplix v Société Velcro* (1994) Rev arb 164; Paris Court of Appeal 19 May 1993, *Société Labinal v Société Mors et Westland Aerospace* (1993) Rev arb 645, 650; for Italy see Italian Supreme Court 21 August 1996, *Telecolor SpA v Technicolor SpA* (1997) 47 Giustizia Civile I-1373; Bologna CA, 21 December 1991, *SpA Coveme v Compagnie Française des Isolants* (1993) XVIII YB Com Arb 422; for England and Wales see *ET Plus SA and others v Welter and others* [2006] Lloyd's Rep (Comm) 251; for Switzerland e.g. Swiss Federal Tribunal 13 November 1998, XXV YB Comm Arb 511(2000); Swiss Federal Tribunal 28 April 1992 (1993) XVIII YB Comm Arb 143; for Sweden e.g. Swedish Arbitration Act, §1(3). See also Alexis Mourre, 'Arbitrability of Antitrust Law From the European and US Perspectives' in Blanke and Landolt (n7) 35-42.

54 Supreme Court of Sweden 17 June 2015, *Systembolaget Aktiebolag v The Absolute Company Aktiebolag*, T 5767-13.

55 *Microsoft Mobile OY (Ltd.) v. Sony Europe Ltd. & Others* [2017] EWHC 374 (Ch), para. 81.

56 *Eco Swiss*; French CCass, *SNF v Cytec* (2008); Paris Court of Appeal, 23 March 2006, *SNF v. Cytec* (2007) Rev arb 100; Niccolo Landi, Catherine Rogers, 'Arbitration of Antitrust Claims in the United States and Europe' (2005-2006) 13-14 Concorrenza e Mercato 455.

57 *Mitsubishi Motors Corp v Soler Chrysler Plymouth* [1985] 1 473 US 614. See, for an interesting comparison of the *Mitsubishi* case and *Eco Swiss*, see von Mehren (n51) 465ff; See also de Groot (2003) (n40) 373.

58 See e.g. Laurence Idot, 'Ordre public, concurrence et arbitrage: état de la rencontre' (2006) 3 Concurrences 12; George Bermann, 'What does it mean to be 'pro-arbitration'' (2018) 34(3) Arb Int'l 341ff. See also Chapter 7, Section 3.2.4, pp. 241ff.

competition law in arbitral awards. Consequently in most countries,[59] essential competition law rules are considered to be fundamental rules of law, the violation of which would offend public policy.[60] In that sense, the qualification of Article 101 TFEU as forming part of EU public policy in *Eco Swiss* is mostly uncontroversial.[61]

1.4. Intermediate Conclusion: EU Competition Law as EU Public Policy

Considering the importance of competition for market economy, it is surprising that the referring court in *Eco Swiss* considered that its own competition law did not form part of its public policy.[62] Competition law is one of the principal instruments of a State's economic policy.[63] It is so significant that it forms part of the public policy of most countries.[64] The EU is no different.[65]

EU competition law is essential to the proper functioning of the internal market. Besides, its function and purpose extend beyond the interests of private parties to those of other undertakings, potential competitors and consumers.[66] Consumer welfare is one of the ultimate goal of EU

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59 Exceptions include Switzerland see e.g. *Tensacciai SPA v Freyssinet Terra Armata SRL*: 'the provisions of competition laws, whatever they may be, do not belong to the essential and broadly recognised values which, according to the concepts prevailing in Switzerland, would have to be found in any legal order.'; or the Netherlands e.g. Hoge Raad, 16 January 2009, *de gemeente Heerlen v Whizz Croissanterie V.O.F*, Case n° C07/170HR.

60 See OLG Düsseldorf, NJOZ2002, 2480 (Germany) and OLG Jena, 8 August 2007 (2008) 44 YCA 539 referring to mandatory antitrust law provisions. Regarding objections based on the German Stock Exchange Act, see BGH, RIW 1991, 420 and BGH, KTS 1988, 756.

61 See Section 2.1 below.

62 *Eco Swiss*, para 24. See also e.g. Swiss Federal Tribunal, 8 March 2006 (2006) ATF 132 III 389, para 3.2.

63 Berthold Goldman, 'L'arbitrage international et le droit de la concurrence' (1989) 3 ASA Bulletin 262.

64 Mario Monti, *EC Competition Law* (CUP 2007) 21. Dirk Otto, Omaia Elwan, 'Article V(2)' in Herbert Kronke et al. eds, *Recognition and enforcement of foreign arbitral awards: a global commentary of the New York Convention* (Kluwer Law International 2010) 356. See e.g. Luca Radicati di Brozolo, 'Court Review of Competition Law Awards in Setting Aside and Enforcement Proceedings' in Blanke and Landolt (n7) paras 22-009ff.

65 *Eco Swiss*, Opinion AG Saggio, para 38.

66 Prechal, Shelkoplyas (n21) 610.

competition law.[67] The importance of EU competition law combined to the general interest underlying its application indicate its public policy nature.[68]

2. Identifying Competition Law Provisions Forming Part of EU Public Policy

Despite the importance of EU competition law for the proper functioning of the internal market, it cannot be the case that any rule of EU competition law forms part of EU public policy in post-award review simply because it falls within the scope of EU competition law. It follows from the ECJ's case law that the EU competition law rule at stake needs to reach a certain level of fundamentality itself to become part of EU public policy. Section 2.1 focuses on the EU provisions that have been explicitly identified as forming part of EU public policy. Then, based on the elements put forward by the ECJ in its jurisprudence, Section 2.2 establishes which other provisions may be deemed fundamental enough to also form part of EU public policy.

2.1. EU Competition Provisions Unmistakably Identified as Forming Part of EU Public Policy

In *Eco Swiss*, the ECJ explicitly qualified Article 101 TFEU as forming part of its public policy (Section 2.1.1); and in *Manfredi*, it indirectly (but explicitly) qualified Article 102 TFEU as another fundamental provision of EU law (Section 2.1.2). However, in these judgments, the ECJ did not provide any detailed explanation justifying these qualifications. It therefore appears essential to do so in order to better grasp the concept of EU public policy.

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[67] The Commission has highlighted the central role of consumer welfare for EU competition law in different notices and guidances notes. For a commentary see Rhoda Smith, David King, 'Does Competition Law Adequately Protect Consumers?' (2007) 28 ECLR 412.

[68] *Eco Swiss*, AG Saggio, para 35. See further Chapter 5, Section 1.2, pp. 136.

2.1.1. Cartel Prohibition: Promoting Healthy Competition in the Internal Market

In *Eco Swiss*, the underlying question the *Hoge Raad* asked the ECJ in its second preliminary question is whether Article 101 TFEU forms part of EU public policy. The ECJ answered the *Hoge Raad*'s second question with a simple reference to the fundamental nature of Article 101 TFEU: 'Article 85 of the Treaty [Article 101 TFEU] constitutes a *fundamental provision*'.[69] However, one might still ask: *why* is Article 101 TFEU such a fundamental rule of EU competition law?

As explained above in Section 1, the principal interest motivating competition laws is the achievement of economic efficiency, which is taken to condition the achievement of a multitude of other economic, social, and political benefits. Key competition laws in this regard include Article 101 TFEU which prohibits restrictive horizontal and vertical agreements,[70] and consequently attempts to ensure equality between undertakings.[71] It is usually referenced as one of the three pillars of EU competition law.[72] Any restrictive agreement, decision by association or concerted practice between competitors that fixes prices, limits output, shares market, customers or sources of supply, or involves other cartel behaviour will unavoidably be regarded as an agreement restricting competition within the meaning of Article 101 TFEU. For an agreement to be sanctioned under Article 101(1) TFEU, it needs to affect trade between Member States and restrict or distort competition to a significant extent. Some agreements caught by Article 101(1) may however be exempted provided they fulfil the conditions of Article 101(3). This requires that the positive aspects of the agreement outweigh its anti-competitive effects, with a fair share of the resulting benefits flowing to consumers.

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69 *Eco Swiss*, para 36.

70 On the distinction between horizontal and vertical agreements see Ioannis Lianos, 'Collusion in Vertical Relations under Article 81 EC' (2008) 45 CMLR 1030.

71 Joined Cases C-56/64 and 58/64 *Etablissements Consten and Grundig-Verkaufs v Commission of the European Economic Community* [1966] ECR 299.

72 The other ones being Article 102 TFEU (prohibits the abuse of a dominant position) and the EU Merger Regulation.

Article 101 TFEU therefore serves the proper functioning of the internal market, and appears efficient enough to dissuade undertakings from unlawful behaviour.[73] By regulating the behaviour of market actors, competition law has a direct influence on contracts. It influences the lawfulness of a contract by prohibiting specific contractual clauses and usually attaching civil sanctions to breaches. Article 101 TFEU establishes a clear sanction in the field of private law, and consequently has a direct impact on contractual relationships. An agreement prohibited under Article 101 TFEU is 'automatically void'[74] which flows from the fundamental character of Article 101 TFEU. In *Eco Swiss*, the ECJ relied on the absolute nullity of Article 101(2) TFEU to underline the public policy character of Article 101 TFEU. However, the nullity provision alone is not a sufficient criterion to characterise which rules of EU competition law are qualified as EU public policy.[75] Indeed, and contrary to Article 101(2) TFEU, the consequences of most other Treaty provisions are less self-evident.

In the light of the above, it can be concluded that Article 101 TFEU is a fundamental provision of EU competition law. Moreover, the function and purpose of Article 101 TFEU extends beyond the interests of private parties to those of other undertakings, potential competitors, and consumers.[76] In *GlaxoSmithKline Services*, the ECJ held that: 'Article [101(1) TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.'[77] This judgment highlights that Article 101 TFEU protects not only consumer welfare, but also competitors and the overall structure of the market. The general interest underlying Article 101 TFEU is another element that distinguishes a public policy rule from

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73 *Metro v Commission.* See also T-236/01 *Tokai Carbon Co Ltd and Others v Commission of the European Communities* [2004] ECR II-1181.

74 TFEU, Article 101(2).

75 Christoph Liebscher, 'European Public Policy-a Black Box?' (2000) 17(3) J Int'l Arb 81.

76 Prechal, Shelkoplyas (n21) 610.

77 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, para 63 ('*GlaxoSmithKline*').

mere mandatory rules.[78] Hence, the qualification of Article 101 TFEU as public policy in *Eco Swiss* is coherent with the primacy of Article 101 TFEU in the system of the Treaty.[79] In the context of international arbitration, the qualification of Article 101 TFEU as public policy aims at making sure that the enforcement of an arbitral award will not affect the superior interests of consumers and the common market.

2.1.2. Article 102 TFEU: an Indirect but Explicit Qualification

The ECJ in *Manfredi* expressly held that 'Articles 81 and 82 EC [101 and 102 TFEU] are a matter of public policy which must be automatically applied by national courts (see, to that effect, Case C-126/97 *Eco Swiss* [..] paragraphs 39 and 40)'.[80] Since arbitration was not at issue, the cursory reference to *Eco Swiss* and not to *Van Schijndel*, which held that national courts were to apply Article 101 TFEU *ex officio* only in cases where domestic law allows such an application by national courts, is certainly surprising. The explicit reference to *Eco Swiss* makes it clear however that the principles of *Eco Swiss* equally apply to Article 102 TFEU. This point was later reiterated in *TeliaSonera* where the ECJ held that 'Article 102 TFEU is one of the competition rules referred to in Article 3(1)(g) TFEU which are necessary for the functioning of that internal market',[81] and thus a 'matter of public policy'.[82] The Commission expressly confirmed that point emphasising that 'it should be remembered that [Article 101 TFEU] and [Article 102 TFEU] are a matter of public policy and are essential to the accomplishment of the tasks entrusted to the Community, and in particular, for the functioning of the internal market.'[83] The same assertion of public policy can be

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78 *Eco Swiss*, AG Saggio, para 35.

79 Komninos (n40) 433; Phillip Landolt, 'Chapter 15: The Application of EU Competition Law in International Arbitration in Switzerland' in Blanke and Landolt (n7) 545.

80 *Manfredi*, para 31.

81 Case C-52/09 *TeliaSonera [2011]* ECR I-00527*,* para 21.

82 *Eco Swiss*, para 36.

83 Commission Notice, para 3.

found in the first Recital to Directive 2014/104 on actions for damages under national law for infringements of competition law. If the public policy nature of Article 102 TFEU is generally admitted in the arbitration context,[84] no criteria justifying this elevation was provided.

Article 102 TFEU provides that:

> any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

A dominant position is a situation where the economic power held by a company allows it to hinder the maintenance of effective competition in the relevant market by behaving to an appreciable extent independently of its competitors, customers, and ultimately consumers. Holding a dominant position is not itself unlawful. However, dominant undertakings have a special responsibility to behave in a way that does not damage or hinder the development of competition. The aim of Article 102 TFEU is to ensure a competitive market structure by protecting the remaining competition from being eliminated by the dominant undertakings, but also to protect consumer welfare.[85] Hence, where a company has a dominant position, it will be in breach of EU competition rules if it abuses that position. Examples of what may be considered abusive include: predatory pricing (i.e. pricing at unfairly low levels), excessive pricing (i.e. high prices may be found to be abusive if they bear no relationship to the economic value of the goods), or discrimination (i.e. if a dominant company applies materially different trading terms to equivalent transactions in the absence of an objective justification).[86] Preventing this form of behaviour is fundamental to the proper functioning of the internal market. The qualification of Article 102 TFEU as forming part of EU public policy in post-award review follows from the ECJ's reasoning in *Eco Swiss*.

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84 *Manfredi*, para 31; Diederik de Groot, 'Chapter 16: The Ex Officio Application of European Competition Law by Arbitrators' in Blanke and Landolt (n7) 610.

85 Guidance Paper, Article 102, para 19.

86 There is no clear definition of 'abuse' within the meaning of Article 102 TFEU. However see for an explanation of this concept see Case C-85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461, para 91.

2.2. Other Essential EU Competition Law Provisions (Potentially) Forming Part of EU Public Policy

Limited detailed analysis has been conducted to find out which other provisions of EU competition law may pertain to EU public policy.[87] In order to alleviate uncertainty, the following section conducts an analysis to remedy this gap.

The main sources of competition law are found in the TFEU, as well as in secondary legislation,[88] the case-law of the ECJ, and a variety of soft law instruments.[89] All of these provisions do not qualify as public policy within the narrow meaning of Article V(2)(b) of the New York Convention. It is however argued that since the TFEU does not comprise a system to control concentration, but instead a regulation which sets up a regime of *a priori* control of concentrations between undertakings,[90] a breach of the Merger Control Regulation is likely to also qualify as a breach of public policy (Section 2.2.1). Besides, anti-competitive State aid under Articles 107-108 TFEU arguably also rise to that level (Section 2.2.2).

2.2.1. EU Merger Control Regulation: a Complement to Articles 101 and 102 TFEU

Articles 101 and 102 TFEU may be insufficient to control all operations which may prove to be incompatible with the system of undistorted competition since the TFEU does not comprise a system to control concentrations.[91] This is why the Merger Control Regulation is considered as

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87 See however the very detailed analysis in Geradin (n10) 133ff.

88 See e.g. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJL 1, 4.1.2003, 1–25; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('EC Merger Regulation'), OJ L 24, 29.01.2004, 1- 22.

89 See, e.g. Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance, OJ C 11, 14.1.2011, 1–72; Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, 43–53.

90 Merger Control Regulation, Article 1.

91 EU Merger Control Regulation, Recitals 5 and 7.

being the third pillar of EU competition law. As Gerardin points out,[92] from a competition law perspective, anti-competitive mergers may create as much consumer harm as anti-competitive agreements or abuses of dominant position falling under Articles 101 and 102 TFEU. To prevent concentrations which may significantly impede effective competition in the internal market or in a substantial part of it,[93] the EU Merger Control Regulation was therefore enacted.[94] It allows the Commission[95] to effectively control all concentrations that fall within the scope of the Regulation[96] in terms of their effect on the structure of competition in the EU.[97] The main aim of merger control is to prevent mergers which would create or reinforce a dominant position. It helps maintain competitive market structures which enhance consumer welfare. In principle, a concentration falling under the EU Merger Control Regulation must be notified to the Commission, and in general, it cannot be implemented unless, and until, the Commission declares it compatible with the internal market.[98] It is submitted that it seems to follow from *Eco Swiss* that a national court would be required to set aside an award giving effect to an agreement between the parties which ignores the Regulation's system of *a priori* control of concentrations between undertakings[99] on the ground of public policy.[100] Since the EU Merger Control Regulation also seeks to ensure that competition in

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92 Geradin (n10) 142ff.

93 EU Merger Control Regulation, Recital 5.

94 Council Regulation (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004). The EU Merger Regulation was complemented by Regulation 804/2004 which sets out procedural rules Commission Regulation (EC) No. 802/2004 of 21 April 2004 implementing Council Regulation (EC) No. 139/ 2004 on the control of concentrations between undertakings, OJ No. L 133 of 30 April 2004, p. 1 as amended by the Commission Regulation (EC) No. 1033/2008 of 20 October 2008, OJ No. L 279 of 22 October 2008, p. 3. Soft law instruments issued by the Commission are also very important. E.g. Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ No. C 265 of 18 October 2008, p. 6 ('Non-horizontal Guidelines').

95 Jurisdiction may be relocated to the National Competition Authorities. For pre-notification reallocation jurisdiction see Articles 4(4) and 4(5); for post-Notification reallocation of jurisdiction see Articles 9 and 22.

96 Merger Control Regulation, Articles 1 and 5.

97 The Commission has the monopoly of application of the Merger Control Regulation. Merger Control Regulation, Article 21(2).

98 EU Merger Control Regulation, Articles 4 and 7(1).

99 EU Merger Control Regulation, Article 1.

100 Supporting this idea see Geradin (n10) 142ff.

the internal market is not distorted, it could be logically considered as forming part of EU public policy in post-award review.

As a side note, it should be added that, when the Commission has already vetoed a merger, an award ignoring the decision would certainly be set aside by national courts on the ground of public policy. Indeed, pursuant to Article 16 of the EU Merger Control Regulation, national courts cannot render judgments running counter to decisions rendered (and even contemplated) by the Commission.[101] Similarly, an award which ignores or misapplies a decision of the Commission on an approved merger, subject to remedies considered capable of removing its effect on competition, should expect the same fate.[102]

2.2.2. A Breach of State Aid Rules, a Breach of EU Public Policy?

As already explained in Section 1.3, the Commission is the only EU institution that can determine whether 'aid' granted by a Member State is compatible or not with the internal market.[103] Consequently, as noted by the Commission, just like national courts, arbitral tribunals are not 'competent to authorise' the granting of State aid.[104] However, arbitral tribunals may decide whether or not a measure amounts to State aid. In that respect, it is widely accepted that State aid issues are arbitrable.[105] For example, in the recent *EDF* case, the arbitral tribunal had to decide whether the purchase price of a stake in the German utility Energie Baden-Württemberg constituted a State aid

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[101] Regulation 1/2003, Article 16. See Radicati di Brozolo, 'EU Merger Control Commitments and Arbitration: Reti Televisive Italiane v. Sky Italia' (2013) 29(2) Arb Int'l 223.

[102] On the relation between EU merger control and arbitration see for instance, Gordon Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies* (European Law Publishing 2006); Gordon Blanke, 'International Arbitration and ADR in Conditional EU Merger Clearance Decisions: EU and US Antitrust Arbitration' in Blanke and Landolt (n7) 1605ff. See also Luca Radicati di Brozolo, 'Antitrust: A Paradigm of the Relations Between Mandatory Rules and Arbitration — a Fresh Look at the 'Second Look'' (2004) 7 Int'l Arb L Rev 34; Radicati di Brozolo (2008) (n43) 7; Radicati di Brozolo (2013) (n101) 223.

[103] See e.g. Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori* [2006] ECR I-2941, para 71.

[104] See e.g. T-179/09, *Dunamenti Erőmű Zrt. v Commission* [2014] ECLI-T 236, para 104.

[105] For the interactions between State aid law and international arbitration see, e.g. Leigh Hancher (n49) 965.

given to EDF, the purchaser.[106] The application of these rules is however by no means simple for the arbitrator as the case law of the different national courts is complex and not always consistent.[107]

State aid rules have not yet been explicitly characterised as public policy by the CJEU. Thus the question arises whether a breach of, or illegal, EU State aid may be considered a valid justification on ground of public policy to refuse enforcement of an arbitral award in a Member State. It is contended that Articles 107 and 108 TFEU are fundamental provisions for the accomplishment of the tasks entrusted to the EU in the context of the internal market,[108] and are therefore likely to qualify as rules of public policy. This point has been made previously by scholars,[109] at least one national courts,[110] and, perhaps even more interestingly, by AG Geelhoed in his Opinion in *Lucchini*,[111] and AG Wathelet in *Achmea* where he held: 'EU State aid rules that are fundamental norms of the EU legal order and form part of its public policy'.[112]

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106 ICC Arbitration, *EDF International S.A.S. v. Baden-Württemberg* reported by a representative of one of the parties, available at http://www.shearman.com/en/newsinsights/news/2016/05/secures-victory-for-edf-in-dispute-over-german# (last accessed 15 May 2019). For more details see Geradin (n10) 143ff.

107 Hancher (n49) 965. More generally on the arbitrability of EU rules on State aid see Piet Jan Slot, 'The Enforcement of EC Competition Law in Arbitral Proceedings' (1996) 23(1) Legal Issues of European Integration 101ff; Koen Lenaerts, Marc Pittie, 'Conclusions générales', in Robert Briner, Yves Derains et al. (eds), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril* 1997 (Bruylant 1997) 196.

108 Diederik De Groot, 'Case Comment, EC competition-state aid-public policy' (2008) Global Competition Litigation Rev 70.

109 In that sense see Luca Radicati Di Brozolo (2011) (n8) 776; Geradin (n10) 158; Aleksandar Stanič, 'Chapter 1: The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction' (2015) Aus YB Int'l Arb 46; Pietro Ortolani, 'Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State aid Law as a Limit to Compliance' (2015) 6 J Int'l Disp Settl 129; Christina Tietje, Clement Wackernagel, 'Enforcement of Intra-EU ICSID Awards, Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration' (2015) 16 J W Invest & Trade 212: '*Eco Swiss* principles include state aid'. Johannes Koepp, Alejandro Escobar et al., 'Arbitration' in Leigh Hancher, Adrien de Hauteclocque, Francesco Maria Salerno (eds) *State Aid and the Energy Sector* (Hart 2018) 350.

110 The Svea Court of Appeal touched on the issue of EU State aid rules forming part of the Swedish international public policy, however holding that it only considers an infringement as a violation of public policy in 'obvious cases' under Swedish law, it ruled that there was no breach of Swedish public policy in the present case; Court of Appeal 4 May 2005, *Republic of Latvia v Latvijas Gaze*, Case T-5730-03, discussed in Alexis Mourre, 'Note' (2008) JDI 1107ff. See also commentary Komninos (2012) (n44).

111 Case C-119/05 *Lucchini Siderurgica* [2007] ECR I-6199, Opinion of AG Geelhoed, paras 73 and 76; see also Case C-321/99 *PARAP and Others v Commission* [2002] ECR I-4287, Opinion of AG Geelhoed, para 189.

112 See *Achmea*, Opinion of AG Wathelet, para 236.

When undertakings receive financial or other assistance from the State or other public funds or entities, there is a risk that this confers an economic advantage that will disrupt normal competitive forces and affect trade, operating as a form of protectionism and threatening the objectives of the internal market. State aid rules therefore prohibit Member States from granting aid to an undertaking that would result in a distortion of competition in the internal market. The purpose of these rules is identical to the purpose of Articles 101 and 102 TFEU: protecting the internal market by ensuring the competitiveness between undertakings. However, contrary to other areas of competition law which are aimed at firms, State aid control is aimed at Member States. Its goal is to prevent a Member State from gaining an advantage over another Member State by subsidising its domestic industries.[113] Besides, preventing that distortion of competition between undertakings in the internal market ultimately serves the general interest. It guarantees that public spending does not exceed what is needed to reach general policy objectives (e.g. stimulating investment, education and training, regional cohesion, research and development, improving digital, transport and energy networks and combatting pollution and climate change) without crowding-out or merely replacing private investment which could affect the firms' incentives to produce efficiently which in turn could undermine welfare.[114]

Even if State aid control is generally not categorised as one of the three pillars of EU competition law,[115] EU State aid rules have been forming part of EU competition policy since its creation. For the reasons set out in this section, it would therefore be reasonable to hold that State

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[113] Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan', in Jurgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid*, (Kluwer Law Int'l 2011) 164ff.

[114] Proposal for a Council Regulation amending Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid. Janos Kornai, Eric Maskin et al., 'Understanding the Soft Budget Constraint' (2003) 41 J Eco Lit 1095-1236.

[115] It did not prevent Mario Monti from categorising State aid as 'the third main pillar of EU competition policy'. Mario Monti, 'EU Competition Policy' Speech made at the Fordham Annual Conference on International Antitrust Law and Policy in New York on 31 October 2002, 7 text available at: http://europa.eu/rapid/press-release_SPEECH-02-533_en.pdf (last accessed 2 September 2019).

aid rules, which similarly to Articles 101 and 102 TFEU deter the fragmentation and distortion of competition in the internal market, may also qualify as public policy for the purpose of post-award review. Hence, it would also be reasonable for parties, arbitral tribunals,[116] and national courts to treat them as such if they do not already.[117]

2.3. Intermediate Conclusion

Following the above analysis, since Articles 101 and 102 TFEU form part of EU public policy, it is submitted that the EU Merger Control Regulation as well as State aid control may also amount to EU public policy in the context of post-award review. These provisions also play a fundamental role in guaranteeing a level playing field between stakeholders in the internal market, and positively impact consumer welfare.

In passing,[118] it should also be noted that if competition law forms part of EU public policy, a violation of the free movement freedoms[119] (i.e. the free movement of goods, services,[120] capital[121] and workers),[122] would be treated in the same way.[123] They are two sides of the same coin.

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116 See Chapter 6.

117 A subtler question is whether the public policy exception of Article V(2)(b) New York Convention should be invoked as a 'blanket rule' covering all situations where a revoked measure might be considered incompatible with EU State aid rules, or whether it should only be applied when the State aid has been expressly declared incompatible by the Commission within the procedure of Article 108 TFEU, and recovered. Answering this question would go beyond the scope of this thesis. See however Ortolani (n109) 129ff.

118 This point is developed in Chapter 5.

119 Thorsten Kingreen, 'Fundamental Freedoms' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2007) 549ff.

120 TFEU, Article 56.

121 TFEU, Article 63.

122 TFEU, Article 45.

123 Stephen Weatherill, *Principles and Practice in EU Sports Law* (OUP 2016) 31.

Both competition law and the free movement law guarantee that free competition in the internal market is not distorted,[124] and improve consumer welfare.

3. The Limits of *Eco Swiss*: Allowing a Possibly Broad Construction of EU Public Policy

As explained above, the qualification of Article 101 TFEU as forming part of EU public policy appears compatible with the narrow understanding of public policy in the context of post-award review. However, *Eco Swiss* raises other difficulties.

A minor issue is the ECJ's qualification of Article 101 TFEU as 'a matter of public policy within the meaning of the New York Convention'[125] despite the fact that the preliminary question related to annulment proceedings. The New York Convention only applies to the recognition and enforcement of foreign arbitral awards, which are a type of proceedings different from annulment.[126] However, the role of the public policy exception being similar in both of these proceedings, the inaccurate reference to the New York Convention does not have any significant consequence.[127] More problematically, the ECJ only provided a limited teleological explanation on the importance of EU competition law. One of the most surprising aspect in *Eco Swiss* is indeed that the ECJ answered the *Hoge Raad*'s second question with a simple reference to the fundamentality of Article 101 TFEU. The ECJ's reasoning is confined to a citation of the importance of EU competition law within the EU legal order, and relies on Article 3(1)(b) TFEU and the sanction of automatic nullity set down in Article 101(2) TFEU. These arguments, however, are vague and not sufficiently persuasive.[128] This has potentially overarching consequences for two main reasons.

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[124] On this relationship see in detail Julio Baquero Cruz, *Between completion and free movement: the economic constitutional law of the European Community* (Hart 2002) 176; Claire Micheau, 'Fundamental freedoms and State aid rules under EU law: the example of taxation' (2012) 52(5) EU Tax 213.

[125] *Eco Swiss*, para 39.

[126] Chapter 1, Section 2.3, pp. 10ff.

[127] Chapter 1.

[128] Liebscher (2000) (n76) 81.

First, since Article 3 EC [now Articles 2 to 4 TFEU] enumerates all the different instruments to accomplish the EU objectives,[129] almost all EU law rules can be tied to it. Therefore, if Article 3 EC is used as a measuring stick to characterise whether a EU law rule pertains to EU public policy,[130] every mandatory rule of EU law could potentially form part of EU public policy,[131] 'from the Charter of Fundamental Rights to a directive on pressurised equipment', in the words of the Advocate General Wathelet.[132] It would contradict the general principle according to which enforcement should be refused 'only in exceptional circumstances'.[133] Besides, these articles do not contain any reference to the protection of fundamental rights which however unmistakably form part of EU public policy.[134]

Second, the fact that a breach of Article 101(1) TFEU is sanctioned by the nullity of the agreement is not convincing either as a general factor of assessment of the public policy nature of a EU competition law provision.[135] It is not a practical criteria. Very few breaches of EU law are sanctioned by nullity, including, in the field of competition law itself, Article 102 TFEU which was

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129 Shelkoplyas (n17) 581; Liebscher (2000) (n76) 81; Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities* (3rd ed, Kluwer Law International 1998) 115.

130 Liebscher (2000) (n75) 81.

131 Some authors have defended this theory see Martin Ebers, 'ECJ (First Chamber) 6 October 2009, Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira* - From *Océano* to *Asturcom*: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata' (2010) 18(4) ERPL 845, fn 100. See also Phillip Landolt, 'Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements' (2007) 23(1) Arb Int'l 82-83; Liebscher (2000) (n76) 77 referring to both Jürgen Baumert, 'Europäischer ordre public and Sonderanknüpfung zur Durchsetzung von EG-Recht, Europäische Hochschulschriften' (1994) 274 with further references; and Hilmar Raeschke-Kessler, 'Binnenmarkt, Schiedsgerichtsbarkeit und ordre public, Europäische Zeitschrift für Wirtschaftsrecht' (1990) 147.

Contra see e.g. Prechal, Shelkoplyas (n40) 605; Natalya Shelkoplyas, *The Application of EC Law in Arbitration Proceedings* (Europa Law Publishing 2003) 213; Liebscher (n76) 81; Kapteyn (n129) 115; Theodore Theofrastous, 'International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-Localization Debate' (1999) 31 Case W Res J Int'l L 126.

132 *Gazprom*, Opinion AG Wathelet, para 182.

133 *Eco Swiss*, para 35; Christophe Liebscher, 'Chapter 23: EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects' in Blanke and Landolt (n7) 810.

134 *Gazprom*, Opinion AG Wathelet, para 236. See also Paschalis Paschalidis, 'Chapter 14: Challenges under EU Law to the Enforcement of Arbitral Awards under the New York Convention', in Katia Fach Gomez and Ana Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 233.

135 Prechal, Shelkoplyas (n21) 605ff; Liebscher (2000) (n75) 81.

later explicitly recognised by the ECJ as forming part of EU public policy.[136] Therefore the nullity provision is not a sufficient element alone to characterise whether a provision forms part of EU public policy. It is only relevant as far as it underlines the mandatory nature of that provision. Thus, the 'fundamental' nature of a provision is the only criterion in the reasoning of the ECJ that distinguishes a rule of EU public policy from a EU law rule that is not,[137] and it is far from being unambiguous. This absence of clarity creates unpredictability in the context of post-award review, and can be used to construe EU public policy broadly which can, in turn, undermine the finality of arbitral awards, as evidenced in the next chapters.

Conclusion

This chapter aimed to analyse the very foundation of the concept of EU public policy in international arbitration and its implications through a study of EU competition law. As evidenced in this chapter, in the EU legal order, competition law is of the highest importance. It is one of the principal instruments of the EU political economy.[138] Competition law promotes consumer welfare, prevents the fragmentation of the internal market,[139] and thus affects the entire economic policy of the EU. As a result, and unsurprisingly, the EU has adopted statutes that prohibit certain practices that distort competition, create monopolies, cartels, or dominant market position in the internal market. In *Eco Swiss*, the ECJ established the 'fundamental' nature of Article 101 TFEU to guarantee the proper functioning of the internal market. This definition of EU public policy in post-award review is coherent with the traditionally narrowly defined content of public policy in

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136 *Manfredi*, para 31.

137 Liebscher (2000) (n76) 82. See further Chapter 5.

138 Berthold Goldman, 'L'arbitrage international et le droit de la concurrence' (1989) 3 ASA Bulletin 262.

139 Damien Geradin et al, *EU Competition Law and Economics* (OUP 2012) 1.61-1.80. On the importance of market integration, see also *GlaxoSimthKline*; Case C-02/01 *P, Bundesverband dr Arzneimittel-Importeure v Bayer AG and Commission* [2004] ECR I-23. On the protection of consumer welfare, see Case C-209/10, P*ost Danmark A/S v Konkurrencerådet* [2012] ECR I-0000.

international arbitration. The ECJ's approach is in that sense uncontroversial. Further, this chapter demonstrated that some other EU competition law rules (i.e. Articles 102, 106, 107-108 TFEU, and the Merger Control Regulation) are also fundamental to the functioning of the internal market and might therefore form part of EU public policy. However, the ECJ did not identify clear-cut criteria to identify whether a provision of EU law forms part of EU public policy in the context of post-award review. Hence, if the definition of public policy regarding EU competition law corresponds to a narrowly construed definition of public policy in international arbitration, it allows the ECJ to adopt a broad scope to the exception if it so wishes.

CHAPTER 4 — THE PROTECTION OF CONSUMERS AGAINST UNFAIR CONTRACT TERMS: FROM MANDATORY RULES TO EU PUBLIC POLICY

Introduction

The ECJ has only thrice ruled on the content of public policy as an exception to the recognition and enforcement of arbitral awards. The previous chapter focused on the first of these rulings, *Eco Swiss*. This chapter now turns to the two other rulings: *Claro* and *Asturcom*. In *Asturcom*, the ECJ qualified a mandatory rule of consumer protection as having an 'equal standing to national rules which rank, within the domestic legal system, as rules of public policy'.[1] Since public policy is an exception to the general principle of recognition and enforcement of arbitral awards, it is traditionally interpreted narrowly, and applied only in exceptional circumstances. However, it is contended in this chapter that the ECJ has developed an unusually broad notion of public policy which has the capacity of triggering an in-depth review of arbitral awards in consumer disputes, undermining the principle of finality of arbitral awards, and ultimately the effectiveness of international arbitration in consumer disputes.

Section 1 engages with the controversy regarding the qualification of Article 6 Directive 93/13 as 'public policy'. The ECJ never justified its decision to qualify Article 6 Directive 93/13 as a rule of public policy. It is submitted that the ECJ in *Claro* and *Asturcom* has dangerously broadened the narrow scope of public policy in post-award review, undermining the principle of finality of arbitral awards. Section 2 underlines the impact that the ECJ's reasoning may have on the effectiveness of consumer arbitration. As further explained in Section 3, the ECJ did not strike a reasonable balance between the competing interests of consumer protection and arbitral efficiency. Finally, it is submitted that alternative grounds might have been more accurate, and might have

[1] *Asturcom*, para 52.

struck a better balance between consumer protection and arbitration efficiency as demonstrated in Section 4.

1. Assessment of the Controversial Qualification of Article 6 Directive 93/13 as Equivalent to a National Rule of Public Policy

By mandating national courts to raise the unfairness of an arbitration agreement in consumer contracts *ex officio*, the ECJ guarantees the effective protection of consumers in the internal market. From that perspective, both decisions are laudable.

The ECJ did not specify in *Claro* and *Asturcom* why Article 6 Directive 93/13 is so fundamental to the functioning of the internal market that it should be treated as equivalent to domestic rules of public policy. The ECJ's public policy argumentation so far has been based on the 'importance' and 'public interest' of consumer law which appears a little vague from a methodological perspective to justify the qualification of public policy. Arguably, according to some commentators, this conclusion may potentially lack a sound basis.[2] It may indeed be difficult to speak of public policy in matters regulated by secondary EU law which only stipulates minimum standards and general guidelines such as the non-exhaustive list of potentially unfair terms in the Annex of Directive 93/13.[3] The public policy character of such provisions is also questionable when the methods of safeguarding that protection are left within the discretion of national law.

Furthermore, and unlike competition law, the protection of consumers against unfair terms in consumer contracts is not commonly categorised as reflecting public policy. If most Member States qualify consumer protection rules as mandatory rules, they would however not go as far as

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2 See Section 3 below.

3 Before *Claro* and *Asturcom*, it had been argued that the direct effect of a EU law provision is a prerequisite to its qualification as EU public policy. See Peter Schlosser, 'Arbitration and European Public Policy' in Robert Briner, Yves Derains et al (eds), *L'Arbitrage et le Droit Européen, Actes du Colloque International du CEPANI du 25 Avril 1997* (Bruylant 1997) 89.

qualifying consumer protection as forming part of their public policy for the purpose of enforcement of foreign arbitral awards. For instance, as explained by Martin Ebers,[4] in Germany, the BGH ruled that the provisions of the Consumer Credit Act are not mandatory rules, in the sense of Article 7(2) Rome Convention, if they are not transposing Consumer Credit Directive 87/102/EWG.[5] Similarly in Austria, the Supreme Court held that the violation of consumer protection law during arbitration proceedings is not sufficient to refuse the recognition and enforcement of an arbitral award in Austria under Article V(2)(b) of the New York Convention.[6] Hence, the issue is that EU consumer protection against unfair terms would be granted a status that its national equivalent might (and usually does) not have. As previously explained in Chapter 2, the ECJ is effectively rewriting the content of national public policy, but also, and perhaps more controversially, broadening its narrowly defined content.

The broader the scope of EU public policy, the more likely it is to undermine the effectiveness of the international arbitration regime. Consequently, disparities between the scope of EU public policy and international arbitration regimes cannot be dismissed as of academic interest only. What is important at this point of the discussion is therefore to establish *why* the ECJ is taking this stance, and whether it is justified.

The justification to the ECJ's qualification of Article 6 as equivalent to domestic rules of public policy can be broken down in three distinct steps. First, the protection of consumers is essential to the functioning of the internal market (Section 1.1). Second, Directive 93/13, because of its broad aim, plays a key role in consumer protection (Section 1.2). Third, Article 6 combined to

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4 Martin Ebers, 'From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata' (2010) 18(4) ERPL 845.

5 BGH, 13 December 2005, (2006) BGHZ 165, 248. Regarding the enforcement of an arbitral award, the legal literature holds the view that provisions based on EU Consumer Law generally do not belong to public policy as explained by Ebers (n4) 845.

6 ÖOGH, 22 July 2009, docket no. 3 Ob 144/09m. See Ebers (n4) 847.

Consideration 1(q) are central to protect consumer's right to due process in arbitration (Sections 1.3 and 1.4 respectively).[7] Hence, ultimately, *Claro* and *Asturcom* established that the consumer's right of access to national courts forms part of EU public policy (Section 1.5).

1.1. The Fundamental Importance of Consumer Protection for the Functioning of the Internal Market

As Weatherill notes 'it is plain that the EU is properly treated as a player of sorts in the development of consumer protection in Europe'.[8] Consumer protection is however only relevant insofar as it limits restriction on trade in the internal market. As pointed out by Johnston '[i]n a Community which is market-driven and which originates in the creation of a free trade zone, consumer protection is bound to be of merely auxiliary nature and to remain a *corollary* to the internal market.'[9] As a result, it is not the role of the EU to directly satisfy consumer needs but rather to guarantee that they are not constrained when they are participating in the internal market. Consumer protection is thus a reaction to market failure (competition is another).[10]

The Council first asserted the importance of consumer interests for the EU legal system in 1975.[11] Ever since, consumer protection has been constantly reinforced in the EU.[12] Pursuant to

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7 In outline, these factors are consistent with earlier analysis. See Ebers (n4) 845; Sacha Prechal, Natalya Shelkoplyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond' (2004) 5 ERPL 610.

8 Stephen Weatherill, *EU Consumer Law and Policy* (2nd ed, Edward Elgar Publishing 2013) 306.

9 Angus Johnston, Hannes Unberath, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection' (2007) 44 CMLR 1244. See more generally Dorota Leczykiewicz, Stephen Weatherill, 'Chapter 1: The Images of the Consumer in EU Law' in Leczykiewicz, Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart 2016) 1ff.

10 Johnston, Unberath (n44). See also Jules Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (2000) 37 CMLR 368-377.

11 Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C-92/1.

12 E.g. Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy [1981] OJ C-133/1; Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests [1987] OJ C-3/2; Green Paper on European Union Consumer Protection, COM [2001] 531; Consumer Policy Strategy 2002–2006, COM [2002] 208; Decision No 1926/2006/EC of the European Parliament and the Council of 18 December 2006 establishing a programme of Community action in the field of consumer policy (2007–2013) [2006] OJ L-404/39.

Article 12 TFEU '[c]onsumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'. The legal basis for the EU to adopt measures specifically in the area of consumer protection can be found under Articles 114 and 169 TFEU which mandate the EU not only to contribute to consumer protection but also to ensure a 'high level' of consumer protection.[13] This obligation is now also stated in Article 38 of the Charter of Fundamental Rights, which was elevated to binding status by the Lisbon Treaty. These provisions supply a constitutional underpinning to consumer protection in the EU.[14] The EU therefore has the responsibility of guaranteeing a high level of consumer protection insofar as it is touched by action at the EU level under both the TFEU,[15] and the Charter of Fundamental Rights.[16] Securing the quality of consumer protection has been done primarily through a number of consumer directives such as Directive 93/13.[17]

The outcome in *Claro* and *Asturcom* suggests that the ECJ perceives the underlying public interest of consumer protection. The ECJ clearly does not consider EU consumer protection rules as only aimed at protecting the personal interests of private parties. The interests at stake are also general and reverberate on the internal market.[18] Already in the first case on Directive 93/13, *Océano Grupo*, AG Saggio in his Opinion held that Directive 93/13 protects not only consumers' interests but also the interests of society beyond the interest of the parties – interests that form part

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13 TFEU, Article 169(1).

14 Weatherill (n8) 306.

15 TFEU, Articles 114 and 169.

16 EU Charter of Fundamental Rights, Article 38.

17 E.g. for minimum Directives: Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L-133; Directive 1999/44 of 25 May 1999, on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L-171; on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L-304.

18 Jan Kleinheisterkamp, 'The Impact of Internationally Mandatory Laws on the Enforceability' (2009) 3 W Arb Med Rev 92.

of 'economic public policy'.[19] The ECJ in *Claro* also stressed the importance of consumer protection and how it relates 'to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory'.[20] Hence, from the ECJ's perspective, there is a public dimension to the protection of consumers that goes beyond the purely personal gain of the weaker party. Indeed, considering that, according to Eurostat, consumer spending accounts for more than half of EU GDP, the effective functioning of the consumer market is crucial to the growth of the EU economy.[21] In that context, Directive 93/13 can be seen as a key instrument to attain the societal objectives of the TFEU.

1.2. The Importance of Directive 93/13 in Protecting EU Consumers against Unfair Contractual Terms

Consumer contracts are, in some respects, different from 'traditional' contracts (i.e. civil or commercial contracts), since a consumer contract is concluded between a professional and a profane consumer who tends to act from an economically disadvantaged bargaining position. In general, the content of consumer contracts is not drafted through a balanced negotiation between the parties, but results from a unilateral decision of the professional imposed to the consumer. In other words, consumers have generally no choice but to accept the terms and conditions of the contract, or to avoid the conclusion of the contract altogether. For these reasons, most national legal systems have implemented laws for the protection of consumers meant to protect the non-professional party against its counterpart and re-equilibrate the balance of power between the parties.[22] In order to

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19 *Océano Grupo*, Opinion AG Saggio, para 25.

20 *Claro*, para 37.

21 Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/GDP_at_regional_level (last accessed 2 September 2018).

22 Some States prohibit the arbitration of certain consumer disputes entirely. E.g. German ZPO, Section 1030(2), which prohibits arbitration of disputes relating to residential tenancies. Other require a specific and separate written arbitration agreement to effectively inform the consumer that they are waiving recourse to courts. See e.g. German ZPO, Section 1031(5); New Zealand Arbitration Act, Section 11, 1966. Several US States also have such a requirement, although it would not apply to international disputes, see Joseph McLaughlin, 'Arbitrability: Current Trends in the United States' (1996) 12 Arb Int'l 114.

promote the interests of consumers and ensure a high level of consumer protection,[23] the EU has adopted several mandatory rules to inform and protect the consumer from imbalanced agreements by prohibiting some unfair commercial practices,[24] or unfair contract terms.[25]

Directive 93/13, which finds its origin in Article 114 TFEU, targets specifically consumer protection against unfair contract terms. Its main purpose is to facilitate the establishment of the internal market by protecting consumers when they are acquiring goods and services under contracts which are governed by the laws of Member States other than their own – especially in relation to the use of standard contracts.[26] In any system of consumer protection, the consumers' lack of knowledge about their rights and/or their lack of access to justice constitutes a challenge. Consumers may indeed be reluctant to take legal actions, especially when their loss is small, when formal proceedings may be long, expensive and a source of stress.[27] These problems become even greater in an international environment. Ultimately, and without the promotion of an effective system of access to justice, consumers may lose their trust in the internal market.[28] The Commission estimates that the cost of unresolved consumer disputes is currently at 0.4% of the EU's GDP.[29] In this context, and according to the ECJ's consistent case law, Directive 93/13 as a whole is an essential measure that strengthens consumer protection, and therefore consumers' trust to have their

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23 TFEU, Article 169. On this topic, see Fabrizio Cafaggi, Hans Micklitz (eds), *New Frontiers of Consumer Protection. The Interplay between Private and Public Enforcement* (Intersentia 2007) 451.

24 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council(2006) OJ L149/22 ('Unfair Commercial Practices Directive').

25 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (1993) OJ L 5/29 ('Directive 93/13').

26 Directive 1993/13, Preamble.

27 Weatherill (n8) 283.

28 Ibid 291; Prechal, Shelkoplyas (n7) 591ff.

29 EU Commission, 'Consumers: Commission puts forward proposals for faster, easier and cheaper solutions to disputes with traders' (2011) available at: http://europa.eu/rapid/press-release_IP-11-1461_en.htm (last accessed 30 July 2018).

dispute resolved.[30] The ECJ argues that by re-establishing the bargaining power in consumer contracts and ensuring due process during (court or arbitral) proceedings, Directive 93/13 guarantees the health of the internal market.[31] This theme is visible too in Directive 2013/11 on alternative dispute resolution in consumer disputes.[32] In that respect, EU consumer protection may appear not dissimilar to EU competition law to the extent that a 'level playing field' in respect of consumer protection may enhance consumer trust in intra-EU trade.[33] The ECJ explicitly sees the analogy when it refers to *Eco Swiss* in *Claro*.[34] This is not surprising considering that one of the objectives of EU competition law is the protection of consumers, as evidenced by the explicit reference to consumers in Article 101(3) TFEU.

1.3. The Internal Importance of Article 6 within Directive 93/13: Effective Protection of Consumers Against Unfair Clauses in Consumer Contracts

In both *Claro* and *Asturcom*, it is not the entire Directive that is considered as equivalent to a domestic rule of public policy but only Article 6 which takes into account the weaker position of the consumer and aims to re-establish equality between the parties. Pursuant to Article 6(1), Member States must provide under their national law that unfair terms in consumer contracts are not binding on the consumer. Further, Article 6(2) requires Member States to take the necessary measures to ensure that consumers do not lose the protection granted by the Directive by virtue of the choice of law of a non-Member country's legal remedies if the contract in question has a close connection with the territory of a Member State.

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30 See *Claro*, para 37; *Pannon*, para 26; and *Asturcom*, para 51.

31 *Asturcom*, para 52; *Claro*, para 37. Directive 93/13, Preamble.

32 See Norbert Reich, 'A Trojan Horse in the Access to Justice - Party Autonomy and Consumer Arbitration in conflict' (2014) 10 EURCL 258.

33 Liza Lovdahl Gormsen, 'The Conflict Between Economic Freedom and Consumer Welfare in the modernisation of Article 82 EC' (2007) EUCJ 329ff.

34 *Claro*, para 37.

1.4. Consideration 1(q): the Unfairness of Pre-Dispute Arbitration Agreements in Consumer Contracts

If the Directive does not impose a definition of unfairness on Member States, it provides a non-exhaustive list of possibly unfair terms in its Annex. The terms listed in the Annex can be *prima facie* considered as unfair (it is however a rebuttable presumption). What is particularly important, in the context of arbitration, is the example given in Consideration 1(q) of the Annex which considers a term to be unfair when it excludes, or hinders the consumer's right to take legal action or exercise any other legal remedy, 'particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions'.[35] The Directive therefore creates a presumption regarding the invalidity of unfair arbitration clauses in consumer contracts. As a result, Member States have adopted different national laws to limit the admissibility of unfair pre-dispute arbitration agreement in consumer contracts. The approaches are however not uniform and may vary from one Member State to another.[36]

In the context of consumer disputes, the use of arbitration may appear controversial, particularly arbitration agreements reached before the dispute arises.[37] Pre-dispute arbitration agreements raise most concerns, as consumer contracts are overwhelmingly adhesion contracts. The one-sided nature of such contracts is particularly problematic. The consumer is presented with the terms of the agreement, that she may accept or reject, but may not negotiate. The inability of a

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35 Consideration 1(q) has generated a lot of criticisms in academic literature regarding its interpretation. E.g. William Park, 'Amending the Federal Arbitration Act' (2002) 13 Am Rev Int'l Arb 130; Christopher Kuner, 'Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce' (September 2000) available at: <www.ilpf.org/events/jurisdiction2/presentations/kuner%5Fpr/> (last accessed 29 July 2018).

36 E.g. in Sweden Section 6 of the Swedish Arbitration Act invalidates any pre-dispute arbitration agreements in consumer contracts; in Austria pre-dispute arbitration agreements in consumer contracts are enforceable only if they are recorded in a separate agreement signed by the consumer, Austrian ZPO, §617; in the UK Sections 89 and 91 of the 1996 Arbitration Act control the use of consumer arbitration agreements, differentiating between consumer agreements above and below £5,000. An arbitration agreement in a consumer contract worth less than £5,000 will be automatically void, while those in consumer contracts worth more than £5,000 are subject to a test with respect to their fairness.

37 Subsequent negotiated agreements referring a specific dispute to arbitration would arguably not be considered as unfair under Directive 93/13. See Mauro Rubino-Sammartano, *International Arbitration* (Kluwer Law International 2001) 545.

consumer to alter the terms of the agreement means two things. First, that the consumer may not be aware that she is entering into an arbitration agreement, and will often not genuinely understand the consequences of doing so.[38] Second, the consumer ultimately has no control over the procedures to be used in any resulting arbitration (e.g. choice of seat, applicable law, procedural rules). As a result, the business party has the capacity not only to impose arbitration on the consumer, but also to dictate the procedure that will be used in that arbitration. Since arbitration receives its legitimacy from its consensual nature, and the equal control of both parties over the procedures, its fairness in consumer disputes comes into question. Hence, the legitimacy and fairness of consumer arbitration has been raised in different jurisdictions, and met with different answers. For instance, Federal US law has adopted a strongly pro-arbitration stance in the context of consumer arbitration.[39] In contrast, the EU has adopted a more cautious approach. The EU legislation on arbitration agreements in consumer contracts focuses mainly on promoting access to justice by enabling consumers to exercise their right to fair trial under Article 6 ECHR through establishing quality standards which out-of-court dispute resolution mechanisms for consumers should meet.[40] Ultimately, the extent of consumer protection depends on how interventionist the State considers it ought to be.

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38 Julia Hörnle, *Cross Border Internet Dispute Resolution* (CUP 2006) 91ff.

39 This position is enshrined in a long line of commercial and consumer cases recognising arbitration as another forum. See e.g. *Scherk v Alberto-Culver Co*, 417 US (1974) 506, 519; *Moses H. Cone Mem'l Hosp v Mercury Constr Corp*, 460 US (1983) US 1; *Gilmer v Interstate/ Johnson Lane Corp*, 500 US (1991) 20 (presumption in favour of arbitration). The favourable regime for arbitration clauses is deepened with the recognition of arbitration as a forum for class action. See e.g. *Green Tree Financial v Bazzle,* 539 US (2003) 444; *Buckeye Check Cashing Inc v Cardegna*, 546 US (2006) 440.

40 These different initiatives are found in: Green paper on the access of consumers to justice and the settlement of consumer disputes in the single market, COM/93/576; Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market, COM/96/13; Commission Recommendation 98/257 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [1998] OJ L 115/31; Communication from the Commission on the out-of-court settlement of consumer disputes COM/98/198; Communication from the Commission on widening consumer access to alternative dispute resolution, COM/ 2001/161; Commission Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC [2001] OJ L 109; Green Paper on alternative dispute resolution in civil and commercial law, COM/2002/196; Directive 2013/11/EU of the European Parliament and Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes [2013] OJ L 165/63 ('Directive 2013/11'). See also, not restricted to consumer disputes, Directive 2008/52 on certain aspects of mediation in civil and commercial matters [2009] OJ L 136/3.

Besides, arbitration agreements also appear to clash with the general limit on party autonomy in consumer contracts, which has been established in EU private international law instruments.[41] Under the Brussels I Recast Regulation,[42] parties that are regarded as weaker from a socio-economic point of view in contractual relationships (i.e. consumer, employee, or insured) must be protected not only under substantive law but also under procedural law.[43] The underlying assumption is that pursuing or defending a claim in a foreign jurisdiction is not a realistic option for a weaker party (e.g. higher cost, loss of time due to travel, language barrier, unfamiliarity with the proceedings).[44] Hence, consumers are protected by rules of jurisdiction more favourable to their interests than the general rule. Pursuant to Article 18(1), 'a consumer may bring proceedings against the other party to a contract […] in the courts for the place where the consumer is domiciled'. Besides, pursuant to Article 18(2) '[p]roceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled'. Parties can only depart from the provisions of the Regulation by a choice-of-court agreement which is entered into *after* the dispute has arisen.[45] By concluding an arbitration agreement *before* the dispute arises, consumers are deprived of their rights to access the courts where they are domiciled to the benefit of an arbitration which may have a seat that is further away than is convenient. For instance, in *Asturcom*, the referring court underlined that the costs incurred by the consumer in travelling a considerable distance from her place of residence to the seat of the arbitration tribunal

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41 The same favourable regime can be found regarding the applicable law (Rome I Regulation, Article 6). The ECJ tends to give a wide interpretation to both regimes (see e.g. Joined Cases C-585/10 and C-144/09, *Pammer v Reederei Karl Schluter GmbH & Co KG* [2010] ECR I-12520).

42 The legal framework of protection of the weaker party was already established in the Brussels Convention (Section 4) and the Brussels I Regulation (Section 4).

43 Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations (1980) OJ C-282.

44 E.g. in *Pannon*, a choice of court clause designating the court of the place of the seller's business was included in a consumer contract. The court was located 275km away from the place where the buyer, who received an invalidity benefit, lived. There was no direct train, or bus connection which made it very difficult for the consumer to reach the court chosen. *Pannon*, para 35.

45 Brussels I Recast Regulation, Article 19(1).

were greater than the amount at issue in the dispute in the main proceedings[46] (i.e. EUR 669.60).[47] The underlying rationale is that without the existence of the arbitration clause, the consumer would have been sued before the courts of her domicile, and might have had access to simplified court proceedings.[48] She would not have had to pay extra travel costs which might have deterred her from defending her case, and, ultimately, from having access to justice.

At the basis of the preliminary questions in *Claro* and *Asturcom* was therefore not only the broad concern for the protection of the consumer against unfair contract terms but more specifically the concern for the protection of the consumer's right to a fair trial and access to justice and the related issue of the validity of the arbitration agreement. The right to access to justice is both a human right (i.e. Article 6 ECDH and Article 47 of the European Charter of Fundamental Rights), and key to making a legal order effective.[49]

Hence, Article 6, read in combination with Consideration 1(q), plays an essential role in the protection of consumers against – allegedly – unfair arbitration clauses inserted in consumer contracts (e.g. pre-dispute arbitration agreements not individually negotiated). The implementation of this provision promotes – or at least should promote – the trust of consumers that their right to access to national courts is guaranteed in the internal market. This trust then should – following the above logic – ultimately contribute to the growth of the EU economy.

1.5. Intermediary Conclusion: the Public Policy Character of Article 6 Directive 93/13

From the above analysis, the qualification of Article 6 Directive 93/13 as a provision of equal standing to a national rule of public policy is based on three elements: (i) the overall importance of

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46 *Asturcom*, para 25.

47 *Asturcom*, para 22.

48 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJL 199 1 creates a European small claims procedure mechanism.

49 Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market. Green Paper, COM (1993) 576.

consumer protection to ensure the optimum functioning of the internal market, (ii) the fundamental role of Directive 93/13 as a tool to guarantee the protection of consumers against unfair contractual terms in consumer contracts, and (iii) the pivotal role of Article 6, read in combination with Consideration 1(q) of the Annex, to protect consumers against unfair terms that may limit their right to a fair trial.

2. Undermining Arbitration Efficiency in Consumer Disputes: Broadening the Narrow Scope of the Public Policy Exception

If both *Claro* and *Asturcom* are to be welcomed as they guarantee the effective protection of consumers against unfair arbitration clauses, it is submitted, in Section 2.1, that by asking national courts to treat Article 6 Directive 93/13 as a national rule of public policy, the ECJ overshoot the mark in its rulings. The qualification of Article 6 Directive 93/13 as forming part of EU public policy dangerously broadened the content of EU public policy, challenging the principle of finality of arbitration, and opening the door to a broad scope of judicial review. With the broad statement in *Asturcom* that Article 6 Directive 93/13 should be treated as a rule of public policy, other consumer protection provisions could also be regarded as EU public policy rules, ultimately diminishing the appeal of consumer arbitration in the internal market, as further explained in Section 2.2.

2.1. A Controversial Qualification: Overshooting the Mark

As explained above,[50] at the basis of the preliminary questions in *Claro* and *Asturcom* was the concern for the protection of the consumer's right to a fair trial and access to justice, and the related issue of the validity of the arbitration agreement. Hence, there is a combination of two fundamental principles of EU law in these cases: (i) consumer protection, and (ii) the right to access to justice and to a fair trial. The protection of both of these principles explains why the ECJ would qualify Article 6 (read in combination with Consideration 1(q)) as pertaining to EU public policy in the

[50] Sections 1.3 and 1.4.

context of post-award review. The real difficulty however is the ECJ's broad wording in both cases. The ECJ did not only qualify an unfair arbitration agreement in a consumer contract as contrary to EU public policy, but more broadly, Article 6 Directive 93/13.[51] The ECJ therefore blurs the distinction between two entirely separate issues: (i) the unfairness of a pre-dispute arbitration agreement inserted in a (non-negotiated) consumer contract; and (ii) the unfairness of any contractual term to the detriment of the consumer.

If Article 6 as a whole forms part of EU public policy, EU consumer protection against unfair terms would also form part '*en bloc*' of EU public policy. It implies that all unfair terms in consumer contracts such as the 17 unfair terms listed under the Annex of Directive 93/13, not only point 1(q), must be raised *ex officio* by national courts during post-award review under the ground of public policy.[52] For instance, under point 1(e) of the Annex, an arbitral award requiring a consumer who failed to fulfil an obligation to pay 'a disproportionately high sum in compensation', should be set aside under the ground of public policy.[53] This provision is just one example of the many different unfair terms that could interfere with the finality of the arbitral award.[54] This broad interpretation of Article 6 in the ECJ's rulings seriously undermines the effectiveness of the arbitral process. It opens the door to a detailed term-by-term review of arbitral awards. This interpretation not only goes beyond the preliminary question asked in *Claro* and *Asturcom*,[55] but also challenges the existence and purpose of consumer arbitration. If the ECJ really aims at a full fledged review of arbitral awards in consumer contracts, why not eliminate the arbitrability of such disputes altogether? Besides, such a broad ruling appears inconsistent with the pro-ADR stance in the

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51 *Asturcom*, para 52. See also *Claro*, paras 36-38.

52 See Chapter 2, Section 3.3, pp. 56ff.

53 Case C-488/11, *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV* [2013] ECL I-341, para 44 (regarding the unfairness of a penalty clause). For a general commentary see Graf, Appleton (n21) 56.

54 See also *Pohotovosť sro v Miroslav Vašuta* [2010] ECL I-685, paras 50ff on the unfairness of a daily default interest and the lack of mention of an annual percentage rate of charge (APR) of 95.6% in a credit agreement contract that contained an arbitration clause.

55 Graf, Appleton (n21) 57.

Recitals of Directive 2013/11.[56] Such an outcome explains the concerns that were raised in the literature on the topic.

2.2. The Protection of Consumers against Unfair Contract Terms Beyond Directive 93/13

The ECJ's reasoning in *Claro* and *Asturcom* on the need for effective consumer protection against unfair contract terms and the public interest of Directive 93/13 is broad:

> the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory.[57]

This rationale may apply in the same manner to other unfair terms in other EU instruments (e.g. Directive on the protection of consumers in respect of distance contracts,[58] Directive on the sale of consumer goods,[59] Directive on the distance marketing of consumer financial services).[60] It remains to be seen whether the ECJ will adopt such a broad approach considering the traditionally narrow concept of public policy, and whether national courts will embrace such an approach.

Indications of which mandatory rules could also qualify as public policy can be inferred from ECJ rulings in consumer litigation proceedings. An important caveat is necessary in that regard: the fact that a mandatory rule qualifies as public policy in consumer litigation, does not mean that it would automatically qualify as public policy in the context of consumer arbitration. However, the parallel remains interesting considering that the ECJ appears to blur the distinction between public policy in consumer litigation and in arbitration. In *Claro* and *Asturcom*, and contrary

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56 Directive 2013/11, Recitals 3 and 4.

57 *Claro*, para 37.

58 Directive 97/7/EC.

59 Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L-280.

60 Directive 1999/44; Directive 2002/65.

to its reasoning in *Eco Swiss*, the ECJ did not put forward any specific argument relating to arbitration proceedings. In *Eco Swiss*, the ECJ pointed out that arbitral tribunals, unlike national courts, are not in a position to request a preliminary ruling on questions concerning the interpretation of EU law.[61] In *Claro* and *Asturcom*, on the other hand, the ECJ derived the public policy nature of Article 6 Directive 93/13 from general considerations on the importance of Article 3(1)(t) EC [Article 4(2)(f) TFEU] and the importance of Directive 93/13's protection system. Besides, in *Rampion*, the ECJ confirmed that the reasoning in *Claro* also applies to litigation proceedings.[62] It could therefore be argued that the ECJ applies an overarching concept of EU public policy in consumer disputes.[63]

A trend can be observed in the application of the principles developed in relation to Directive 93/13 to other consumer directives.[64] The ECJ has recognised the existence of an obligation for national courts to raise *ex officio* three mandatory rules of consumer protection that may eventually be regarded as provisions of equal standing to national rules of public policy in post-arbitration review. As explained in Chapter 2,[65] there is a direct link in the ECJ's reasoning in *Claro* and *Asturcom* between the need to raise a provision *ex officio* and its characterisation as a rule of public policy. Public policy is indeed the only ground that may allow a national court to verify that the arbitral award does not violate a fundamental EU law provision. Hence, it is submitted that

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61 *Eco Swiss*, paras 32-34 and 40 with reference to *Nordsee*, in which the Court decided that an arbitration tribunal which is established pursuant to a contract between private individuals is not 'a court or tribunal' in the sense of Article 234 EC (now Article 267 TFEU). Prechal therefore argues that the conclusions of *Eco Swiss* should be restricted to review of arbitral awards and not be given general application, since declaring Article 101 TFEU a matter of public policy was the only way to get its interpretation before the ECJ. Sacha Prechal, 'The Court of Justice and Effective Judicial Protection: What has the Charter Changed?' in Christophe Paulussen, Tamara Takács, et al (eds) *Fundamental Rights in International and European Law* (Asser 2015) 163. However, in *Manfredi*, the Court transferred the *Eco Swiss* ruling to normal civil proceedings. *Manfredi*, para 31.

62 *Rampion*, para 62.

63 Regarding litigation, see *Asbeek Brusse* where the ECJ used the same formula that it previously used in *Asturcom*, para 44. *Asbeek Brusse*, para 44.

64 Balazs Fekete, Anna Maria Mancaleoni, 'Application of Primary and Secondary EU Law on the National Courts' Own Motion' in Arthur Hartkamp, Carla Sieburgh et al (eds) *Cases, Materials and Text on European Law and Private Law* (Hart Publishing 2017) 426 ff.

65 Chapter 2, Section 3.2, pp. 44ff.

the acknowledgement of the ECJ, in consumer litigation, that a provision of EU law is essential enough to be raised *ex officio* by a national court may indicate a willingness, in the context of judicial review of arbitral award, to raise the same provision to the level of public policy. These provisions are: Article 11(2) Directive 87/102 on consumer credit in *Rampion* (Section 2.2.1), Article 4 Doorstep Selling Directive 85/577/EEC on contracts negotiated away from business premises in *Martín Martín* (Section 2.2.2), and Article 5(3) of Directive 1999/44 on consumer sales and associated guarantees in *Faber* (Section 2.2.3).

2.2.1 Article 11(2) Directive 87/102

In *Rampion*, the ECJ held, by analogy with the case law on Directive 93/13, that Article 11(2) Directive 87/102,[66] establishing a link between the contract for supply of goods or services and a credit agreement in order to allow the consumer to pursue a remedy against the creditor in case of non-performance, must be interpreted so as to allow national courts to apply *ex officio* the provisions transposing Article 11(2). To justify the *ex officio* application of the provision, the ECJ emphasised the 'dual aim' of the Directive: 'ensuring both the creation of a common consumer credit market and the protection of consumers who avail themselves of such credit'.[67] In *Pohotovost'*, the ECJ explicitly linked Directive 87/102/EEC to Directive 93/13.[68] Accordingly, the failure to mention the APR in a consumer credit contract, which is an essential information in the context of Directive 87/102, may be a decisive factor in the assessment of whether the terms of a consumer credit agreement are written in plain, intelligible language within the meaning of Article 4 Directive 93/13. If it is not the case, the national court has the power to assess *ex officio* whether the failure to mention the APR in the term concerning the cost of the credit is likely to confer on that

66 Repealed by Directive 2008/48/EC.

67 *Rampion*, para 59.

68 *Pohotovost'*, paras 76-77.

term an unfair nature within the meaning of Articles 3 and 4 of Directive 93/13.[69] Consequently, national courts are required to assess the unfairness of a penalty contained in a consumer credit agreement *ex officio*.

2.2.2. Article 4 Directive 85/577

In *Martín Martín*,[70] the ECJ held that the obligation to give notice of the right of withdrawal, laid down in Article 4 of the Doorstep Selling Directive 85/577/EEC,[71] is of public interest and permits deviations from the principle of judicial passivity.[72] The Spanish court of appeal requested a preliminary ruling on the question whether Article 4 Directive 85/577, according to which 'Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to it […] is not supplied', allows a national court to raise *ex officio* the infringement of that provision and to declare the nullity of the contract on the ground that the consumer was not informed of her right to cancellation.[73] The Spanish court stressed that the consumer had not pleaded at any stage in the proceedings that the contract was void; and that, under Spanish law, civil actions are generally governed by the *principio de justicia rogada*, a principle on the basis of which the court cannot assess *ex officio* facts, evidence, or claims which the parties have not raised.[74]

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69 *Pohotovost'*, para 77.

70 Case C-227/08, *Martín Martín* [2009] ECR I-792.

71 Repealed by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (2011) OJ L-304.

72 *Martín Martín*, para 28.

73 For a comprehensive overview of Spanish Law on Doorstep Selling and the consequences that arise where a business has failed to inform the consumer about his right of withdrawal, see Martin Ebers, Esther Arroyo Amayuelas, 'Heininger y las sanciones a la infracción del deber de información sobre el derecho de desistimiento ad nutum, Sentencia TJCE de 13 diciembre de 2001, Asunto C-481/99' (2006) 9 Revista de la Facultad de Derecho de la Universidad de Granada, 409ff.

74 *Martín Martín*, para 16.

The ECJ referred to its decisions in *van Schijndel* and *van der Weerd* to rule that a national court is able to act of its own motion in exceptional cases, such as where the 'public interest' requires its intervention. The ECJ held that Article 4 Directive 85/577, which provides that traders are required to give consumers written notice of their right of cancellation, is founded on such a 'public interest'.[75] Thus, the 'public interest' pursued by the Directive justifies a derogation from the general rule. In this case, the ECJ made no reference to public policy but simply to the 'public interest' of the provision. However, the reasoning follows a similar pattern to the one in *Claro*. This suggests that the ECJ would, in all likelihood, consider that Article 4 of the Doorstep Selling Directive 85/577/EEC qualifies as a provision of equal standing to national rules of public policy in the context of post-award review.

2.2.3. Article 5(3) of Directive 1999/44

Finally in *Faber*, the ECJ ruled that:

> In view of the nature and importance of the public interest underlying the protection which Article 5(3) of Directive 1999/44 confers on consumers, that provision must be regarded as a provision of equal standing to a national rule which ranks, within the domestic legal system, as a rule of public policy.[76]

Article 5(3) relates to time-limits and holds that 'any lack of conformity which becomes apparent within six months of delivery of the good shall be presumed to have existed at the time of delivery'.

These different rulings indicate that the ECJ might recognise in the future that some provisions of Directive 87/102, Directive 85/577/EEC, and Directive 1999/44 are equivalent to rules which the national legal systems qualify as public policy rules. An arbitral award which fails to protect those rights may therefore be set aside or denied recognition and enforcement in the Member States. Such a qualification should however not be welcomed, in the context of

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[75] *Martín Martín*, paras 21 and 28.

[76] *Faber*, para 56.

international arbitration. It would open the door to a term-by-term review of arbitral awards and allow a review of its underlying merits. It can only be hoped that if the ECJ was ever asked to rule on these provisions in the context of post-award review, it would distinguish public policy in litigation and in arbitration, and reject the public policy qualification of these provisions for the purpose of post-award review.

2.3. Intermediary Conclusion: the Danger of Broadening the Scope of Public Policy to (All) Mandatory Rules of Consumer Protection Against Unfair Contractual Terms

If preventing consumers from being bound by an unfair arbitration agreement is justified regarding consumers' right to due process, a broader interpretation would dramatically undermine the principle of finality of arbitral awards and allow a full-fledged review of arbitral awards in consumer disputes. Such a broad interpretation would seriously undermine the effectiveness of the arbitral process and challenge the existence and purpose of consumer arbitration. If the ECJ was to broadly categorise all – allegedly – unfair terms as contrary to EU public policy in the context of post-arbitral review, it would grant national courts a broad power to review (almost) term-by-term arbitral awards rendered in consumer disputes under the public policy ground. What may be conceivable from a EU law perspective is difficult to fathom from an international arbitration standpoint. Such a broad understanding of the scope of public policy would threaten the principle of finality of arbitral awards, and question the purpose of arbitration in consumer disputes in the internal market. It remains impossible however to predict with certainty which rules of EU law will be regarded as public policy in the future. Yet, since qualifying a rule as public policy has far reaching implications on Member State's procedural autonomy and undermines the principle of finality of arbitral awards, it is regrettable that the ECJ has not had the opportunity, so far, to provide a more detailed test to determine which provisions of EU law should be treated as EU

public policy.[77] It is therefore urgent for the ECJ to further clarity the concept of EU public policy in consumer disputes.[78]

3. Undermining Arbitration Efficiency in Consumer Disputes: the Duty to Raise EU Public Policy Considerations E*x Officio*

As previously explained in Chapter 2, the ECJ has ruled that national courts *must* apply Article 6 Directive 93/13 *ex officio*, even if under their national law a mandatory rule of consumer protection cannot be raised for the first time as the post-award stage.[79] According to the ECJ, the imbalance between the weak consumer and the professional in terms of their level of knowledge and bargaining power can only be corrected through positive action of national courts. The abstract image of the consumer in the field of unfair contract terms therefore contrasts with the consumer in free movement cases where she is seen as 'reasonably well informed and reasonably observant and circumspect'.[80]

The challenge is to find a reasonable balance between consumer protection and arbitral efficiency.[81] As von Goldbeck pointed out: 'the more time and resources have been spent in the arbitral process, the more reasonable it should be to rely on the outcome of that process'.[82] Arbitral efficiency would be given maximum effect if the consumer was only able to raise the unfairness of an arbitration agreement at the beginning of the arbitral proceedings, and if the arbitral tribunal (and

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77 On this point see Chapter 5.

78 Ebers (2010) (n38) 846.

79 See *van der Weerd*, discussed in Johanna Engström, 'National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing New Respect for Party Autonomy and National Procedural Autonomy' (2008) 1 Rev EU Admin L 68; Jan Jans, Albert Marseille, '*van der Weerd'* (2008) CMLR 853ff.

80 Charlotte Pavillon, 'ECJ 26 October 2006, Case C-168-05 Mostaza Claro v. Centro Movil Milenium SL - The Unfair Contract Terms Directive: The ECJ's Third Intervention in Domestic Procedural Law' (2007) 5 ERPL 745 referring to Case C-210/96 *Gut Springenheide* [1998] ECR I-4657. See e.g. Case C-210/96 *Gut Springenheide* [1998] ECR I-4657.

81 Brenna Sheffield, 'Pre-Dispute Mandatory Arbitration Clauses in Consumer Financial Products: The CFPB's Proposed Regulation and its Consistency with the Arbitration Study' (2016) 20 NC Banking Inst 229-230.

82 Von Goldbeck (n9) 283.

national courts) had no power to raise it on their own motion. On the other hand, consumers would be absolutely protected, if the unfairness of an arbitration agreement could be assessed at any stage of the proceedings *ex officio* by either the arbitral tribunal, the annulment courts, or even the enforcement courts when the award has already acquired *res judicata* effect. It has been argued that the ECJ in *Claro* and *Asturcom* did not strike a reasonable balance between consumer protection and arbitration efficiency.[83] Instead, the ECJ chose absolute consumer protection,[84] even if it meant increasing friction between EU public policy and the legal principles underlying efficient arbitration procedures justifying limited interference of courts.

In *Claro*, the consumer had ten days to refuse the arbitration and to opt instead for litigation before national courts. AG Tizzano argued that this period was too short for the consumer to opt for court proceedings.[85] However, the consumer was still able within this ten-day period to submit arguments on the merits of the dispute.[86] Besides, even after the expiration of this period, she did not raise the unfairness of the arbitration agreement at any point of the arbitration proceedings.[87] It is only after she lost that she argued for the first time, during the annulment proceedings, that the arbitration agreement was unfair.[88] Yet, Spanish law required issues of invalidity of an arbitration agreement to be pleaded prior to the court proceedings.[89] The purpose of this requirement was to promote arbitral efficiency. The efficiency of arbitration indeed largely depends on the idea that parties must bring all their legal claims, whether procedural or substantive, before the arbitral

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83 Ibid, 284.

84 *Asturcom*, para 34: 'the consumer is afforded absolute protection'. See Andrew Dickinson, 'Unfair arbitration clause before the ECJ' (2009) available at: http://conflictoflaws.net/2009/unfair-arbitration-clause-before-the-ecj/ (last accessed 24 November 2019).

85 *Asturcom*, Opinion AG Tizzano, para 48.

86 *Asturcom*, para 17.

87 Ibid.

88 *Asturcom*, para 18

89 Ley 36/1988.

tribunal rather than reserve them for post-award review. Hence, the arbitration practice has adopted the principles of waiver or estoppel in order to compel the parties to raise their claims before the arbitral tribunal to avoid forfeiting them. However, *Claro* means that the consumer was not required to raise the unfairness of the arbitration agreement before the arbitral tribunal. Instead, she was allowed to challenge the unfavourable award at the post-arbitral stage. As a result, the ECJ creates an incentive for the consumer not to question the fairness of the arbitration agreement during the arbitral proceedings and to wait for the award. If she wins, she can simply accept the outcome.[90] However, if she loses, she may seek the annulment of the award at the seat on the ground that since the arbitration agreement is unfair, the arbitral award violates EU public policy. In that respect, *Claro* is particularly problematic. Born complains that *Claro* is 'ill-considered and arguably contradicts the [New York] Convention's requirements for restraint in application of Article V(2)(b)'s public policy exception'.[91] Allowing a party that has participated to the proceedings to argue, for the first time, a new point of law at the annulment stage can be deemed dishonest.[92]

On the other hand, in *Asturcom*, the consumer did not participate at all to any of the proceedings.[93] She did not make any submission during the arbitral proceedings, she did not seek the annulment of the award at the seat,[94] and finally she did not resist enforcement.[95] Hence, it has been argued that by asking national courts to raise the unfairness of the arbitration agreement *ex*

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90 Maud Piers, 'Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations' (2011) 2(1) JIDS 225-226.

91 Gary Born, *International Commercial Arbitration*, vol 3 (2nd ed, Kluwer 2014) fn 1494, 3432. See also Piers (n123) 209.

92 See e.g. Weininger, Byrne, 'Mandatory Rules, Arbitrability and the English Court Gets It Wrong' (2010) Cahiers de l'Arbitrage 201; H Dundas, 'EU Law versus New York Convention – Who Wins? Accentuate Ltd v Asigra Inc' (2010) 76(1) Arbitration 164–5: 'The fact that EU law (which the judge was bound to apply) condones this [element of dishonesty of pleading on a wholly different basis than what was agreed] is no advertisement for the European Union's credentials as a supporter of a free world trade system; […] this is about protectionism.'

93 *Asturcom*, para 33.

94 *Asturcom*, paras 23, 33, 40.

95 *Asturcom*, para 34.

officio at the enforcement stage, when the award is final and has acquired the force of *res judicata*,[96] the ECJ also undermines arbitral finality. The ECJ is arguably creating an incentive for consumers to be passive and simply wait for the enforcement court to determine *ex officio* the fairness of the arbitration agreement under the ground of public policy.[97]

Both cases are troubling. They assume that arbitral finality is a secondary consideration as compared to EU law. However, *Asturcom* should be distinguished from *Claro* because the application of EU law to the factual problem is different. As explained previously in Chapter 2, in *Claro*, the ECJ required the annulment of the award pursuant to the principle of effectiveness of EU law,[98] but in *Asturcom* it did not. In *Asturcom*, the Spanish Government clarified that under the applicable rules of Spanish procedural law, the enforcement court has the power to assess the validity of an arbitration agreement *ex officio* as a matter of national public policy irrespective of whether the party concerned has appeared before the arbitral tribunal or the court responsible for enforcement, and irrespective of whether that party has initiated proceedings.[99] Hence, in *Asturcom*, it is Spanish law twinned with EU law, rather than EU law directly, which insists on subverting arbitral finality.[100] For this reason, *Claro* may *prima facie* appear more insensitive to the principle of arbitral finality and arbitral efficiency than *Asturcom* since it relied on the principle of effectiveness, and not on the principle of equivalence. However, in *Asturcom*, under the applicable Spanish rules, the Spanish courts only had the *power* to assess the unfairness of an arbitration agreement *ex officio*.[101] Yet, the ECJ went a step further when it ruled that 'a national court or tribunal hearing an action for enforcement of an arbitration award which has become final […] is *required* […] to

96 *Asturcom*, paras 23, 33, 40.

97 Piers (n123) 225-226; von Goldbeck (n9) 288.

98 *Claro*, para 38.

99 *Asturcom*, Opinion AG Trstenjak, para 38.

100 *Asturcom*, para 55.

101 *Asturcom*, Opinion AG Trstenjak, para 38.

assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair'.[102] In other words, if a national court *can* review whether an arbitral award complies with national public policy, the court *must* review the compliance of the arbitral award to Article 6 Directive 93/13, the nature of which is similar to public policy. Hence, the ECJ's reliance on the broadly construed principle of equivalence in *Asturcom* allows EU law to penetrate into national law (almost) as deeply as when it relied on the principle of effectiveness in *Claro*.[103]

It is submitted that the ECJ did not strike a reasonable balance between consumer protection and arbitral efficiency in its rulings. The Court dangerously challenged the principle of finality of arbitration, and ultimately diminished – even eliminated – the appeal of consumer arbitration for businesses. Considering the amount of criticisms those decisions received, one may wonder if it would have been possible for the ECJ to favour another approach, that would have been as effective and maybe less controversial, to free the consumer from being bound by an unfair arbitration agreement while maintaining arbitral efficiency.

4. Less Controversial Qualifications and Alternative Solutions

As explained above, if the effective protection of consumers is a respectable objective, the broad argument of public policy with which the ECJ underpinned both rulings could be fundamentally misleading.[104] The question whether the ECJ should have chosen a less interventionist road remains. It is submitted that the provisions in dispute in *Claro* and *Asturcom* were Consideration 1(q) of the Annex read in combination with Article 6 which free the consumer from being bound by an unfair arbitration clause in a consumer contract. Hence, the protection of the consumer's right to

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[102] *Asturcom*, para 59.

[103] von Goldbeck (n9) 289. See also Chapter 2, Sections 3.3.2, pp. 59ff.

[104] Piers (n123) 224.

a fair trial and access to justice, and its impact on the validity of the arbitration agreement in post-arbitral review were at the heart of both rulings.[105] It may therefore have been more legitimate for the ECJ to rely on the two issues that were at the heart of both preliminary references, namely the validity of the arbitration agreement and the right to due process. As explained in Sections 4.1 and 4.2 below, these alternative rationales would have been legally more correct without offering consumers absolute protection.

4.1. First Alternative Ground: the Arbitration Agreement is Null and Void

The Spanish arbitration law differentiated between different grounds on which the arbitral award in *Claro* might be annulled, amongst which were public policy and the nullity of the arbitral agreement.[106] A similar ground to the latter, although not directly applicable to this case, can be found under Article V(1)(a) New York Convention to justify the refusal of recognition and enforcement of a foreign arbitral award.[107] Therefore, considering the facts of both cases, the ECJ could have urged the Spanish court to consider the latter ground to refuse the enforcement of the arbitral award.[108] The arbitration agreement had to be considered null and void because it was an –allegedly –unfair term. It was only as a consequence that the arbitral award had to be annulled. Under EU consumer protection laws, arbitration agreements between a consumer and a commercial party relating to future disputes may be invalid. Significantly, Directive 2013/11 holds, in its Article 10(1), that pre-dispute agreements are not binding on the consumer if they were concluded before the dispute materialised and if they have the effect of depriving the consumer of her right to bring

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[105] Piers (n123) 224.

[106] *Asturcom*, para 15 (Article 45 of Law 36/1988 now Article 41(1)(a) on the nullity of an arbitration agreement, and Article 41(1)(f) on public policy).

[107] A comparative study shows that the invalidity of an arbitration agreement is generally recognised as a ground on which a court may decide to set aside an arbitral award – Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 720.

[108] See *Philip Alexander Securities & Futures Ltd v Werner Bamberger* [1996] EWCA Civ 63.

an action before the courts for the settlement of the dispute.[109] This alternative reasoning may however suffer two important flaws from an EU perspective: first, national legislation generally recognises that parties are precluded from relying on the ground that the arbitration agreement is invalid for the first time in post-award proceedings (Section 4.1.1); second, this ground cannot be raised *ex officio* under either Spanish law,[110] or more broadly under national law, nor under the New York Convention (Section 4.1.2).

4.1.1. Preclusion: the Party Failed to Raise the Unfairness of the Arbitration Agreement During the Arbitration Proceedings

In *Claro*, the consumer did not rely on the ground of public policy to challenge the arbitral award before the courts of the seat but instead on the unfair nature of the arbitration clause which would render the arbitration agreement null and void, and therefore justify its setting aside.[111] Similarly, the referring court, the *Audiencia Provincial de Madrid*, referred to the ECJ the following question for preliminary ruling:

> [m]ay the protection of consumers under Council Directive 93/13/EEC […] require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that arbitration agreement contains an unfair term to the consumer's detriment.[112]

The difficulty with this argument is that under the applicable law, Article 23(1) of Law 36/1988:[113]

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[109] Directive 2013/11 was inapplicable in both *Claro* and *Asturcom* for two reasons: (i) it was adopted after these cases were decided; and (ii) Article 2(g) excludes of the scope of application of Directive 2013/11 'procedures initiated by a trader against a consumer'.

[110] Pursuant to Article 41 of Spanish Arbitration Law Arbitration Law, the fact that the arbitration agreement may be null and void cannot be raised by the Spanish court hearing the application to set aside the award on its own motion; contrary to the public policy ground pursuant to Article 41(2). See Sentencia del Tribunal Superior de Justicia de la Comunidad Valenciana (Sala de lo Civil y Penal, Sección Primera) *Zurich Insurance Plc and Barcelonesa de Drogas and Productos Químicos Medifer Liquids, SL* (2013) nº 15/2013. See also Arbitration Law 60/2003. For a translation see David Cairns, Alejandro López Ortiz, 'Spain's Consolidated Arbitration Law' (2012) 13 Spain Arb Rev 49ff.

[111] *Claro*, para 18.

[112] *Claro*, para 20.

[113] *Claro*, para 14.

> [a]n objection to arbitration on the ground that the arbitrators lack objective jurisdiction or on the grounds of the non-existence, nullity or expiry of the arbitration agreement must be raised at the same time as the parties make their initial submissions.

However, Ms Claro presented arguments on the merits of the dispute without ever pleading that the arbitration agreement was void.[114] Instead, she raised that argument for the first time during the annulment proceedings which according to Spanish law meant that her claim was precluded. Similarly, under the New York Convention, if Article V(1)(a) is silent on whether a party's silence during the arbitration proceedings may preclude her from later raising a defence on this ground, certain court rulings[115] and national legislation[116] have held that a party is prevented from relying on that defence if she has failed to do so during the arbitration proceedings.[117] Relying on that ground would have therefore not afforded an absolute protection to the consumer, and would have undermined the protection established by Directive 93/13 in an *Asturcom* type scenario where the consumer has been completely silent.

4.1.2. Impossibility of Raising the Unfairness of an Arbitration Clause *Ex Officio* Unless It Falls Under the Grounds of Arbitrability or Public Policy

In arbitration, and contrary to litigation, courts may only intervene at the post-arbitral stage in a very limited way. They may only raise a point *ex officio* if it falls under either arbitrability or public

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114 *Claro*, paras 17 and 20.

115 E.g. in Greece, Supreme Court 14 January 1977, *Agrimpex SA v JF Braun & Sons, Inc* (1979) IV YB Com Arb 269; in Germany, OLG München, 11 July 2011, 34 Sch 15/10; OLG Frankfurt, 18 October 2007, 26 Sch 1/07; OLG Hamm, 27 September 2005, 29 Sch 01/05; OLG Koblenz, 28 July 2005, 2 Sch 4/05; OLG Schleswig, 30 March 2000, 16 SchH 05/99.

116 E.g. Austrian Arbitration Act, ss 592 and 611(2); Belgian Judicial Code, Article 1704(4); German CPC, Sections 1059(2)(a) and 1027; Dutch CPC, Articles 1065 and 1052(2); 1996 Arbitration Act 1996. ss 67 and 73; French CPC, Article 1466 (applicable to national arbitration and international arbitration as per Article 1506 of the same Code). For a commentary see Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Commercial Arbitration* (2nd ed, OUP 2009) 464.

117 Contra *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (a party would not be precluded from raising a defence under Article V(1)(a) on the ground that it had not participated to the arbitration proceedings); BGH 16 December 2010, III ZB 100/09 (a party would not be precluded from raising that defence on the ground that it had not raised it in setting aside proceedings but only at the enforcement stage).

policy.[118] If the provision does not fall under one of these grounds, it would have to be raised by the party resisting enforcement, here the consumer, who might not be aware of her rights.[119] Hence, if the ECJ had not followed the public policy route, it would not have been able to guarantee absolute consumer protection. In *Asturcom*, where the consumer had been completely passive during the arbitral and enforcement proceedings, absolute consumer protection would have therefore been compromised if the national court had not been allowed to consider *ex officio* whether the arbitration clause was an 'unfair term' within the meaning of the Directive 93/13.[120]

Therefore, in order to require national courts to raise the unfairness of an arbitration agreement in consumer contracts, *ex officio* when needed, the ECJ had only two options: either to rule on the arbitrability of consumer disputes, or qualify unfair arbitration clause as contrary to public policy. Arbitrability was not an option. Indeed, the benefits for the internal market of the development of arbitration, and more broadly of Alternative Dispute Resolution ('ADR'), in consumer disputes are highlighted in the Recitals of Directive 2013/11. The Recitals explain that ADR offers a simple, fast and low-cost out-of-court solution to disputes between consumers and traders[121] which benefits consumers and should boost their confidence in the internal market.[122] It is estimated that access to ADR will save consumers up to EUR 22.5 billion per year.[123] In order to increase the consumers' trust, which is essential for the completion of the internal market, the EU however needs to eliminate direct and indirect obstacles that prevent ADR from reaching its full potential. Public policy is therefore the only ground left that allows (or maybe more accurately

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[118] New York Convention, Article V(2).

[119] Christoph Liebscher, *The Healthy Award. Challenge in International Commercial Arbitration* (Kluwer Law International 2003) 147–354 and 383–422.

[120] *Asturcom*, Opinion AG Trstenjak, paras 57-60.

[121] Directive 2013/11, Recital 4.

[122] Ibid, Recital 3.

[123] European Commission, Press Release, Consumers: Commission puts forward proposals for faster, easier and cheaper solutions to disputes with traders, 29 November 2011, available at: http://europa.eu/rapid/press-release_IP-11-1461_en.htm (last accessed 30 July 2018).

mandates)[124] national courts to raise the unfairness of an arbitration agreement *ex officio* during post-award review proceedings.

4.2. Second Alternative Ground: Due Process as Public Policy

The ECJ in *Claro* and *Asturcom* relied upon the public policy nature of Article 6 Directive 93/13. However, as explained above in Section 2.1 and recognised by AG Tizzano in *Claro*,[125] the public policy defence should be narrowly construed and applied only to matters of 'primary and absolute importance'.[126] So instead of broadening the scope of the public policy exception by relying on the public policy nature of Article 6 Directive 93/13 – which AG Tizzano nevertheless described as being a 'legitimate' option[127] – the ECJ could have underpinned the public policy status of this provision based on 'fair trial' considerations.[128] Indeed, at the basis of the preliminary questions in *Claro* and *Asturcom* were the concerns for the protection of the consumer's fair trial and fair access to justice, and the related issue of the validity of the arbitration agreement. Therefore, the ECJ could have followed the propositions made by both AG Tizzano in *Claro* and AG Trstenjak in *Asturcom* to approach the issue at hand from a due process standpoint. AG Tizzano pointed out that in his view, the 'fundamental principle of the legal order, namely the right to a fair hearing' is at the core of this case.[129] He continued holding that it is widely agreed that the right to be heard is 'part of the concept of Community public policy'.[130] AG Trstenjak adopted a similar perspective and referred to the right to be heard and the principle of effective judicial protection as fundamental principles of EU law, provided in Articles 6 and 13 ECHR, and reaffirmed by Article 47 of the Charter of

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[124] See Chapter 6.

[125] *Claro*, Opinion AG Tizzano, para 56.

[126] Ibid, para 56.

[127] Ibid, para 56.

[128] Ibid, paras 56–57. See also Norbert Reich, 'More clarity after 'Claro'?' (2007) 1 ECLR 42–43.

[129] *Claro*, Opinion AG Tizzano, para 54.

[130] Ibid, para 60.

Fundamental Rights of the European Union.[131] She added that the right to a fair hearing is 'one of the fundamental rights deriving from the constitutional traditions common to the Member States',[132] also protected under Article 6 ECHR,[133] and thus clearly qualifies as a rule of public policy.

The prudent approach proposed by the Advocates General represents a sound and persuasive alternative to the reasoning by analogy based on Article 3 EC. Considering that in many jurisdictions the right to a fair trial is to some degree related to public policy, a reasoning based on this ground, and the constitutional right to institute legal proceedings, would have been a less intrusive, yet a legally (more) satisfying alternative which would have *prima facie* achieved the same result. So why did the ECJ refuse to follow that path? The Court did not address this point in any of its rulings.

To conclude, a reasoning based on the right to a fair trial of consumers might have been less intrusive, less controversial and legally more correct than the broad reasoning put forward by the ECJ. It would have allowed the ECJ to strike a balance between consumer protection and arbitral effectiveness, while also circumventing the questions relating to judicial passivity. Instead, the ECJ characterised Article 6 Directive 93/13 as forming part of EU public policy. By doing so, the ECJ opened the door to a broad scope of judicial review of arbitral awards rendered in consumer disputes. Judicial review of arbitral awards is therefore now possible under the ground of public policy not only when the arbitral agreement is allegedly unfair, but whenever a term of the award is allegedly unfair pursuant to the definition put forward in Directive 93/13 and illustrated in its Annex. In practice, as a result of these decisions, businesses should think twice before including an

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131 *Asturcom*, Opinion AG Trstenjak, para 61. In that regard see also more broadly TEU, Article 19.

132 Ibid, para 59.

133 The ECJ applied the ECHR as part of its 'general principles of law' under the ECJ's broad interpretation of Article 220 of the EC Treaty. Article 220 provided that: '[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.' This application of the ECHR is now specifically confirmed in Article 6(2) TEU.

arbitration agreement in their consumer contracts, and should instead directly seise national courts in order to avoid duplicative proceedings which are both costly and time-consuming.[134]

Conclusion

The ECJ has sought to guarantee the absolute protection of consumers in the internal market by requiring national courts to raise the unfairness of arbitration agreements in consumer contracts *ex officio*. From that perspective, both decisions are laudable. There are however some objections with regard to the means of achieving this goal. This chapter demonstrated why the ECJ's approach is problematic in terms of foundations and outcomes. By qualifying Article 6 Directive 93/13 'as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy',[135] the ECJ opened the door to the possibility of a term-by-term review of arbitral awards against unfair terms in consumer disputes. Asking reviewing courts to control *ex officio* the conformity of arbitral awards with a wide range of mandatory rules would effectively lead to a constant review of arbitral awards. The arguments underlying the 'public interest' of the protection benefiting the weak consumer are formulated in such general terms that they could justify an 'ever-increasing extrapolation'[136] of the content of the public policy exception in this context. Each time a consumer might be unaware of her rights or experiencing difficulties in enforcing them, Article 6 Directive 93/13 would amount to public policy. If these decisions resulted in the protection of consumer against unfair terms winning ground, it definitely occurred at the expense of efficiency in arbitration.[137] The adoption of such a broad wording is even more puzzling considering the

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[134] Graf, Appleton (n21) 63.

[135] *Asturcom*, para 52.

[136] Olivier van der Haegen, 'European Public Policy in Commercial Arbitration: Bridge Over Troubled Water' (2009) 16 Maastricht J Eur & Comp L 468.

[137] Piers (n123) 229. Liebscher (2008) (n16) 556; see also Prechal, Shelkoplyas (n42) 607.

increased efforts of the EU legislator to promote ADR in consumer disputes.[138] The ECJ will have to develop its case law on EU public policy in arbitration more consistently, and identify fundamental EU rules to which the same effect can be given as Article 101 TFEU in *Eco Swiss*.[139]

[138] Commission Recommendation 98/257; Council Resolution of 25 May 2000 on a Community wide network of national bodies for the extra judicial settlement of consumer disputes (2000) OJ C-155/1; Proposal for a Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC Directive on consumer ADR COM (2011) 793; Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) COM (2011) 794.

[139] Liebscher (2008) (n16) 557.

CHAPTER 5 — EU PUBLIC POLICY IN POST-AWARD REVIEW: A BROAD SCOPE CAPABLE OF UNDERMINING THE EFFECTIVENESS OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE EU

Introduction

The previous chapter explained that EU public policy in the domain of EU consumer protection enjoys a far greater scope than generally accepted in international commercial arbitration. One of the questions this chapter now seeks to answer is whether there is a risk that the trend observed in the domain of consumer protection be generalised to other branches of EU law. EU consumer protection is a very specific branch of EU law, with its own rules and mechanisms.[1] Until the ECJ has the opportunity to clarify this point through preliminary rulings in other fields of EU law, any definitive conclusion would be premature. The content of EU public policy will only become apparent progressively as national courts ask the ECJ whether a given norm of EU law enjoys public policy status.[2] Nevertheless, this chapter argues that the ECJ's 'unusually robust notion'[3] of public policy in the domain of consumer protection is likely to be adopted and generalised to other fields of EU law.

Section 1 first explains *how* the ECJ is capable of developing a broad notion of public policy. This section identifies the main criteria put forward by the ECJ in its rulings, and emphasises on the legal nature of the interests protected by EU public policy. However, these criteria (i.e. fundamentality and public interest) are incredibly vague. Hence, the ECJ may rely on them to construe EU public policy broadly if it wishes. It is further submitted in Section 2 that the ECJ has an incentive to define the scope of EU public policy broadly in order to guarantee the effective

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1 Camelia Toader, 'Chapter 1: EU Law and Consumer Arbitration' in Franco Ferrari (eds) *The Impact of EU Law on International Commercial Arbitration* (Juris 2017) 29.

2 See generally Hanna Schebesta, 'Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom' (2010) 4 ERPL 847.

3 George Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 Arb Int'l 397. See also Antoine Duval, 'The Court of Arbitration for Sport and EU law: Chronicle of an Encounter' (2015) 22(2) MJ 227ff.

application of EU overriding mandatory rules, and to ensure the primacy of EU law *vis-à-vis* the Member States. Under these circumstances, and as pointed out by Bermann, EU public policy cannot be assumed to have the exceptional character generally ascribed to it.[4] However, as explained in Section 3, the risk is to drastically undermine the effectiveness of international commercial arbitration in the EU. Thus, if a broad scope of EU public policy *prima facie* enhances the effectiveness of EU law, it may ultimately undermine the proper functioning of the internal market. It is therefore essential to find a balance in this dialectical relationship between private and public interests. If having the authority to determine the content of EU public policy is a crucial expression of the sovereignty of the EU, and ultimately lies with the CJEU and the EU legislator, this chapter contends that the different characteristics of EU public policy should be construed restrictively in order to maintain the effectiveness of international commercial arbitration in the internal market. Ultimately, the mission of balancing the broad scope of EU public policy with the effectiveness of international commercial arbitration is left to national courts. As a result, and as explained in Section 4, national courts are able to mitigate the broad scope of EU public policy by establishing that not every violation of a rule deemed essential to the functioning of the internal market automatically justifies the setting aside or absence of recognition and enforcement of the arbitral award.

1. The Absence of Clear Contours to EU Public Policy: Allowing a Broad Construction of the Exception

In general, the criteria establishing which rules of the forum's law form part of its public policy are rarely explicitly specified. The EU is no exception. A study of the CJEU judgments however reveals that there are strong indications that the borderline are the principles of fundamentality (Section 1.1), and public interest (Section 1.2). These criteria are however incredibly vague and can be, and

4 Bermann (n3) 420.

have been, broadly interpreted by the ECJ in its judgments, allowing the possibility of a broad construction of the public policy exception.

1.1. A Broad Interpretation of the Principle of Fundamentality

As a matter of principle, it is widely accepted in international commercial arbitration that public policy should be restricted to provisions that reflect the forum's fundamental principles, and from which no derogation can be allowed.[5] The EU appears *prima facie* no different. The ECJ in *Eco Swiss* insisted that Article 101 TFEU is a 'fundamental provision' which is to be regarded as 'essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.'[6] Similarly, in *Claro* and *Asturcom*, the ECJ emphasised that Article 6 Directive 93/13 is 'essential for the accomplishment of the tasks entrusted to the Community.'[7] This point is further highlighted in *Achmea* where the ECJ holds that 'in relation to commercial arbitration, the Court has held that […] the review of arbitral awards by the courts of the Member States [shall be] limited in scope, provided that the *fundamental provisions of EU law* can be examined in the course of that review.'[8] Similarly, AG Wathelet in *Gazprom* suggests placing an emphasis on whether the rules and values involved are among the 'principles that form part of the very foundations of the [EU] legal order'.[9] This approach is consistent with the letter and spirit of the New York Convention according to which, as a matter of principle, only the mandatory rules of the enforcement forum that reflect the forum's most fundamental concepts of morality and justice should be considered as part of its public policy.[10]

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5 Emmanuel Gaillard, John Savage et al (eds), *Fouchard Gaillard Goldman On International Commercial Arbitration* (Kluwer Law International 1996) 996.

6 *Eco Swiss*, paras 35, 36 and 40.

7 *Claro*, para 37; *Asturcom*, para 51.

8 *Achmea*, para 54. See also *Gazprom*, Opinion AG Wathelet, para 177.

9 *Gazprom*, Opinion AG Wathelet, paras 177, 181 ('shake the very foundations on which the EU legal order rests').

10 *Fouchard Gaillard Goldman* (n5) 996.

On the other hand, provisions that can be derogated from may not form part of EU public policy. In *Gazprom*, AG Wathelet considered that the prohibition of anti-suit injunctions in the context of the Brussels I Regulation does not form part of EU public policy.[11] He pointed out that since Article 23 of the Brussels I Regulation expressly provided that the parties may derogate from the rules on jurisdiction by choosing the courts of a Member State other than that which would have jurisdiction in application of the Regulation,[12] these rules are not mandatory and therefore cannot be considered to be a matter of public policy.[13] He concluded that 'a provision which is not mandatory cannot in any event be considered to be a matter of public policy.'[14] Hence, the mandatory nature of a EU law provision appears as a minimum criteria for its elevation as forming part of EU public policy. It is a well recognised principle that only (overriding) mandatory rules[15] can be characterised as public policy rules.[16] It is indeed difficult to consider that a rule forming part of the foundations of a legal order would not be mandatory.[17] However, this is not a high threshold to meet considering the overall mandatory nature of EU law.

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11 *Gazprom*, Opinion AG Wathelet, paras 180ff.

12 Ibid, para 183. Provided that the clause conferring jurisdiction is not contrary to Articles 13, 17 and 21 (i.e. jurisdiction in respect of insurance, consumer contracts and individual contracts of employment), and does not infringe Article 22 of the Brussels I Regulation [now Article 24 of the Brussels I Recast Regulation] (i.e. exclusive jurisdiction).

13 Ibid, paras 184-188.

14 Ibid, para 184.

15 The ECJ in its judgments on EU public policy in the context of post-award review only refers to 'mandatory provision' (*Eco Swiss*, para 36; *Claro*, paras 36-37; *Asturcom*, paras 30, 51) without ever distinguishing between the different sub-types of mandatory rules. Private international law however distinguishes between overriding mandatory rules (Rome I Regulation, Article 9(1)) and 'provisions which cannot be derogated from by agreement', so-called 'mere mandatory rules' (Rome I Regulation, Recital 37). Since mere mandatory rules can be limited, or even excluded, by party autonomy, it can be controversial to regard them as the expression of a fundamental policy of the forum. Instead, it is generally overriding mandatory rules that are deemed to reflect public policy. See e.g. Andrea Bonomi, 'Mandatory Rules in Private International Law. The quest for uniformity of decisions in a global environment' (1999) 1 YB Priv Int'l L 223; ILA, Recommendation 3(a).

16 UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article V(2)(b), paras 17-18. See also Bernard Hanotiau, Olivier Caprasse, 'Public Policy in International Commercial Arbitration' in Emmanuel Gaillard, Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 791ff.

17 *Gazprom*, para 184

The difficulty is that any specific policy pursued by a particular overriding mandatory rule may, with a broad construction, be seen as giving effect to a more general and fundamental principle of EU law, and therefore amounting to public policy. For instance, as explained previously in Chapter 4, Article 6 Directive 93/13 can be tied to Article 114 TFEU which requires the EU to ensure a 'high level' of consumer protection.[18] As a result, the ECJ in *Claro* and *Asturcom* held that this provision helps guarantee the vitality of the internal market by re-establishing the bargaining power in consumer contracts and ensuring due process during (court or arbitral) proceedings, and forms part of EU public policy.[19] This phenomenon is also well illustrated in *Ingmar GB Ltd v Eaton Leonard Technologies Ltd* ('*Ingmar*')[20] where the ECJ draw a direct parallel between Articles 17 and 18 of Directive 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents ('Directive 86/653') and Treaty objectives. This case is indirectly relevant to international commercial arbitration as it addresses the issue of overriding mandatory rules and their impact on choice of law agreements in international contracts. Yet, there are enough elements in the ECJ case law to suggest that the ECJ would, in all likelihood, qualify these provisions as forming part of EU public policy in post-award review if ever given the opportunity.[21]

In *Ingmar*, a commercial agent providing its services in the UK and Ireland, Ingmar GB Ltd, which concluded a contract in 1989 with a principal established in California, Eaton Leonard Technologies. The commercial agency contract was governed by the law of the State of California while no choice of court agreement was made.[22] Ignoring the choice of law clause, Ingmar instituted proceedings before the High Court of Justice of England and Wales seeking compensation

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18 TFEU, Article 169(1).

19 *Asturcom*, para 52; *Claro*, para 37.

20 C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Ltd* [2000] ECR I-09305 ('*Ingmar*').

21 Peter Schlosser, 'Arbitration and the European Public Policy', in *Arbitration and European Law, reports of the International Colloquium of CEPANI, April 25, 1997* (Bruylant 1997) 87 where he argues that Articles 17 to 19 form part of 'EU public policy'. See also Jan Engelmann, *International Commercial Arbitration and the Commercial Agency Directive* (Springer 2017); Jan Kleinheisterkamp, 'The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements' (2009) 3 World Arb Med Rev 105.

22 *Ingmar*, para 10.

under the English transposition of Article 17(3) Directive 86/653. Directive 86/653 establishes a mandatory regime which requires principals to either indemnify,[23] or compensate[24] self-employed commercial agents who provide their services in a Member State upon termination of the agency contract. Considering that under English law, effect is to be given to the applicable law chosen by the parties unless there is a public policy reason for not doing so, the Court of Appeal decided to submit a preliminary question to the ECJ to establish whether Articles 17 and 18 Directive 86/653 pertain to public policy.[25] The ECJ held that Articles 17 and 18 Directive 86/653, whose purpose is to protect commercial agents' freedom of establishment and the operation of undistorted competition in the internal market,[26] must be observed throughout all the EU if the Treaty objectives are to be attained.[27] They are 'essential for the Community legal order'.[28] Thus, the ECJ effectively qualified Articles 17 and 18 as overriding mandatory provisions[29] in the context of international contracts.[30]

In order to justify this qualification, the ECJ relied on the purpose of Directive 86/653, and held that 'apparent from the second recital in the preamble to the Directive, the harmonising measures laid down by the Directive are intended, *inter alia*, to eliminate restrictions on the carrying-on of the activities of commercial agents, to make the conditions of competition within the Community uniform',[31] and added that '[t]he purpose of the regime established in Articles 17 to 19

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23 Directive 86/653, Article 17(2).

24 Directive 86/653, Article 17(3).

25 *Ingmar*, para 13.

26 The reference to undistorted competition builds a parallel with *Eco Swiss*.

27 *Ingmar*, para 24. See also Case C−507/15 *Agro Foreign Trade & Agency Ltd v Petersime NV* [2017] ECL I-129, para 31 ('*Petersime*').

28 *Ingmar*, para 25.

29 *Ingmar*, paras 21-22. See Kleinheisterkamp (n21) 105; Natalya Shelkoplyas, *The Application of EC Law in Arbitration Proceedings* (Europa Law Publishing 2003) 64.

30 Confirmed in Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare* [2013] ECR I-663, paras 37-46; *Petersime,* paras 30-32.

31 *Ingmar*, para 23

of the Directive is thus to protect, for all commercial agents, […] the operation of undistorted competition in the internal market.'[32] As explained in its Recital 2, Directive 86/653 is based on the premise that harmonisation of Member States' laws on commercial agency will improve the conditions of competition within the internal market. It therefore finds its source in Article 100 EEC Treaty (now Article 117 TFEU).[33] There is no doubt that overriding mandatory provisions can be justified as a response to a distortion of competition law on the internal market. The ECJ and AG Léger even draw a parallel between EU competition law and the distortion of competition referred to in the Directive.[34] However, it is difficult to accept that a choice of law clause in an agency contract could distort competition in the internal market in such an important way as to justify the qualification of Articles 17 and 18 as overriding mandatory provisions. Hence, *Ingmar*'s holding lowers the bar to what may be deemed 'essential to the Community legal order'.[35]

Since the specific policy underlying any overriding mandatory rule can be tied to a Treaty provision, the risk is that an arbitral award which violates an EU overriding mandatory rule will systematically be refused recognition and enforcement as a matter of EU public policy.[36] Landolt goes as far as contending that all overriding mandatory rules of EU law must be subject to public policy protection.[37] Such reasoning should be avoided as it tends to expand the scope of public policy, and is difficult to reconcile with the ECJ's acknowledgement of a fundamental principle of

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32 *Ingmar*, para 24

33 Commercial Agency Directive, Preamble.

34 Stefan Grundmann, 'The structure of European Contract Law' (2001) EPLR 518. AG Léger also drew a parallel between the field of EU competition law and the distortion of competition as referenced in the Directive, Recital 2. *Ingmar*, Opinion AG Léger, para 27. EU however distinguishes between restriction and distortion of competition.

35 *Ingmar*, para 25. See Allen Green, Josh Weiss, 'Public Policy and International Arbitration in the European Union' (2011) 22 Am Rev Int'l Arb 670.

36 Ibid 661.

37 Phillip Landolt, 'Modernised EC Competition Law in International Arbitration' (2007) 23(1) Arb Int'l 82-83.

arbitration,[38] namely, that 'annulment of or refusal to recognise an award should be possible only in *exceptional circumstances*'.[39]

There is no doubt that the nature of overriding mandatory rules overlaps to a great extent with the concept of public policy.[40] Yet, many rules of EU origin are in fact mandatory, as the need to adopt new EU law provisions is generally triggered by the need for special protection. It is closely connected to the functioning of the internal market. Hence, not all overriding mandatory rules should be deemed fundamental to the functioning of the internal market.[41] Furthermore, not every element of a mandatory rule is of such importance that it may be relevant to public policy. Its underlying principles may be preserved even if its technical content was not, or inaccurately, applied. It is the underlying principles of a mandatory provision that may constitute public policy, not its technicalities,[42] as further explained in Section 3.

The decision whether an overriding mandatory rule which protects the functioning of the internal market is fundamental enough to form part of EU public policy is highly contextual.[43] Yet, the broad scope of EU law, combined with the fact that the ECJ may deem any branch of EU law essential to the functioning of the internal market, suggests that EU public policy is also capable of a broad application across EU law. This is difficult to reconcile with the narrow definition of public

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38 *Eco Swiss*, para 35; *Claro*, para 34. In that sense see Shelkoplyas (n27) 126ff: 'As was correctly pointed out by one of the commentators [Christoph Liebscher, 'European Public Policy - a Black Box?' (2000) 17(3) J Int'l Arb 73-88], if one tool this provision as a measuring stick to qualify rules as European public policy, practically any and all rules of EC law pertain to public policy'.

39 *Eco Swiss*, paras 35, 38; Christoph Liebscher, 'Chapter 23: EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects' in Gordon Blanke and Phillip Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International 2011) 810.

40 Hanotiau, Caprasse (n16) 791ff; Luke Villiers, 'Breaking in the "Unruly Horse": The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards' (2011) Australia Int'l LJ 179ff; Xandra Kramer, 'Chapter 9: EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration' in Ferrari (n1) 300.

41 Hanotiau, Caprasse (n16) 787, 791-794; Villiers (n40) 155.

42 Giuditta Cordero-Moss, 'Chapter 10: EU Overriding Mandatory Provisions and the Law Applicable to the Merits' in Ferrari (n1) 326. See also Giuditta Cordero-Moss, *International Commercial Contracts* (CUP 2014) 246. Luca Radicati di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23 Am Rev Int'l Arb 56-60.

43 E.g. Sacha Prechal, Natalya Shelkoplyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond (2004) 12 EPLR 589.

policy under the different international instruments and national laws. The criteria of fundamentality therefore hardly narrows down the scope of overriding mandatory provisions that may be considered as forming part of EU public policy.

1.2. Public Interest: an Essential Criteria, Broadly Interpreted

Besides being fundamental, it is submitted that EU law provisions that form part of EU public policy must also protect a public interest. AG Trstenjak in her Opinion in *Commission v Luxembourg* describes the scope of public policy as arising from 'mandatory rules from which there can be no derogation and which, by their *nature and objective, meet the imperative requirements of the public interest*.'[44] If this definition does not fully hit the mark, as it shifts the meaning of public policy to mere overriding mandatory rules, one may however concur with AG Trstenjak that, considering the overall mandatory nature of EU law, for public policy to be invoked there must be at the same time a public interest.[45] The reasoning of the ECJ in *van der Weerd* also confirms that a rule has to contain at least an element public interest in order to be regarded as forming part of public policy.

In *van der Weerd*, the ECJ ruled that the provisions of Directive 85/511 introducing Community measures for the control of foot-and-mouth disease[46] are not public policy rules, even though these provisions form part of the general public health policy. The ECJ justified this characterisation by pointing out that these provisions would have been put forward in the main

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44 Case C−319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2007] ECR I-04323, Opinion AG Trstenjak, para 44.

45 Alexander Bělohlávek, 'Public Policy and Public Interest in International Law and EU Law' (2012) Czech YB Int'l L 134. See also Prechal, Shelkoplyas (n41) 610. Olivier van der Haegen, 'European Public Policy in Commercial Arbitration: Bridge Over Troubled Water' (2009) 16 Maastricht J EUCL (2009) 459.

46 Council Directive 90/423/EEC of 26 June 1990 amending Directive 85/511/EEC introducing Community measures for the control of foot-and-mouth disease, Directive 64/432/EEC on animal health problems affecting intra-Community trade in bovine animals and swine and Directive 72/462/EEC on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat or meat products from third countries [1990] OJL 224, 13.

proceedings essentially to take into account the private interests of individuals who had been the object of measures to control foot-and-mouth disease.[47] Hence, in addition to the fundamentality of the EU norm in question, for it to be part of public policy, its function and purpose should not only be in the interest of the person directly affected.

Public interest here is understood as the opposite of private interest. Public interest can refer to society in general (e.g. environment protection, public health, public safety and public security, or the principle of non-discrimination), or to a local or group interest (e.g. the protection of the consumer, workers etc).[48] Public and private interests hence differ in that the circle of persons to whom the public interest is attributable remains undefined. A narrow definition of public policy would only encompass rules that are designed to order society in general, what the French courts have referred to as 'règles d'ordre public de direction', and not rules that are designed to protect the specific interests of a particular category of persons, also known as 'règles d'ordre public de protection'. However, that is not the approach adopted by the CJEU. In *Claro* and *Asturcom*, the ECJ referred to the nature and importance of the 'public interest' underlying the protection conferred to consumers in Directive 93/13. The ECJ saw a link between consumer protection against unfair terms and the objectives of the Treaties. It saw a public interest beyond the private interest of the consumer. According to the ECJ, and as previously explained in Chapter 4, consumer protection against unfair contract terms is not designed to directly satisfy the needs of a particular consumer but rather to ensure that consumers are enabled to participate to an inhibited internal

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47 *Van der Weerd*, para 32. The Court determined that a national court is not required to raise on its own motion arguments based on an alleged violation of Directive 85/511 governing measures to control foot-and-mouth disease.

48 Bělohlávek (n45) 121.

market.[49] This approach supports a broad understanding of public interest. Most mandatory rule may, with such a broad construction, be tighten to the protection of a public interest.

1.3. Intermediate Conclusion

This section identified criteria which allow a distinction between EU public policy provisions and 'ordinary' EU provisions. For a provision to form part of EU public policy for the purpose of post-award review, it has to be recognised as central to the achievement of a fundamental EU policy. This fundamentality is often expressed in the overriding mandatory nature of the provision. Besides, the aim of the provisions has to be the protection of a public interest. The difficulty is that the underlying policy or purpose pursued by any EU mandatory rule may, if broadly construed, be interpreted as giving effect to a more general principle deemed fundamental to the EU, and as defending the public interest of the EU. This may lead in turn to a high level of intervention in international commercial arbitration.

The decision whether an overriding mandatory rule is fundamental enough to form part of EU public policy is highly contextual.[50] The scope of EU law, combined with the possibility for any of its branches to acquire public policy status, suggests that the public policy exception, despite its emphasis on protecting fundamental norms, is capable of a broad application in the EU. This is difficult to reconcile with the narrow understanding of public policy in international instruments and national laws.

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[49] Kleinheisterkamp (n59) 92. This qualification is however controversial as it has been argued that the protective rule may be voluntarily abandoned by the protected party (in this case, the consumer). This conclusion often conflicts with a national concept adopted in the countries which prescribe to a breach of public policy absolute consequences such as an absolute invalidity or a similar effect. From this perspective, Article 6 sits uneasily with the distinction between mandatory rules and public policy. See Walter Doralt, 'The Optional European Contract Law and Why Success or Failure May Depend on Scope Rather than Substance' (2011) 11(9) Max Planck Priv L Research Paper. Martin Ebers, 'Unfair Contract Terms Directive 93/13', in Hans Schulte-Nölke, Christian Twigg-Flesner et al (eds), *EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States* (EU Law Publisher 2008) 241; Landolt (n16) 77-78; Liebscher (2008) (n16) 554. See Case C-429/05 *Rampion and Godard* [2007] ECR I-8017, Opinion AG Mengozzi.

[50] Prechal, Shelkoplyas (n41) 589ff.

2. The Temptation of a Broad Construction: EU Public Policy Performing a Different Function?

The absence of clear-cut criteria to distinguish EU provisions which form part of EU public policy, from those which do not, grants the ECJ great flexibility. It may decide to use this flexibility to either narrowly or broadly construe the public policy exception in the context of post-award review. So far, the ECJ has used this flexibility to define public policy broadly in the context of post-award review.[51] This section analyses the underlying rationale behind the ECJ's broad construction of EU public policy in the context of post-award review. It is submitted that the ECJ has a general incentive to entertain a robust conception of EU public policy since doing so guarantees the effective application of EU overriding mandatory rules and strengthens the effectiveness of EU law in the national legal orders. In the EU context, EU public policy therefore performs a distinctive function, and cannot be expected to have the exceptional character traditionally assigned to it in international private law. Bermann speaks of 'the two worlds of public policy' distinguishing the well-accepted narrow concept of public policy in international arbitration and contrasting it to the broad notion of EU public policy developed by the ECJ in its judgments.[52]

The temptation of adopting a broad scope of public policy can be understood through the separation between the EU legal system and arbitral tribunals. From the CJEU's perspective,

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[51] This approach can be contrasted to the ECJ's approach of public policy under the Brussels instruments. See e.g. Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ L 299, 44). See e.g. Case C-145/86, *Hoffmann v Krieg* [1988] ECR 645; Case C-7/98, *Krombach v Bamberski* [2000] ECR I-1935; Case-414/92, *Solo Kleinmotoren GmbH v Emilio Boch* [1994] ECR I-2237; Case C-38/98, *Renault v Maxicar* [2000] ECR I-2973; Case C-394/07, *Marco Gambazzi v Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company* [2009] ECR I-2563.

[52] Bermann (n3) 408.

arbitral tribunals constituted pursuant to an arbitration agreement[53] do not have the status of a 'court or tribunal of a Member State' within the meaning of the Treaties.[54] They are ultimately private tribunals 'entrusted to consider and settle disputes upon the wishes of the parties and in place of State courts',[55] and therefore too loosely connected with the established system of judicial protection in the Member States.[56] As a result, arbitral tribunals are not bound by the principle of sincere cooperation with the EU and its institutions,[57] nor by the principle of mutual trust, or State liability when they fail to give effects to provisions of EU law.[58] Perhaps more importantly, arbitral tribunals are also unable to directly refer preliminary questions to the CJEU when they are applying EU law provisions, and arbitrating parties do not benefit from the mechanisms of cooperation between national courts and EU institutions.[59] In this sense, the interface between the EU legal order and the international arbitral legal order is conceived as a 'downstream'[60] or a 'back-loaded'[61] system, in the sense that the mission of ensuring the compatibility of international arbitral awards

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53 The ECJ's position is different regarding arbitration arising from law rather than the will of the parties. E.g. Case C-109/88, *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening* [1989] ECR 3199; Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* [2014] ECR I-1754, para 29; Case C-555/13 *Merck Canada Inc* [2014] ECR I-92, paras 19-25.
The debate recently intensified regarding the admissibility of preliminary references from investment arbitral tribunals. In that regard see the controversial Opinion of AG Wathelet in *Achmea* who considered the arbitral tribunal constituted under the ISDS mechanism of Article 8 of the Netherlands-Slovakia BIT as 'established by law' (para 134). This position was however rejected by the CJEU. See also *Electrabel S.A. v The Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, para 4.112.

54 *Nordsee*, para 10. According to settle case-law, in order for a judicial body to qualify as a 'court or tribunal' for the purpose of Article 267 TFEU certain factors, such as 'whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent', must be taken into account. See also Case C−394/11 *Belov* [2013] ECR I-48, para 38; *Ascendi*, para 23; Case C−203/14, *Consorci Sanitari del Maresme* [2015] ECR I-664, para 17.

55 *Ascendi*, Opinion AG Szpunar, para 24.

56 *Nordsee*, paras 10-13. Detailed consideration of the factors militating against allowing orders for reference from courts of arbitration was undertaken by AG Reischl in his Opinion in *Nordsee*.

57 TEU, Article 4(3).

58 On state liability see Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239 ('*Köbler*').

59 *Nordsee*, para 10. See also *Eco Swiss*, para 34, Case C-125/04 *Denuit and Cordenier* [2005] ECR I-923, para 13; *Gazprom*, para 36; *Achmea*, para 37. See also Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014 [2014] ECR I-2454, para 176.

60 *Genentech*, Opinion AG Wathelet, paras 59-60 referring to a 'downstream' system of review.

61 Paschalis Paschalidis, 'Arbitral tribunals and preliminary references to the EU Court of Justice' (2017) 33 Arb Int'l 664.

with EU law, usually through the public policy ground, whether in the context of an action for annulment,[62] or an action against recognition and enforcement,[63] is entrusted to national courts, not to arbitral tribunals.[64] By contrast, the system of mutual trust of the Brussels I Recast Regulation is the exact opposite. It operates as an 'upstream'[65] or 'front-loaded system'[66] where national courts must (almost) automatically recognise and enforce judgments rendered by another national court, and where public policy is construed very narrowly.[67] It is 'upstream' in the sense that it is the mission of the national court first seized to uphold EU law, not of the national court where recognition and enforcement is sought.[68] The rationale here is that the national court can, if necessary, submit a reference to the ECJ for a preliminary ruling, and has sufficient domestic remedies to guarantee the effectiveness of EU law.

Arbitral tribunals may apply EU law but do not have the tools to secure its full effect, nor are they compelled to guarantee its effectiveness.[69] Besides, some voices within the ECJ have not hesitated to express doubts about the neutrality of arbitrators. AG Trstenjak in *Asturcom* for example expresses (controversial) doubts regarding the independence and neutrality of arbitrators, 'serious doubts would remain as to whether an arbitrator can always be regarded as independent and neutral, especially since an arbitrator may possibly have a personal interest in maintaining the arbitration clause on which he is required to adjudicate.'[70] As a result, she concludes that only national courts can fully guarantee the 'judicial impartiality required in a State governed by the rule

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62 E.g. *Eco Swiss*, *Genentech*, *Claro*.

63 E.g. *Gazprom*; *Asturcom*.

64 *Genentech*, Opinion AG Wathelet para 60; Paschalidis (n62) 663ff.

65 *Genentech*, Opinion AG Wathelet para 60.

66 Paschalidis (n62) 664.

67 Brussels I Recast Regulation, Article 45(1)(a). See e.g. *Renault v Maxicar*, paras 33–34.

68 Paschalidis (n62) 664.

69 See Chapter 7.

70 *Asturcom*, Opinion AG Trstenjak, para 66.

of law.'[71] If questioning the independence and impartiality of arbitral tribunals is very controversial and substantiated only on very rare occasions,[72] what is certain is that even when arbitrators decide to apply EU law, they may err in several ways when applying it. They may misinterpret it, reach a wrong conclusion regarding its breach, ignore its supremacy, or deprive EU law of its *effet utile*.[73] From a EU law perspective, arbitration may therefore pose a potential threat to its integrity and autonomy, and to its application. Since arbitral tribunals are not treated as part of the EU justice system, the only point of control is the moment when national courts are seized of the challenge or the recognition and enforcement of an arbitral award.[74] This situation has important repercussions on the role of national courts, as explained in Chapter 6, but it is also an important background element to understand the ECJ's approach regarding the content of EU public policy in the context of post-award review. If post-award review is the only stage where a preliminary ruling may be requested from the ECJ, it is also the only stage where the effective application of EU public policy may be guaranteed. National courts are indeed bound by the principle of effectiveness of EU law, contrary to arbitral tribunals. In this context, the risk is for the public policy mechanism to be used as a device to ensure the compliance of arbitral awards with overriding mandatory rules of EU law, not only with EU public policy.[75] For these purposes, the ECJ would have reasons to embrace a particularly robust concept of EU public policy. Hence, there might be a certain disingenuousness in the qualification of a EU law provision as forming part of EU public policy.[76] In this context, public

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71 Ibid.

72 Rare examples include French CCass, 24 March 1998, *Soc Excelsior Film TV v Soc UGC-PH*, n°95-17.285 (dispute involving two parallel arbitrations between the same parties. One of the arbitrators, who was sitting in both tribunals, provided false information to one tribunal which impacted that tribunal's decision on jurisdiction); Swiss District Court of Affoltern am Albis, 26 May 1994 (1998) XXIII YB Com Arb 754, paras 18ff (one of the parties' counsel inserted a provision in the contract appointing himself as the sole arbitrator should a dispute arise between the parties).

73 Markus Burgstaller, 'Chapter 19: European Law Challenges to Investment Arbitration' in Michael Waibel (eds) *The backlash against investment arbitration* (Kluwer Law 2010) 472

74 Christoph Liebscher, 'Chapter 23: EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects' in Blanke, Landolt (n37) 803.

75 Van der Haegen (n46) 456.

76 Green, Weiss (n33) 675.

policy would not be presumed to have the exceptional quality generally assigned to it in private international law.[77]

Besides, as previously explained in Chapter 2, the broader the concept of EU public policy, the stronger EU law's effectiveness becomes within the national legal orders. Indeed, EU public policy also emphasises the importance of EU law *vis-à-vis* the law of the Member States.[78] Hence, in the EU context, public policy may carry other functions than the ones traditionally ascribed for the purpose of post-award review. As a result, and for these reasons, its scope may be broader since it is put to a different set of purposes.[79] If this approach can be envisioned from a EU's perspective, it is necessary to recall that public policy is a safety valve that should only protect the most fundamental values of a legal system. It is not a mechanism that was developed to ensure the application of the overriding mandatory rules of the forum to the arbitral award.[80] Such reasoning can only jeopardise the finality of arbitral awards and the effectiveness of arbitration in the EU.

3. Consequences and Dangers of a Broad Construction of EU Public Policy

The authority to determine whether a EU law provision forms part of EU public policy is a crucial expression of the sovereignty of the EU. As such, it ultimately lies with the CJEU, but also with the EU legislator. As pointed out by Weatherill, it is the Court's choice and, as such, 'critic will be still more vexed by appreciation that the areas in which the Court will be prepared to expect intervention are not closed and much will depend on the Court's future approach'.[81] However, if the content of

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77 Bermann (n3) 420. This underlying problem is well illustrated in AG Saggio's Opinion in *Eco Swiss*, para 35, where he held that '[b]y allowing awards to be annulled on the ground that they are unlawful only in highly exceptional cases, the Netherlands provisions do not allow the national courts - and in the final analysis, through them, the Court of Justice - to supervise arbitration awards in an adequate manner.'.

78 Bermann (n3) 419.

79 Ibid 419ff.

80 See Georges Bermann, 'Reconciling European Law Demands with the Demands of International Arbitration' (2011) 34(5) Fordham In'l LJ 1211 where he highlights the dangers resulting from an exaggeratedly broad notion of public policy.

81 Stephen Weatherill, *Principles and Practice in EU Sports Law* (OUP 2017) 34.

public policy is overly broadly construed, it is submitted that it would undermine the principle of finality of arbitral awards, the principle of *res judicata*, and ultimately one of the main appeal of international commercial arbitration for the parties, namely, the ease of recognition and enforcement of an arbitral award.[82] This, it is argued, could deter parties from choosing Member States as their seats, and even from doing business with EU nationals since the recognition and enforcement of an arbitral award rendered against a EU national is likely to be sought before national courts (i.e. this depends on the localisation of the assets of the losing party). Ultimately, a broad concept of EU public policy may have an economic impact on the internal market as explained below.

First, a broad conception of EU public policy increases the likelihood of annulment of an award at the seat when it is located in a Member State. Parties can avoid this drawback by a simple expedient: choosing a seat in a non-Member State. This would decrease (if not eliminate) the likelihood of the arbitral award being set aside under the ground of EU public policy. For instance, in the Swiss case, *Terra Armata v Tensacciai*, the losing party sought to have the award annulled on the basis of its alleged incompatibility with Article 101 TFEU. It argued that the violation of this fundamental EU provision rendered the award contrary to public policy within the meaning of Article 190(2)(e) of the Swiss Private International Law Act ('PILA'). However, and even though it was considered a public policy issue in the EU, the Swiss Supreme Court rejected the demand of annulment.[83]

If parties were to increasingly choose their seats in non-Member States, not only would it undermine the protective goal of EU public policy; it may also economically impact the internal market. Indeed, arbitration generates a variety of economic activities. Arbitration proceedings may require the use of local counsels, experts, and arbitrators bringing benefits to the local legal services

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[82] The enforceability of arbitral awards continues to be perceived as arbitration's most valuable characteristic according to the 2018 Queen Mary's University Survey, 6.

[83] Bart Volders, Valentin Rétornaz, 'Challenging an Arbitral Award for Infringement of Competition Law: The Terra Armata Decision of the Swiss Federal Tribunal of 8 March 2006' (2006) 8 YPIL 307.

community, but also to specialised services (e.g. translation and interpretation services) in the case of international arbitration. Besides, non local counsels, experts, and arbitrators will have to travel to the hearing location (usually at the seat). They will therefore spend on accommodation, food, and transport. Additionally, beyond local legal support, the proceedings require local services and venues. Hence, the potential impact of the choice of seat on the local economy can be significant not only on the local legal industry but also on other industries such as the local hospitality industry.[84] An overly broad concept of EU public policy may deter parties from choosing to have their seat in a Member State and therefore directly impact the economy of the internal market.[85]

Second, by broadening the scope of public policy, the CJEU weakens the effectiveness of international commercial arbitration which is widely considered as an indispensable means to facilitate business transactions within the internal market. It signals to the international community a problematic degree of economic protectionism in the EU which may make the prospect of contracting with EU nationals less appealing.[86] Besides, the overuse of the public policy exception also threatens the international commercial arbitration regime in the EU as it encourages losing parties, unhappy with the outcome of the arbitration, to rely on that ground to challenge the arbitral award. As pointed out by Mayer and Sheppard, 'perceived uncertainty and inconsistency concerning the interpretation and application of public policy by State courts has encouraged losing parties to rely on public policy to resist, or at least delay, enforcement.'[87] This, it is argued, undermines some

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84 No study to my knowledge assesses the economic impact of arbitration on the Member States. However, an interesting study of 2012 on the city of Toronto estimates that the total impact of arbitration on the economy of the City of Toronto to be $256.3 million in 2012, growing to $273.3 million in 2013. Study available at: https://www.crai.com/sites/default/files/publications/Arbitration-in-Toronto-An-Economic-Study.pdf, 27 (last accessed 1 March 2019). Since Toronto is far from being a popular seat (i.e. it does not appear in the 10 most popular seats in the 2018 QMUL University Study, contrary to London (1st), Paris (2nd), or Stockholm (7th)) it is possible to conclude that international arbitration in the EU is a multi billion dollar industry.

85 Member States however have means to mitigate these drawbacks. Some Member States have not hesitated to develop accommodation strategies which limit the impact of the broad concept of EU public policy. These accommodation strategies, and whether they are compatible with the principle of effectiveness of EU law, are studied in Chapter 6.

86 Green, Weiss (n33) 660.

87 Pierre Mayer, Audley Sheppard, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (2003) 19 Arb Int'l 254.

of the original benefits of arbitration (e.g. reduced costs, the finality of arbitral awards, the facilitation, and reliability of recognition and enforcement through the pro-enforcement system of the New York Convention).[88] Hence, the broad construction EU public policy may have repercussions not only on the effectiveness of the international arbitration regime but also on international commerce within the internal market. It is therefore essential for the ECJ to embrace a narrow(er) scope of EU public policy which would not undermine the efficiency of international arbitration. It could do so by simply interpreting the different criteria identified in Section 1 more narrowly than it currently does.

4. Mitigating the Broad Scope of EU Public Policy by Taking into Account the Nature of the Breach

Since the ECJ has not directly addressed the point at which a violation of a EU public policy rule attracts judicial review during post-award proceedings under the ground of public policy, the task of balancing the demands of EU law with the effectiveness of international commercial arbitration is left to national courts.[89] On the one hand, national courts could consider that every failure to comply with a substantive mandatory rule of EU law which has been identified as reflecting EU public policy (e.g. misapplication of the rule, arbitral awards which adopt an understanding different from the ECJ's albeit not incompatible with it) amounts to a breach of EU public policy. In such a case, the absolute effectiveness of EU law prevails over the principle of finality of arbitral awards. On the other hand, national courts could also consider that only certain violations, particularly serious, amount to a breach of EU public policy for the purpose of post-award review. This approach allows national courts to cope with the pressure that the broad notion of EU public policy has placed on the effectiveness of international arbitration in the EU. Taking into account the nature of the breach of a

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88 Andrew Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules' (2000) 49 Duke L J 1285-88.

89 Bermann (n3) 398.

EU public policy rule can be seen as a strategy to allow national courts to relax the demands of the EU legal order to accommodate the demands of international arbitration.[90] The question whether the ECJ will accept the loosening of EU public policy that is inherent to this approach, and to what extent, remains unanswered. In the silence of the ECJ, it is unclear whether there is a margin of tolerance to recognise that every violation of a EU public rule should not be automatically sanctioned.

This section aims to establish that not every violation of a rule deemed essential to the functioning of the internal market violates EU public policy for the purposes of post-award review. It is first submitted, in Section 4.1, that the recognition and enforcement of the arbitral award needs to create an effective and concrete violation of EU public policy to be sanctioned. This is uncontroversial. As a corollary, as explained in Section 4.2, every error of application or every failure to take into consideration a EU public policy rule will not automatically violate EU public policy. Finally, Section 4.3 examines whether, besides being effective and concrete, the breach also has to be serious in order to be sanctioned in post-award review under the ground of public policy. If only serious breaches of EU public policy rules amount to a breach of EU public policy for the purpose of post-award review, the ECJ's broad interpretation of the content of EU public policy could be mitigated. Hence, taking into account the seriousness of a breach of a EU public policy rule would allow national courts to relax the demands of the EU legal order. However, it is argued that there is insufficient support in EU law and the ECJ case law to consider that only serious infringements of fundamental provisions of EU law amount to a breach of EU public policy. On the contrary, such an approach could be seen as jeopardising the principle of effectiveness of EU law.

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[90] Ibid 398 where Bermann refers to 'accommodation techniques' which can be defined as strategies 'whereby one or both of two competing legal orders relaxes its demands sufficiently to accommodate the demands of the other.'

4.1. Uncontroversial Criteria: an Effective and Concrete Breach of EU Public Policy

In the silence of EU law and the ECJ, national courts will have to work out for themselves the point at which an arbitral award will be set aside or not enforced because of a breach of a EU public policy rule. However, as explained in Chapter 2, the procedural autonomy of the Member States finds its limits in the principle of effectiveness of EU law.[91] The principle of effectiveness[92] mandates that the procedural rules of Member States should not make it too difficult or impossible to exercise the rights conferred by EU law.

Few national courts have explicitly addressed the nature of a breach of EU public policy. One of the rare exception is the French courts which established a clear standard of review in respect of the public policy ground in *SA Thalès Air Défense v GIE Euromissile* (‘*Thalès v Euromissile*’)[93] and *Sté SNF v Sté Cytec Industries BV* (‘*SNF v Cytec*’).[94] The French Supreme Court established, in both cases, that the ‘control should be limited to the flagrant, effective and concrete nature of the alleged violation’. The words ‘flagrant, effective and concrete’ deserve a word of explanation. ‘Flagrant’ does not refer to the nature of the breach but rather to the scope of post-award review.[95] Since the scope of review is the object of Chapter 6, the impact of the requirement of flagrancy on post-award review will be addressed in the following chapter.[96] However, the adjectives ‘effective and concrete’ refer to the nature of the breach of public policy

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91 It also finds its limits in the principle of equivalence which is however not relevant in this section. On the principle of equivalence see Chapter 2, Section 3.2, pp. 47-56.

92 TEU, Article 5(3).

93 Paris CA 18 November 2004 [2005] Rev Arb 757.

94 The arbitral award in *Cytec* led to proceedings before two jurisdictions in parallel: before, the French courts where Cytec sought enforcement of the arbitral award against SNF, and before the Belgium courts, courts of the seat of the arbitration, where SNF sought annulment of the arbitral award. For the proceedings before the French courts see Paris CA 23 June 2006 (2007) 32 Rev Arb 100 which was confirmed in Cass civ, 4 June 2008 (2008) Com 518.

95 Yves Derains, ‘Chronique de jurisprudence française: SA Gallay v. Société Fabricated Metals Inc,’ (2001) Rev Arb 815–16, translation from Caroline Duclerq and Talel Aronowicz, ‘When French Judges Confirm the Expansion of their Control over Arbitral Awards’ (2018) YAR 74.

96 Chapter 6, Section 3.1, pp. 176ff. Similarly, the new requirement of a ‘manifest’ breach is addressed in Chapter 6, Section 3.1.

and are therefore studied in this section. It is submitted that the requirement of an 'effective and concrete' breach of EU public policy is uncontroversial[97] and summarises the approach adopted in other jurisdictions.

To be effective, the violation of public policy must translate into an action which is contrary to public policy.[98] A breach will be ineffective if an arbitral tribunal fails to consider a rule of public policy which ultimately has no impact on the outcome of the award.[99] For instance, in the context of EU competition law, it has been argued that EU public policy would not in principle be breached if the arbitral tribunal awards damages for a past conduct, when the alleged breach of EU competition law has stopped.[100] It appears logical that once the anticompetitive agreement has been declared null and void, the anticompetitive behaviour has ceased. The arbitral award then does not effectively violate public policy even if it awards damages on the basis of the annulled contract.[101] It is uncontroversial that there can only be a breach of public policy if the arbitral award imposes the perpetuation of a behaviour which adversely undermines the essential principles of the forum.[102] Similarly, in the field of commercial agency,[103] if an arbitral award does not recognise the post-termination compensation of the commercial agent under Directive 86/653 but ensures her protection (e.g. by increasing the rate of commission) there is no effective breach of EU public

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97 See in general Luca Radicati Di Brozolo, 'Chapter 22: Court Review of Competition Law Awards in Setting Aside and Enforcements Proceedings' in Blanke, Landolt (n37) 755.

98 Derains (n93) 805, 815–16.

99 Ibid. Derains refers to this principle as 'théorie de l'équivalence' or 'equivalence theory'.

100 Radicati di Brozolo (2011) (n23) 776; Pierre Mayer, 'L'étendue du contrôle, par le juge étatique, de la conformité des sentences arbitrales aux lois de police' in *Mélanges Gaudemet Tallon* (Paris 2008) 459; Christophe Seraglini, 'Observations' (2008) JCP, 166.

101 Radicati di Brozolo (n23) 775. This is the exact opposite of the Brussels Court of First Instance's decision in *SNF v Cytec*. However, there is arguably a case where the amount of damages awarded may not be immaterial from the perspective of public policy: State aid. If the amount of damages corresponds to the amount a party, usually the investor, would have received from the Member State if the illegal scheme had not been terminated, the amount of damages are per se State aid. The award that simply awards damages in such a case perpetuates an anticompetitive behaviour and therefore breaches EU public policy. See e.g Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award *Micula v Romania* of 11 December 2013 [2015] OJ L 232/43. See Paschalis Paschalidis, 'International Investment Law and EU Law: Are There Systemic Conflicts and Incompatibilities?' (2018) 11 IAI Series 92ff.

102 See Mayer (2008) (n98) 459; Seraglini (2008) (n98) 166; Radicati di Brozolo (n23) 776.

103 As discussed in Chapter 5, Section 1.2, pp. 136ff.

policy.[104] Hence, 'effectiveness' inevitably necessitates a value judgment from the national court engaged in post-award review.[105]

Further, to be concrete, the breach of public policy must lead to a solution that is materially incompatible with the rule.[106] It is not the abstract rule of law applied by the arbitral tribunal which must be measured against the requirements of public policy, but the solution given to the dispute.[107] The recognition and enforcement of the award can only be denied if the enforcement of that solution violates public policy.[108] The review should therefore only bear on the compatibility of the effect of recognition and enforcement of the award with public policy. It is not the role of the enforcing court to re-examine the findings of the arbitral tribunal and substitute its own conclusions to the arbitrators' findings.[109] The reviewing court must only consider whether the enforcement of the arbitral award would produce a result that violates public policy.[110] This is not to say, however, that only the operative part of the arbitral award is examined, as explained in the following chapter. Legal scholars, even the ones who favour a broad scope of judicial review of arbitral awards,[111] agree that the compatibility of the recognition and enforcement of the arbitral award with public

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104 For similar remarks, see Francesca Ragno, 'Chapter 6: Are Overriding Mandatory Provisions an Impediment to Arbitral Justice?' in Ferrari (n1) 174; Stefan Kröll, 'The "arbitrability" of disputes arising from commercial representation' in Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 347.

105 Engelmann (n21) 243.

106 Derains (n93) 815–816; Cordero-Moss (2014) (n40) 247. Radicati di Brozolo (2012) (n40) 60.

107 Paris CA, 27 October 1994, *Lebanese Traders Distributors & Consultants LTDC v. Reynolds* (1994) Rev Arb 713; Paris CA, 6 December 2007, *Aimery de Y v Trioplast*, case n° 06/4016. See also *Fouchard Gaillard Goldman* (n5) para 1649.

108 Gary Born, *International Commercial Arbitration* (2nd ed, Kluwer 2014) 3667ff. See e.g. Paris CA, 23 June 2006, *SNF v Cytec* (2007) 32 YB Com Arb 287.

109 Ibid 283–284, 286–287. See also Gaillard, Di Pietro (n16) 805.

110 See Shelkoplyas (n27) 311. For a similar formulation, see Christophe Seraglini, *Lois de police et justice arbitrale internationale* (Dalloz 2001) 206.

111 In favour of the maximalist view see: Christophe Seraglini, 'L'affaire Thalès et le non-usage immodéré de l'exception d'ordre public' (2005) 2 Cahiers de l'arbitrage 5; Hanotiau, Caprasse (n16) 787; Philip Landolt, 'Limits on Court Review of International Arbitration Awards Assessed in Light of States' Interests and in particular of EU Law Requirements' (2007) Arb Int 63. For a re-reading of the maximalist position in a more moderate light, see Mayer (2008) (n98) 459; Christophe Seraglini, 'Le contrôle de la sentence au regard de l'ordre public international par le juge étatique: mythes et réalités' (2009) Cahiers de l'arbitrage 5.

policy must be controlled with regard to the situation at hand in order to establish whether the enforcement of the arbitral award effectively jeopardises the objectives goals of EU public policy.[112]

Hence, the necessity to demonstrate that the breach of public policy is effective and concrete appears uncontroversial.[113] The only relevant considerations are the consequences that the recognition or enforcement of the arbitral award might have on the territory of the State where enforcement is sought.[114]

4.2. Mere Error or Failure to Apply EU Public Policy Rules: Not Automatically Violating EU Public Policy

As a corollary to the effective and concrete nature of a breach of EU public policy, it is widely accepted that an incorrect, or even the non-application of a public policy provision by an arbitral tribunal[115] is not, by itself, sufficient to lead to a breach of public policy.[116] In other words, public policy is not aimed at ensuring the correct application of the details of a provision deemed fundamental to the forum, but to make sure that the interests protected by that fundamental rule are safeguarded.[117] It is only in some exceptional circumstances that the arbitrators' erroneous application or failure to apply a EU public policy rule may produce damaging legal effects of such a magnitude that it amounts to a breach of EU public policy. Many courts have consistently adopted

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112 Cordero-Moss (2014) (n40) 247. Radicati di Brozolo (2012) (n40) 60.

113 See in general Luca Radicati Di Brozolo, 'Chapter 22: Court Review of Competition Law Awards in Setting Aside and Enforcements Proceedings' in Blanke, Landolt (n37) 755.

114 Pierre Lalive, 'Absolute Finality of Arbitral Awards' (2008) 1 Rev Int'l Arb 114.

115 See Assimakis Komninos, Markus Burianski, 'Arbitration and Damages Actions Post-White Paper: four common misconceptions' (2009) GCLR 27.

116 See Seraglini (2009) (n109) para 31.

117 Cordero-Moss (2014) (n40) 246. Radicati di Brozolo (n22) 56-60.

this view,[118] and so have commentators.[119] Yet, the ECJ's willingness to endorse this approach cannot be taken for granted.[120] The ECJ stated in *Eco Swiss* and in *Claro* that:

> where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on *failure to observe* national rules of public policy, it must also grant such an application where it is founded on *failure to comply* with [EU law rules of this type].[121]

If this statement relies on an inaccurate interpretation of domestic procedural law,[122] it demonstrates that the ECJ might consider the failure to apply a EU public policy rule sufficient to deny recognition and enforcement to an arbitral award.

On the other hand, the ECJ in *Renault v Maxicar* recognised that a mere error in the application of a EU public policy rule does not always prevent enforcement.[123] This case is however only relevant in an indirect way since it was rendered in the context of the recognition of a judgment under the Brussels Convention.[124] In *Renault v Maxicar*,[125] Maxicar, an Italian company,

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[118] See e.g. *SNF v Cytec Industries BV* (2008) 34 YB 489; OLG Wien (Austria), 27 November 2013, docket no. 2 R 187/13d; Landgericht Zweibrücken (Germany), 11 January 1978 (1979) IV YB Com Arb 263; Brussels CA, 24 January 1997, *Inter-Arab Inv Guarantee Corp v Banque Arabe et Internationale d'Investissements*, (1997) XXII YB Com Arb 666; Luxembourg CA, 28 January 1999 (1999) XXIVa YB Com Arb 714; English Court of Appeal, *Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH v Ras Al-Khaimah Nat'l Oil Co* [1987] 2 All ER 779; OLG Brandenburgisches (Germany), 2 September 1999 (2014) XXIX YB Com Arb 699. See more generally Born (n106) 3667ff, and the references therein.

Contra Brussels TPI, 8 March 2007, *SNF SAS v Société Cytec Industrie* [2007] 2 Rev Arb 303 (overturned in Brussels CA, 22 June 2009, *SNF v Cytec* (2009) Rev arb 574).

[119] Born (n106) 3667ff; Karl-Heinz Böckstiegel, Stefan Kröll, Patricia Nacimiento, *Arbitration in Germany, The Model in Practice* (2nd ed, Kluwer Law International 2014) 452; Christian Borris, Rudolf Hennecke, 'Article V General' in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary* (Hart 2012) 239; Herbet Kronke, *Introduction: The New York Convention Fifty Years on: Overview and Assessment*, in Herbert Kronke et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 8ff; Pierre Mayer, 'La sentence contraire à l'ordre public au fond' (1994) Rev arb 621; Alexis Mourre, Luca Radicati di Brozolo, 'Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back' (2006) 23 J Int'l Arb 172; Emmanuel Gaillard, George Bermann, *Guide sur la Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères (New York, 1958)*, (Pedone 2017) 155.

[120] Berman (n3) 427.

[121] *Eco Swiss*, para 37; *Claro*, para 35.

[122] See Chapter 2, Section 3.1, pp. 42ff.

[123] Bermann (n3) 427.

[124] *Renault v Maxicar* was rendered under the Brussels Convention, however this approach remains applicable under the Brussels I Regulation and the Brussels I Recast Regulation. The reference to the 'Brussels instruments' encompasses these three instruments.

[125] *Renault v Maxicar*.

had been sued in France by Renault, for having manufactured and marketed body parts for Renault vehicles in Italy. The Dijon Court of Appeal ruled in favour of Renault and declared Maxicar guilty of forgery under French IP law. Renault sought to enforce the judgment before the Italian courts. Maxicar opposed Renault's application under Article 27(1) of the Brussels Convention [Article 45(1)(a) of the Brussels I Recast Regulation], arguing that the award breached fundamental provisions of EU law on free movement of goods[126] and abuse of dominant position.[127] The ECJ concluded that a national court cannot refuse recognition of a decision 'solely on the ground that it considers that national or Community law was misapplied' and an error of law such as that alleged in the case referred to it 'does not constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought.'[128] Hence, the ECJ made clear that the refusal to enforce or recognise a judgment under the ground of public policy cannot solely be based on a discrepancy between the legal rule applied by the national court which issued the judgment and the way the national court where enforcement is sought would have applied it,[129] even when the alleged error concerns a fundamental rule of EU law.[130] This principle was later confirmed in *Diageo Brands*,[131] which dealt with the recognition of a Bulgarian judgment before the Dutch courts.[132]

Yet, the EU's perception of the function of public policy under the Brussels instruments and under the New York Convention may differ. The Brussels I Recast Regulation, as did its

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126 Article 28 EC, now Article 28 TFEU.

127 Article 82 EC, now Article 102 TFEU.

128 *Ibid*, paras 33-34

129 *Ibid*, para 29

130 *Ibid*, para 32

131 *Diageo Brands*, para 68.

132 The Dutch court considered refusing the judgment, because the Bulgarian court had incorrectly applied a rule originating from Article 5(3) of First Council Directive 89/104/EEC of 21 December 1988 to harmonise the laws of the Member States relating to trademarks.

predecessors,[133] is designed to bind only Member States. It operates between countries whose laws have been substantially harmonised and whose cultural and social environments are presumed to be sufficiently similar to expect their public policy to be comparable. Pursuant to Article 2 TEU, the EU is founded on a set of common values which are shared between Member States. Using the words of the CJEU in *Achmea*: '[this] premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected.'[134] A narrow control of manifest violations might therefore suffice. It is clear from the ECJ's consistent jurisprudence that Article 45(1)(a) of the Brussels I Recast Regulation (i.e. public policy as a ground justifying the absence of recognition and enforcement in a Member State of a judgment originating from another Member State) must be interpreted strictly.[135] On the other hand, arbitral tribunals are not 'courts or tribunals of a Member State' and as such cannot benefit of the advantages and the facility of recognition and enforcement of judgments under the Brussels I Recast Regulation.[136] As a result, AG Szpunar proposes in her *Diageo Brands*' Opinion that the public policy exception should be applied less strictly in the case of decisions of national courts than in the case of arbitral awards.[137] She explains that such a distinction is justified since national courts are subject to the system of judicial protection established by EU law, contrary to arbitral tribunals.[138]

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[133] Brussels I Regulation and Brussels Convention.

[134] *Achmea*, para 34. The principle of mutual trust is expressed in the harmonisation of the rules on jurisdiction of the courts (i.e. Brussels instruments).

[135] See e.g. *Solo Kleinmotoren*, para 20; *Krombach*, para 21; *Renault v Maxicar*, para 26; *Apostolides*, para 55; Case C-139/10, *Prism Investments BV v Jaap Anne van der Meer* [2011] ECR I-09511, para 33. See also Hélène Gaudemet-Tallon, 'De la définition de l'ordre public faisant obstacle à l'exequatur, Cour de justice des Communautés européennes — 11 mai 2000, Régie nationale des usines Renault SA c. Mexicar SpA et Orazio Formento' (2000) Rev crit DIP 497.

[136] Brussels I Recast Regulation, Article 1(2)(d) and Recital 12.

[137] *Diageo Brands*, Opinion AG Szpunar, para 54. See also Maciej Szpunar, 'Chapter 4: Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU' in Ferrari (n1) 104.

[138] Ibid. See also Stéphanie Francq, 'Article 34' in Ulrich Magnus and Peter Mankowski (eds), *Brussels I Regulation* (Sellier 2007) para 570.

Hence, the ECJ's reasoning in *Renault v Maxicar* and *Diageo Brands* cannot be transferred *per se* to post-award review since both judgments were motivated by fostering the 'free movement of judgments' and limiting the power of national courts in that regard.[139] In *Renault v Maxicar*, the Italian court was effectively relying on public policy to evade its obligation to recognise the French judgment. The ECJ, in order to foster the free movement of judgments, clearly had an interest in admonishing the Italian court to respect its obligations under the Brussels Convention, and also had the jurisdiction to do so.[140] On the other hand, the recognition and enforcement of arbitral awards is not tied to any EU law instrument but to international conventions, such as the New York Convention or the UNCITRAL Model Law, where the ECJ lacks interpretative powers.[141] Consequently, as Engelmann points out 'the arguments in favour of leniency in respect of a [national] court's decision do not hold the same currency in respect of arbitral awards'.[142] Accordingly, it is questionable whether the ECJ's position in *Renault v Maxicar* is indicative of EU public policy's application during post-award review.[143]

There might be concerns that the ECJ would refuse to give EU public policy the same scope in the context of recognition and enforcement of arbitral awards under the New York Convention.[144] The question arises because tolerating errors in the application of fundamental EU law provisions limits the application of the public policy ground. Hence, the ECJ's willingness to validate the relaxation of EU public policy inherent to this approach cannot be taken for granted.[145] However, it is necessary to recall that public policy is a safety valve to the pro-enforcement policy of the New

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139 Christoph Liebscher, 'Drafting arbitration clauses for EC merger control' (2011) 21 J Int'l Arb para 23-109.

140 Engelmann (n21) 72.

141 Bermann (n3) 426. See also Brussels I Recast, Recital 12.

142 Engelmann (n21) 76. See also Karl Baudenbacher, Imelda Higgins, 'Decentralization of EC completion law enforcement and arbitration' (2002) 27 Columb J Eur L 13.

143 Liebscher (n64) para 37.

144 Shelkoplyas (n27) 12.

145 Bermann (n3) 427.

York Convention, as it is an exception to the circulation of national court judgments in the EU under the Brussels I Recast Regulation. As such, it should be interpreted strictly under the New York Convention as well. If a mere error or absence of application suffices, the scope of EU public policy would be undoubtedly broadened and the effectiveness of arbitration in the EU undermined.

For the reasons stated above, it would therefore be desirable for the ECJ to adopt the same characterisation of a breach of public policy for the purposes of post-award review as it did under the Brussels Convention for judgments.[146] In other words, the reviewing court should not become an appellate jurisdictions reviewing decisions of lower courts.[147] It would make no sense to set aside or refuse recognition and enforcement to an arbitral award simply because the judge does not fully endorse the arbitrator's solution.[148]

In essence, it means that if the EU legislator or the CJEU wants to secure the 'correct'[149] application of certain EU law provisions, it can make that provision inarbitrable. However, the overall arbitrability of EU law expresses a trust in arbitration as an alternative dispute resolution mechanism and an acceptance of the limited grounds of post-award review. Public policy is not meant to ensure the correct application of the detail of a provision,[150] irrespective of the importance of the provision to the forum, but to safeguard the underlying interests protected by that rule. Therefore, even if a specific provision may be considered as protecting fundamental principles of the forum, public policy will not necessarily be regarded as violated if the technical content of that

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146 Engelmann (n21) 75.

147 Born (n106) 3186ff. See also Dirk De Meulemeester, Maud Piers, 'Brussels Court, Judgment R.G. 2005/7721/A of 8 March 2007, SNF SAS (F) v. Cytec Industrie (NL) - Merits revisited? Arbitral Award, Public Policy and Annulment – The Belgian Experience' (2007) 25(3) ASA Bulletin 640.

148 Peter Schlosser, 'Articles 81 and 82 EC-Treaty and Arbitration: A German Perspective' (2008) Cahiers de l'arbitrage 248.

149 If such a thing as a 'right' solution to a legal issue even exists. See Luca Radicati di Brozolo, 'Antitrust: A Paradigm of the Relations Between Arbitration and Mandatory Rules – A Fresh Look at the "Second Look"'(2004) Int'l Arb L Rev 28; Luca Radicati di Brozolo, 'L'illicéité "qui crève les yeux": le critère de contrôle des sentences au regard de l'ordre public international' (2005) Rev arb 540ff.

150 Anton Maurer, *The Public Policy Exception Under the New York Convention* (Juris 2013) 101.

provision has not been accurately followed, as long as the underlying principles have been safeguarded.[151]

For the parties it means that, by choosing to have their dispute settled outside the court system with only a limited protection from the courts, they accept a 'risk of error'.[152] It does not suffice that a party can demonstrate that the decision in question is wrong; that there is a discrepancy between the application of the legal rule by the national court of origin and how the national court in which enforcement is sought would have applied it, even if the alleged error affected a fundamental provision of EU law. The recognition of the arbitrator's ability to apply EU law means that the arbitrator might misapply it without being sanctioned. However, an award might be incompatible with EU public policy because the arbitral tribunal failed to (correctly) apply EU law to the substance of the dispute which led to a result that, if enforced, would violate EU public policy effectively and concretely.

4.3. Seriousness as the Delimitation between a Mere Breach of EU Law and a Breach of EU Public Policy?

Besides being effective and concrete, it is questionable whether the breach should also be serious in order to be sanctioned. The two questions this section aim to answer are whether: (i) the seriousness of the breach can become the frontier between a mere violation of a public policy rule and that violation amounting to a breach of public policy, and (ii) whether the ECJ will accept the mitigation of EU public policy inherent to this approach.

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[151] Giuditta Cordero-Moss, 'Balancing Arbitrability and Court Control' in Horatia Muir Watt et al (eds) *Global Private International Law: Adjudication Without Frontiers* (Edward Elgar Publishing 2019) 85. See also Cordero-Moss (2014) (n40) 246; Radicati di Brozolo (2012) (n40) 56-60; Santiago Martínez Lage, 'Arbitration and EU Competition Law: New Rulings and New Thoughts' (2016) 25 Spain Arb Rev 141.

[152] This term was used in this context by Pierre Mayer, 'Seeking the middle ground of court control: a reply to I. N. Duncan Wallace' (1991) Arb Int'l 311ff.

Most commentators tend to consider that only a serious breach of a rule deemed fundamental may amount to a breach of public policy.[153] It is submitted however that this approach conflicts with EU law and the ECJ jurisprudence as demonstrated in the field of EU competition law (Section 3.2.1.), and unfair arbitration agreements in consumer contracts (Section 3.2.2).

4.3.1. EU Competition Law

Regarding EU competition law, there is little doubt that an award that enforces an horizontal agreement containing a so-called 'hard core' restriction of competition (e.g. price-fixing, market-sharing, territorial market allocation, output restrictions, and other restrictions by 'object')[154] will be considered as a 'serious' restriction of EU competition law which violates EU public policy. Similarly, regarding vertical agreements, 'hard core' restrictions of competition[155] (e.g. territorial restrictions, resale price maintenance)[156] will also be considered as 'serious' breaches of EU competition law. However, some commentators contend that it is questionable whether an arbitral award dealing with a vertical restriction violates public policy, since this type of competition restriction can be viewed as less important.[157] They suggest that national courts could distinguish between infringements by 'object' and by 'effect' regarding horizontal agreements, and 'hard core'

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153 See e.g. Christoph Liebscher, 'Arbitration of Antitrust Disputes' in Gaillard, Di Pietro (n16) 523ff; Christoph Liebscher, 'Chapter 23: EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects' in Blanke, Landolt (n37) 784. For an overview of the national notions of public policy see European Parliament, Legal Instruments and Practice of Arbitration in the EU, Study for the Juri Committee, 54-86, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf (last accessed 11 August 2019); Report on the Public Policy Exception in the New York Convention – A Report by the IBA Subcommittee on Recognition and Enforcement of Foreign Arbitral Awards dated October 2015, 6-10 available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E (last accessed 11 August 2019). See also Seraglini (2008) (n98) 166; Lage (n147) 141 arguing that only a serious breach violates EU public policy.

154 See e.g. Case C-67/13 P, *Groupement de Cartes Bancaires v Commission* [2014] ECR I-0000, para 58.

155 See Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336, paras 21–25.

156 Ibid, Article 4.

157 Luca Radicati di Brozolo, 'Arbitrage commercial international et lois de police: autonomie de la volonté et conflits de juridictions' (2005) 315 Collected Courses of the Hague Academy of International Law 374.

and 'non-hard core' restrictions regarding vertical agreements.[158] Restrictions by 'effect' and non-'hard core' restrictions of competition would not (always) be deemed serious enough to amount to a breach of public policy.[159] Following the above logic, every arbitral award, the enforcement of which would violate Articles 101 and 102 TFEU, would not always violate EU public policy. Radicati di Brozolo suggests that a similar distinction between serious violations of competition law entailing a breach of public policy, and not serious violations could be extended to state aid rules.[160]

However, the competition law provisions in the TFEU do not distinguish between serious and minor breaches of EU competition law. Any agreement that breaches Article 101(1) TFEU and does not meet the conditions of Article 101(3) TFEU is, pursuant to Article 101(2) TFEU, null and void. Besides, the ECJ in *Eco Swiss* did not make a distinction between different breaches of EU competition law. It simply held that when a Member State's rules of procedure:

> require a national court to grant an application for an annulment of an arbitration award where such an application is founded on a failure to observe national rules of public policy, it must also such an application where it is founded on failure to comply with the prohibition laid down in Article [101(1) TFEU].[161]

Since a constitutive requirement for an infringement of Article 101 (and 102 TFEU) is its effect on trade,[162] any agreement that violates this provision arguably also undermines the proper functioning of the internal market. A high threshold has to be met in the first place for a breach of Article 101 TFEU to be recognised. Following this reasoning, any arbitral award which effectively and concretely violates Article 101 TFEU is deemed serious, and therefore important enough to qualify

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158 Damien Geradin, 'Public Policy and Breach of Competition Law in International Arbitration' (2016) 27 Spain Arb Rev 45; Lage (n147) 140ff; Radicati di Brozolo (n23) 755ff.

159 See Lage (n147) 141 where he refers to a decision of the Spanish Supreme Court (STS 12/01/15 REPSOL Ribera Baixa, Recurso 1279/2011) in which it had to correct its previous interpretation of Regulation 2790/99 on the authorised duration of certain exclusive purchase agreements of fuel which were not regulated under the previous Regulation (i.e. Regulation 1984/83).

160 Radicati di Brozolo (n23) 776.

161 *Eco Swiss*, para 37.

162 Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C-101/81. For early cases, Cases C-56/64 and C-58/84, *Consten and Grundig v Commission* [1966] ECR I-299 and Cases C-6/73 and C-7/73, *Commercial Solvents v Commission* [1974] ECR 223, respectively on anticompetitive agreement and abuse of dominant position. See also Carlo Petrucci, 'Subsidiarity in Directive 2014/104 EU on Damages Actions for breach of EU Competition Law' (2017) 23(2) EU Pub Int'l 406.

as a breach of EU public policy.[163] Further, AG Wathelet recently rejected a distinction between infringements by 'object' and by 'effect' as a method that would help identify infringements of EU competition law that are serious enough to amount to a breach of EU public policy. He held that:

> [e]ven if there were a scale of infringements of Article 101 TFEU based on their obviousness and harmfulness including, in particular, restrictions by object and by effect, there is nothing in Article 101 TFEU to support the conclusion that these restrictions would be permissible. Indeed, Article 101 TFEU expressly prohibits agreements between undertakings 'which have as their object or effect' the restriction of competition. Accordingly, either there is an infringement of Article 101 TFEU, in which case the agreement between undertakings at issue is automatically void, or there is no infringement at all.[164]

Hence, it appears that an arbitral award that enforces an agreement which violates Article 101 TFEU should aways be considered as implying a violation of EU public policy, irrespective of the nature of the breach. The same reasoning applies to abuse of dominant position (Article 102 TFEU) which does not distinguish between the importance of abuses of dominant position, and State aid (Articles 107 and 108 TFEU) for the same reason. The principle of effectiveness, which mandates the procedural rules of the Member States not to be framed so as to make it too difficult or impossible to exercise the rights conferred by EU law,[165] would stand in the way of making gradual differences between the nature of a breach of a EU competition law rule which has been identified by the ECJ as forming part of EU public policy for the purpose of post-award review.

4.3.2. Consumer Protection Against Unfair Arbitration Clauses

Following the above logic in the domain of EU competition law, the principle of effectiveness of EU law would also arguably stand in the way of making gradual differences in the protection afforded to consumers against unfair contract terms depending on the seriousness of the breach.

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[163] See Chapter 3, Section 2.1.1, pp. 81ff.

[164] *Genentech*, Opinion AG Wathelet, para 66.

[165] TEU, Article 5(3). See Chapter 2, Section 3.2, pp. 44ff.

Claro and *Asturcom* aim at unrestrictedly protecting consumers from losing the rights guaranteed by Article 6 Directive 93/13 when they are active in a Member State. Once the national court seized of the post-award dispute has been able to establish that the non-negotiated arbitral agreement inserted in the consumer contract is unfair, there is a breach of EU public policy. Restricting the post-award protection of consumers to cases in which the loss of those rights was particularly serious may make it challenging, if not impossible, for the consumer to preserve the rights protected by Directive 93/13's minimum level of protection.[166] A clear distinction however must be maintained between the protection of the consumer against unfair contractual terms which is absolute, and the assessment of the unfairness of such a term which is relative and depends on each contract.[167]

Yet, abandoning the requirement of a particularly serious breach of public policy does not transform every infringement of any transposition of Directive 93/13 into a breach of EU public policy. This is particularly true when the Member States' transposition exceeds the minimum level of protection provided for in the Directive. Only those violations which are sufficiently serious not to get through the minimum threshold will be sanctioned.

To conclude, there is insufficient support in EU law and the ECJ case law to consider that only serious infringements of EU public policy provisions can be sanctioned. On the contrary, it is argued that doing so could be perceived as undermining the effectiveness of EU public policy in post-award review.

Conclusion

In *Claro* and *Asturcom*, the ECJ opened the door to a broad interpretation of a traditionally narrowly defined procedural provision. This approach has the potential of producing negative implications

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[166] Engelmann (n21) 242 makes a similar point regarding the Commercial Agent Directive. However, the principle of effectiveness does not come into play in the Member States' transposition when they exceed the Directive's minimum level of protection.

[167] The list of unfair term in the Annex of Directive 93/13 is only indicative (see Article 3(3)).

for international commercial arbitration in the EU if it is to be generalised to other branches of EU law. This chapter sought to assert whether it could be the case.

The scope of EU competences has widened in the past twenty years. Since the public policy exception aims at protecting the most important principles of the forum, the growth of EU competences implies a growth of the scope of EU public policy. There is not doubt that EU public policy now extends beyond the protection of the four fundamental freedoms. However, it cannot be the case that all mandatory provisions of EU law automatically form part of EU public policy. It is therefore necessary to attempt to draw the frontier between EU public policy provisions and mandatory provisions. The contours of EU public policy, as reflected in the ECJ jurisprudence, are however incredibly vague. Two main characteristics have been identified: (i) the fundamentality of a provision, and (ii) public interest. Yet, both have been broadly interpreted, blurring the distinction between EU public policy and overriding mandatory rules. This chapter further explained, in Section 2, that there are objective reasons why the ECJ may want to construe EU public policy broadly. The ECJ has an incentive to broadly define the scope of EU public policy in order to guarantee the effective application of EU overriding mandatory rules and to ensure the primacy of EU law *vis-à-vis* the Member States. This broad approach may however become problematic.

By broadening the scope of public policy, the CJEU weakens the effectiveness of international commercial arbitration which is widely considered as an indispensable means to facilitate business transactions within the internal market. What a broad concept of EU public policy initially sought to protect (i.e. the proper functioning of the internal market) may ultimately have the opposite effect. Hence, it is essential for the ECJ to embrace a narrower scope of public policy that is not 'ghost haunting the efficiency of international arbitration'.[168] As national legal systems have evolved and gradually accepted arbitration with its inherent risk of under-enforcement of national laws, it is hoped that the EU will also become confident that its foundation will not be

[168] Jan Kleinsheisterkamp, 'Overriding Mandatory Laws in International Arbitration' (2018) 67 ICLQ 928.

undermined if EU law is occasionally misapplied or ignored during arbitral proceedings.[169] In the current situation, it however remains to be seen whether national courts can do right by both EU and international arbitration imperatives.

The importance of the role played by the ECJ in delimiting the scope of EU public policy cannot be overstated. As explained in Section 4, national courts only have limited leeway to narrow down the scope of EU public policy by taking into account the nature of its breach without undermining the principle of effectiveness of EU law.

[169] Toader (n1) 24. See also Shelkoplyas (n27) 438.

CHAPTER 6 — DETERMINING THE APPROPRIATE SCOPE OF POST-AWARD JUDICIAL REVIEW UNDER THE GROUND OF PUBLIC POLICY

Introduction

This chapter focuses on the procedural means by which it can be assured that the recognition and enforcement of an arbitral award violating EU public policy will not occur. One of the key aspects in relation to this problem is to analyse whether post-award review procedures are appropriate tools to guarantee the effective protection of EU public policy. The post-award level of scrutiny relates to two distinct elements: the degree of violation of a substantive EU mandatory law required to deserve intervention, and the depth of the court's review into the arbitral tribunal's decision on the merits. This chapter focuses on the latter, as the former has already been addressed in the previous chapter. Since arbitral awards are final and binding on the parties, reviewing courts are not capable of passing judgment on the content of the arbitral award; they may only decide whether the arbitral award violates public policy. This excludes a review on the merits ('*révision au fond*') which would no doubt impact the effectiveness of arbitration. However, certain factual appreciation is inevitable when establishing whether an arbitral award violates public policy and should be permissible. The difficulty is finding the appropriate balance between an acceptable court review that protects the effectiveness of EU public policy, and an intrusive review on the merits which would be akin to an appeal.[1] This thesis seeks to demonstrate that EU public policy must, in exceptional circumstances, be supervised by a broad scope of judicial review, even sometimes *ex officio*, as systematic narrow judicial review creates islands of protection for wrongdoers.

Questions surrounding the appropriate scope of judicial review of foreign arbitral awards became particularly acute after *Eco Swiss*. However, as it will be demonstrated in Section 2 of this

[1] George Bermann, 'What does it mean to be 'pro-arbitration'?' (2018) 34(3) Arb Int'l 341–353. See also Dirk De Meulemeester, Maud Piers, 'Merits revisited? Arbitral award, public policy and annulment – the Belgian experience' (2007) 3 ASA Bulletin 630–42.

chapter, the ECJ has been entirely silent on the appropriate scope and intensity of judicial review. Yet, national courts have extensively discussed this issue and have reached different, and sometimes opposite, conclusions. Sections 3 and 4 of this chapter examine the two key approaches adopted by national courts on the appropriate scope of judicial review. That analysis aims to show, in Section 3, that a narrow scope of judicial review is ineffective and should be abandoned; and, in Section 4, that a broad scope of judicial review of arbitral awards should be available to reviewing courts. Section 5 then focuses on the practical implications of a broad scope of judicial review for the reviewing courts, and further explains which exceptional circumstances may justify it. But before addressing the question of the appropriate scope of judicial review under the ground of public policy, it appears necessary to examine the controversial issue of the existence of a duty for national courts to raise such a breach on their own motion in Section 1.

1. Raising a Breach of Public Policy *Ex Officio*

Before discussing the appropriate standard of judicial review of arbitral awards under the ground of public policy, this section discusses whether national courts are required to raise such an issue on their own motion (Section 1.1), and under which conditions (Section 1.2).

1.1. Raising a Breach of Public Policy *Ex Officio*: Possibility, Power, or Duty for National Courts?

In general, there is no need for the reviewing court to raise a violation of public policy *ex officio* since the losing party will usually invoke it.[2] However, if the party fails to raise this specific ground, while raising other grounds, and if the national court notices a potential breach of EU public policy,

[2] Pierre Mayer, 'La sentence contraire à l'ordre public de fond' (1994) 4 Rev arb 624.

it is submitted that the reviewing court should raise that point *ex officio* at any stage of the court proceedings, even if that point had not been raised during the arbitration proceedings.

As a general rule, EU law does not require national courts to abandon the passive role assigned to them in civil proceedings in order to raise a point of EU law on their own motion.[3] The ECJ embraces that approach, as regulated by the principles of party autonomy and judicial passivity. According to these principles, the courts are bound by the submissions of the parties. That principle reflects conceptions prevailing in most Member States; 'it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas'.[4] Indeed, who would be better placed to take care of their private interests and rights than the parties themselves? However, certain *public* interests, such as public policy, may nonetheless prevail over party autonomy in civil proceedings.[5] It is only in 'exceptional circumstances', such as where the *public* interest requires intervention, that national courts will be required to abandon the passive role assigned to them.[6] The courts are then entrusted with protecting these interests and may have to raise public policy considerations *ex officio* in the face of the parties' silence. The enforcement of this principle might vary however, depending upon the

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3 *Van Schijndel*, paras 13-14, 22. *See* Johanna Engström, 'National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing new Respect for Party Autonomy and National Procedural Autonomy?' (2008) Rev EU Adm L 67; Jan Jans, Albertjan Marseille, 'Case Note' (1998) CMLR 853 discussed by Sarah Prechal, 'Community Law in National Courts: The Lessons from van Schijndel' (1998) CMLR 681.

4 *Van Schijndel*, para 21.

5 *Van Schijndel*, para 21

6 *Van Schijndel*, para 21

Member State in question. Common law jurisdictions, being as they are based on an adversarial court system,[7] may be less inclined to intervene in the proceedings than civil law jurisdictions.[8][9]

Initially, it appears that the ECJ only required national courts to raise EU public policy considerations *ex officio* when national law requires them to do so for national public policy considerations. This is a direct application of the principles of national procedural autonomy and equivalence under EU law. For instance, the application of Article 101 (and 102) TFEU at a national level is, in principle, governed by the procedural rules of Member States.[10] Accordingly, as established in *Van Schijndel* and *Peterbroeck*, the principle of equivalence means that there can only be *ex officio* judicial review when the national court can consider comparable questions of national law. If national laws provide for the possibility, or duty, for national courts to raise 'national' public policy issues *ex officio*, they then have a similar duty as a matter of EU. However, the ruling of the ECJ in *Manfredi* invites a broader understanding of the *ex officio* duty.

The ECJ in *Manfredi* stressed that 'Articles 81 and 82 EC [101 and 102 TFEU] are a matter of public policy which *must* be *automatically* applied by national courts (*see, to that effect*, Case

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7 English procedural law is generally based on the assumption that the court had no independent knowledge of the law. E.g. *Rahimtoola v Nizam of Hyderabad* [1958] Ac 379, the four Lords participating in the decision unanimously rebuked Lord Denning's independent research specifically on the ground that the parties had not been heard on the points that formed the basis of Lord Denning's judgment as thoroughly explained in Alan Paterson, *The Law Lords* (UTP 1982) 39. See also Neil Andrews, *English Civil Procedure, Fundamentals of the New Civil Justice System* (OUP 2003) paras 5.22ff; John Anthony Jolowicz, *On Civil Procedure* (CUP 2000) 254. Although the new Civil Procedure Rules of April 1999 have increased the judge's powers of control, the prevailing view is that the judge is in principle bound by the legal arguments relied upon by the parties. See Andrews, para 6.85; Jolowicz 254.

Even English law allows an *ex officio* intervention in illegal contracts provided that the illegality is clear. See Simon Whittaker, 'Who Determines What Civil Courts Decide? Private Rights, Public policy and EU Law' in Dorota Lecykiewicz, Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (OUP 2013) 96; *Chitty on Contracts* [2012] 16-208.

8 For civil law countries see e.g. Germany, BGB, §134. German procedural law deems the court to know the law and requires the court to apply the law *ex officio* ('*jura nova curia*') without however exceeding the limits of the case as defined by the claims of the parties. See also French Civil Code, Article 6; CPC, Articles 12(1), (2). For a commentary see François Terré, Philippe Simler, Yves Lequette, *Les obligations* (12th ed, Dalloz 2018) 391; Philippe Malaurie, Laurent Aynès, Philippe Stoffel-Munck, *Les Obligations* (10th, Dalloz 2018) 699.

9 Such comparisons of national procedures inevitably lead to broad generalisations. See John Anthony Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) ICQ 281.

10 Case C-60/92 *Otto v Postbank* [1993] ECR I-05683, para 14.

C-126/97 *Eco Swiss* [..] paragraphs 39 and 40)'.[11] *Manfredi* seems to recognise a general duty for national courts to raise EU competition law *ex officio* even if the national legal system does not provide for that possibility. It would be a general duty imposed on national courts given the public policy nature of EU competition law. The ECJ ruling in *Manfredi* therefore strikes at the core of national procedural systems by imposing a general duty upon national courts to raise EU public policy issues 'automatically'. Besides, what is striking in *Manfredi* is that the ECJ based its reasoning on paragraphs 39 and 40 of *Eco Swiss* suggesting that the judgment recognised an 'automatic' duty for national courts to apply EU competition law *ex officio*. Yet, the ECJ in *Eco Swiss* did not do so, relying instead upon the principle of equivalence.[12] Therefore, the ruling in *Manfredi* challenges the importance of the principle of equivalence in *Eco Swiss* and suggests a general duty for national courts to raise considerations of EU public policy on their own motion. This approach has been confirmed in the subsequent ECJ jurisprudence.[13] Hence, the present situation is that EU law, as interpreted by the ECJ in *Eco Swiss* and *Manfredi*, prescribes the *ex officio* application of Articles 101 and 102 TFEU by national courts, because of the public policy character of those provisions.

In the domain of consumer protection against unfair contract terms, since *Océano*, the ECJ has framed the *ex officio* application of Directive 93/13 as a tool that the national judge can use to effectively enforce EU law in order to protect the weaker party (i.e. the consumer) in civil proceedings.[14] Following *Océano* and *Cofidis*, the question arose whether national courts are simply *authorised* to examine the unfairness of a possibly unfair contractual term *ex officio*, or whether they are *required* to do so. When this jurisprudence was extended to the judicial review of arbitral

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[11] *Manfredi*, para 31.

[12] See Chapter 2, Section 3.3.1, pp. 57ff.

[13] E.g. *T-Mobile Netherlands*, para 49.

[14] Piet Taelman, 'Some European Challenges for Belgian Civil Procedure' in Anna Nylund, Bart Krans (eds), *The European Union and National Civil Procedure* (Intersentia 2016) 5ff.

award under the ground of public policy, the ECJ clarified that point. The Court held in *Claro* that 'the nature and importance of the public interest underlying the protection which the Directive confers on consumers' justifies 'the national court *being required to assess of its own motion* whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier'.[15] Pursuant to *Claro*, when the national court has the power to assess the unfairness of a contractual term *ex officio* pursuant to its domestic procedural law, it is obliged to make use of its power, even when the consumer has not asserted her rights during the arbitration proceedings.[16] In *Asturcom*, the ECJ had to answer a similar question. Yet, *Asturcom* differs from the previous line of cases, since in that case, the arbitral award had become final and had acquired the force of *res judicata*. Following a far reaching interpretation of the principle of equivalence,[17] the ECJ ruled that when domestic procedural law grants a national court the *discretion* to consider *ex officio* whether a clause is in conflict with national public policy, the national court is under an *obligation* to undertake an *ex officio* review with respect to EU public policy.[18]

The ECJ's reference to the principle of equivalence and to national law does not seem to place any effective limitation on this *ex officio* duty as both the New York Convention[19] and the UNCITRAL Model Law recognise public policy as a ground that may be raised *ex officio* by the reviewing court. Since Member States have designed their domestic arbitration laws according to

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15 *Claro*, para 38.

16 See Chapter 2, Section 3.3.3, pp. 62ff, and Chapter 4, Section 2.1, pp. 107 ff.

17 For a detailed analysis see Chapter 2, Section 3.3, pp. 56ff.

18 *Asturcom*, para 54. The ECJ justified this ruling by referring to *van Schijndel*, paras 13-14 and 22; and *Kempter*, para 45.

19 Courts have acknowledged that they can review an arbitral award for breach of public policy *ex officio* e.g. *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] EWCA Civ 988: 'the defence that enforcement would be contrary to public policy is stated without an express burden of proof [...]. This is no doubt because it must always be open to the court to take a point of public policy of its own motion'; KG Berlin, 11 June 2009 (2010) XXXV YB Com Arb 369; OLG München, 17 December 2008 (2010) XXXV YB Com Arb 359; Court of Appeal of Genoa, 2 May 1980 *Efxinos Shipping Co Ltd v Rawi Shipping Lines Ltd* (1983) VIII YB Com Arb 381. See also Albert van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 359.

these rules (or similar rules),[20] national courts all have the possibility of raising an issue of public policy *ex officio*, and therefore a duty to do so for considerations of EU public policy according to the ECJ's jurisprudence,[21] even if it is outside the frame of reference of the arbitration, and even if the arbitral award has acquired the force of *res judicata*. In the unlikely event that such a national remedy is unavailable, and the principle of equivalence is therefore inapplicable, the principle of effectiveness would in all likelihood be used in order to overcome that impediment. It has even been argued that the *ex officio* application of EU public policy by national court has become a self-standing principle of EU procedural law.[22] These rulings may therefore have far reaching implications for the Member States.[23]

Despite the ECJ's express statement in *Manfredi*, *Claro*, and *Asturcom*, the extent to which national courts feel obliged, in practice, to abandon their passive role to assess a breach of EU public policy *ex officio* remains unclear. This confusion was highlighted in a recent report of the Max Planck Institute on Consumer Protection published by the European Commission where almost 60% of judges interviewed held the view that it was possible to exercise *ex officio* control of whether an arbitral award violates consumer rights derived from EU law during enforcement proceedings, but the remaining 40% opined that it was not possible.[24] This study demonstrates that

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20 Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 719–73 and 798–808.

21 The principle of equivalence must be combined with the 'may is must' rule according to which if the national court *may* apply a rule of national law of its own motion, it *must* apply the corresponding rule of EU law of its own motion. See *Van Schijndel*, *Asturcom* and *Asbeek Brusse*. For a reference to this principle see Arthur Harkamp 'Ex Officio Application in Unenforceable Contracts' in Louise Gullifer, Stefan Vogenauer, *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Bloomsbury Publishing 2014) 471.

22 Report Max Planck 194. Increasingly, express reference is also made by the Court to the CFR and particularly to Article 47 CFR where the principle of effective judicial protection is clearly stated, e.g. Case C-169/14 *Sánchez Morcillo and Abril García* [2014] ECR I-2099. Reference is not only made to Article 47 CFR but also other CFR provisions, e.g. *Pohotovost'* [2014] (reference to Article 38 CFR).

23 See Paul Craig, Gráinne De Burca, *EU Law* (OUP 2003) 251-252; Koen Lenaerts, Ignace Maselis, Katherine Gutman, *EU Procedural Law* (OUP 2014) para 4.05, fn 13.

24 The Max Planck Institute Luxembourg, heading an international consortium, is undertaking a European Commission-funded Study (JUST/2014/RCON/PR/CIVI/0082) on the laws of national civil procedure of the 28 Member States and the enforcement of European Union law paras 380ff, 206ff.

despite the seemingly clear ECJ jurisprudence, there are still conceptual ambiguities that can be directly linked to the heterogeneous procedural regimes of the Member States, and the fact that most domestic laws do not provide clear rules with regard to the *ex officio* application of the law and assessment of facts. Hence, in practice, it is unlikely that national courts will systematically raise EU public policy considerations *ex officio*, even if according to the ECJ's jurisprudence, they should.

1.2. Factual and Legal Elements Triggering an *Ex Officio* Review

One line of cases decided by the ECJ concerns the *ex officio* power of the court in relation to the examination necessary for the purpose of assessing whether a contractual term is unfair. The ECJ held in *Asturcom* that it is only when the reviewing court 'has available to it the legal and factual elements necessary for the task' that it must raise the violation of EU public policy *ex officio*.[25] The Court reiterated this restriction with respect to the review of arbitral awards in *Pohotovost*,[26] hereby expressing a certain degree of restraint. However, the ECJ does not explain what qualifies as a necessary element in that case. The meaning of this phrase is unclear. Regarding the 'factual elements', the question remains whether the reviewing court has an *ex officio* duty only when the parties have advanced sufficient facts during the arbitral proceedings, or whether the court, when it does not have sufficient elements is required to ask the parties to produce additional facts. The ECJ has not yet been confronted to this question since in all of the cases discussed above, the national courts had sufficient information available to decide whether there was a breach of Articles 101 or 102 TFEU, or whether the arbitration agreement was unfair to the consumer. However, this question might become central in the future. It is still unclear whether the CJEU will uphold its approach in

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[25] *Asturcom*, para 53. For the use of the same formula regarding choice of court agreement see *Pannon*, paras 32, 37.

[26] *Pohotovost*, paras 51, 53. See also *Eco Swiss*, Opinion AG Saggio, para 42.

Van Schijndel, relying on facts and circumstances defined by the parties, or whether it will find that national courts should abandon their passive role and be granted some fact-finding powers.

It is submitted that when the reviewing court has enough elements to suspect a breach of public policy, it should be able to demand all the necessary factual elements from the parties in order to determine whether there is an effective and concrete breach of public policy, even new evidence. As regards to 'legal elements' necessary to assess the possible breach of EU public policy, it appears that the ECJ, at least in its jurisprudence on unfair arbitration clause in consumer contracts, assumes that the national courts know the law since it can raise the unfairness of the clause *ex officio*. Hence, they are not bound by the legal arguments relied upon by the parties.

These developments reveal that it is difficult to infer from the ECJ's case law what degree would be insufficient to conform to the principle of effectiveness.[27] The expression is marked by a certain ambiguity, which ultimately depends on the circumstances of each case. Hence, if the national court is not in possession of the necessary legal and/or factual elements, it will apparently not have to require specific inquiries to be made in this respect.

2. Creation of a Loophole: Imprecision on the Appropriate Scope of Judicial Review of Arbitral Awards in the ECJ Jurisprudence

One question which remains unanswered after *Eco Swiss, Claro*, and *Asturcom* is how these decisions should be interpreted in terms of the intensity of judicial review of arbitral awards by national courts. The ECJ did not rule clearly on this issue.[28] Indeed, neither the Dutch Supreme Court, nor the Spanish courts requested the ECJ to consider the scope of intensity of review of arbitral awards required under EU law. The ECJ had previously ruled that review of arbitral awards

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[27] Jan Engelmann, *International Commercial Arbitration and the Commercial Agency Directive* (Springer, 2017) 77. See also Philip Landolt, 'Arbitration and Antitrust: An Overview of EU and National Case Law' (2012) 4 e-Competitions 1.

[28] Ibid; Christoph Liebscher, 'European Public Policy After Eco Swiss' (1999) 10 Am Rev Int'l Arb 93.

might be 'more or less extensive depending on the circumstances',[29] which leaves considerable discretion to courts. Therefore, each reviewing court will, necessarily, have to work out for itself the appropriate scope of judicial review. However, both the literature and national courts have relied on these judgments to justify a more or less broad scope of judicial review.

On the one hand, proponents of a narrow scope of review, so-called 'minimalists', explain that the overall reading of *Eco Swiss* does not seem to suggest the need for an 'intrusive review' of arbitral awards.[30] It is true that, in relation to commercial arbitration, the ECJ has explicitly held that: 'it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.'[31] Besides, much attention has been paid to the expression of the principle of procedural autonomy of the Member States,[32] and to the principle of equivalence (i.e. judicial review can only be exercised by the national court to the extent that national law permits) in these judgments:

> [W]here its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC [101(1) TFEU].[33]

Some authors have analysed this part of the judgment as allowing national courts to narrowly review arbitral awards for violation of public policy,[34] and suggesting that the ECJ does not require a broad(er) scope of judicial review of arbitral awards under EU law if it is not required under

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29 *Nordsee*, para 14; *Eco Swiss*, para 32.

30 Luca Radicati di Brozolo, 'Chapter 12: Court Review of Competition Law Awards' in Gordon Blanke, Philip Landolt eds, *EU and US Antitrust Arbitration: A Handbook for Practitioners Vol 1* (Kluwer 2011) 767.

31 *Eco Swiss*, para 35. See also *Claro*, paras 34-39; *Achmea*, para 54.

32 *Eco Swiss*, para 48.

33 *Eco Swiss*, para 37.

34 See e.g. Renato Nazzini, 'International arbitration and public enforcement of competition law' (2004) ECLR 153, 155.

national law. It is questionable however whether the CJEU would understand the principles of procedural autonomy and equivalence this way as further explained in Section 2.2 below, and suggested by AG Wathelet in his Opinion in *Genentech*.[35] It is submitted, in this chapter, that the principle of procedural autonomy finds its limit in the principle of effectiveness of EU law.[36]

On the other hand, a literal reading of the ECJ jurisprudence, particularly of *Eco Swiss*, could support the opposite scope of judicial review (i.e. substantive judicial review of arbitral awards). First, even though stating as a general rule that review of arbitral awards should be 'limited in scope',[37] the ECJ provides that in 'exceptional circumstances' this rule should be set aside. Thus, it seems that the depth of the review of the arbitral award with respect to substantive questions of EU public policy depends on the complexity of the issue at stake.[38] In 'exceptional circumstances', such as when an arbitral award violates EU public policy, the scope of judicial review could therefore be broad. Second, the ECJ states that national courts must set aside an arbitral award 'where it is founded on *failure to comply* with the prohibition laid down in Article 81(1) EC'.[39] As pointed out by Blanke, a 'failure to comply' means *any* infringement, not just 'obvious' or 'flagrant' breaches which can be revealed by a 'limited' scope of judicial review, and supports the idea of total and substantive review.[40] The national judge might have to scrutinise the detail of the reasoning, and not only the operative part of the arbitral award, in order to identify a breach. Finally, the ECJ concludes that a national court will be obliged to set aside or deny recognition and enforcement of

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35 *Genentech*, Opinion AG Wathelet, paras 55–72 (especially para 58).

36 Jan Kleinheisterkamp, 'Overriding Mandatory Laws in International Arbitration' (2018) 67 ICLQ 918.

37 *Eco Swiss*, para 35.

38 See Gordon Blanke, 'Chapter 6: The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last?' in Devin Bray, Heather Bray (eds), *Post-Hearing Issues in International Arbitration* (Juris Publishing 2013) 185.

39 *Eco Swiss*, para 37.

40 Blanke (n37) 183.

an arbitral award 'if it considers that [it] is *in fact* contrary to Article [101 TFEU]'.[41] It could be argued that in order to detect a breach, national courts have no other option than to review the case in detail. Despite these indications which suggest that national courts should, or at least could, review broadly arbitral awards which breach EU public policy, the ECJ does not expressly decide this issue.[42] It explains, *a priori*, why national courts could rely upon *Eco Swiss* to justify either a narrow or a broad scope of judicial review depending upon their national procedural rules and jurisprudence.[43] It is therefore no surprise that the standard of review applied by national courts may vary considerably.[44]

Even if the desirable degree of review cannot be explicitly gathered from the ECJ's jurisprudence, since these ECJ judgments, many national courts have made clear their respective positions on this issue. Some national courts have adopted a very narrow scope of judicial review, deemed in favour of the effectiveness of international commercial arbitration,[45] while others have adopted a broad scope of review to efficiently uphold the enforcement of EU public policy, or have lingered between these two positions.[46] However, this thesis argues in Section 3 below that the correct reading of ECJ jurisprudence is that narrow judicial review cannot systematically guarantee the '*effet utile*' of EU public policy.[47] Therefore, if judicial review of arbitral awards is generally conducted according to the fundamental principles of international arbitration and is 'limited' in

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41 *Eco Swiss*, para 41.

42 For a more thorough analysis of the interplay between the two issues see Luca Radicati Di Brozolo, 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators' (2011) 27(1) Arb Int'l 1.

43 Landolt (2012) (n25) 4.

44 Kleinheisterkamp (n35) 916.

45 Bermann speaks of 'accommodation strategies'. George Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 Arb Int'l 398.

46 For arguments in favour of both positions, see Radicati di Brozolo (2011) (n28) 755ff; Diederik de Groot, 'Chapter 16: The Ex Officio Application of European Competition Law by Arbitrators' in Blanke, Landolt (n29) 681ff. See also Emmanuel Gaillard, 'Extent of Court Review of Public Policy' (2007) 237(65) NYLJ 1.

47 Case C-267/86, *Van Eycke v ASPA* [1988] ECR 4769, para 16.

scope when EU public policy is breached, which constitutes an 'exceptional circumstance' and a derogation from the general rule, an increased level of judicial scrutiny might be required.

3. The Dangers of Limiting the Scope of Judicial Review of Foreign Arbitral Awards to Blatantly Obvious Breaches: a Superficial Protection of EU Public Policy

The ECJ's lack of clarity on the appropriate scope of judicial review of arbitral awards when EU public policy is at stake produces disparate interpretations by national courts. An analysis of Member States' case law and the literature reveals the flaws of opting for a narrow scope of judicial review. To demonstrate this point, it is first essential to introduce what narrow judicial review entails (Section 3.1), before explaining why it is not an appropriate scope of judicial review to guarantee the effectiveness of EU public policy (Section 3.2).

3.1. A Closer Look at the Narrow Scope of Judicial Review

Before addressing these substantive issues, it is first necessary to confront the vocabulary used in the literature and in this thesis. Since *Eco Swiss*, the scope of judicial review of arbitral awards has been the subject of heated academic debate. A basic distinction has been drawn by authors between the (so-called) 'minimalist' and 'maximalist' approaches. These terms are generic categorisations of various proposals. The common denominator of the 'minimalist' literature is that the principle of finality of arbitral awards is paramount and justifies a limited scope of judicial review.[48] On the other hand, the 'maximalist' literature emphasises the need for effective protection of public policy and believes that only an in-depth judicial review of arbitral awards is appropriate.[49] Although

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[48] See Alexis Mourre, Luca Radicati di Brozolo, 'Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back' (2006) 23 J Int'l Arb 171; Peter Schlosser, 'Articles 81 and 82 EC Treaty and Arbitration: A German Perspective' (2009) 1 Cahiers de l'arbitrage 25; Radicati di Brozolo (2011) (n28) 1; Dirk de Meulemeester, Maud Piers, 'Merits Revisited? Arbitral Awards, Public Policy and Annulment: The Belgian Experience' (2007) 25 ASA Bull 639.

[49] See Bernard Hanotiau, Olivier Caprasse, 'Arbitrability, Due Process and Public Policy under Article V of the New York Convention' (2008) 25 J Int'l Arb 721; Christophe Seraglini, 'Le contrôle de la sentence au regard de l'ordre public international par le juge étatique: mythes et réalités' (2009) 1 Cahiers de l'arbitrage 5; Pierre Mayer, 'The Second Look Doctrine: The European Perspective' (2010) 21 Am Rev Int'l Arb 201.

general categorisations may be helpful, in the present case they fail to reflect the complexity of the case law.[50] Therefore, this thesis will only refer to the terms 'minimalist' and 'maximalist' to evoke general schools of thoughts developed by the academic literature but not to describe the case law. It is against this background that this thesis will examine closely the scope of judicial review.

In the light of the current pro-arbitration consensus, a narrow scope of judicial review of arbitral awards has been a gradually accepted principle. It has been considered essential to the sustainability of arbitration that the work of the arbitrator is not too easily challenged. The arbitrator remains the ultimate umpire of the dispute. It is therefore for her to assess the evidence submitted and resolve the dispute. The arbitral award is not a draft which should be improved by the judge but a final decision binding on the parties. But should ordinary solutions of judicial review of arbitral awards be implemented unaltered when controlling the implementation of public policy rules in the arbitral award?

To those advocating the 'minimalist approach', the answer is clearly in favour of not departing from ordinary principles of judicial review.[51] A breach of public policy may only be sanctioned when it appears in the award itself. This approach thus seeks 'the appearance of compliance to the award to public policy'.[52] It limits the scope of review of the arbitral award to flagrant violations. Enforcement of arbitral awards will only be refused if the breach of EU public policy is 'blindingly

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[50] See e.g. Brussels Tribunal of First Instance, 8 March 2007, *SNF SAS v Société Cytec Industrie* [2007] 2 Rev Arb 303; Hof's Gravenhage (Netherlands), 27 May 2004, *Marketing Displays International Inc v VR Van Raalte Reclame BV* (2006) 8(2) SIAR 201 ('*MDI*'); OLG Düsseldorf, 21 July 2004 (2007) 22 YB Com Arb 3158. These cases were categorised as forming part of the 'maximalist' approach. However, the reasoning of the courts and their outcomes are very different. The Brussels Tribunal of First Instance set aside the arbitral award because it disagreed with the reasoning of the arbitrators despite the fact that the solution in the arbitral award protected public policy since it nullified the anticompetitive contract. On the other hand, in *MDI*, the Dutch courts adopted a broad scope of judicial review but only to evaluate if the result in the arbitral award was contrary to public policy. It demonstrates that there is no unified 'maximalist' approach in practice.

[51] This reasoning has been approved by a number of authors, see e.g. Luca Radicati di Brozolo, 'L'illicéité 'qui crève les yeux': critère de contrôle des sentences au regard de l'ordre public international (à propos de l'arrêt Thalès de la Cour d'appel de Paris)' (2005) Rev Arb 529; Thomas Clay, 'Notes' (2005) Dalloz 3050; Alexis Mourre, 'Notes' (2005) 1 JDI 101; and criticised by others see e.g. Eric Loquin, 'Notes' (2005) RTD com 263; Christophe Seraglini, 'L'affaire Thalès et le non-usage immodéré de l'exception d'ordre public (ou les dérèglements de la dérèglementation)' (2005) 2 Gaz Pal 5; Sylvain Bollée, 'L'allègement du contrôle de la conformité des sentences arbitrales au droit communautaire de la concurrence' (2006) Rev Crit DIP 111.

[52] Eric Loquin, 'Note sous Civ 1ère 3 juin 1998' (1999) Rev Arb 76.

obvious' as established in the significant French case *SA Thalès Air Défense v GIE Euromissile* ('*Thalès*').[53] The rationale behind this reasoning is that an intrusive control of arbitral awards would denature arbitration of its function as an alternative dispute mechanism, and undermine the principle of finality.[54]

French courts have established this point over the past fifteen years.[55] This standard of review found expression, perhaps more famously, in the area of competition law. In the above mentioned case, *Thalès*, drawing on prior case law of the *Cour de cassation*,[56] the Paris Court of Appeal rejected the request for annulment of a final arbitral award based on an alleged violation of Article 101 TFEU, as part of French international public policy, where the issue had not been raised before the arbitral tribunal. In this case, Thalès and Euromissiles signed, in 1992, an agreement that granted Euromissiles the exclusivity on the production and commercialisation of VT-1 missiles. In 1998, Thalès won a Greek tender. It subsequently asked Euromissiles for price quotes. Since both parties could not agree on a price, Thalès initiated an ICC arbitration to cancel the contract signed with Euromissiles. The arbitral tribunal rejected Thalès' request, and awarded damages to Euromissiles. Thalès challenged the arbitral award alleging that the arbitral tribunal had failed to notice that the contract breached Article 101 TFEU (a point that had never been raised by Thalès during the arbitral proceedings). It therefore argued that the arbitral award breached French public policy and should be annulled. The Paris Court of Appeal expressed doubts that the breach of EU

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53 Paris CA, 18 November 2004 (2005) Rev Arb 757.

54 Luca Radicati di Brozolo, 'Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration – A Fresh Look at the "Second Look"' (2004) 1 Int'l Arb 37; Mourre, Radicati di Brozolo (2006) (n47) 188; Alexis Mourre, 'Le libre arbitre, ou l'aveuglement de Zaleucus: Variations sur l'arbitrage, l'ordre public et le droit communautaire' in François Bohnet, Pierre Wessner (eds) *Mélanges en l'Honneur de François Knoepfler* (Helbing & Lichtenhahn 2005) 323. Luca Radicati di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23 Am Rev Int'l Arb 55.

55 CCass, 21 March 2000 (2001) Rev Arb 805; Paris CA, 2 October 2009, *Linde Aktiengesellschaft and Linde Hellas v Halyvourgiki* (2010) Rev arb 124 ('*Linde*'). For relevant commentary, see Pierre Heitzmann, Jacob Grierson, 'The French Approach to arbitrating EC Competition Law in the Light of the Paris Court of Appeal's Decision in SNF v. Cytec Industrie' in Tobias Zuberbühler, Christian Oetiker eds, *Practical Aspects of Arbitrating EC Competition Law* (Schulthess 2007); Alexis Mourre, Luca Radicati di Brozolo, 'Case comments on SNF c/ Cytec' (2007) 2 Rev Arb 303.

56 CCass, 19 November 1991, *Grands Moulins de Strasbourg* (1992) Rev Arb 76.

public policy was 'flagrant' since the parties, their legal representatives, and three experienced arbitrators had failed to raise the issue during the arbitral proceedings. The Paris Court of Appeal further clarified the scope of judicial review of arbitral awards based on alleged violations of (EU) public policy. It stated that its control was limited to situations where awards breach public policy in a 'flagrant, effective, and concrete' manner;[57] and ultimately rejected the challenge to the award since the infringement of the EU competition rule was deemed not 'manifest'. The French court elaborated on the role of the reviewing court in this context, and held that:

> 'the annulment judge may [...] make an assessment in fact and in law of all the elements contained in the award deferred to its control, but may not decide on the merits of a complex dispute that has never been pleaded or judged before an arbitrator concerning the mere eventuality of illegality of some contractual provisions.'[58]

This standard of review was re-affirmed in the seminal case *Sté SNF v Sté Cytec Industries BV* ('*SNF v Cytec*'),[59] in which a French company, Cytec, sought enforcement in France of an ICC arbitral award rendered in Belgium against a Dutch company, SNF.[60]

In 1993, SNF, a French company, entered into an agreement with Cytec, a Dutch company, for the purchase of a chemical component (i.e. acrylamide monomer) ('1993 Contract'). That agreement replaced a previous agreement signed in 1991 ('1991 Contract'). In 2000, Cytec initiated an arbitration against SNF which had previously sought termination of the agreement based on its alleged breach of Articles 81 and 82 EC [Articles 101 and 102 TFEU]. The arbitration was seated in

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[57] In *Thalès*, an arbitral tribunal awarded 108 million euros as damages to Euromissiles. Thalès applied to the Paris Court of Appeal to set aside the award, arguing that the licensing agreement was incompatible with EU competition. The particularity of this case is that the competition law issue had not been raised by the parties nor by the arbitral tribunal during the arbitration proceedings but only for the first time before the Court of Appeal.

[58] The Court of Appeal's *Thalès* decision as translated in Caprasse, Hanotiau (n48) 736. This reasoning has been approved by a number of authors see e.g. Radicati di Brozolo (2005) (n50) 529; Clay (n50) 50; Mourre (2005)(n50) 132 JDI 357; and criticised by others, see e.g. Eric Loquin, (2005) (n50) 263; Seraglini (2005) (n50) 5; Bollée (n50) 111.

[59] For relevant commentaries, see Xavier Delpech, 'Observations' (2008) AJ 1684; Christophe Seraglini, 'Observations' (2008) JCP 164; Jérôme Ortscheidt, 'Note' (2008) JCP 430; Ibrahim Fadlallah, 'Note' (2008) Rev Arb 473; Eric Loquin, 'Observations' (2008) RTD Com 518; Alexis Mourre, 'Note' (2008) Clunet 1107.

[60] This case is interesting as parallel proceedings were launched by SNF at the seat to have the award set aside. See TPI Brussels 8 March 2007 (2007) 2 Rev Arb 303; CA Brussels 22 June 2009 (2009) Rev Arb 574.

Brussels and subjected to French law. In a partial arbitral award on liability, the arbitral tribunal held that the agreement was null and void *ab initio*, because its object and purpose was to prevent SNF from accessing the EU market of acrylamide monomer for eight years which constituted a restriction of competition prohibited under Article 81(1) EC Treaty [Article 101(1) TFEU]. The tribunal established however that Cytec had not abused a dominant position pursuant to Article 82 EC [Article 102 TFEU] since it was not in a position to impose unfair selling prices. Hence, SNF and Cytec had shared responsibility for the violation of Article 81 EC [Article 101 TFEU] since they both should have known that the 1993 Contract was null and void. As a result, both companies had a potential indemnity claim for the damages incurred as a consequence of the execution of the 1993 Contract. The final arbitral award issued on 28 July 2008 determined the quantum of damages. Each party claimed half of the damages suffered as a result of the annulment of the 1993 Contract. However, the tribunal granted damages exclusively to Cytec on the basis of the amount Cytec could have gained from the 1991 Contract if it had not been replaced by the irregular 1993 Contract. SNF's compensation requests were rejected in their entirety on the basis that it had not sufficiently proven that it had lost a chance to purchase acrylamide monomer from third parties at a better price, nor that it could have obtained more favourable purchase conditions from Cytec than the ones agreed upon in the 1993 Contract.

Cytec sought recognition and enforcement of the 2002 and 2004 awards in France which were granted in two enforcement orders issued by the President of the Paris *Tribunal de Grande Instance* on 15 September 2004. SNF appealed before the Paris Court of Appeal on 6 October 2004 against these enforcement orders. Separately, SNF applied for the setting aside of the two awards before the Brussels Tribunal of First Instance on 19 May 2005. SNF's applications in both instances were based on the claim that the arbitrators had applied EU law improperly and allegedly reached an erroneous decision on the issue of EU competition law. The purported error consisted in the fact

that, despite declaring the 1993 Contract null and void because it breached Article 81 EC [Article 101 TFEU], the arbitrators had nevertheless awarded damages to Cytec for an amount that exceeded the amount that would have been due under the 1993 Contract.[61] The awards therefore allegedly violated EU public policy.

The Paris Court of Appeal rejected SNF's application on 23 March 2008.[62] It re-affirmed that breaches of public policy must be 'flagrant, effective and concrete'[63] to lead to the non-enforcement of an arbitral award. The Court further clarified that it is not the abstract rule of law applied by the arbitrators which must be measured against the requirements of public policy but the 'result' of the awards.[64] Accordingly, this case upheld one of the most fundamental pillars of international arbitration: the prohibition of merits review of the arbitrators' decision. The Paris Court of Appeal explained that there was no 'flagrant' breach since the arbitrators when applying EU law declared that there was no dominant position, and added that it could not substitute its views of the facts and the law without touching the merits of the dispute. The Paris Court of Appeal concluded that the evaluation of damages did not fall within the enforcement court's purview under the public policy ground (i.e. Article 1502(5) of the French Code of Civil Procedure). The *Cour de cassation* confirmed this decision, and embraced this narrow standard of review.

As explained in the previous chapter, the fact that a breach of public policy needs to be effective and concrete to be sanctioned is (mostly) uncontroversial.[65] The same cannot be said about the criteria of flagrancy. As Derains points out, 'to be flagrant, the violation of public policy, as a

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61 Two expert opinions by Professors Idot and Parléani were submitted in support SNF's position. See Phillip Landolt, *Modernised EC Competition Law in International Arbitration* (Kluwer Law International 2006) 200.

62 For relevant commentaries, see Heitzmann, Grierson (n54) 194ff; Pierre Heitzmann, Jacob Grierson, '*SNF v. Cytec Industrie:* National Courts Within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Article 81 EC' (2007) SIAR 2; Mourre, Radicati di Brozolo (2007) (n54) 303.

63 Paris CA 23 June 2006 (2007) Rev Arb 100 which was confirmed in CCass 4 June 2008 (2008) Com 518; see also *Linde*: 'blatant, real and concrete'. For relevant commentary, see Heitzmann, Grierson (n54) 302ff; Mourre, Radicati di Brozolo (2007) (n54) 303.

64 See Heitzmann, Grierson (n54) 187.

65 Chapter 5, Section 4.1, pp. 148ff.

flagrante delicto, must be committed before the judge's very eyes.'[66] The judge therefore only reviews the award 'as it is', 'without calling into question the legal characterisation of the issues to be decided by the arbitrators, nor the appreciation that they had of the parties' rights in light of the legal dispositions invoked, and even less the relevancy of the legal reasoning on which they rely to rule on the questions submitted to them'.[67] Only a breach of public policy which is obvious when reading the dispositive part of the arbitral award will be sanctioned. The courts embracing this formalistic standard of review refuse to review the merits of the case or the application of the law in order to establish whether the breach of public policy is effective or not. This limited scope of review is not only enshrined in French case law;[68] other national courts[69] follow the same approach. For instance, Italy has limited the scope of judicial review of arbitral awards to 'blatant' breaches.[70] Further, the Italian Supreme Court ('*Corte di Cassazione*')[71] stated that only the operative part of the award has to be analysed by the judge. Similarly, this framework is well established in the national case law of Sweden and Denmark.[72] The Swedish Supreme Court, for instance, held recently that the threshold for either setting aside or denying recognition and enforcement to an

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66 Yves Derains, 'Chronique de jurisprudence française: SA Gallay v. Société Fabricated Metals Inc,' (2001) Rev Arb 815–16, translation from Caroline Duclerq and Talel Aronowicz, 'When French Judges Confirm the Expansion of their Control over Arbitral Awards' (2018) YAR 74.

67 Louis-Christophe Delanoy, 'Le contrôle de l'ordre public au fond par le juge de l'annulation : trois constats, trois propositions' (2007) Rev Arb177.

68 E.g. Paris CA, 17 December 2009, *SMEG v La Poupardine*; Paris CA, 8 April 2010, *Air Namibia v Transnamib Holdings Ltd*; Paris CA, 11 May 2010, *Thalès and Thalès Underwater System v Marine de la République de Chine (Taiwan)*; CCass, 11 March 2009 (2009) Rev Arb 241; CCass, 4 June 2008 (2008) Rev arb 346; *Linde*; Paris CA, 6 December 2007 (2007) Rev arb 934; Paris CA, 18 November 2004 (2005) Rev arb 75.

69 Some non-Member State courts have also embraced this narrow scope of review e.g. Swiss Supreme Court (Bundesgericht), 8 March 2006 (2006) Rev Arb 763; *Baxter Int'l, Inc v Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2002).

70 Florence Court of Appeal, 21 March 2006, *Soc Nuovo Pignone v Schlumberger SA* (2008) 54 Riv Dir Civ 71; Milan Court of Appeal, 5 July 2006, *Terra Armata SRL v Tensacciai SpA* (2007) 25 Bull ASA 618.

71 Italian *Corte di Cassazione*, 8 April 2004 (2006) XXXI YB Com Arb 806.

72 Danish Supreme Court, 28 January 2016, reported in Jakob Sørensen and Kristian Torp, 'The Second Look in European Union Competition Law: A Scandinavian Perspective' (2017) 34(1) J Int'l Arb 35.

arbitral award under the ground of public policy is only possible 'in obvious cases'.[73] In other countries, such as Germany, the issue is less clear. For instance, some German courts have opted for a broad scope of judicial review,[74] while others have embraced a narrow scope.[75] This narrow scope of review not only strictly limits the characterisation of a violation of public policy, but also of the judges' right to rely on an factual or legal element within their control. The courts which adopt this restrictive scope of review refuse to base their decision on elements of law or facts that were not argued by the parties before the arbitrators or which do not appear in the arbitral award.

3.2. The Narrow Scope of Judicial Review: Inappropriate Scope to Effectively Protect EU Public Policy

Narrow judicial review is inappropriate to effectively protect EU public policy. This can be illustrated by reference to *Thalès* where despite the existence of a clear market-sharing agreement, the French courts declined to verify whether the arbitral award was based on a contract void under Articles 101 and/or 102 TFEU. It is not persuasive to argue that since neither the parties nor the arbitrators had raised the public policy exception before the judicial review stage, the award could not possibly breach EU law or harm the EU market. Narrow judicial review can only lead to many more similar situations which threaten the effectiveness of EU law.

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73 Swedish Supreme Court, 17 June 2015 HDT 5767/13; Svea Court of Appeal, 23 October 2013, Case n°T4487-12. See also Svea Court of Appeal, 4 May 2005, *Republic of Latvia v Latvijas Gaze*, Case n°T-6730-03 (on EU state aid rules, ruling that an infringement of competition law can be considered a violation of public policy 'only in obvious cases'). For a commentary see Alexis Mourre, 'Note' (2008) JDI 1107. See also for Denmark, Danish Supreme Court decision of 28 January 2016, *ibid*.

74 OLG Düsseldorf, 21 July 2004 (n49).

75 OLG Thüringen, 8 August 2007, S4 Sch 3/06. The facts were similar in both cases except that in OLG Thüringen, the party did not raise the potential breach of EU competition law rules before the arbitral tribunal but the arbitrators did so *ex officio*.

First, there are several reasons why parties might not argue a contractual breach of EU public policy during the arbitral proceedings whether due to ignorance, collusion,[76] or even their involvement in illegal/criminal activities. Second, it is not because the question of possible breach of EU public policy was not raised that there is no breach. As arbitrators are nominated by contract and do not represent the interest of any State, they have no legal obligation to ensure that EU public policy is protected. On the other hand, national judges are the defenders of EU public policy.[77] It is therefore their duty to ensure the compatibility of foreign arbitral awards with substantive EU law through the public policy exception. Thus, narrow judicial review is not satisfactory. It can only control blatant breaches, whereas agreements or practices liable to violate EU public policy are unlikely to be so obvious, and the operative provisions of a judgment will rarely provide a solution explicitly contrary to public policy.[78] The refusal to control the characterisation of the issues or the interpretation of the contract made by the arbitrators is inappropriate when this triggers the application or non-application of a public policy rule. The only relevant consideration is the consequences the recognition or enforcement of the arbitral award might have on the territory of the State where enforcement is sought.[79] Such a narrow scope of judicial review also goes against the wording of some EU public policy provisions. For instance, Article 101 TFEU expressly prohibits agreements which 'have as their object or effect' the restriction of competition. Hence, either there is an infringement of Article 101 TFEU, in which case the underlying contract is automatically void, or there is no infringement of Article 101 TFEU. It makes no difference whether the infringement is flagrant or not.

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[76] An example of collusion is reported in Jacques Werner, 'Application of Competition Laws by Arbitrators. The Step too far' (1995) 12 JIA 23, where he refers to an unpublished ICC award in which two EU companies entered an agreement which infringed Article 101 TFEU. Only one copy of the agreement existed to which the arbitrators had access but they were asked not to mention it in their decision.

[77] TEU, Article 5(4). See also Case C-2/88 *Zwartfeld and Others* [1990] ECR I-3365, para 10.

[78] Emmanuel Gaillard, 'La jurisprudence de la Cour de cassation en matière d'arbitrage international' (2007) Rev Arb 721.

[79] Pierre Lalive, 'Absolute Finality of Arbitral Awards' (2008) 1 Rev Int'l Arb 114.

It is possible to argue that judicial review of an arbitral award on a public policy ground, when the question was already raised before the arbitral tribunal, might entail review of the merits, which is contrary to the principle of finality of arbitral awards. However, general principles in favour of finality and against review of the merits are not absolute and find their limits in the public policy exception. The exception by nature departs from the general rules applicable to the judicial review of arbitral awards. This is the reason why public policy is one of the limited grounds under Article V of the New York Convention. Consequently, these two principles cannot dictate the appropriate scope of judicial review of the public policy exception. Besides, in *Gazprom*, the ECJ reiterated that the principle of mutual trust is not binding on arbitral tribunals.[80] Therefore, national courts are not bound to comply with the decisions on EU law provided by arbitral tribunals as they are not national courts according to the meaning of Article 267 TFEU. For these reasons, judicial review of whether an international arbitral award is contrary to EU public policy cannot be conditioned by whether or not the question was raised and/or debated during the arbitration proceedings. This system is the opposite of the system of mutual trust between national courts which entrusts responsibility for ensuring compliance with EU law to the court first seized of the dispute and not to the court where recognition and enforcement is sought.[81]

Recently, in *Genentech*, AG Wathelet in his Opinion on a preliminary ruling issued by the Paris Court of Appeal[82] confirmed the harmful effects of a limited scope of judicial review for the EU market. He stated that an obvious or flagrant infringement of Article 101 TFEU would be

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80 Case C-536/13, *Gazprom OAO v Lietuvos Respublika* [2015] ECR I-316, para 37 (‘*Gazprom*’).

81 See Brussels I Recast Regulation. See Chapter 5, Section 2, pp. 139ff.

82 Paris CA, 23 September 2014, *Genentech v Hoechst* available at: http://kluwerpatentblog.com/wp-content/uploads/sites/52/2014/10/2014-09-23_CA_Paris_Genentech_c_Hoec (last accessed 23 April 2019). Although the Paris Court of Appeal did not use the preliminary ruling procedure to refer a question to the ECJ on the standard of review, AG Wathelet nevertheless addressed this issue. It also explains why the ECJ eventually decided not to take position on the standard of review, it would have gone beyond the question asked. This silence does not however, and contrary to what some authors have suggested, implicitly accept the validity of a narrow scope of judicial review. It can only be hope that the ECJ will soon have the opportunity to clarify its position on this issue.

'illusory'[83] as '[n]o system can accept infringements of its most fundamental rules making up its public policy, irrespective of whether or not those infringements are flagrant or obvious',[84] and concluded that the responsibility for reviewing compliance with EU public policy 'lies with courts of Member States not with the arbitrator, whether in the context of an action for annulment or proceedings for recognition and enforcement'.[85] The Opinion of AG Wathelet thus makes clear that the narrow scope of review adopted by the French courts is incompatible with the principle of effectiveness of EU law since it allows national courts to accept in their legal order an arbitral award which violates EU public policy on the mere ground that the violation is not flagrant. As pointed out by the *Tribunal Superior de Justicia* of the Basque Country in its seminal ruling in *France Telecom v Euskatel*,[86] 'a review limited solely to the outcome of the award in most cases does not guarantee effective public policy control'.[87] Some French legal scholars have also strongly criticised this approach. Seraglini for instance speaks of 'an illusory control of the appearance of conformity or of the obvious violation of the international public policy'.[88]

This long list of criticisms might explain why even the Paris Court of Appeal, which played a pioneering role in the development of a narrow scope of review to control violations of public policy, decided recently to allow a more substantive review of arbitral awards on grounds of

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83 *Genentech,* Opinion of AG Wathelet, para 64.

84 *Genentech*, para 61.

85 *Genentech*, para 67.

86 Tribunal Superior de Justicia del País Vasco, 19 April 2012, *France Telecom v Euskaltel*, Rec. 5/201, ECLI:ES:TSJPV:2012:2.

87 See also, in the same sense, the recent judgment of the TSJ of Madrid, 24 March 2015, *Mercantil Hijos de J.A. Arroyo v CEPSA Comercial*, JUR/2015/110835, which rejects the setting aside of an award delivered in an arbitration administered by the *Corte Española de Arbitraje*, on the basis of an alleged infringement of Article 101 TFEU. The TSJ confirms the correct application of both Article 101 and EU Regulation 330/2010 carried out by the arbitrator, after examination of the law, the case law applicable to the case, and the evaluation of the evidence presented during the arbitration proceeding.

88 Jérôme Ortscheidt, Christophe Seraglini, *Droit de l'arbitrage interne et international* (Lextenso 2013) 892. See also Delanoy (n65) 177.

violation of public policy. This shift happened in two steps. First, in a trilogy of decisions,[89] the Paris Court of Appeal abandoned the requirement of flagrancy in favour of the requirement of a 'real' and 'concrete' breach. Hence, in the first of these rulings, known as *Gulf Leader v Crédit Foncier*, rendered on 4 March 2014, the Court held that:

> Where it is claimed that an award gives effect to a contract obtained by corruption, it is for the judge in set aside proceedings […] to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality of the agreement and to appreciate whether the recognition or enforcement of the award violates international public policy in an real and concrete manner.[90]

Then, the Paris Court of Appeal had a new opportunity to clarify its position and introduced a new adjective to describe the nature of the breach: 'manifest'.[91] One might think that the Court reverted to its anterior jurisprudence, 'manifest' being understood as a synonym to 'flagrant'; if that is correct, then the change was purely formal. But it was not. In all of these cases, the judges carried out a (short) merits review based on their own assessment of the evidence taken by the arbitrators during the arbitration proceedings, and decided on the basis of their own definition of the content and characterisation of international public policy, here corruption.[92] In its decision of 16 January 2018, the Paris Court of Appeal reaffirmed that judges are empowered to control, 'with no limitation' 'to seek in law and in fact all the elements' to establish whether the arbitral award 'manifestly, effectively and concretely' violates international public policy.[93] It led one author to

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89 Paris CA, 23 September 2014, *Gulf Leaders for Management and Services Holding Company v SA Crédit Foncier de France*, n°12/17681; confirmed by Paris CA, 14 October 2014, *République du Congo v Commisimpex*, n°13/03410; Paris CA, 4 November 2014, *Man Diesel & Turbo France v Al Maimana*, n°13/10256 in cases in which the contractual obligation had been entered into as a result of a corrupt behaviour. Even before the criteria of flagrance was not always upheld, e.g. Paris CA, 26 February 2013 (2013) Dalloz 2936.

90 Translation from Patricia Peterson 'The French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged: Is the Requirement of a "Flagrant" Breach Now Gone?' (2014) Kluwer Blog available at: http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/ (last accessed 23 April 2019).

91 Paris CA, 27 September 2016, *Sté Indrago* (2017) JDI 1361, note Emmanuel Gaillard. Paris CA, 21 February 2017, *Belokon*, n°15/01650.

92 *Sté Indrago* confirmed in CCass, 13 September 2017, *Sté Indrago* (2017) JDI 1361.

93 Paris CA, 16 January 2018, *MK Group* (2018) Rev arb 401.

comment that: '[t]he Court proceeds to a new and thorough investigation of the case'.[94] 'Manifest' should therefore be interpreted as referring to the nature of the breach of public policy, not to the standard of review. Hence, a 'manifest' breach of public policy does not amount to a 'flagrant' breach since it allows an in-depth analysis of any relevant factual or legal elements.[95] In these circumstances, 'manifest' appears to be a synonym for 'effective', and cannot, confusing as it can be, be interpreted as a synonym for 'flagrant' in the former jurisprudence. It would therefore be preferable to drop this reference, or replace it with the adjective 'serious' or 'grave' which would prevent confusing seriousness with obviousness.[96]

The Paris Court of Appeal has thus begin (apparently) to retreat from a minimalist standard of review. However, it is still unclear whether this broader scope of judicial review will be upheld by the *Cour de cassation*, and whether it will be explicitly extended to competition law awards.[97] So far the Court has circumvented the question of the standard of review.[98] Irrespective of what the *Cour de cassation* will decide, it must be acknowledged that a limited scope of control of arbitral awards is inefficient. Only a detailed examination of the facts and law of the case will allow a court to establish if the result of the arbitral award is contrary to public policy and therefore effective in protecting the internal market. The reviewing court cannot restrict itself to controlling the operative part of the award to sanction only an obvious breach of public policy, since taken by itself, it will almost always be irrelevant for the purposes of revealing a possible breach of public policy.[99] Post-award judicial review would otherwise amount to a mere rubber-stamping of the award.

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94 Xavier Boucobza, Yves-Marie Serinet, 'L'intensité et la nature du contrôle de conformité de la sentence arbitrale à l'ordre public international' (2017) 2 Revue des contrats 304.

95 Ibid. For a recent illustration see Paris CA, 10 April 2018, *Alstom v ABL*, n°16/11182 and Paris CA, 28 May 2019, *Alstom v ABL*, n°16/11182.

96 Seraglini defends a very similar position in Seraglini (2009) (n49) 11.

97 Sylvain Bollée, 'Note' (2018) 3 JDI 12.

98 See e.g. *Sté Indrago*.

99 Radicati di Brozolo (2011) (n28) 14.

4. The Necessity of a Broad Scope of Judicial Review of Arbitral Awards to Guarantee an Effective Protection of EU Public Policy

Because looking 'behind the award' is as an exception to the principle of finality of arbitral awards, it could undermine the effectiveness of the New York Convention. Proponents of the 'minimalist' approach argue that such an approach transforms judicial review into an appeal on the merits.[100] They also argue that extensive review encourages the losing party to delay and resist enforcement before national courts.[101] However, as explained in the previous section, the principle of finality is not absolute and can be questioned when (EU) public policy is at stake.[102] Indeed, the grounds for challenging or refusing recognition and enforcement to an arbitral award can all be considered as exceptions to the principle of finality.[103] Finality is therefore irrelevant to answer the question of the appropriate degree of control of the arbitral award by national courts. The question is which degree of control would be better to effectively protect EU public policy. It is submitted that even if the breach is not flagrant, it is legitimate to expect national judges to scrutinise the arbitral award against EU public policy.[104] This means that national courts cannot simply limit their review to verifying that, in the dispositive part of the arbitral award, there are no blatant illegalities. In order to carry out their function effectively, national courts must therefore be in a position to have a sufficiently clear overview of the entire situation.[105] After explaining in Section 4.1 why a broad scope of judicial review is the direct counterpart of the general arbitrability of EU law; Section 4.2 focuses on the legal justifications which support that scope of review (i.e. the duty of loyal cooperation of national courts and the principle of effectiveness of EU law). Finally, Section 4.3

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100 Mourre (2005) (n53) 303.

101 Diederik de Groot, 'The Ex Officio Application of European Competition Law by Arbitrators' in Blanke, Landolt (n29) 568.

102 Pierre Lalive, 'Absolute Finality of Arbitral Awards?' (2008) 1 Rev Int Arb 127.

103 Christoph Liebscher, 'Chapter 23: EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects', in Blanke, Landolt (n29) 819.

104 This duty derives from Article 4(3) TFEU (loyal cooperation). See *Achmea*, Opinion AG Wathelet, para 233.

105 Radicati di Brozolo (2011) (n28) 14.

examines the jurisprudence of some Member States to illustrate and explain what a broad scope of judicial review exactly encompasses.

4.1. A Broad Scope of Judicial Review: Direct Counterpart of an Expansive Concept of Arbitrability

It is submitted that broad judicial review of foreign arbitral awards under the ground of public policy is the corollary of the ever-increasing arbitrability of matters related to public policy.[106] The arbitrability of public policy considerations permits this very question as it is not conceivable that States would entrust private entities to protect public policy without constraint. The recognition of the arbitrator's jurisdiction means that the ultimate control of any arbitral awards rests with national courts.

Arbitral compliance with EU mandatory rules can be scrutinised at two stages by national courts: first, during the annulment proceedings, as many jurisdictions provide that an arbitral award might be set aside on the ground that it is contrary to public policy, and secondly, at the recognition and enforcement stage, since Article V(2)(b) of the New York Convention states that an award may be denied recognition and enforcement if it is contrary to the public policy of the forum.[107] The Paris Court of Appeal in *European Gas Turbine v Westman International Ltd* established the logical connection between the power conferred upon the arbitrator to rule on public policy issues and the enhanced control of arbitral awards.[108]

It is argued that broad arbitrability requires, by way of *quid pro quo*, a broad scope of judicial review of arbitral awards. Without this, arbitration may provide a haven for illegal

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[106] Caprasse, Hanotiau (n48) 738 reflecting on the Brussels Court of First Instance's ruling in *SNF v Cytec*. See also Assimakis Komninos, 'Arbitration and EU Competition Law' in Jürgen Basedow, Stéphanie Francq, Laurence Idot (eds), *International Antitrust Litigation, Conflict of Laws and Coordination* (Hart Publishing 2011) 193 both authors draw a parallel between the arbitrability of EU competition law and the necessity to allowing national courts to perform of broad judicial review.

[107] Mihail Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing 2010) 264.

[108] Paris CA, 30 September 1993, *European Gas Turbine v Westman International Ltd* (1995) 20 YBCA 198.

practices. A lower standard of review may not be enough to prevent it and may ultimately endanger the arbitration project.

4.2. Legal Justifications to a Broad Scope of Judicial Review of Arbitral Awards

Applying a broad scope of judicial review to arbitral awards involving EU public policy is justified by two fundamental principles of EU law: (i) the duty of loyal cooperation of national courts, and (ii) the principle of effectiveness of EU law.

First, pursuant to Article 4(3) TFEU,[109] Member States are bound by a duty of loyal co-operation. They are, in the words of AG Wathelet, 'the guardians of EU law', and as such they must 'ensure respect for the rules and principles which derive from the very foundations of the EU legal order'.[110] This means, for instance, that reviewing courts must ensure that arbitral awards with EU competition law aspects are compliant with any final or on-going decision of the Commission. The court can even go as far as to suspend the proceedings pending the outcome of the Commission, or render a decision based on the future of the decision of the Commission provided it is predictable,[111] or refer a preliminary question on the interpretation of EU law to the ECJ.[112] To be able to assess if an arbitral award infringes a Commission decision or not, national courts will have to review the arbitral award as to its substance.[113]

Second, as explained in Chapter 2, the procedural autonomy of the Member States finds its limits in the principle of effectiveness.[114] The principle of effectiveness[115] mandates the procedural

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[109] *Van Schijndel*, para 14.

[110] *Achmea*, Opinion AG Wathelet, para 236.

[111] Alexis Mourre, 'Arbitrability of Antitrust Law from the European and US Perspectives' in Blanke, Landolt (n29) 60.

[112] Article 234 EC [267 TFEU]; *Eco Swiss*, para 40.

[113] *Eco Swiss*, Opinion AG Saggio, para 30.

[114] It also finds its limits in the principle of equivalence which is however not relevant in this section.

[115] TEU, Article 5(3).

rules of the Member States not to be framed so as to make it too difficult or impossible to exercise the rights conferred by EU law. In his *Eco Swiss* Opinion, AG Saggio confirmed that national courts must perform an 'effective judicial supervision' of the compliance of arbitral awards with EU law.[116] Furthermore, AG Wathelet called the French standard of review of arbitral awards (i.e. narrow scope of judicial review) 'contrary to the principle of effectiveness of EU law';[117] adding that:

> [n]o system can accept infringement of its most fundamental rules making up its public policy, irrespective of whether or not those infringements are flagrant or obvious […] Put another way, one or more parties to agreements which might be regarded as anticompetitive cannot put these agreements beyond the reach of review under Articles 101 TFEU and 102 TFEU by resorting to arbitration.[118]

There is therefore a close connection between the effectiveness of judicial review to ensure a strict application of EU law and the scope of judicial review. Enforcement of substantive EU public policy rules must not be undermined because an arbitral tribunal and not a national court ruled on the case. National courts as guardians of EU law must effectively ensure respect for the rules and principles which derive from the very foundations of the EU legal order,[119] and bear the ultimate responsibility for ensuring the effective compliance of the arbitral award with EU public policy.[120]

The importance of the principle of effectiveness becomes even more manifest when considering the consequences of national courts' failure to ensure such effectiveness. Within the

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[116] *Eco Swiss*, Opinion AG Saggio, paras 34-35.

[117] *Eco Swiss*, para 58.

[118] *Genentech*, Opinion AG Wathelet, paras 67, 72. See also Paris CA, 21 February 2017, *Belokon v Kirghizistan*, No 15/01650, available at <https://www.italaw.com/sites/ default/files/case-documents/italaw8476.PDF> (last accessed 23 April 2018) 15. See also Kleinheisterkamp (n35) 916ff.

[119] See, to that effect, *Eco Swiss*, paras 36-39; *Krombach*, para 21; Joined Cases C−402/05 and C−415/05, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-461, para 304; and Opinion 2/13 Accession of the Union to the ECHR of 18 December 2014 [2014] ECR I-2454, para 172. For a more comprehensive analysis of the concept of EU public order, see *Gazprom*, Opinion AG Wathelet, paras 166-177; *Genentech*, Opinion AG Wathelet, paras 55-72.

[120] See, to that effect, *Genentech*, Opinion AG Wathelet, paras 59-62.

limits based on the principle of national procedural autonomy,[121] national courts execute their review under EU law's 'state liability' doctrine.[122] This would arguably give rise to the liability of the Member State to the individuals protected by the EU law provision at stake. This means that the enforcement of an arbitral award which causes a sufficiently serious or manifest breach of EU law may expose the non-compliant national courts to actions for state liability in damages[123] under the so-called *Köbler* doctrine.[124] National courts must therefore not make it excessively difficult, through their national procedures, for those provisions to be enforced at the national level.

4.3. National Courts Adopting a Broad Scope of Judicial Review

National courts generally do not adopt a broad scope of review, yet in a small number of cases, some national courts have. For instance, the Dutch courts in *Marketing Displays International Inc v VR Van Raalte Reclame BV* ('*MDI*')[125] met the expectations of an effective judicial supervision of arbitral awards in relation to EU competition law.

MDI was the first judicial application of *Eco Swiss*. In that case, licensing agreements to use patents, trademarks, trade name, know-how, and proprietary interests were signed between the Dutch company VR Van Raakte Reclame BV ('VR') and the American company Marketing Displays International Inc ('MDI') in order to sell billboard frames in the Benelux countries

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[121] See *Courage v Crehan* and *Manfredi*.

[122] See generally Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357, para 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany and ex parte Factortame* [1996] ECR I-1029, para 31; Case C-392/93 *ex parte British Telecommunications* [1996] ECR I-1631, para 38; Case C-5/94 *ex parte Hedley Lomas* [1996] ECR I-2553, para 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others v Germany* [1996] ECR I-4845, para 20.

[123] Gordon Blanke, 'The application of EU law to arbitration in England' in Julian Lew, Harris Bor et al (eds) *Arbitration in England: With Chapters on Scotland and Ireland* (Alphen man den Reign 2013) 248 with reference to the High Court's decision in *Cooper v Attorney General* [2008] EWHC 2178 (QB).

[124] Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10290 ('*Köbler*'). In *Köbler*, the CJEU found that the liability of Member States may arise when a national court of last instance fails to request a preliminary ruling in violation of Article 267 TFEU.

[125] Hof's Gravenhage (Netherlands), 27 May 2004 (2006) 8(2) SIAR 20.

('Contract'). After the dispute arose in 1998, the sole arbitrator seated in the US rendered three arbitral awards between 2001 and 2003 under the rules of the American Arbitration Association ('AAA') and the law of the State of Michigan. They were all confirmed by a Federal Court in Michigan. MDI sought enforcement of the awards in the Netherlands where VR had assets. Before the Dutch Court of First Instance, VR for the first time of the proceedings argued the invalidity of the Contract for breach of EU competition law. Both parties had remained silent on this issue during the arbitral and US proceedings and the arbitrator had not raised this issue *ex officio*.[126] The District Court considered the Contract to be in breach of Article 101(1) TFEU because it awarded VR an exclusive license to manufacture and sell products in the Benelux countries, and ruled that the agreement was not covered by the block exemption under EU Regulation No 240/96. Consequently, the Contract was void. The District Court therefore declined to grant leave for enforcement of the arbitral awards since their enforcement would breach EU public policy.[127] This decision was upheld on appeal.[128] To reach this conclusion, the Dutch courts had to review the merits of the case and apply a broad scope of judicial review to the arbitral awards.

Proponents of a 'minimalist' scope of control of arbitral awards have strongly criticised the Dutch decisions.[129] Some commentators highlight that a major attraction of international arbitration is the limited way in which arbitral awards can be set aside or denied recognition. Errors in the application of the law (or non-application of the law, as it was the case here) by arbitrators is not one of them.[130] These criticisms miss the point. The selling of frames pursuant to the licensing agreement was to take place exclusively in Benelux countries and therefore enforcing arbitral awards based on a void contract which breaches EU competition law would unmistakably

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[126] Ibid, para 27.

[127] President Court of First Instance of The Hague, 27 May 2004 (2006) 31 YB Com Arb 816.

[128] The Hague Court of Appeal, 24 March 2005 [2006] TvA 24.

[129] Mourre, Radicati di Brozolo (2007) (n54) 305.

[130] Chapter 5, Section 4.2, pp. 151ff.

negatively impact the internal market.[131] A national court could not enforce such an agreement. The Dutch decisions should be welcomed as a positive development which promotes effective control of EU competition law claims by national courts over arbitral awards.[132]

The Court of Appeal of Düsseldorf adopted a similar scope of judicial review during enforcement proceedings, in circumstances where the respondent argued that enforcement of the arbitral award breached EU and German competition law and should consequently be rejected under Article V(2)(b) of the New York Convention. After explaining that it had discretion to refuse enforcement under Article V(2)(b) of the New York Convention if the arbitral award breached German public policy, and holding that it was not bound by the arbitrators' 'legal and factual findings',[133] the Court of Appeal of Düsseldorf dismissed the respondent's claims and declared the award enforceable since, after broad review of the arbitral award, it appeared that the underlying contract did not breach EU competition law.[134]

As foreshadowed, an extensive standard of review of arbitral awards ensures the proper enforcement of EU public policy.[135] This principle permits some review of the merits and legal reasoning of the arbitrators in order to verify that the recognition and enforcement of the arbitral award on the territory of a Member State would not effectively and concretely violate EU public policy.[136] At the same time, if a broad scope of review is systematically enforced, it would

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131 See developments in Chapter 3.

132 Danov (n105) 268.

133 OLG Düsseldorf, 21 July 2004 (n49) 3158.

134 See also more recently Austrian Supreme Court, 18 February 2015, 2 Ob 22/14w, and for a commentary Gordon Blanke, 'Austrian Supreme Court rejects competition law challenge of ICC award' (7 November 2015) Kluwer Arbitration Blog, available at: http://arbitrationblog.kluwerarbitration.com/2015/11/07/austrian-supreme-court-rejects-competition-law-challenge-of-icc-award/ (last accessed 5 July 2019).

135 Christophe Seraglini, 'L'intensité du contrôle du respect par l'arbitre de l'ordre public' (2001) 4 Rev Arb 801; Radicati di Brozolo (2011) (n28) 40; Denis Mouralis, 'Conformité des sentences internationales à l'ordre public: la Cour de cassation maintient le principe d'un contrôle limité' (2014) 16 La semaine juridique 784.

136 It is a variation of the application of the 'second look doctrine' as postulated in the US Supreme Court's decision in *Mitsubishi*. In *Mitsubishi*, the Supreme Court held that courts retain the possibility to cast a 'second look' at the award at the setting aside and enforcement stage. US courts will have to control arbitral awards when US antitrust laws are involved. *Mitsubishi,* para 19.

jeopardise the principle of finality of arbitral awards which is essential for the settlement of commercial disputes and consequently for the development of the internal market. Besides, such a review may be particularly burdensome to the party in terms of cost, time, uncertainty of outcome, and should therefore not be automatic but limited to exceptional circumstances. An equilibrium must therefore be found between effective protection of EU public policy and effectiveness of international commercial arbitration within the EU.

5. Limiting the Broad Review of Arbitral Awards to Exceptional Circumstances: Finding a 'Middle Way'

AG Saggio in his *Eco Swiss* Opinion was in favour of an 'effective judicial supervision'[137] of arbitral awards dealing with EU competition law issues and underlined that 'the need to supervise arbitration awards to ensure that they are compatible with [EU] law is particularly great in an area, such as competition, where there is a general interest in observance of the rules to ensure the smooth functioning of the common market'.[138] In practice, an enlarged scope of control is the occasion to verify whether the consequences of enforcement would violate the fundamental interests of the EU. Therefore, when public policy rules are involved, the control should be made in fact and in law: the review of arbitral awards must be total.[139] It is, as explained above,[140] the necessary corollary of the courts' liberalism as regards the arbitrability of public policy issues.[141] The judicial review of arbitral awards must be an effective tool against the risk that the enforcement

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[137] *Eco Swiss*, Opinion AG Saggio, para 32.

[138] *Eco Swiss*, para 35.

[139] Jean-Baptiste Racine, *L'arbitrage commercial international et l'ordre public* (Dévolvé 2000) 571. For a contrary view see Radicati di Brozolo (2011) (n28) 21, where he considers that even when the award is unclear, poorly drafted or if it appears that the arbitration process was a cover for a fraudulent behaviour or if competition law has not been pleaded and not been raised *ex officio* by the arbitrators, 'a full-fledged review is not necessarily required'.

[140] Section 4.2, pp. 191ff.

[141] Thomas Carbonneau, 'Mitsubishi: the folly of quixotic internationalism' (1986) 2(2) Arb Int'l 127; William Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 Tulane L Rev 669.

or recognition of an arbitral award by a national court might impair EU public policy. For each of the reasons listed above,[142] reviewing courts cannot systematically limit themselves to only controlling the operative part of the arbitral award since, in itself, it is likely to be insufficient to reveal breaches of public policy.[143] For instance, competition law being intensely factual, it is very unlikely that the incompatibility of an agreement or of a practice with EU competition law might be flagrant in the dispositive part of the award. Instead, a detailed analysis of the factual context of the alleged infringement, and of its economic repercussions will generally be needed to determine whether there is an effective violation of EU public policy (e.g. determining the existence of a cartel requires a review of the facts as the infringement is usually concealed).[144] There is therefore a need for the possibility of a broad scope of judicial review which encompasses, a full review and, if needed, a new assessment of the evidence of the case.[145]

Hence, national reviewing courts should not relinquish their role as guardians of EU public policy and therefore be limited in their ability to review an arbitral award in any manner they deem necessary. Yet, they should not engage in an automatic in-depth review of each arbitral award which would undermine some fundamental principles of international commercial arbitration. A 'middle way'[146] must therefore be found which would encourage a full substantive review of the arbitral

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142 Section 4, pp. 189ff.

143 See e.g. Swiss Federal Tribunal, 5 November 1991 (1993) ASA Bull 9: 'the judge has to scrutinize not only the operative part of the award but also the grounds on which the decision is based'; Paris CA, 30 September 1993, *European Gas Turbines SA v Western International Ltd* (1994) 359: 'a national judge's control must take into account the significant facts and points of law required for the review of the compatibility of the award with public policy'. Olivier Caprasse, Bernard Hanotiau, 'Enforcement of Arbitration Agreements' in Emmanuel Gaillard and Dietro Di Pietro eds, *Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice* (Cameron May 2008) 815. However, a control limited to the face of the award seems to be the dominant US interpretation of *Mitsubishi*. See e.g. Christoph Liebscher, 'Arbitration of Antitrust Disputes' in Gaillard, Di Pietro 547.

144 Damien Geradin, *EU Competition Law and Economics* (OUP 2012) 1.61-1.80.

145 ILA, Recommendation 3(c): '[w]hen the violation of a public policy rule of the forum alleged by a party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the facts of the case, the court should be allowed to undertake such a reassessment of the facts.' available at: http://webcache.googleusercontent.com/search?q=cache:U0C9wyjmUEUJ:www.ila- hq.org/download.cfm/docid/BD0F9192-2E98-4B17- 8D56FFE03B80B3EA+&cd=1&hl=pl&ct=clnk&gl=be (last accessed 23 April 2019).

146 In favour of this middle way see Blanke (2013) (n38) 169-227

award when necessary. It is therefore an issue on which a pragmatic approach is needed considering the variety of scenarios that national courts may be confronted with when reviewing the arbitral award.[147] It is submitted that courts should only engage in a broad scope of judicial review when it is necessary as there are many instances when it will be clear, based upon the reading of the arbitral award's reasoning, that the arbitral tribunal has carried out a competent analysis of EU law and that there is no violation of public policy (Section 5.1). It only becomes necessary for the reviewing court to perform a broad review of the award, and go beyond it, when there are sufficient red flags raised either by the losing parties or *ex officio* by the reviewing court when examining the arbitral award (Section 5.2).[148]

5.1. Circumstances where a Limited Scope of Review Will (Usually) Be Sufficient

The reviewing court should rely on the elements submitted to the arbitral tribunal, without automatically being under the obligation to adopt the arbitral tribunal's legal characterisation, when it has no reason to suspect that it is inaccurate. The starting point for a reviewing court is therefore to look at the reasoning of the arbitral award. In the majority of cases, when the factual analysis and the reasoning of the arbitral award are satisfactorily developed, a simple reading of the arbitral award will be sufficient for the reviewing court to determine whether the award breaches EU public policy. When the arbitral awards contains exhaustive reasoning, it is therefore argued that there is no need for a broader scope of review which would include a review on the merits of the solution or an inquiry going beyond the analysis of the arbitral award,[149] since the arbitral award itself should reveal whether the public policy issue at stake has been satisfactorily addressed. For instance, in

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[147] See Mayer (2008) and Seraglini (2008) (n59) both categorised as pertaining to the 'maximalists' propose a standard of review which does not involve a systematic review of the merits of the awards and give useful guidance on the standard of review to guarantee its effectiveness.

[148] See Section 1 above.

[149] For a discussion of the meaning of the prohibition of the review of awards on the merits and for a criticism of the more restrictive views of Mayer and Seraglini, see Fadlallah (2008)(n58) 480ff.

SNF v Cytec, the arbitral tribunal methodically analysed the issue of EU competition law before declaring the underlying contract null and void for violation of EU provisions. When the reasoning of the arbitral award is sound and convincing in its factual and legal aspects, it is difficult to argue that the reviewing court would have to go beyond the reasoning of the arbitral award to perform an in-depth review of the facts and of the law.[150] Conversely, if the reasoning unmistakably reveals that the enforcement of the arbitral award would violate EU public policy (e.g. continuation of an anticompetitive behaviour), the reviewing court will be in a position to set aside or refuse recognition and enforcement to the arbitral award without performing any further review. The breach of public policy is then flagrant. This is the situation in *Eco Swiss* where a rapid examination of the facts in the arbitral award was sufficient to reveal that the underlying agreement violated Article 101 TFEU. Hence, if no violation of public policy is apparent from the review of an exhaustively reasoned arbitral award, it is unlikely that the reviewing court should go beyond the arbitral award. It is only in exceptional circumstances that a more extensive analysis might be necessary in order to determine whether there is a breach of public policy.

Even when the public policy issue has not been raised or pleaded, a broad scope of review will not always be required. A broad review is not needed when the alleged violation of EU law, even if established, would not rise to the level of a breach of EU public policy. For instance, a competition law issue might not have been addressed by the parties, or raised by the arbitral award on its own motion, but the award only awards damages without requiring the perpetuation of any anticompetitive behaviour. As explained in Chapters 3 and 5, such an award would not breach EU public policy. If, on the other hand, based on these facts, a convincing case could be made for a breach of EU public policy, the national court should consider engaging in a further examination of factual and legal arguments, but only for this very specific purpose.[151] The reviewing court should

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[150] Mourre, Radicati di Brozolo (2007) (n54) 326.

[151] Radicati di Brozolo (2011) (n28) 16. See also Luca Radicati di Brozolo, 'Arbitrage commercial international et lois de police' in *Collected Courses of the Hague Academy of International Law* (2006) 1431.

however pay due respect to the reason why this question was not raised during the arbitration proceedings.[152]

5.2. Circumstances that Call For a More Extensive Scope of Review

In certain circumstances, the mere analysis of the arbitral award might be insufficient to allow the reviewing court to determine whether there is an effective and concrete breach of EU public policy. In these circumstances, in order to guarantee the effective enforcement and protection of EU public policy, the national court will therefore have to go beyond the arbitral award. This section distinguishes three main situations.

First, and even when the arbitral award is exhaustively reasoned, the reviewing court might have to go beyond the arbitral award if the losing party provides compelling evidence to do so.[153] For instance, the party challenging the arbitral award provides material evidence, which had never been submitted to the arbitral tribunal, that the agreement between the parties effectively restricts competition in the internal market. The reviewing court will therefore have to go beyond the material elements submitted to the arbitral tribunal and the arbitrator's reasoning to determine whether the enforcement of the arbitral award would breach EU public policy. In that process, it might also request additional evidence from the parties according to its national rules of procedure. However, a mere allegation of a breach of EU public policy, not substantiated by compelling evidence, should not suffice to provoke a review of the result of the arbitration. It is submitted that the threshold triggering a broad scope of judicial review must be very high in order to guarantee the

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[152] Ibid; Seraglini (2009) (n48) 41.

[153] Canadian courts have requested that the party opposing recognition and enforcement should present compelling evidence. See e.g. *Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and P.T. PLN* [2007] ABQB 616.

principle of effectiveness of arbitration. The petitioning party must demonstrate that the breach, if ascertained, would constitute an effective and concrete breach of EU public policy.[154]

Second, when the reviewing court has strong suspicions that the arbitral award might effectively and concretely breach EU public policy, it should also have the possibility, on its own motion, to ask the parties to submit additional factual elements or testimonies that were not submitted to the tribunal during the proceedings.[155]

Thirdly, the scope of review is influenced depending on whether the public policy issue at stake has been ignored, or on the contrary has been examined by the arbitral tribunal.[156] Even when the reasoning in the arbitral award is not exhaustive, if the arbitral tribunal has satisfactorily treated the public policy issue, the reasoning should suffice to establish whether public policy has been breached or not. Further review then becomes unnecessary. However, when the issue has not been covered at all, or if the reasoning is not exhaustive, the reading of the reasoning of the arbitral award is unlikely to be sufficient. If the reviewing court may still be able to rely on facts, evidence, and testimony submitted by the parties to the tribunal, the reviewing court should also be able to ask the parties to submit additional elements that are deemed necessary in order to establish whether there is a breach of EU public policy. The court will have no other choice but to go beyond the limited, or inexistent, reasoning of the arbitral award, and perform an analysis of the merits and of the law in order to rule on the breach of public policy. Hence, the possibility for national courts to perform a broad review of the arbitral award should incentivise arbitrators to include in their arbitral award a reasoning detailed enough to allow the reviewing court to control whether EU public policy is upheld. This 'fear of the cop' might therefore indirectly ensure that EU public policy is

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154 Seraglini (2009) (n48) 40.

155 Ibid 39-40.

156 Ibid 40-41.

sufficiently taken into account by arbitral tribunals.[157] It might encourage arbitrators to consider, whether on their own motion or not, the applicability of substantive mandatory rules of EU law with a sufficient level of care to produce an award that maximises its chances of being upheld and enforced, since the absence of a proper reasoning may propel the reviewing courts to carry out an in-depth analysis of the award, increasing the risk that it may be set aside or denied enforcement.[158]

5.3. A Balanced Approach

The standard of review discussed in this section aims to strike a balance between the effective protection of EU public policy and the finality of arbitral awards. This standard is prudent enough to be in line with EU law, and acceptable enough not to warrant a departure from the principle of procedural autonomy of the Member States in order to guarantee the effectiveness of EU law.[159] If the sole reading of the dispositive part of the arbitral award will in general not be sufficient to inform the reviewing court whether there is a breach of EU public policy, the review should essentially relate to the examination of the arbitral tribunal's reasoning, without re-evaluating the merits or the tribunal's finding. The review of the arbitral award should be performed with an *a priori* positive bias towards the work performed by the arbitral tribunal.[160] This presumption of enforceability should only be overturned when there are serious reasons (or red flags) that justify it. Hence, a reviewing court can only broaden its review in the exceptional circumstances described in Section 5.2. This indirectly encourages arbitral tribunals to provide exhaustive reasoning for their decision to allow reviewing courts to verify that issues of public policy have been addressed.

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157 Damien Geradin, 'Public Policy and Breach of Competition Law in International Arbitration: A Competition Law Practitioner's Viewpoint' (2016) TILEC Discussion Paper No 2016-029 21ff, available at: https://ssrn.com/abstract=2786370 (last accessed 23 April 2019). See also Seraglini (2009) (n48).

158 Geradin (n156) 22.

159 Gordon Blanke, 'Chapter I: The Arbitration Agreement and Arbitrability - EC Competition Law Claims in International Arbitration' (2009) Austrian Arb YB 86ff.

160 Seraglini (2009) (n48) 40.

Exhaustive reasoning should shield the arbitral award from an intrusive scrutiny. An additional conclusion is that the mere allegation of a breach of EU public policy is insufficient to justify a review of the arbitral award under the ground of public policy. The party alleging a breach of public policy must demonstrate, 'with a very high degree of persuasiveness', that the breach, if established, would amount to an effective and concrete breach of public policy.[161]

Conclusion

The principle of procedural autonomy seemingly leaves considerable leeway to national courts when determining the standard of post-award review under the ground of public policy. However, as the foregoing analysis sought to show, there should be no systematic light touch review of arbitral awards when the public policy exception is involved. EU public policy would effectively be under-enforced if national courts were to adopt the French liberal system of review.[162] The possibility of extensive judicial review is necessary in order to allow courts to have complete freedom to evaluate the factual and legal circumstances of the case at hand. The general principles of finality of arbitral awards and absence of merits review cannot be used to deprive judicial review of its effectiveness. If national courts only control the extent to which arbitral awards apparently conform to EU public policy, then the protection of EU public policy is superficial and becomes illusory. Indeed, the award itself will very rarely carry a solution which would be explicitly contrary to public policy. Most of the time, the substantive decision, as opposed to its underlying merits, will be neutral as a matter of public policy.[163] A narrow scope of judicial review of arbitral awards is largely inefficient, and unacceptable as national judges are the genuine guardians of EU public

[161] Radicati di Brozolo (2011) (n28) 17. See also Seraglini (2009) (n48) 40.

[162] At least the French jurisprudence anterior to 2014.

[163] Racine (n136) 544.

policy, not arbitrators.[164] On the other hand, a systematic broad scope of judicial review might be unnecessary when the reasoning of the arbitral tribunal is sufficiently developed in the arbitral award to allow the national court to determine whether there is an effective and concrete breach of public policy. Hence, it is only when exceptional circumstances demand it that courts should go beyond the arbitral award to establish whether its recognition and enforcement would effectively and concretely breach EU public policy.

[164] Mayer (1994) (n3) 216.

CHAPTER 7 — THE IMPACT OF EU PUBLIC POLICY ON ARBITRAL TRIBUNALS

Introduction

As discussed in Chapters 3, 4, and 5, the ECJ has identified certain overriding mandatory provisions of EU law as pertaining to EU public policy for the purpose of post-award review (hereinafter 'EU public policy rules'). As a result, several national courts have annulled, or have refused to recognise and enforce arbitral awards because they breached EU public policy. This chapter analyses the consequences, if any, of these rulings for arbitral tribunals. It is concerned with the issue whether EU public policy considerations may be upheld during arbitration proceedings through the positive application of EU public policy rules.[1]

Arbitration, as the creature of contractual (and private) arrangements, may seem poorly suited to implementing public policy. Arbitrators, contrary to judges, are appointed by the parties and do not administer justice in the name of a state. They do not have a forum and are not the

1 The academic literature on the role of mandatory rules in arbitration is incredibly voluminous. See e.g. Pierre Mayer, 'Les Lois de Police Etrangères' (1981) 108 J Droit Int'l 277; Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arb Int'l 275; Jürgen Basedow, 'The Law of Open Societies: Private Ordering and Public Regulation of International Relations' (2012) 360 Collected Courses of the Hague Academy of International Law 164–92, 429–70; Lawrence Collins et al, Dicey, Morris and Collins on the Conflict of Laws, Lawrence Collins et al eds (15th ed, Sweet and Maxwell 2012) 1827ff; *Mandatory Rules in International Arbitration*, George Bermann and Loukas Mistelis (eds) (JurisNet 2011). See also Pierre Mayer, 'La sentence contraire à l'ordre public au fond' (1994) Rev Arb 615; Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' (1986) 3 ICCA Congress Series 205; Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 Am Rev Int'l Arb 319; Bernd von Hoffmann, 'Internationally Mandatory Rules of Law before Arbitral Tribunals' in Karl-Heinz Böckstiegel (ed), *Acts of State and Arbitration* (Carl Heymanns Verlag KG 1997) 3; Mark Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 14 J Int'l Arb 23; Mark Blessing, 'Impact of Mandatory Rules, Sanctions, Competition Laws' in *Introduction to Arbitration - Swiss and International Perspectives* (1999) 10 Swiss Commercial Law Series 228.

guardians of the public policy of any country.[2] The ECJ made this point clear in *Nordsee* where it held that arbitral tribunals are not courts or tribunals (in terms) of Member States.[3] This means that the EU legal order does not impose any direct obligation on arbitral tribunals.[4] As described by AG Wathelet in *Genentech*, the interface between EU law and international arbitration is conceived as a back-loaded system.[5] The mission of ensuring the application and interpretation of EU public policy is entrusted to national courts not to arbitral tribunals which are seized first of the matter.[6] Hence, if there is a requirement for arbitrators to uphold EU public policy, it can only be deemed to exist implicitly.[7] Yet, it does not logically follow that arbitral tribunals are automatically uninvolved bystanders to the EU's legal order.

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2 Mayer (1986) (n1) 291. In the absence of a *lex fori*, arbitrators may find 'public policy in [their] conscience' or, in what has been referred to as transnational public policy. The concept of transnational public policy is said to arise out of an international consensus regarding universal norms that are generally recognised as fundamental in 'civilised countries' (e.g. prohibitions against corruption, bribery, money laundering, human trafficking, slavery, or terrorism). See Audley Sheppard, 'Mandatory Rules in International Commercial Arbitration An English Law Perspective' (2007) 18 Am Rev Int'l Arb 129; Pierre Mayer, 'International Public Policy' in Loukas Mistelis and Julian Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 62; Emmanuel Gaillard, 'Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules' (1995) 10 ICSID Rev 223; Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?' (2001) 13 Arb Int'l 62. For a first formulation of the concept see Pierre Lalive, 'Transnational (or True International) Public Policy and International Arbitration in Comparative Arbitration Practice and Public Policy in Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1986) 3 ICCA 263-264.

3 *Nordsee*, para 10; *Eco Swiss*, para 34; and more recently *Achmea*, paras 43-49 (investment arbitration).

4 The obligations which arise from Article 4(3) TEU (to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union') do not extend to arbitrators. This point is well established. See e.g. Assimakis Komninos, 'Arbitration and the Modernisation of European Competition Law Enforcement' (2001) 24(2) World Competition 228; Laurence Idot, 'Arbitration and the Reform of Regulation 17/62' in Claus-Dieter Ehlermann, Isabela Atanasiu (eds) *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) I.2.1; Sacha Prechal and Natalya Shelkoplyas, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond' (2004) ERPL 608.

5 *Genentech*, Opinion AG Wathelet, paras 59-60.

6 Paschalis Paschalidis, 'Case C-567/14 Genentech: EU law confronted with international arbitration' (2016) 5(1) Eur Int'l Arb Rev 59; Paschalis Paschalidis, 'Arbitral tribunals and preliminary references to the EU Court of Justice' (2016) 32(3) Arb Int'l 3.

7 Philip Landolt, *Modernised EC Competition Law in International Arbitration* (Kluwer Law International 2006) para 7-48.

It is worth recognising that arbitrators are in a 'double bind'.[8] On the one hand, arbitration is a creature of contract. This requires arbitrators to decide the dispute that is referred to them within the limits of the arbitration agreement (their contractual mandate).[9] The importance of this is reflected in the fact that an arbitral award which exceeds the parties' submissions may be annulled[10] or not recognised and enforced.[11] On the other hand, party autonomy finds its limits in the sovereignty of States, 'the essence of jurisdictional power'.[12] Arbitration is necessarily dependent on sovereign support since courts of the seat or where recognition or enforcement is sought can deprive arbitral awards of their legal effectiveness,[13] and States may limit the arbitrability of any subject matter or ban arbitration altogether if its fundamental principles of law are flouted.[14] Hence, if the EU legal order does not require anything directly of arbitrators, they still perform their function within the grasp of national courts' post-award review mechanisms which attach importance to EU public policy. The interplay between those two main constraints shape the arbitrators' latitude for their decision whether to take EU public policy considerations into account. As this chapter argues, the scope of post-award review under EU law operates commutatively

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8 William Park, 'Private adjudicators and the public interest: the expanding scope of international arbitration' (1986) Brooklyn J Int'l L 650. See also Mayer (1986) (n1) 274.

9 See International Law Association ('ILA'), Rio de Janeiro Conference, Final Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration 19; Julian Lew, 'Chapter 5 – The Tribunal's Rights and Duties: What do Parties and Arbitrators Bargain for' in Bernard Hanotiau and Alexis Mourre (eds), *Players Interaction in International Arbitration* (2012) 9 Dossiers of the ICC Institute of World Business Law 47.

10 See UNCITRAL Model Law, Articles 34(2)(iii) and (iv); Arbitration Act 1996, paras 68(2)(b) and (c).

11 New York Convention, Article V(1)(c).

12 Charles Jarrosson, 'Qui tient les rênes de l'instance arbitrale? Volonté des parties et autorité de l'arbitre' (1999) Rev Arb 619; Charles Jarrosson, 'Notes on the decision of the Paris Court of Appeal, 19 May 1998, *Société Torno SpA v/ Société Kagumi Gumi Co Ltd*' (1999) Rev Arb 619.

13 At least when the losing party challenges the arbitral award or refuses to comply with it.

14 This point was illustrated recently regarding ISDS mechanisms in intra-EU BITs. In *Achmea*, the ECJ ruled that by submitting the disputes arising under the Netherlands-Slovakia BIT to an arbitral tribunal, these two Member States breached their obligations under Articles 267 and 344 TFEU to submit any question of interpretation or application of EU law to EU courts.

(notwithstanding imperfectly) as a constraint on arbitral tribunals.[15] They will usually do what is necessary in order to avoid interferences with their award.

This chapter examines the most desirable course of action for arbitral tribunals. There are three main questions that must be answered in order to determine whether arbitral tribunals will uphold EU public policy considerations: (i) may arbitral tribunals apply EU public policy rules?; (ii) if so, may they apply these provisions *ex officio*?; and (iii) if so, *should* they apply these provisions (even *ex officio*)?[16] This chapter is therefore divided into three parts. Section 1 demonstrates that if arbitral tribunals are rarely compelled to apply EU public policy rules, they have a broad discretion to do so. It is still unclear however whether arbitral tribunals, which derive their jurisdiction from the agreement of the parties, may, if the parties fail to plead the applicability of a public policy rule, raise this point *ex officio*.[17] Section 2 explains that the arbitrators' jurisdictional power grants them the ability to discretionarily raise the applicability of EU public policy rules *ex officio*, albeit within certain procedural limits. However, the difficulty with the arbitrators' broad procedural discretion to take into account public policy rules, even *ex officio*, is its lack of predictability: they might decide to exercise their discretion or they might not. Section 3 aims at introducing more predictability by explaining *why* arbitrators should raise EU public policy considerations, even *ex officio*, when such application is commanded by the facts of the case.

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15 Landolt (n7) 198; Hans van Houtte, 'Arbitration and Arts. 81 and 82 EC Treaty – A State of Affairs' (2005) 23(3) ASA Bull 431ff.

16 There is a fourth question which is: which method should they apply? However, this chapter does not address the different methods the arbitrator may rely on to justify the application of overriding mandatory rules. On the different methods of direct application see e.g. Laurence Shore, 'Chapter 4 – Applying Mandatory Rules of Law in International Commercial Arbitration' in Bermann and Mistelis (n1) 134; Andrew Barraclough, Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melb J Int'l L 227-235; Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 14(4) J Int'l Arb 28-33; Alexander Greenawalt, 'Does International Arbitration Need a Mandatory Rules Method?' (2008) 103(18) Am Rev Int'l Arb 147. For a critical evaluation of of these methods see George Bermann, 'Introduction – The Origin and Operation of Mandatory Rules' in Bermann and Mistelis (n1) 12. For a proponent of conflict of laws method see Giuditta Cordero-Moss, 'Arbitration and Private International Law' (2008) 11 Int'l Arb L Rev 153; Giuditta Cordero-Moss, 'Regulation of International Commercial Contracts: a Dilemma of Philosophical Character?' (2006) Scandinav Stud L 62; Giuditta Cordero Moss, 'Why Arbitration Needs Conflict of Laws Rules?' (2018) Kluwer Arbitration Blog, available at: http://arbitrationblog.kluwerarbitration.com/2018/10/17/why-arbitration-needs-conflict-of-laws-rules/ (last accessed 1 July 2019).

17 Giuditta Cordero-Moss, 'EU Overriding Mandatory Provisions and the Law Applicable to the Merits' in Franco Ferrari (ed.) *The impact of EU law on international commercial arbitration*.(Juris Publishing 2017) 388.

1. May Arbitral Tribunals Apply EU Public Policy Rules?

Court may apply mandatory rules emanating from three different sources: the *lex fori*, the *lex causae* (i.e. the law designated by the conflict of law rules of the *lex fori*), and the law of third States (i.e. States that are neither the forum nor the one of the *lex causae*).[18] Arbitrators, in contrast to judges, have no *lex fori* to fall back on, but simply a seat and a substantive law,[19] and do not administer justice in the name of a State. Consequently, arbitral tribunals may only apply the mandatory rules stemming from two sources: the *lex contractus* (i.e. the substantive law applicable to the merits of the dispute which may be designated by the parties, or, in their silence, chosen by the arbitral tribunal), and the legal systems of third States (hereinafter 'foreign mandatory rules'). As Section 1.1 explains, the application of EU public policy rules is well established when the *lex contractus* is the law of a Member State. The situation is far more complex[20] when EU public policy rules qualify as foreign mandatory rules. The application of foreign mandatory rules has always been controversial, even before courts, as it can limit the application of the law chosen by the parties. Yet, Section 1.2 establishes that there is an increasing consensus that arbitral tribunals may apply these rules.

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18 Gabrielle Kauffman-Kohler, Antonio Riggozi, *International Arbitration: Law and Practice in Switzerland* (OUP 2015) 383.

19 Pierre Mayer, 'Reflections on the International Arbitrators' Duty to Apply the Law – The 2000 Freshfields Lecture' (2001) 17(3) Arb Int'l 246. See also Yves Derains, 'Specific Issues arising in the Enforcement of EC Antitrust Rules by Arbitration Courts' in Claus-Dieter Ehlermann (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) 330; ICC Case No 1512 (1976) YB Com Arb 128 in which Pierre Lalive acting as sole arbitrator in the case held: '[t]he international arbitrator has no *lex fori* from which he can borrow rules of conflict of laws'; Yves Derains, 'L'ordre public et le droit applicable au fond du litige dans l'arbitrage international' (1986) 19 Rev Arb 380.

20 Blessing (n16) 23. See also Mark Blessing, 'Chapter 9 – Impact of Mandatory Rules, Sanctions, Competition Laws' in Mark Blessing (ed), *Introduction to Arbitration – Swiss and International Perspectives* (Helbing & Lichtenhahn 1999) 228.

1.1. A Straightforward Application of EU Mandatory Rules: the *Lex Contractus* is the Law of a Member State

The basic premise in commercial contract law is the principle of party autonomy which is widely acknowledged by national laws,[21] arbitration rules,[22] and authors.[23] Pursuant to the doctrine of party autonomy, parties are free to determine the substantive law (reflected in the '*lex contractus*' and, if different, in the '*lex arbitri*'), the rules applicable to the merits of the dispute to be solved by arbitration, and the seat of the arbitration from which derives, at least an implicit acceptance of, the *lex loci*. According to the principle of party autonomy, the choice of substantive law is binding on the arbitral tribunal. In the absence of an agreement by the parties, arbitral tribunals enjoy great latitude to determine the substantive law to govern their relationship.[24] The freedom to choose the applicable law is arguably greater than in litigation where this choice is constrained in several ways. For instance, under the Rome I Regulation, which expressly excludes arbitration agreements from its scope,[25] party autonomy is subject to several sets of limitations. For instance, Article 3(3) of the Rome I Regulation prevents the selection of a law that circumvents the mandatory rules of the

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21 See English Arbitration Act 1996, s 46; French CPC, Article 1511; Dutch CPC, Article 1054; German ZPO, Article 1051(1). See also European Convention on International Arbitration, Article VII(1); UNCITRAL Model Law, Article 28(1).

22 See e.g. UNCITRAL Rules, Article 33; 2017 ICC Rules, Article 21(1); 2014 LCIA Rules, Article 14(2).; Swiss Rules of International Arbitration Article 33(1); AAA International Arbitration Rules Article 28(1).

23 See Bernard Audit, 'Chapter I – Choice of the Applicable Law by the Parties' in Fabio Bortolotti, Pierre Mayer (eds) *The Application of Substantive Law by International Arbitrators* (2014) 11 Dossiers of the ICC Institute of World Business Law 10; Emmanuel Gaillard, John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer 1999) 785.

24 Some national laws leave the arbitral tribunal completely free to choose the applicable law see e.g. French CPC, Article 1511; Spanish Ley 60/2003 de 23 diciembre de Arbitraje, Article 34(2); Dutch WBR, Article 1054 para 2. By contrast, some arbitration laws leave the arbitral tribunals only free to choose the conflict of law rules they deem appropriate in order to determine the applicable law (indirect approach). See e.g. English Arbitration Act, Section 46(3); Belgian Judicial Code, Article 1710(2); European Convention on International Arbitration, Article VII(1). However, some arbitration laws do not give the arbitral tribunal the choice of the conflict of law rules they must apply to determine the applicable law. E.g. Italian CPC, Article 834; German ZPO, 1051(2). Yet, even the German and Italian regimes do not actually constrain arbitral tribunals since there is not sanction if they fail to respect the conflict of law rule. See Jan Engelmann, *International Commercial Arbitration and the Commercial Agency Directive* (Springer 2017) 81ff; Jan Kleinheisterkamp, 'The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements' (2009) 3 World Arb & Med Rev 107; Blessing (1999) (n20) 212; Natalya Shelkoplyas, *The Application of EC Law in Arbitration Proceedings* (Europa Law Publishing 2003) 266.

25 Rome I Regulation, Article 1(2)(e).

'natural' choice of law when all the elements of the contract point to a single country. Article 3(4) of the Rome I Regulation extends this principle to EU provisions which cannot be derogated from by agreement.[26] There are also limitations connected to the public policy of the forum State.[27] Parties therefore enjoy greater flexibility when choosing the applicable law to their underlying dispute in international arbitration since arbitral tribunals are not bound by the conflict of laws rules binding courts.[28]

The fundamental question that needs to be answered is how broad the scope of the applicable law is. It is generally admitted that a choice of law encompasses the entirety of that law (i.e. statutes, regulations, decrees, international treaties in force in the State to which the choice of law refers).[29] It follows logically that the chosen law is applicable in its entirety to solve the substantive dispute.[30] The choice of law therefore also includes the mandatory rules of the chosen law.[31] As Bermann posits, it would be 'entirely counter-intuitive' if arbitrators did not apply mandatory rules that are part of the law applicable to the merits.[32] Indeed, the parties have the possibility of selecting an applicable law which contains, or does not contain, certain mandatory rules.[33] The parties may even choose the *lex contractus* for its mandatory rules.[34] This only

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26 There are other references in the Rome I Regulation to provisions which cannot be derogated from by agreement regarding: (i) contracts involving consumers (Article 6(2)); (ii) insurance contracts (Article 7(3)); (iii) employment contracts (Article 8(1)); and (iv) rights in rem or tenancy in immovable property (Article 11(5)).

27 Rome Convention, Article 16; Rome I Regulation, Article 21.

28 Kleinheisterkamp (n24) 107; Julian Lew, Loukas Mistelis et al (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 426.

29 Kaufmann-Kohler, Rigozzi (n18) 384.

30 Bernhard Berger, Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd, Stämpfli 2015) 1399; Kaufmann-Kohler, Rigozzi (n18) 383; Mayer (1986) (n1) 280; Bernd von Hoffmann, 'Internationally Mandatory Rules of Law before Arbitral Tribunals' in Karl-Heinz Böckstiegel (ed), *Acts of State and Arbitration* (Verlag 1997) 3.

31 Berger, Kellerhals (2015) (n30) 1424.

32 George Bermann, 'Mandatory rules of law in international arbitration' (2007) 18 Am Rev Int'l Arb 331.

33 Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International 1987) 228. See also Marc Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts* (Helbing & Lichtenhahn 1999) 355.

34 Barraclough, Waincymer (n16) 216.

strengthens the argument that it is safer to assume that the selected *lex contractus* applies fully, including its mandatory rules.[35] There is therefore a presumption in favour of applying the mandatory rules of the *lex causae* until parties demonstrate, or agree to, the contrary. The situation is different if the parties expressly excluded, in their arbitration agreement or before the arbitral tribunal, the mandatory rules of the *lex contractus*.[36] Similarly, when arbitrators select the *lex contractus* in the silence of the parties,[37] this law should apply in *toto*.

When the *lex contractus* is the law of a Member State, EU mandatory rules become applicable.[38] As explained previously in Chapter 2, EU law is considered as forming part of the Member State law by virtue of the principle of primacy of EU law. EU laws are incorporated within the Member State's legal order.[39] This has also been acknowledged, albeit implicitly, by a number of arbitral tribunals which have applied EU competition law when the substantive law applicable to the dispute was that of one of the Member States, and the underlying contract restricted competition within the internal market.[40] For instance, in ICC award No 7873,[41] the arbitrators considered the applicability of EU competition law because the *lex contractus* was German. Since the anti-

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35 Contra Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 Am Rev Int'l Arb 339ff.

36 For instance under Swiss law, the parties can choose not to apply a particular substantive law or to only apply a certain part of it (so-called 'negative choice of law'). Hence, parties could agree to exclude the application of EU law when the *lex arbitri* allows it. Berger, Kellerhals (2015) (n30) 1397; Kaufmann-Kohler, Rigozzi (n18) 385.

37 *Fouchard Gaillard Goldman* (n23) 1190.

38 See Audit (n23) 10.

39 Yves Brulard, Yves Quintin, 'European Community Law and Arbitration' (2001) 18 J Int'l Arb 533.

40 ICC Interim Award No 9347 (EU competition law forming part of Greek law, the governing law of the underlying main agreement), and ICC Final Award No 10694 as quoted in Katharina Hilbig, *Das gemeinschaftsrechtliche Kartellverbot im internationalen Handelsschiedsverfahren, Anwendung und Gerichtliche Kontrolle* (Munich 2006) 134, fn 908, and 139 (where Hilbig reports that the ICC Tribunal noted that Austrian law and hence Article 81 EC (now Article 101 TFEU) was applicable to the dispute). Even if these awards do not expressly refer to the principle of primacy of EU law, its application is clearly implied in the wording of the text of the awards. See also ICC Interim Award No 7319 (1994) ICC Bull 41–42: 'European Community Law, where applicable […] forms part of the national laws of each Member State'; ICC Final Award No 7315 (1994) ICC Bull 44, invoking 'the rules of free competition of the European Economic Community' on the basis of Spanish Law being applicable to the underlying exclusive distribution agreement.

41 Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration', in Peter Sanders (ed), *International Council for Commercial Arbitration – Comparative Arbitration Practice and Public Policy in Arbitration* (TMC Asser Institute 1986) 244. Contra Voser (n35) 339.

competitive behaviour affected the EU market (the underlying contract was signed between a German licensor and an Italian licensee for the distribution of manufacturing products within the EU), the arbitral tribunal applied EU competition law on the basis that it formed part of German competition law which was the *lex contractus* chosen by the parties.

It is therefore uncontroversial that arbitral tribunals will have to apply EU mandatory rules when: (i) the *lex contractus* is the law of a Member State, (ii) one of the party invokes the application of its mandatory rules (which includes EU mandatory rules), and (iii) the parties did not expressly exclude their application (the contrary is however rare in practice).[42] As explained below, the situation becomes more complex when one of these three elements is not fulfilled.

1.2. May Arbitrators Apply EU Public Policy Rules When the *Lex Contractus* is not the Law of a Member State?

This section seeks to answer the question whether arbitral tribunals can go beyond the *lex contractus* to apply the mandatory rules of another law. Two situations shall be distinguished: (i) one of the party invokes the application of EU public policy rules despite the *lex contractus* being the law of a non-Member State; and (ii) the parties expressly exclude the application of a Member State law, or EU law. These two scenarios are studied in Sections 1.2.1 and 1.2.2 respectively. If the possibility of applying foreign mandatory rules is generally accepted,[43] it might raise some difficulties as explained in Section 1.2.3.

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[42] Mayer (1986) (n1) 280.

[43] Andrea Bjorklund, 'Chapter 8: Investment Arbitration' in Bermann, Mistelis (n1) 233; Bermann (n16) 10; Shore (n16) 131.

1.2.1. The Arbitral Tribunal's Discretion to Apply EU Public Policy Rules When the *Lex Contractus* is Not the Law of a Member State

To a certain extent, the situation is similar to the one courts are confronted to. When the courts of country A apply the law of country B as a result of the application of their conflict of law rules, should they also consider applying the mandatory rules of country C?[44] Even if the arbitrator does not have a forum nor a *lex fori* in the private international law meaning of the term, the situation is analogous since the arbitrator, like the judge, needs to decide whether she should take into account the mandatory rules of country C, which do not belong to the *lex contractus*.

Both statutes[45] and academic literature[46] accept that foreign mandatory rules might prevail over the law chosen by the parties when a dispute is brought to courts. However, in practice, this principle is rarely implemented. Audit cannot find one example of a national court implementing Article 7(1) of the Rome Convention (now Article 9(3) of the Rome I Regulation) which allows courts to apply foreign mandatory rules.[47] Most national courts still ignore this principle.[48] This is arguably because it is difficult to identify third-country mandatory rules.[49] Hence, if the frequency with which arbitral tribunals may consider the application of foreign mandatory rules is to be inferred from how often national courts enforce them pursuant to Article 9(3) of the Rome I Regulation, the conclusion is that they might do so very infrequently.

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44 Bermann (n16) 10.

45 Rome I Regulation, Article 9(3) (prior Rome Convention, Article 7(1)). See also Rome I Regulation, Article 3, and Recitals 15, 20 and 37; Unidroit Principles of International Commercial Contracts 2014 and the US Second Restatement of the Conflict of Laws.

46 See (n1).

47 Bernard Audit, 'How Do Mandatory Rules of Law Function in International Civil Litigation' (2007) 18 Am Rev Int'l Arb 53.

48 See ibid 45–47; Dominique Bureau, Horatia Muir Watt, 'L'impérativité Désactivée? A Propos de Cass. Civ. I ère, 22 Octobre 2008' (2009) 98 Rev Crit DIP 17; Jonathan Harris, 'Mandatory Rules and Public Policy under the Rome I Regulation' in Franco Ferrari and Stefan Leible (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Sellier 2009) 281–82.

49 See Bermann (n16) 6–7; Hannah Buxbaum, 'Chapter 1: Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization' in Bermann, Mistelis (1) 38.

However, conflict of laws rules do not effectively constrain arbitral tribunals.[50] It does not mean that arbitrators cannot voluntarily adhere to them if they deem them applicable to the dispute. In the absence of strict international guidelines, arbitrators have to remain the primary judges of the relevance of raising foreign mandatory rules.[51] Arguably, it is the reason why some authors argue that the position of foreign mandatory rules is comparatively stronger in international arbitration than it is in international litigation.[52] Arbitrators might be more receptive to the application of foreign mandatory rules since they have a lesser degree of obligation as decision makers to any given State.[53] Besides, it is generally agreed that arbitration clauses are more broadly drafted than choice-of-law clauses.[54] Since the jurisdiction of the arbitrators is generally based on broad contractual arbitration agreements, their decisional authority can be exercised over broader sets of claims than those encompassed in more narrowly drafted choice-of-law clause. This arguably allows arbitrators to entertain with greater latitude claims arising out of applicable mandatory rules, even when they do not belong to the *lex contractus*. It does not mean however that they will systematically decide to do so.

For instance, in *Accentuate v Asigra*, an English distributor/agent, Accentuate Limited, brought an action for breach of a software distribution contract against its licensor/principal, Asigra Inc, a company incorporated in Canada. The contract contained an arbitration agreement which submitted any dispute to the laws of Ontario and the federal laws of Canada, and provided for arbitration in Toronto. The claimant asserted his right under EU law, more specifically Articles 17 to

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50 That arbitrators are not bound to apply the principles of private international law that are applicable to courts is considered to be an uncontested point. See Mayer (n1) 283; *Fouchard Gaillard Goldman* (n23) 849. At the same time, arbitrators are said to be under no public duty to enforce state laws. See ILA Final Report 20; Luca Radicati di Brozolo, 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators' (2011) Arb Int'l 16ff.

51 See Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts, 19 March 2015, Article 11(5). These principles are meant as a restatement of generally recognised principles of private international law.

52 Delphine Nougayrède, 'TNK-BP, Party Autonomy, and Third-Country Mandatory Rules' (2015) 35(3) Northwestern J Int'l Law & Bus 6; Bermann (n16) 16; Greenawalt (n16) 147.

53 Bermann (n16) 13-16; Audit (n23) 37.

54 Bermann (n16) 16; Greenawalt (n16) 148.

19 of Directive 86/653.[55] However, the Canadian arbitrators held that despite 'interesting academic and intriguing domestic and international policy reasons why an arbitral tribunal should or should not apply non *lex contractus* mandatory rules of law to certain situations', 'this does not justify restricting the parties' freedom to choose a desired governing law in Ontario' and applied exclusively the latter.[56] Hence, through the arbitration agreement and the choice of a non-Member State law, the English agent lost the protection afforded to him under EU law. EU overriding mandatory rules became mere '*lois d'application semi-nécessaire*'[57].[58]

1.2.2. The Arbitral Tribunal's Discretion to Apply EU Public Policy Rules When EU Law Has Been Explicitly Excluded by the Parties

Albeit very rare in practice, parties may exclude the application of certain substantive laws, so-called 'negative choice of law'.[59] It is unclear what arbitrators should do when the parties expressly agree that EU law, broadly or some specific provisions, shall not be applied to solve their substantive dispute. It needs to be examined whether, in such a case, the tribunal could disregard the negative choice of law to some extent and apply EU public policy rules.

As discussed above, it is broadly accepted that the arbitral tribunal has a broad discretion in deciding whether to apply mandatory rules even when they do not belong to the *lex contractus*.

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55 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L 382, 17–21.

56 Excerpt of the award of 3 March 2008, paras 18-20, cited in *Accentuate v Asigra* [2009] EWHC 2655 (QB), para 73.

57 Luca Radicati di Brozolo, 'Mondialisation, jurisdiction, arbitrage: vers des règles d'application semi-nécessaire?' (2003) Rev crit DIP 1; Luca Radicati di Brozolo, 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators' (2011) 27(1) Arb Int'l, paras 37-38. See also Horatia Muir Watt, 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy' (2003) 9 Colum J Eur L 383; Luca Radicati di Brozolo, 'Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration: A Fresh Look at the "Second Look"' (2004) Int'l Arb LR 23.

58 However, the English High Court denied recognition and enforcement to the arbitral award in the controversial *Accentuate Ltd v Asigra* judgment. See particularly the reasoning Tugendhat J para 88. For a similar reasoning see Mann J in *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (albeit obiter). See also OLG München 17 May 2006 (2007) 7 U 1781/06, IPrax, 322-334; CCass (Belgium) 3 November 2011, *Air Transat v Agencies Air Belgium*, N° C.10.0613.N; OGH 1.3.2017, 5 Ob 72/16y.

59 E.g. Swiss law. For a commentary see Berger, Kellerhals (2015) (n30) 1397; Kaufmann-Kohler, Rigozzi (n18) 357.

However, it has been argued that the situation is more complex when the parties explicitly excluded the application of a law, since they expressly manifested their desire not to have such a law applied to their dispute.[60] Yet, if parties can exclude the application of EU law, it is doubtful that they can exclude the application of its overriding mandatory rules. There are certain limits to party autonomy in choice of law. As Born points out, although presumably valid in principle, a negative choice of law finds its limits in the application of the overriding mandatory rules of the law that the parties sought to dismiss.[61] In these circumstances, it is therefore submitted that the arbitral tribunal maintains its broad discretion to ignore the exclusion of EU law in order to take into account EU overriding mandatory provisions.

1.2.3. Going Beyond the *Lex Contractus*: an Excess of Power?

Since the arbitral tribunal retains discretion in interpreting the contract and the proven facts, but also in applying the governing law, these elements are not subject to post-award review. The arbitral award is valid and enforceable even if it is based on an incorrect application of the law, unless this incorrect application of the law triggers a breach of public policy.[62] It is only when the arbitral tribunal exceeds its power that the arbitral award may be invalid or unenforceable. Such an arbitral award could be set aside pursuant to numerous State arbitration laws,[63] and be deemed unenforceable pursuant to Article V(1)(c) of the New York Convention.[64]

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60 Sandra De Vito Bieri, Penelope Nünlist, 'The application of EU law by arbitral tribunals seated in Switzerland' (2017) 35(1) ASA Bulletin 58.

61 Gary Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) 2769. See also Christophe Seraglini, *Lois de Police et Justice Arbitrale Internationale* (Dalloz 2001) 340.

62 See Chapter 5, Section 4.2, pp. 151ff.

63 The award may therefore also be set aside by the courts of the country of origin. See English Arbitration Act, Section 68(2)(b); French CPC, Article 1520(3); Swiss PILA, Article 190(2)(c); UNCITRAL Model Law, Article 34(2)(a)(iii). The same rule applies to the annulment of ICSID awards (ICSID Convention, Article 52(1)(b)).

64 The enforcement of ICSID awards is subject to the same rules of enforcement that apply to final court decisions of that State (ICSID Convention, Article 54(1)).

An arbitral tribunal is obliged to apply the law chosen by the parties when the contract contains a choice of law according to both arbitration rules[65] and arbitration laws.[66] This duty to apply the law chosen by the parties raises the question whether an arbitral tribunal can disregard the parties' choice under certain circumstances or whether this would constitute an excess of power. If post-award proceedings may not be used to review the merits of the arbitral tribunal's decision, nor the tribunal's application of the law, the courts reviewing the arbitral award might however verify whether the arbitral tribunal had the authority to apply that law in the first place. If it did not, the absence of authority could amount to an excess of power.[67] The underlying idea is that the same contract may have significantly different effects depending on the applicable law. When the dispute is supposed to be solved on the basis of a certain law that has been chosen by the parties, if the arbitral tribunal applies another law which regulates a similar issue in a different way, it could be argued that the tribunal's decision would be made on matters different than those submitted by the parties.[68] Such a reasoning has been successful in some ICSID arbitral awards which were annulled by the Appeal Committee on the basis of excess of power[69] because the arbitral tribunal rendered an award on the basis of a law different from the applicable law.[70] Yet, in these cases the arbitral tribunal had either failed to apply any provision of the applicable law, applying instead 'broad

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65 E.g. 2017 ICC Rules, Article 21(1); 2014 LCIA Rules, Article 22(3); SCC Rules, Article 22(1); UNCITRAL Rules, Article 35(1).

66 E.g. English Arbitration Act, Section 46(1); French CPC, 1520(3); Swiss PILA, Article 187(1); UNCITRAL Model Law, Article 28(1); ICSID Convention, Article 42.

67 Giuditta Cordero-Moss, 'Chapter 8 – The Arbitral Tribunal's Power in respect of the Parties? Pleadings as a Limit to Party Autonomy - On Jura Novit Curia and Related Issues', in Franco Ferrari (ed) *Limits to Party Autonomy in International Commercial Arbitration* (JurisNet 2014) 310ff.

68 Cordero-Moss (2014) (n67) 307. For a similar reasoning see Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (6th edition, OUP 2015) para 3.91; ILA, 'Final Report: Ascertaining the Contents of the Applicable Law', Rio de Janeiro Conference (2008), Recommendation 19, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/19 (last accessed 30 September 2019).

69 ICSID Convention, Article 52.

70 For an overview see Christoph Schreuer, *The ICSID Convention* (CUP 2001) paras 191-270; Emmanuel Gaillard, 'The Extent of Review of the Applicable Law in Investment Treaty Arbitration' in Emmanuel Gaillard, Yas Banifatemi (eds) *Annulment of ICSID Awards* (Juris Publishing 2004) 223.

equitable principle',[71] or had failed to apply essential provisions of the applicable law.[72] The position of an arbitral tribunal which applies mandatory rules which do not belong to the *lex contractus* is arguably different.

Besides, as explained by Cordero-Moss, when the law chosen by the parties contains rules that provide for other laws to be taken into account, there cannot be an excess of power.[73] For instance, some laws contain a rule on illegality which allows a choice of law to be disregarded when that choice leads to the violation of foreign mandatory rules.[74] Hence, a tribunal taking into account a foreign law under these circumstances would not exceed its power but would instead be giving full application to the law chosen by the parties.[75] Similarly, the law chosen by the parties may give effect to foreign mandatory rules through its frustration rules.[76] Finally, and perhaps more controversially, conflict of laws rules of the applicable law may also regulate the scope of party autonomy, and allow the direct application of foreign (overriding) mandatory rules and the public policy exception.[77] Yet, even when the law chosen by the parties does not contain any of these elements, an analysis of UNCITRAL Model Law and of New York Convention case law demonstrates that the defence of excess of power is rarely successful for the purpose of sanctioning the arbitral tribunals' selection and application of the law,[78] and tends to be rejected.[79]

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71 *Klöckner v Cameroon* (ICSID Case No. ARB/81/2), Decision on Annulment, 3 May 1985 (the tribunal did not apply the applicable law but instead relied on 'broad equitable principle' para 79).

72 *Amco v Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, 16 May 1986 (failure to apply essential provisions of the applicable law).

73 Ibid.

74 E.g. German BGB, § 138; Swiss Obligation Code, Article 20; Russian Civil Code, Article 169.

75 Cordero-Moss (2014) (n67) 310ff.

76 Ibid; *Fouchard Gaillard Goldman* (n23) 849.

77 Giuditta Cordero-Moss, *International Commercial Contracts* (CUP 2014) 177-180.

78 See Born (n62) Sections 25.04(F) (3)(g) and 26.05(C)(4)(f).

79 *Fouchard Gaillard Goldman* (n23) 1700.

1.3. Intermediate Conclusion

When the *lex contractus* is not the law of a Member State, arbitrators are under no direct obligation to take EU public policy rules into account. Yet, they maintain a broad discretion to do so. In the absence of strict international guidelines, arbitrators have to remain the primary judges of the relevance of applying EU public policy rules. The key question is to determine which elements may trigger the exercise of that discretion.

2. May Arbitrators Raise EU Public Policy Considerations *Ex Officio*?

There is no doubt that arbitrators can apply EU law.[80] However, even if parties tend to bring up the applicability of EU law themselves,[81] as part of the so-called 'Euro-defense',[82] they might not do so whether due to ignorance, collusion,[83] or even concerns about criminal liability and/or reputational damage. In that silence, *can* arbitrators raise EU public policy considerations *ex officio*? Some

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80 It is inferred from the judgment in *Nordsee* in which the ECJ refused to answer a preliminary question refereed by an arbitral tribunal. In doing so, the ECJ recognised, implicitly, that EU law can be applied in arbitral proceedings. Since then, this conclusion has been confirmed in other ECJ judgments e.g. *Eco Swiss*, *Claro*, and *Asturcom*.

81 Meng Chen, 'Empirical Research on Mandatory Rules Theory in International Commercial Arbitration' (2016) 19 Int'l Trade & Bus Law Rev 245ff. This paper did not focus on EU overriding mandatory rules and EU public policy but studied the 520 published extracts from ICC arbitral awards since 1990. Only 34 of these awards mentioned mandatory rules, and only 13 directly involved and discussed mandatory rules. In about half (46%) of the cases mentioning mandatory rules, the respondent brought up the mandatory rules, and in 8% it was the claimant (N/A 8%). In 38%, five cases, the arbitral tribunal initiated mandatory rules discussion.

82 See John Beechey, 'Arbitrability of Anti-trust/Competition Law Issues – Common Law' (1996) 12(2) Arb Int'l 182; Landolt (n7) 202.

83 An example of collusion is reported in Jacques Werner, 'Application of Competition Laws by Arbitrators. The Step too far' (1995) 12 J Int'l Arb 23, where he refers to an unpublished ICC award in which two EU companies entered an agreement which infringed Article 101 TFEU. Only one copy of the agreement existed to which the arbitrators had access but they were asked not to mention it in their decision.

commentators encourage such an active role,[84] while others challenge it,[85] or even argue for its exclusion.[86] Arbitral tribunals have sometimes done so,[87] but the theoretical and legal justification for this unilateral action is far from clear. As explained in Section 2.1, the jurisdictional power of arbitrators grants them the power to raise EU public policy considerations *ex officio*. However, this thesis also argues, in Section 2.2, that when arbitrators raise EU public policy considerations *ex officio*, they should ensure that the award complies with the essential principles of international arbitration (i.e. the parties' right to be heard in an adversarial procedure, their right to equality, and their right to the impartial resolution of their dispute) to avoid the annulment or non-recognition of the arbitral award.

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84 For example, Teresa Giovannini, 'International arbitration and jura novit curia' (2012) 9(3) Trans Disp Management 1-14; Joanna Jelmielniak, Stefanie Pfisterer, 'Iura Novi Arbiter Revisited: Towards a Harmonised Approach?' (2015) Unif LR 56ff; Joshua Karton, 'The Arbitral Role in Contractual Interpretation' (2015) 6(1) J Int'l Disp Settl 4ff. For a more cautious approach see Gisela Knuts, 'Jura novit curia and the right to be heard – an analysis of recent case law' (2012) 28(4) Arb Int'l 669ff. In the context of investment arbitration, see Christoph Schreuer, 'Three generations of ICSID annulment proceedings' in Emmanuel Gaillard, Yas Banifatemi (eds), *Annulment of ICSID Awards* (IAI Series on International Arbitration 2004) 30ff, quoting a series of decisions by the ICSID *ad hoc* annulment Committee applying the principle *iura novit curia*, and therefore approving of this application. Some authors without encouraging such an active role at least recognise its possibility. E.g. Audley Sheppard, 'Chapter 6 – Mandatory Rules in International Commercial Arbitration: An English Law Perspective' in Bermann, Mistelis (n1) 171; Shore (n16) 131.

85 For example, Antonias Dimolista, 'The raising ex officio of new issues of law' in Fabien Bortolotti, Pierre Mayer (eds) *The Application of Substantive Law by International Arbitration* (ICC Dossiers 2014) 23; Catherine Kessedjian, 'Principe de la contradiction et arbitrage' (1995) 3 Rev Arb 381ff; Julian Lew, *Iura Novit Curia and Due Process* (QMUL, Legal Studies Research Paper No 72/2010) 7ff; Noah Rubin, 'Observations in connection with Swembalt AB v. Republic of Latvia' (2004) 2 Stockholm Arb Rep 123ff, seems to justify an active role by the tribunal only in some contexts of public interest, such as investment arbitration; Michael Schneider, 'Combining arbitration with conciliation' (2003) 2 Oil, Gas and Energy Law Intelligence 4, doubts whether an arbitral tribunal should have the authority to identify, *ex officio*, the applicable rules of law to the claims made before it. In any case, he considers it necessary for the tribunal to invite the parties to clarify their case. Bermann (n16) 20.

86 E.g. Kaj Hober, 'Arbitration involving states' in Laurence Newman, Richard Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris Net 2004) 158, affirming that in a procedure as consensual as arbitration is, it must be up to the parties to determine the scope of the dispute both as to facts and law. See also Gabrielle Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions' (2005) 21(4) Arb Int'l 631; Gabrielle Kaufmann-Kohler, ''Iura Novit Arbiter' - Est-ce bien raisonnable? Réflexions sur le statut du droit de fond devant l'arbitre international' in Anne Hériter Lachat and Laurent Hirsch (eds) *De Lege Ferenda - Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch* (Slatkine 2004) 71.

87 Arbitral award rendered in Rotterdam 22 July 1964 (1965) Rev Arb 28: the arbitral tribunal verified *ex officio* the validity of contracts on imports in the Netherlands under Article 85 of the Treaty of Rome and ruled that the contracts were void. See also ICC n°7539 1995 (1996) Rev Arb 1030: the arbitral tribunal applied *ex officio* EU competition law to agreements prohibiting active or passive sales by the licensee; ICC n°2811 1978 (1979) Rev Arb 983; ICC n°6106 1991 (1994) 5(2) Bull CIA/CCI 44.

2.1. The Arbitrator's Discretionary Power to Raise the Applicability of EU Public Policy Rules *Ex Officio*

The ECJ held that courts should only act *ex officio* where the public interest requires, exceptionally, intervention.[88] The parties are otherwise responsible for introducing legal issues in the ordinary course. The ECJ did not take the extra step in any of its judgments of recognising an equivalent duty on arbitral tribunals, despite being given the explicit opportunity by the Dutch Supreme Court to answer that question in *Eco Swiss*.[89] Arguably this silence was to be expected considering, that arbitral tribunals are not courts or tribunals (in terms) of Member States.[90] The enforcement of EU law rests in large part on the duties that Article 4(3) TFEU places upon Member States, including their courts or tribunals. This makes it difficult for the ECJ to impose obligations, as a matter of EU law, on arbitral tribunals.[91] As a result, the EU legal order does not impose direct obligations on arbitral tribunals. Hence, if there is a requirement for arbitrators to apply EU law, it can only be deemed to exist implicitly.[92]

Since the EU legal order does not require anything *directly* of arbitrators, the role of ascertaining their role has fallen, as result, to domestic legal regimes and applicable arbitration

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88 *Van Schijndel*, para 21; *Eco Swiss*, para 41; *Manfredi*, para 31; *Claro*, para 38; *Asturcom*, para 59.

89 *Eco Swiss*, para 42. On the other hand, AG Saggio argued that: 'Community law does not require arbitrators […] to raise of their own motion questions about the compatibility of that agreement with Community competition law if consideration of those questions would oblige them to abandon the passive role assigned to them'. *Eco Swiss*, Opinion AG Saggio, para 21.

90 *Nordsee*, para 10; *Eco Swiss*, para 34; and more recently *Achmea*, paras 43-49 (investment arbitration).

91 The ICC Task Force for Arbitrating Competition Law Issues' proposition in paragraph 8 of the *Draft Best Practice Note on the European Commission Acting as Amicus Curiae in International Arbitration Proceedings* which suggests that arbitrators would have a duty to raise EU law *ex officio* is therefore incorrect as a general statement. Carl Nisser, Gordon Blanke, 'ICC Draft Best Practice Note on the European Commission Acting as Amicus Curiae in International Arbitration Proceedings – The Text' (2008) 19(1) Eur Bus L Rev 198ff.
On this subject, see also Yves Derains, 'Les normes d'application immédiate dans la jurisprudence arbitrale internationale' in *Mélanges Goldman* (Litec 1983) 38. In relation to EU law, see in particular, Yves Derains, 'Specific Issues Arising in the Enforcement of EC Antitrust Rues by Arbitration Courts' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart 2003) 330ff; Alexis Mourre, 'Le libre arbitre, ou l'aveuglement de Zalaucus (variations sur l'arbitrage, l'ordre public et le droit communautaire)' in *Mélanges en l'honneur de François Knoepfler* (Helbing & Lichtenhahn 2005) 286ff.

92 Landolt (n7) paras 7-48.

rules.[93] In most jurisdictions, the power of arbitrators to raise new legal issues *ex officio* is not explicitly provided for in the law. National arbitration laws, other than the 1996 English Arbitration Act,[94] the Dutch Code of Civil Procedure,[95] and the Danish Arbitration Act,[96] and arbitration rules, other than the LCIA Rules,[97] do not provide an express basis to the power of the arbitrator to raise legal issues *ex officio*.[98] There are two ways in which an arbitrator's *ex officio* power can be read into the silence of most national arbitration laws on the issue: (i) by analogy with the rules in litigation practice, or (ii) by praying in aid the general discretion granted to arbitrators in most national laws and institutional rules.

Litigation practice generally embraces the power of judges to ascertain the law, referred to as '*iura novit curia*' in civil law jurisdictions, but to various extents. Austrian and German courts tend to apply the principle extensively;[99] Belgian, French, and Scandinavian courts apply the

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93 The issue of whether the arbitrator has the power/duty to raise an issue of law *ex officio* is a matter of procedural law. This procedural law can be the law of a Member State or the law of a non-Member State.

94 Arbitration Act 1996, Section 34(2)(g). It could appear counter-intuitive that England which has an adversarial system of adjudication where the advocate is the dominant figure who raises the relevant issues, and as a result one of the least developed concept of *iura novit curia*, has expressly recognised the existence of this principle in the context of international arbitration. See also 2014 LCIA Rules, Article 22(1)(iii).

95 Dutch CPC, Article 1044.

96 Danish Arbitration Act, Article 27(2).

97 2014 LCIA Rules, Article 22(1)(iii). See also Recommendation 7 of Resolution No 1/2008 of the Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (2010) 26(2) Arb Int'l 193ff.
Most leading arbitration rules (e.g. ICC Arbitration Rules, UNCITRAL Arbitration Rules and the Swiss Rules of International Arbitration) are silent on that issue. It is interesting however to note that recently, in December 2018, new Rules on the Efficient Conduct of Proceedings in International Arbitration (also known as the 'Prague Rules') were adopted. Article 7.2 of these Rules hold that pursuant to the principle of *iura novit curia*, a tribunal can apply legal arguments not pleaded by the parties, having given them the opportunity to express their views on them first.

98 See discussion in ILA, 'Final Report: Ascertaining the Contents of the Applicable Law', Rio de Janeiro Conference (2008) 13; Teresa Giovannini, 'Ex Officio Powers to Investigate' in Bernd Ehle, Domitille Baizeau (eds), *Stories from the Hearing Room: Experience from Arbitral Practice. Essays in Honour of Michael E. Schneider* (Wolters Kluwer 2015) 66; Philip Landolt, 'Arbitrators' Initiatives to Obtain Factual and Legal Evidence' (2012) 28(2) Arb Int'l 188; Veit Öhlberger, Jarred Pinkston, 'The Arbitrator and the Arbitration Procedure, Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blinders and Misplaced Concerns About Impartiality' in Christian Klausegger, Peter Klein et al (eds.) *2016 Austrian Yearbook on International Arbitration* (2016) 106; Christian Alberti, 'Iura Novit Curia in International Commercial Arbitration: How Much Justice Do You Want?' in Stefan Michael Kröll, Loukas Mistelis et al. (eds.) *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 16.

99 Austrian Act on Private International Law, Article 4. See also Alberti (2011) (n101) 16.

principle sometimes;[100] while English courts apply the principle rarely, if at all in litigation.[101] However, looking into litigation practice is practically irrelevant since, as the International Law Arbitration ('ILA') points out, '[b]eyond a superficial analogy court approaches to determining the contents of law do not provide strong guidance for how arbitrators should ascertain the contents of law'.[102] There is indeed a substantial debate on the extent of which State court principles apply in international arbitration.[103] Furthermore, as demonstrated by the ambivalence of English law, litigation and international arbitration procedural rules are two distinct sets of rules. It is precisely one of the reasons why parties are drawn to arbitration: because it is not litigation. It would therefore appear presumptuous to infer from the existence of an *ex officio* power of the judge a similar power of the arbitrator. Hence, this first option (i.e. drawing a parallel to litigation practice) is not fully convincing. The most relevant aspect of the litigation analogy is to understand the mindset of the parties and arbitrators, and their willingness to resort to the principle of *iura novit curia*.

In general, in the silence of applicable procedural rules, arbitrators are vested with a broad discretion anchored in arbitration rules[104] and arbitration practice.[105] Since in most legal systems the power of the arbitrator to raise new issues of law *ex officio* is not provided for in the law, the principle of procedural discretion can be used to close this loophole.[106] This second approach (i.e.

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[100] See for instance French CPC, Article 12; Swedish Code of Judicial Procedure, Chapter 35 Section 2.

[101] Neil Andrews, *On Civil Processes I, Court Proceedings* (Intersentia 2013) 785; Michael Zander, *The Law-Making Process* (Hart Publishing 2015) 355.

[102] ILA, Rio de Janeiro Conference (2008) International Commercial Arbitration, <http://www.ila-hq.org/en/committees/index.cfm/cid/19> (last accessed 10 October 2019).

[103] Giovannini (2015) (n101) 66; Alberti (n101) 15.

[104] See for instance LCIA Rule, Article 14.2; ICDR Rule, Article 20; VIAC Rule, Article 28(1). See also William Park, 'The 2002 Freshfields Lecture - Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion' (2003) 19 Int Arb 284.

[105] Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) 1190.

[106] See Öhlberger, Pinkston (n101) 105.

relying on the general discretion of arbitrators) therefore appears persuasive but for a major flaw: its lack of predictability as further explained in Section 3 below.

2.2. Potential Issues When EU Public Policy Rules Are Raised *Ex Officio*

The arbitrators' power to raise legal issues *ex officio* has been described as 'daunting'.[107] For instance, in *Eco Swiss*, the Dutch Supreme Court was concerned that by raising Article 101 TFEU *ex officio* arbitrators would exceed their mandate, impinging on party autonomy, and risk annulment under the rules of Dutch civil procedure.[108] In an adversarial system such as arbitration, each party normally has to prove its claims. In that respect, an *ex officio* investigation unsettles the normal burden of proof between the parties. The arbitral tribunal may also be concerned about exceeding its mandate, undermining party autonomy, or violating due process guarantees.[109] Besides, additional fact-finding may be costly and time-consuming for the parties.[110] Yet, none of these concerns should prove insurmountable.[111] As pointed out in the 2008 ILA Final Report:

> In ascertaining the contents of applicable law and rules, arbitrators should respect due process and public policy, proceed in a manner that is fair to the parties, deliver an award within the submission to arbitration and avoid bias or appearance of bias.[112]

This recommendation summarises the precautions that arbitrators should respect when raising EU public policy considerations *ex officio* since a violation of these principles may lead to the annulment, or non-recognition, or non-enforcement of the arbitral award under Articles V(1)(b) and

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[107] Pierre Mayer, 'La liberté de l'arbitre' (2013) 2 Rev Arb 46: '[l]a liberté de l'arbitre fait peur.'

[108] Domitille Baizeau, Tessa Hayes, 'The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte', in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, 19 ICCA Congress Series (Kluwer Law International 2017) 228; Dutch CPC, Article 1065(1)(c); *Eco Swiss*, para 26. The *Hoge Raad* considered that the arbitrators would have gone beyond the ambit of the dispute and therefore risked annulment for failure to comply with the terms of reference.

[109] Giovannini (2015) (n101) 72-73.

[110] Baizeau, Hayes (2017) (n110) 228.

[111] Ibid.

[112] ILA, Final Report, General Consideration No 2, 22.

V(1)(c)[113] of the New York Convention, and different State arbitration laws.[114] Therefore, arbitrators must always verify that the proactive application of any mandatory rule does not violate the fundamental procedural rights of the parties such as their right to a fair hearing and to equal treatment in adversarial proceedings (Section 2.2.1), or their right to an impartial tribunal (Section 2.2.2). These procedural rights are especially tested when arbitrators raise legal issues not anticipated by the arbitral agreement *ex officio* (Section 2.2.3).

2.2.1. The Right to be Heard in Adversarial Proceedings

There have been some arbitral proceedings where the arbitral tribunal appears to have applied *ex officio* the applicable public policy rules without the express consultation of the parties.[115] For instance, in ICC Final Award No 10694,[116] a tribunal seated in Vienna applied Article 101 TFEU *ex officio* without putting this issue to the parties for comment. However, the tribunal did not find that a concrete breach of EU competition law had in fact occurred. In that regard, Blanke notes that the absence of an EU law breach 'accommodates the Tribunal's procedural failure to hear the parties on the proper application of the relevant antitrust laws in the first place'.[117] Irrespective of the result, the arbitrators would have been best advised to respect the principle of adversarial proceedings and the right of the parties to a fair hearing.

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[113] See also Geneva Convention 1961, Article IX (1)(c); UNCITRAL Model Law, Article 34.

[114] It may therefore also be set aside by the courts of the country of origin. See English Arbitration Act, Section 68(2)(a); Swiss PILA, Article 190(2)(d); UNCITRAL Model Law, Article 34(2)(a)(ii).

[115] ICC Final Award No 7315 (1994) ICC Bull, Special Sup (1994) 44; ICC Final Award No. 7539 (1996) Rev Arb 1030, and ICC Final Award No. 7181 (1995) 6(1) ICC Bul 56. See also Gordon Blanke, Renato Nazzini, 'Arbitration and ADR of Global Antitrust Disputes: Taking Stock (Part II)' (2008) 2(1) Global Competition Litigation Rev 78ff; Gordon Blanke, 'Chapter 49 – Antitrust Arbitration under the ICC Rules' in Gordon Blanke and Phillip Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International 2011) 1847.

[116] ICC Final Award No 10694 of 21st January 2002 as quoted in Hilbig (n40) 139.

[117] Blanke (n118) 1847.

It is widely recognised that the right to be heard in adversarial proceedings is fundamental to the international arbitration system. This duty stems from the rule that parties must be treated equally and have a reasonable opportunity to present their case. Recommendation 8 of the ILA Resolution suggests that the application of any mandatory rule *ex officio* should neither surprise the parties nor be unforeseeable.[118] The right to be heard is undermined when arbitrators rule on matters which were not drawn to the attention of either party, or when submissions made by one party come to the knowledge of the other upon the making of a decision. Some national legal systems have adopted a clear position on this issue. For instance, France has adopted the principle that parties must be heard in an adversarial procedure on all issues, including new legal issues raised *ex officio* by the arbitral tribunal.[119] In England, courts also consider that parties must be provided with the opportunity to address all issues relevant to the resolution of their dispute.[120] Swiss case law appears, in this respect, more liberal since the only limit to introducing new legal issues is the duty to not 'take the parties by surprise'.[121] However, from an arbitrator's perspective, it might be difficult to establish the criteria used to determine the predictability of an issue of law.

To ensure the recognition and enforcement of the arbitral award, or at least to avoid its annulment under numerous State arbitration laws[122] or non-enforcement under Article V(1)(b) of

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[118] See Catherine Kessedjian, 'Principe de la contradiction et arbitrage' (1995) Rev Arb 381.

[119] Article 16(3) of the French Code of Civil Procedure which applies to international arbitration through Article 1460 of the same code. See Paris CA 25 November 1997, *Société VRV v Pharmachim* (1998) Rev Arb 687; Cass civ (1) 14 March 2006 (2006) Rev Arb 653; Civ 1 23 June 2010 (2011) 2 Rev Arb 442; Cass civ (1) 26 June 2013 (2013) Gaz Pal 270. See Giovannini (2015) (n101) 70; Damien Geradin, Emilio Villani, 'Iura Novit Curia Stealing the Limelight (Again)' (2016) Kluwer Arbitration Blog available at: http://kluwerarbitrationblog.com/2016/04/22/iura-novit-curia-stealing-the-limelight- again/ (last accessed 23 June 2019).

[120] Arbitration Act 1996, Section 33(1). See also *Modern Engineering v Miskin* [1981] 1 LLR 135; *Vimeira* [1984] 2 LLR 66; *OAO Northern Shipping Company v Remolcadores De Marin SL* [2007] EWHC 1821; *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER 264; *The Pamphilos* [2002] 2 LLR 681.

[121] LDIP, Article 190(2); Swiss Federal Tribunal 30 September 2003 (2004) 22(2) ASA Bull 574; Swiss Federal Tribunal 26 September 2007 (2008) 26(1) ASA Bull 152; Swiss Federal Tribunal 9 February 2009 (2009) 27(3) ASA Bull 498; Swiss Federal Tribunal 15 February 2010 (2010) 28(2) ASA Bull 282; Swiss Federal Tribunal 7 January 2011 (2011) 4 Rev Arb 1075. See Berger, Kellerhals (n30) 1126.

[122] The award may therefore also be set aside by the courts of the country of origin. See English Arbitration Act, Section 68(2)(c), French CPC, Article 1520(1); Swiss PILA, Article 190(2)(d); UNCITRAL Model Law, Article 34(2)(a)(ii).

the New York Convention, it might be prudent for arbitrators to give the parties an opportunity to discuss all new issues of fact or law raised *ex officio*.[123] It should be considered a matter of good practice.[124] From a more pragmatic standpoint, it will also allow arbitrators to assess the relevance of the new issue raised *ex officio*.[125]

2.2.2. The Impartiality of the Arbitral Tribunal

It can also be argued that arbitrators jeopardise their impartiality whenever they introduce new legal issues, especially if this would advantage one party over the other.[126] In this way, introducing new legal issues can create the appearance of bias, whether real or perceived. The award could then be set aside pursuant to numerous State arbitration laws,[127] and unenforceable pursuant to Article V(1)(d) of the New York Convention.[128] This risk becomes more acute when the arbitrator is acting as sole arbitrator. According to Dimolitsa, the risk of bias depends on the circumstances and manner this new issue is brought to the attention of the parties.[129] The risk of (an appearance of) bias is considerably reduced if the parties are invited to confront the public policy consideration raised *ex officio*, and such invitation is introduced only exceptionally and with a legitimate purpose. Accusations of partiality should not pose a threat if arbitrators can justify their initiative by relying

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[123] E.g. ICC Final Award No 8423 (2002) 4 JDI 1079ff. The arbitral tribunal examined the application of Article 101 TFEU *ex officio* but subsequently heard the parties' submissions on the application of this article and several expert evidence.

[124] Philip Landolt, 'Arbitrator's Initiative to Obtain Legal and Factual Evidence' (2012) 28(2) Arb Int'l 219. See also Pierre Mayer, 'The Arbitrator's Initiative: Its foundation and Its Limits' (2016) 45 ASA Special Series 5.

[125] Dimolitsa (n88) 19.

[126] Mayer (2016) (n127) 4; Landolt (2012) (n127) 190.

[127] The award may therefore also be set aside by the courts of the country of origin. See English Arbitration Act, Section 68(2)(a), French CPC, Article 1520(4); Swiss PILA, Article 190(2)(d); UNCITRAL Model Law, Article 34(2)(a)(iv).

[128] Enforcement of ICSID awards is subject to the same rules of enforcement that apply to final court decisions of that State (ICSID Convention, Article 54(1)).

[129] Dimolitsa (n88) 22.

on objective elements of the case, and demonstrate that they would have acted the same way irrespective of the party affected.[130]

2.2.3. Respecting the Scope of the Arbitration Agreement

If an arbitral award is rendered beyond the scope of authority granted to the arbitral tribunal by the parties, it exceeds the power granted to the tribunal. Such an arbitral award would be set aside according to numerous State arbitration laws,[131] and would be unenforceable according to Article V(1)(c) of the New York Convention.[132]

The arbitrators' capacity to resolve disputes before them depends upon a pre-existing agreement to arbitrate, or at least the willingness of the parties to enter into such an agreement after the dispute arises. When raising *ex officio* considerations of EU law not pleaded by the parties, arbitrators may risk granting relief which exceeds the parties' claims, thus ruling *ultra petita*. In general, the principle according to which the judge should not go beyond the requests of the parties[133] is easily implemented by arbitrators who can verify that the relief granted in the dispositive part of the arbitral award does not exceed the relief requested by the parties in their submissions.[134] Raising *ex officio* a point of EU law does not present real risk of resulting in an *ultra petita* award as long as the point of EU law is relevant to the claims and defences submitted by the parties. For instance, where the parties have asked the tribunal to rule on rights arising out of a

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130 Baizeau, Hayes (2017) (n110) 246. See also Öhlberger, Pinkston (n101) 108-109; Landolt (2012) (n127) 190-191.

131 The award may therefore also be set aside by the courts of the country of origin. See English Arbitration Act, Section 68(2)(b); French CPC, Article 1520(3); Swiss PILA, Article 190(2)(c); UNCITRAL Model Law, Article 34(2)(a)(iii). The same rule applies to the annulment of ICSID awards (ICSID Convention, Article 52(1)(b)). See *Eco Swiss*, Opinion AG Saggio, para 21: 'arbitration is based on the principles of autonomy of the parties and the passive role of the tribunal, as is evident from the fact that any award which exceeds the terms of the agreement may be annulled.'

132 Enforcement of ICSID awards is subject to the same rules of enforcement that apply to final court decisions of that State (ICSID Convention, Article 54(1)).

133 New York Convention, Article V(1)(c).

134 Damien Geradin, 'The Power of Arbitral Tribunals to Raise Public Policy Rules *Ex Officio*: The Case of EU Competition Law' (2016) TILEC Discussion Paper 2016-2017 22.

certain contract, whether or not that contract is in fact an illegal contract favouring a cartel is not merely relevant to the parties' claims, it is determinative of them.

2.3. Intermediate Conclusion

Arbitrators have a discretionary power to invoke EU public policy rules *ex officio*. As a general rule however, they should submit any new issue they intend to base their award on to the parties for comment.[135] The possibility for arbitrators to introduce *ex officio* new issues of law is limited by the obligation to respect the fundamental rights of the parties who have trusted them with the resolution of their dispute. In practice, however, arbitrators may be unaware that among the laws which may have a connection with the case, one intends to have mandatory authority over the contract.[136] Yet, under certain circumstances, arbitrators cannot ignore the applicability of a mandatory rule.

3. Justifications to the Application of EU Public Policy Rules by Arbitrators

As explained in the previous section, arbitral tribunals are not expressly required to apply EU law when it does not belong to the *lex contractus*, nor to raise EU public policy considerations *ex officio* since they are not national courts, and are therefore not bound by the principles of loyal cooperation and effectiveness of EU law. They however have the power to do so as they are vested with a broad discretion anchored in arbitration rules and arbitration practice. Yet, the exercise of such a power, being discretionary, is highly unpredictable: arbitrators might decide to exercise it or they might not. Since published awards are scarce, it is difficult to overall assess arbitrators' conduct.[137] Even

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[135] Gordon Blanke, 'The Arbitration Agreement and Arbitrability, EC Competition Law Claims' in Gerold Zeiler (eds), *International Arbitration, Austrian Yearbook on International Arbitration* (Verlags 2009) 42; Renato Nazzini, *Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies* (OUP 2004) 343.

[136] Mayer (1986) (n1) 280.

[137] Accordingly, the process of arbitral decision making has been seen as a 'black box' for the better part of commercial arbitration's existence, see Philip McConnaughay, 'The Risks and Virtues of Lawlessness: A 'Second Look' at International Commercial Arbitration'(1999) Northwestern Univ LR 453. On the recent improvements see Catherine Rogers, 'Transparency in International Commercial Arbitration (2006) 54 U Kan L Rev 1312. In that respect see also Chen (2016) (n84) 245.

judging from the observable part of practice, it is almost impossible to anticipate whether, and how, arbitrators will apply EU law.[138] This leads to a highly unpredictable case-by-case approach where arbitrators decide whether or not to exercise discretion based on their legal background and their personal preference.[139] In order to promote predictability, this section identifies the considerations which favour the exercise of arbitrators' discretion.[140] This section also aims to demonstrate that the broad arbitrability of EU law creates a need for arbitrators to apply EU public policy rules, and to raise EU public policy considerations *ex officio*, when there is a sufficiently 'close connection'[141] between the dispute and the EU market.

One argument often raised to justify the exercise of arbitrators' broad discretion is that arbitrators must render a valid and enforceable arbitral award, and avoid becoming the accomplices of an illegal scheme. After a critical assessment of these two arguments, in Sections 3.1 and 3.2 respectively, this thesis develops a complementary argument finding its footing in the sustainability of international arbitration. It is submitted that arbitrators should consider raising EU public policy considerations to guarantee the sustainability of international arbitration in the EU, as part of their judicial function.[142] As explained in Section 3.3, without going as far as endorsing a territorial

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138 Natalya Shelkoplyas, *The application of EC Law in arbitration proceedings* (Groningen 2003) 266 and 272.

139 Radicati di Brozolo (2003) (n57) 1; Luca Radicati di Brozolo, 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators' (2011) 27(1) Arb Int'l 37ff. See also Muir Watt (2003) (n57) 383; Radicati di Brozolo (2004) (n57) 23.

140 Radicati di Brozolo (2003) (n57) 1; Radicati di Brozolo (2011) (n142) 37-38. See also Muir Watt (2003) (n57) 383; Radicati di Brozolo (2004) (n57) 23.

141 The concept of 'close connection' refers to the material and spatial scopes of application of EU mandatory rules that may form part of EU public policy in post-award review. For instance, Articles 101 and 102 TFEU prohibit agreements which have as their object or effect the restriction of competition 'within the internal market'. Thus, there is a 'close connection' between the dispute and the EU market when all or parts of the consequences of the infringement are located on the EU territory.

142 The sustainability of international arbitration has been invoked to justify the arbitrator's duty to apply mandatory rules. See e.g. Pierre Mayer, 'L'interférence des lois de police' in *L'apport de la jurisprudence arbitrale* (Institut du droit et des pratiques des affaires internationales 1986) 285; Yves Derains, 'Les tendances de la jurisprudence arbitrale internationale' (1993) Rev Arb 846.

approach,[143] it is undeniable that the arbitration system relies heavily on the support of States. Therefore, the EU legal order might be inclined to revisit the arbitrability of certain fundamental aspects of EU law if its protection is only occasionally and partially ensured through arbitration.

3.1. Pragmatic Justification: 'Duty' to Render Enforceable Arbitral Awards

A compelling reason to take into account mandatory rules is that their non-application may have repercussions when their breach amounts to a violation of public policy. The legal exposure of an arbitral award is a product of its consistency with, among other elements, public policy. To explain, an arbitral award's effectiveness is co-extensive with its capacity for recognition and enforcement. This is only possible if the arbitral award does not violate the public policy of the *forum* where annulment may be sought. Not only this, arbitrators can account for the public policy of the future places of recognition and enforcement of the arbitral award. Although, here, it is worth recognising that this enquiry is only a professional duty of arbitrators, and only when it can be inferred from the arbitration agreement and some institutional arbitration rules.[144] But even so, arbitrators are not under a legal 'duty' or 'obligation' to render an effective arbitral award. They must only apply their best efforts to do so.[145] This is essentially the conclusion of the International Law Association ('ILA') which held in its Final Report:

> In disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators *may be justified* in taking measures appropriate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or factual), and giving appropriate

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[143] On the territorial approach see Francis Mann, 'Lex Facit Arbitrum' in Peter Sanders (eds), *International Arbitration: Liber Amicorum for Martin Domke* (Nijhoff 1967) 167; *Fouchard Gaillard Goldman* (n23) 6; Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (6th edn, Sweet & Maxwell 2015) 4ff.

[144] See 2017 ICC Rules, Article 42 (previously 2012 ICC Rules, Article 41): 'the arbitral tribunal shall make *every effort* to make sure that the award is enforceable at law' and ICC Award Case No 8626 (2003) 14(2) ICC ICA Bull 55, para 18 (the arbitral tribunal considered *ex officio* a potential breach of Article 85 EEC (Article 101 TFEU) by a licensing agreement to ensure the enforceability of the arbitral award in Germany). Contra ICC Final Award No 4604 (1985) JDI 973–979; ICC Final Arbitral Award No 2476 (1977) Rev Arb 936.

[145] Martin Platte, 'An Arbitrator's Duty to Render Enforceable Awards' (2003) 20(3) J Int'l Arb 307–13.

> instructions or ordering appropriate measures *insofar as they consider this necessary to abide by those rules or to protect against challenges to the award*.[146]

Further, the arbitrator's reputation is an additional reason why arbitrators might want to take into account the public policy of the seat or of the place(s) where recognition and enforcement are likely to be sought. As pointed out by Engelmann, 'the risk of rendering an unenforceable award can be considered to constitute the worst case for fostering a reputation as an arbitrator worth reappointing'.[147]

The actions of the arbitrators are dependent on the different systems of review in order to create a final and enforceable arbitral award. Hence, the ECJ case law that subjects arbitral awards to national courts' review on the grounds of EU public policy provides an indirect, but strong suggestion,[148] that arbitrators should apply public policy rules, even on their own motion, to ensure the validity of their arbitral awards,[149] and sustain their reputation as arbitrators worth reappointing.[150] It would make little sense, including from a time and cost perspective, to submit a dispute to arbitration in which EU mandatory provisions are not expected to be applied (unless the parties raise them and they form part of the *lex contractus*), and then being forced to litigate anew the same dispute because the arbitral award was set aside or denied recognition and enforcement for breaching EU public policy.

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146 ILA, 'Final Report: Ascertaining the Contents of the Applicable Law', Recommendations 6 and 13.

147 Engelmann (n24) 8.

148 For a similar conclusion see Assimakis Komninos, 'Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, Judgment of 1 June 1999, Full Court' (2000) 37(2) CML Rev (2000) 476. *Contra* Prechal, Shelkoplyas (n4) 608 who consider that there is no distinction between 'an incentive supported by the threat of sanction and [a] genuine duty'.

149 Landolt (n7) 122; Albert Jan van den Berg, 'Should an arbitrator apply the New York Convention of 1958?' in Pieter Sanders (ed) *The Art of Arbitration, Liber Amicorum* (Kluwer Law International 1982) 47; Pierre Mayer, 'Le contrat illicite' (1984) Rev Arb 220.

150 Engelmann (n24) 8.

Taking effectiveness seriously might mean that the arbitrator accounts for two sets of public policy rules: the public policy of the seat (Section 3.1.1), and the public policy of the future place(s) of recognition or enforcement of the arbitral award (Section 3.1.2).

3.1.1. Avoiding the Annulment of the Arbitral Award by the Courts of the Seat

Most national arbitration laws provide a ground for setting aside arbitral awards made within their territory which breach their public policy.[151] Therefore, arbitrators who wish to fulfil their professional duty, and avoid annulment, should consider EU public policy when the arbitration is seated within the territory of a Member State.[152] Besides, there are broader consequences at stake since arbitral awards set aside by the courts of the seat of the arbitration are exposed to the risk of non-recognition and non-enforcement in third States.

If an arbitral award is annulled, on one view it becomes a 'nullity'[153] and cannot be recognised or enforced in a third State. On another view, that result is not ensured. This is mostly because the word 'may' appears in Article V(1)(e) of the New York Convention. Article V(1)(e) of the New York Convention reads '[r]ecognition and enforcement of an arbitral award *may* be refused […] (if the award) has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made'. The word 'may' in Article V(1) of the New York Convention grants, on one view, a margin of discretion to the courts where recognition and enforcement is sought. Some New York Convention signatories, such as the United Kingdom[154] or

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[151] See e.g. Austria, England, France, Germany and Italy.

[152] Diederik de Groot, 'Chapter 16 – The Ex Officio Application of European Competition Law by Arbitrators' in Blanke, Landolt (n118) 599ff.

[153] Peter Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 6 Neth ILR 43.

[154] *Yukos Capital SARL v OJSC Rosnef Oil Co* [2012] EWCA Civ 855.

Germany,[155] have read the word 'may' on different occasions as 'must'. If a court follows this approach, when a foreign arbitral award is annulled by the court of the seat, it cannot be recognised and enforced in those countries. Other New York Convention signatories have read the word 'may' as permitting a discretion to courts in which recognition and enforcement is sought. For instance, US[156] and Dutch courts[157] have ruled in different cases that they will defer to the (foreign) annulment decision absent specific evidence of an unfair hearing. This approach encourages national judges to scrutinise the annulment judgment and decide, as necessary, whether the award should be recognised.

By contrast, a court's refusal to enforce an arbitral award that has been annulled because it breaches the public policy of the seat could violate the European Convention on International Commercial Arbitration ('European Convention').[158] Article IX(2) of the European Convention, which was ratified by 17 of the 28 Member States,[159] provides that when a State is party to the New York Convention and also party to the European Convention, a court's discretion to refuse enforcement on the basis of Article V(1)(e) of the New York Convention shall be limited to those cases where the arbitral award has been annulled for one of the limited ground enumerated under

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[155] Germany has admitted an exception when the court judgment setting aside the award must be recognised under German procedural law, Austrian Supreme Court, 20 October 1993 and 23 February 1998 (1999) 24 YB Com Arb Int'l 919; OLG Rostock 28 October 1999, 1 Sch 03/99, Betriebs-Berater, Beilage 8, 14 September 2000. See Klaus Sachs, 'The Enforcement of Awards Nullified in the Country of Origin: The German Experience' in Albert Jan van den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No. 9 (Kluwer Law International 1998) 552.

[156] *Chromalloy Aeroservices v Arab Republic of Egypt* (939 F Supp 907 (DDC 1996)) decision allowed courts to recognise and enforce a foreign arbitral award even when it has been set aside at the seat of arbitration. It has been confirmed in multiple decisions (*TermoRio SA ESP v Electranta*, SP, 487 F 3d 928 (DC Cir 2007); *Martin I Spier v Calzaturificio Tecnica SpA*, 71 F Supp 2d 279 (SDNY 1999); *Baker Marine Nigeria Ltd v Chevron Nigeria Ltd*, 191 F 3d 194 (2d Cir 1999)) and most recently in (*Corporacion Mexicana de Mantenimiento Integral, S de RL de CV v Pemex-Exploracion y Produccion*, 10 Civ 206 (AKH) 2013 WL 4517225).

[157] CA Amsterdam Court of Appeal 28 April 2009, *Yukos Capital SARL v OAO Rosneft* (2010) 35 YB Com Arb 1.

[158] European Convention on International Commercial Arbitration, Geneva, 21 April 1961, available at: https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf (last accessed 30 September 2019).

[159] Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Luxembourg, Poland, Romania, Slovakia, and Spain. For the application of the European Convention, see the United Nations Treaty Collection, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en (last accessed 9 July 2019).

Article IX(1) of the European Convention. This article however does not list public policy as a ground.[160] Hence, for instance, the Austrian Supreme Court, pursuant to its obligation under the European Convention, enforced an arbitral award that had been set aside for violation of public policy in Slovenia, reasoning that '[p]ursuant to Article IX(1) of the European Convention, even the annulment of an award for public policy of the country of origin [...] is not one of the grounds for refusal exhaustively listed [...] and is therefore not a ground for refusing enforcement in the enforcement state.'[161]

The only exception where enforcement might be granted irrespective of annulment is France. French courts will systematically make use of French domestic law, and more specifically of the limited grounds set in Article 1520 of the French Code of Civil Procedure. To achieve this result consistently with the New York Convention, the French Supreme court[162] relied on the more favourable provision in Article VII(1) of the New York Convention.[163] However, even if French courts are likely to recognise and enforce an arbitral award that has been set aside at the seat of arbitration, they would still look unfavourably at an EU law breach which also violates EU public policy. This point is illustrated by the decisions in *Thalès* and *Cytec* detailed in the previous chapter.[164]

In short, putting to one side the European Convention and the French exception, an annulment decision is likely to affect an arbitral award's capacity to be recognised in New York

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[160] The grounds of Article IX(1) of the European Convention reproduce the grounds of Article V(1)(a)-(d) of the New York Convention.

[161] Supreme Court, Austria, 26 January 2005, 3Ob221/04b referenced in UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UN 2016) 304ff available at http://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf (last accessed 9 July 2019).

[162] Cass civ (1) 9 October 1984 (1985) 3 ASA Bull 187 ('*Norsolor*'); Cass civ (1) 10 March 1993 (1993) Rev Arb 255 ('*Polish Ocean Line*'); Paris CA 29 June 2007 (2007) Rev Arb 507 ('*Rena Holding*').

[163] Article VII(1) of the New York Convention reads:

> [Arbitral awards] *shall not* (…) deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the treaties of the country where such award is sought to be relied upon.

[164] See Chapter 6, Section 3.1, pp. 176ff.

Convention States. Hence, the professional duty of arbitrators to render an enforceable arbitral award requires them to account, *ex officio* when needed, the public policy of the seat.

3.1.2. Taking into Account the Enforceability of the Arbitral Award

The professional duty of arbitrators to render an enforceable arbitral award may also require that they take into account the public policy rules of the future place(s) of recognition and enforcement of the arbitral award.[165] This is because, pursuant to Article V(2)(b) of the New York Convention, the courts in which enforcement and recognition is sought can deny it if the arbitral award violates their public policy. If the arbitral award is likely to be enforced in a Member State, it might therefore be sensible to take into account EU public policy.

However, as some arbitral tribunals have pointed out,[166] it might be extremely difficult for arbitrators to take into account the public policy rules of countries in which recognition and enforcement of the arbitral award will be sought since this place is usually hard, if not impossible, to determine during the arbitral proceedings.[167] The question of enforcement can be asked of wherever the losing party's assets are located; a question made difficult by complex corporate structures, the geographical fragmentation of assets, and the ease in which assets can be moved from place to place.[168] However, even if known, there may be multiple places of enforcement. Consequently, there might be more than one set of mandatory rules which purports to apply. The

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[165] Alan Rau, 'Chapter 3: The Arbitrator and "Mandatory Rules of Law' in Bermann, Mistelis (n1) 77; Shore (n16) 131.

[166] Intermediary ICC award No 6106 (1994) Bull CIA/CCI 44; See also ICC award No 4604 (1985) Rev Arb 973. See approval by Yves Derains, 'Observations' (1985) Rev Arb 973.

[167] See van den Berg (n171) 48; Serge Lazareff, 'Mandatory Extraterritorial Application of National Law' (1995) 11(2) Arb Int'l 145; Seraglini (2001) (n62) 262.

[168] Lazareff (n169) 140.

question remains: which mandatory rules should the arbitrators prioritise? The correct answer will depend on the conflict of laws approach adopted by the arbitrators.[169]

Regardless of that approach, what must be considered is whether the award will be recognised and enforced in a Member State. Under these circumstances, EU public policy forms part of the *lex executionis* (i.e. the law of the State where the arbitral award will be enforced). For instance, since EU competition law,[170] according to the ECJ, must be regarded as a matter of public policy within the meaning of Article V(2)(b) of the New York Convention, national courts are obliged to refuse recognition and enforcement to all arbitral awards which jeopardise the interests protected in Articles 101 and 102 TFEU.[171] Hence, if in the silence of the parties, arbitrators do not consider the applicability of EU competition law on their own motion when the enforcement is to take place on the territory of a Member State, there is a considerable risk that their arbitral award will be denied enforcement. This point was clearly illustrated in ICC Case No 8626. In that case, the contract was governed by the law of the State of New York and the seat of the arbitration was Geneva. However, the arbitral tribunal reasoned that since one of its duties under the ICC Rules was to render an enforceable award, and that Germany was a potential place of enforcement, ignoring EU competition law would lead to the rejection of the enforcement of such an award in Germany. It therefore applied EU competition law to the merits.[172] On the other hand, in ICC arbitral award No 6503,[173] both parties, who were EU nationals, entered into, as well as performed, their distribution agreement within the internal market (i.e. Spain). They chose to have the seat of their arbitration in Switzerland, Swiss law as their *lex contractus*, and Swiss arbitrators acting as *amiable*

[169] Baraclough, Waincymer (n16) 216. See also Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in Pieter Sanders (eds), *Comparative Arbitration Practice and Public Policy in Arbitration* (3 ICCA Congress Series 1987) 257.

[170] *Eco Swiss*, para 37; *Nordsee*, para 10.

[171] See Chapter 3.

[172] ICC Award in Case 8626 (2003) 14(2) ICC Bull 55. In this case the defendant asserted that the agreement violated the EC Treaty. The arbitrators did not raise it on their own motion.

[173] ICC Case No. 6503 [1990] reported in (1994) ICC Bull Spec Sup 39-41.

compositeurs. In other words, the parties initially wanted to remove their dispute from the purview of the EU. The claimant however argued that the contract was void for violating mandatory rules of EU competition law. The arbitral tribunal held that, since they were acting as *amiable compositeurs*, rendering the contract null would be inequitable because the claimant had performed the contract without reservation. Besides, under Swiss law, arbitrators acting as *amiable compositeurs* can disregard mandatory rules of law.[174] The decision of the arbitral tribunal not to take into account applicable EU competition law rules jeopardised the enforceability of the arbitral award in the EU.

Here, the best effort commitment of arbitrators to render an effective arbitral award might demand the application of EU public policy rules when: (i) the arbitral award has been rendered by an arbitral tribunal seated in a Member State, or (ii) when the award is reasonably expected to be enforced in a Member State. This does not only serve the interests of the EU legal order, but it also serves the parties who are receiving an enforceable arbitral award.[175]

3.2. Not Becoming the Accomplice of an Unlawful Scheme

Not taking into account public policy rules might however have more disastrous consequences than just rendering an unenforceable arbitral award which will be set aside or denied recognition and/or enforcement on public policy grounds. Under certain circumstances, the arbitral award not only breaches public policy, it also facilitates the illegal actives of the parties (e.g. corruption, hard core cartel infringements). A major ethical and legal concern for arbitrators then becomes not addressing

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[174] The situation would have been different if arbitrators were not acting as *amiables compositeurs*. See e.g. Swiss Federal Tribunal, 8 March 2006, *Tensaccia S.P.A v Freyssinet Terra Armata R. L.* (2006) 3 ASA Bulletin 521: 'The Swiss judge or arbitrator who has to decide on the validity of a contractual agreement concerning markets in the European Union examines this issue in the light of Art. 81 Rome Treaty [Art. 85 of the former Rome Treaty]. He must do so notwithstanding the fact that the parties agreed on the application of Swiss law to their contractual relationship.'

[175] Xandra Kramer, 'EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris 2017) 307.

strong suspicions of illegality, hence making themselves complicit in the parties' wrongdoing.[176] Arbitrators could be held personally liable for 'facilitating' the implementation of illegal behaviour.[177] For instance, if the parties excluded applicable EU competition law, by ignoring these provisions and by supporting these illegitimate expectations,[178] the arbitrators could be held liable for facilitating the implementation of an anticompetitive conduct[179] or cartel behaviour.[180] Arbitrators could face disciplinary actions, depending on the applicable national law and institutional arbitration rules, as well as the censure by peer groups of fellow arbitrators.[181] As the former Secretary General of the ICC held:

> An international arbitrator is bound to ensure that arbitration does not become an instrument for fraud upon the legitimate interests of the State. If he neglects that duty, international arbitration will disappear, at the expense of the development of international trade.[182]

Hence, in order to avoid falling victim to the hidden agenda of parties who may instrumentalise the arbitral process for the enforcement of illegal activities, it is therefore recommended that arbitrators

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176 Baizeau, Hayes (2017) (n110) 236 (making that point about corruption).

177 An ICC Tribunal clearly acknowledged that arbitrators are obliged to comply with the relevant competition law to avoid being held personally liable: 'Arbitrators are not public or supernational [read: supranational] bodies charged with the obligation of applying the competition provisions; rather, they are in the same position as any judge and/or private person who must comply with such competition provisions when carrying out their tasks and/or activities. [...] Direct application [of the EC competition laws] must be adhered to and guaranteed by national courts and administrations as well as by private persons [including arbitrators].' See ICC Partial Award No. 7146 of 1992 (2001) XXVI YCA 119ff, paras 3 and 11.

178 As seen previously, private parties cannot contract out of their duties under EU competition law by opting for arbitration (see Case C-393/92, *Almelo v NV Energiebedrijf* [1994] ECR I-1477, para 23). The EU legal order creates rights and obligations for individuals in Member States which include the respect of EU competition law (see *Eco Swiss*, Opinion AG Saggio, para 38).

179 See Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-01501 where a consultancy firm was held liable as a cartel facilitator.

180 Examples can be found in trade associations and professional organisations which use arbitration to sanction any 'cartel-deviant behaviour', Gordon Blanke, 'International Arbitration and ADR in Remedy Scenarios Arising under Articles 101 and 102 TFEU in Blanke, Landolt (n118) 1074.

For instance, *Association syndicale belge de la parfumerie* (Case IV/299) Commission Decision 70/333/EEC [1970] OJ L148/9; *Stoves and Heaters* (Case IV/712) Commission Decision 78/59/EEC [1978] OJ L20/18; *International Energy Agency* (Case IV/30.525) Commission Decision 83/671/EEC [1983] OJ L376/30.

181 Diederik de Groot, 'The Ex Officio Application of European Competition Law by Arbitrators' in Blanke, Landolt (n118) 611.

182 See Yves Derains, 'Report in Competition and Arbitration Law' (1993) Inst Int'l Bus L Prac 267.

scrutinise, *ex officio* when necessary, the commercial dispute pending before them for any illegal behaviour. They should be encouraged in this endeavour by the arbitral institutions which could possibly also be held liable for aiding and/or being complicit of the illegal scheme of the parties, even when the arbitration rules contain a wide scope of exclusion of liability.[183] For instance, within the EU competition law context, an arbitral institution could qualify as a private undertaking which could be held liable for complicity in a hard core cartel infringement, particularly if it can be proven that the institution, through its individual members, was fully aware of the infringement concerned.[184]

This justification however only covers public policy violations that amount to an illegal activity. These violations usually do not only amount to public policy violations of the forum but more broadly to a violation of transnational public policy[185] (e.g. corruption).[186] Hence, there are numerous situations not covered by the reasoning put forward in this section (e.g. consumers' protection against unfair arbitration agreements, compensation to be paid to the commercial agent). It is therefore only a partial justification.

3.3. Ethical Considerations

The third, and perhaps most important, reason to encourage arbitrators to use their discretion is to lean on the arbitrators' role in sustaining the international arbitration system and their judicial function. The liberalism displayed by the EU regarding the arbitrability of EU law is motivated by

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[183] E.g. 2017 ICC Rules, Article 34.

[184] For an analogous argument in relation to the potential liability of the LCIA, see Gordon Blanke 'Antitrust Arbitration under the Arbitration Act 1996: A Commentary' (2011) 22(1) EBLR 119; and Gordon Blanke, Renato Nazzini, Ali Nikpay. 'England & Wales' in Gordon Blanke, Renato Nazzini (eds) *International and Comparative Competition Litigation* (Kluwer Law International 2011).

[185] See (n2).

[186] Transnational public policy can be seen as the public policy endorsed by a large group of States (e.g. corruption, fraud, human rights). On transnational public policy see Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?' (2001) 13 Arb Int'l 62; Emmanuel Gaillard, 'Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules' (1995) 10 ICSID Review – FILJ 208. On corruption as transnational public policy see Baizeau, Hayes (2017) (n110).

the desire to ensure the effectiveness of the arbitration system[187] but is also an expression of trust towards international arbitration as a mean to ensure the protection of interests deemed superior. Several arbitration scholars have posited that expanding the scope of arbitrable matters calls for giving effect to applicable mandatory rules, whether they belong to the *lex contractus* or not.[188] The premise to this reasoning is that arbitral tribunals perform a judicial function. Arbitrators are substitutes for judges.[189] In this regard, arbitration would quickly become intolerable to States if parties could use it to circumvent the application of mandatory provisions.[190] This would sacrifice public interests that would have been protected if the dispute had been litigated. Hence, if arbitrators only apply the law chosen by the parties, it would only 'weaken the support, secured through decades of patient efforts, from the judicial authorities, and rekindle their old suspicion that arbitrators actually undermine the respect for public-policy norms.', as submitted by Werner.[191]

As explained previously in Chapter 6, and underlined recently in *Achmea*, post-award review is 'limited',[192] and therefore not always sufficient to ensure the effectiveness of mandatory rules that form part of the forum's public policy. If the losing party does not challenge the validity of the arbitral award, there will be no annulment proceedings at the seat. If the losing party complies with the arbitral award, there will be no need for enforcement proceedings. If enforcement is not sought before national courts, non-Member State courts are not required to uphold EU public policy considerations. In these scenarios, national courts will not have the opportunity of assessing

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[187] See for instance Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) 2010/0383 (COD) 9, para 3.1.4 'Improvement of the interface between the regulation and arbitration'; Directorate-General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs Legal Instruments and Practice of Arbitration in the EU, Study for the Juri Committee [2014] 49, <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf.> (last accessed 10 September 2019).

[188] Seraglini (2001) (n62) 260; Mayer (1986) (n1) 285.

[189] Mayer (1986) (n1) 285.

[190] Giuditta Cordero-Moss, 'Chapter 17 – General Report on Jura Novit Arbiter' in Giuditta Cordero-Moss, Franco Ferrari (eds), *Jura Novit Curia in International Arbitration* (Juris 2018) 478ff.

[191] Jacques Werner, 'Application of Competition Laws by Arbitrators: The Step Too Far' (1995) 12 J Int'l Arb 25.

[192] *Achmea*, para 54.

the conformity of the arbitral award with EU public policy. If arbitrators systematically fail to take into account EU public policy rules, the most radical solution would be for the EU to deny parties access to arbitration when a dispute raises *prima facie* questions of EU law. A step back on arbitrability could favour the resurgence of dilatory tactics since the arbitral tribunal would have to stay proceedings when an issue is (partially or entirely) inarbitrable. This situation is not merely hypothetical. National courts have already rendered decisions restricting the arbitrability of disputes arising of agency agreements because they could not guarantee that the arbitral tribunal would apply the EU mandatory rules protecting the commercial agent.[193] Besides, some national courts have not hesitated to decide that arbitrations agreements based on a non-Member State law are unenforceable when EU overriding mandatory rules are applicable to the situation.[194]

Further, as illustrated recently in the domain of investment arbitration, the ECJ did not hesitate to ban arbitration altogether in the domain of intra-EU bilateral investment Treaties ('intra-EU BITs'). In *Achmea*, the ECJ ruled that the investor-State dispute settlement ('ISDS') mechanism in the Slovakia-Netherlands BIT does not ensure the full effectiveness of EU law and undermines its autonomy.[195] Hence, according to the ECJ, Articles 267 and 344 TFEU preclude Member States from referring a question of interpretation or application of EU law to an arbitral tribunal under an intra-EU BIT. *Achmea* illustrates the erosion of 'arbitration-friendliness' in the domain of investment arbitration. If this solution is inapplicable to commercial arbitration,[196] it however effectively demonstrates that arbitration as an alternative dispute mechanism can have its scope of

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[193] See e.g. Austrian Supreme Court (ÖOGH), 1 March 2017, 5 Ob 72/16y which ruled that potential claims under the Austrian Commercial Agents Act can be brought before an Austrian court even if the underlying agency agreement contains an arbitration clause and is governed by the laws of New York.

[194] In the domain of commercial agency see Tugendhat J in *Accentuate v Asigra* [2009] EWHC 2655 (QB), para 88; Mann J in *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (albeit obiter); OLG München 17 May 2006 (2007) 7 U 1781/06, IPrax, 322-334; CCass (Belgium) 3 November 2011, *Air Transat v Agencies Air Belgium*, N° C.10.0613.N; OGH 1.3.2017, 5 Ob 72/16y.

[195] *Achmea*, paras 57-60.

[196] *Achmea*, paras 54-55. Until now however, the ECJ maintains a clear distinction between investment and commercial arbitration see *Achmea*, para 55 (albeit the justification as to this distinction fails to convince).

application limited under EU law. The EU's liberalism is a recent phenomenon not totally or permanently acquired.[197] The realisation of the possible dangers and abuses of arbitration could stop this liberal evolution and even reverse the process as already evidenced in the domain of consumer protection.[198] National courts might be more willing to trust arbitration if they knew that arbitrators take into account applicable mandatory provisions of EU law.

There is a paradox in the attitude of arbitral tribunals which restrict their interference with party autonomy. They usually do so to strengthen arbitration and improve its effectiveness. The risk is that the exact opposite result will be achieved. Arbitration instead of being promoted will be restrained.[199] Therefore, this thesis recommends, as the better solution for ensuring the effectiveness of arbitral awards and the sustainability of international arbitration, for arbitrators to consider the applicability of fundamental provisions of EU law, even *ex officio*, when the dispute is 'closely connected' to the internal market. Arbitrators ought to consider the applicability of EU public policy rules, even when parties do not raise them in the dispute. The applicability of these rules depends on their effect on the internal market, not on the will of the parties.[200] Giving expression to the expectations of the EU legal order in respect of EU public policy rules will limit subsequent interference with the arbitral award and promote the effectiveness of international commercial arbitration as an efficient alternative dispute resolution mechanism.

Arbitral tribunals do not necessitate any legitimisation from the parties to give effect to a fundamental policy of a given legal system.[201] They do not need specific indications from them to

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[197] Decades ago, disputes that involved issues of regulatory law such as competition law were deemed not to be arbitrable. E.g. *Mitsubishi*, *Eco Swiss*.

[198] See Chapter 4.

[199] Cordero-Moss (2018) (n212) 479.

[200] Luca Radicati di Brozolo, 'Competition Law and Arbitration' (2011) 7 Competition L Int'l 12.

[201] Karsten Thorn, Walter Grenz, 'The effect of overriding mandatory rules on the arbitration agreement' in Franco Ferrari, Stefan Kröll (eds) *Conflict of Law in International Arbitration* (Sellier European Law Publishers 2011) 198.

take into consideration mandatory provisions applicable to the pending case.[202] As pointed out by Radicati di Brozolo, 'since overriding mandatory rules aim to protect collective interests and not the interests of the parties to the contractual relationship, their application cannot by definition be made to depend on the will of the parties.'[203] This does not mean, however, that an arbitral tribunal is not constrained when administering the arbitral proceedings. The arbitral tribunal's initiatives have to be compatible with the arbitral mandate.

Conclusion

This chapter sought to demonstrate that the consensual nature of arbitration should not permit parties to escape their obligations under the mandatory rules applicable to the dispute. Party autonomy only allows parties to select the law applicable to their disposable rights. In contractual matters, mandatory rules are more than a limit on the application of the law chosen by the parties, they are the necessary complement without which party autonomy would not be justified. The application of mandatory rules appears as a prerequisite and a limit to the admission of party autonomy.[204] Arbitrators should consider raising EU public policy rules, even *ex officio*, not only to uphold party autonomy or guarantee the effectiveness of the arbitral award in a specific dispute but also to ensure the effectiveness of international arbitration as an institution. Confronted with a purely pragmatic attitude of arbitrators, the EU could consider that arbitration endangers the application of the most fundamental provisions of EU law and that punctually reviewing arbitral

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[202] For further details, see George Bermann, 'Mandatory rules of law in international arbitration' (2007) 18 Am Rev Int'l Arb 336; Giuditta Cordero-Moss, 'Chapter 8 – The Arbitral Tribunal's Power in respect of the Parties? Pleadings as a Limit to Party Autonomy - On Jura Novit Curia and Related Issues', in Franco Ferrari (ed) *Limits to Party Autonomy in International Commercial Arbitration* (JurisNet 2014) 308; Hans van Houtte, 'Law and Practice of International Arbitration in Belgium' in Peter Gottwald (ed) *International Schiedsgerichtsbarkeit - International Arbitration* (Gieseking 1998) 166.

[203] Luca Radicati di Brozolo, 'Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration' in Franco Ferrari (ed) *Limits to Party Autonomy in International Commercial Arbitration* (JurisNet 2014) 339.

[204] See Pierre Mayer, 'Les lois de police, Journées du cinquantenaire' (1985) Trav Com Fr DIP 108.

awards at the post-award stage does not satisfactorily guarantee the protection of EU public policy. The EU could ultimately decide to adopt a stricter regime as to the arbitrability of EU law which would harm the development of international commercial arbitration. Arbitrators should find comfort in the fact that a proactive approach is largely advocated particularly as arbitration comes under greater scrutiny.[205]

[205] Baizeau, Hayes (2017) (n110) 264.

CONCLUSIONS

The EU and the arbitration legal orders represent coexisting systems of laws. However, there are tensions between their underlying principles. The EU has developed a judicial area in which it expects the achievement of the policies adopted on the basis of its political mandate. As a result, the EU calls for consistency, predictability, and control in the application of EU law. On the other hand, arbitration admittedly represents a mostly autonomous legal system based, to a large extent, on party autonomy, flexibility, and pluralistic legal orders. Both legal systems coexist while being based on very different, and seemingly incompatible, first principles. It is therefore unsurprising that the EU and the international arbitration legal orders have developed two radically different notions of public policy. In order to control the effectiveness of EU law in the Member States, the ECJ relies on a broad notion of EU public policy, as evidenced in the fields of competition law and consumer protection. On the other hand, arbitration seeks emancipation to the greatest extent from the control of courts. The international arbitration regime therefore conceives public policy as an exception to the recognition and enforcement of arbitral awards which must be construed narrowly. As the interactions between both systems increase, the discrepancies between both concepts of public policy become more palpable: the broad concept of EU public policy renders arbitral awards more prone to annulment, non-recognition and non-enforcement than usually allowed in international commercial arbitration.

Both systems however are here to stay: the EU has created a successful internal market between the Member States, and international commercial arbitration allows the development of cross-border transactions by providing a stable dispute resolution mechanism. This thesis is therefore aimed at establishing a workable compromise for both concepts of public policy to coexist in order to allow arbitration to become a successful alternative dispute resolution mechanism in the

competitive business environment that the EU aspires to promote. To this end, this thesis reached four main conclusions.

ECJ's Interference with Member States' Procedural Autonomy

In general, EU law penetrates deeper into national law through the principle of effectiveness. However, by relying on the principle of equivalence to elevate EU provisions to public policy, the ECJ proves that the principle of equivalence can be as effective. In *Eco Swiss*, *Claro*, and *Asturcom*, the ECJ granted public policy status to EU provisions that equivalent national provisions did not have. By doing so, it rewrote the content of national law and introduced uniform standards for those EU law provisions that must be regarded as rules of EU public policy, which is wholly outside its attributions in preliminary ruling procedures. The combination of the principles of effectiveness and equivalence has a profound impact on post-award review procedures, resulting in a violation of national procedural autonomy.

Under the guise of the public policy exception, the ECJ has put itself in the position of reinterpreting the procedural conditions of post-award review, and has found a way to strengthen the effectiveness of EU law in the national legal orders. Chapter 2 concluded that, in this context, public policy cannot be assumed to have the exceptional character generally assigned to it in international arbitration. To that extent, EU public policy risks undermining the proper functioning of international commercial arbitration in the internal market.

The Necessity for the ECJ to Narrow Down the Scope of EU Public Policy

As explained in the second part of this thesis, the CJEU has developed an unusually robust notion of public policy in international commercial arbitration.

Prima facie, the broad scope of EU public policy may appear legitimate. The ECJ may indeed wonder to what degree a narrow public policy exception effectively protects the internal market. It may object that the executive force of EU law cannot vary depending on the circumstances without jeopardising the attainment of the objectives of the Treaties, and undermining the effectiveness of the provisions of the Treaty and of secondary EU law. From the perspective of the EU's public interests, the effective protection of its fundamental principles may only appear possible at the cost of an expansive notion of EU public policy. Yet, if public policy is controlled too broadly within the framework of the EU, it will irreparably weaken the effectiveness of international commercial arbitration which is widely considered as an indispensable means to facilitate business transactions within the internal market. It is therefore essential for the ECJ to shape the content of EU public policy more coherently. This thesis identified two main criteria, fundamentality and public interest, which the ECJ ought to interpret more restrictively.

Besides, the possibility for national courts of mitigating the consequences the broad concept of EU public policy may have on post-award review appears limited considering the compulsory restrictions set by EU law. The principle of effectiveness indeed mandates national procedural laws not to make it excessively difficult for parties to exercise the rights conferred by EU law. This underlines that the scope of EU public policy shaped by the ECJ has deep ramifications within the EU which can only be alleviated by the ECJ itself.

Finally, instead of systematically broadening the narrow scope of public policy to uphold the interests of the internal market, this thesis suggests that, when the ECJ anticipates decisions which are likely to violate EU public policy, or wants to guarantee absolute protection to an EU law

principle (i.e. the protection of consumers against unfair arbitration clause), the concept of inarbitrability may be more appropriate. There is indeed always a possibility that a violation of EU public policy will go unnoticed in post-award review proceedings.

The Necessity for National Courts to Exercise a Broad Scope of Judicial Review to Uphold the Effectiveness of EU Public Policy

The ECJ has never clearly ruled on the conditions of post-award review under the ground of EU public policy. According to the principle of procedural autonomy, it is therefore for national courts to determine the appropriate level of scrutiny in post-award proceedings. In doing so, they are caught between upholding the principle of effectiveness of EU law, on the one hand, and the pro-enforcement demands of international commercial arbitration, on the other. Chapter 6 sought to determine whether national courts can simultaneously satisfy these demands.

Despite the heterogeneous methods of post-award review in the different Member States, it is possible to design a preferable system of post-award review, which includes public policy protections. The preferable system of post-award review must balance three interests: respecting party autonomy, protecting the effectiveness of EU public policy during post-award review proceedings, and promoting time- and cost-efficient arbitral proceedings.[1] It must also address both the degree of a violation of public policy and the scope of post-award review.

First, this thesis established that not every violation of a rule deemed essential to the functioning of the internal market violates EU public policy for the purposes of post-award review. The recognition and enforcement of the arbitral award needs to create an effective and concrete violation of EU public policy to be sanctioned. This is uncontroversial. As a corollary, every error of application or every failure to take into consideration a EU public policy rule will not automatically violate EU public policy. However, this thesis demonstrated that there is insufficient support in EU law and the ECJ case law to consider that only serious infringements of fundamental provisions of

[1] Jan Engelmann, *International Commercial Arbitration and the Commercial Agency Directive* (Springer 2017) 242.

EU law amount to a breach of EU public policy. This impossibility for national courts to take into account the seriousness of a breach of a EU public policy rule means that they have limited leeway to mitigate the demands of the EU legal order without undermining the principle of effectiveness of EU law.

Second, as explained in Chapter 6, a narrow scope of judicial review of arbitral awards is largely inefficient. Yet, a systematic broad scope of judicial review might be unnecessary when the reasoning of the arbitral tribunal is sufficiently developed to allow the national court to determine whether there is an effective and concrete breach of public policy. Hence, it is only when exceptional circumstances demand it that courts should go beyond the arbitral award to establish whether its recognition and enforcement would effectively and concretely breach EU public policy. This thesis identified the red flags which would justify the revisiting of the presumption of enforceability of arbitral awards. It established that the threshold triggering a broad scope of judicial review must always be very high in order to guarantee the principle of effectiveness of arbitration.

The preferable standard of post-award review developed in this thesis is assumed to be prudent enough to be in line with EU law, and acceptable enough not to warrant a departure from the principle of procedural autonomy of the Member States in order to guarantee the effectiveness of EU law.

The Necessity for Arbitral Tribunals to Apply EU Public Policy Rules to Guarantee the Sustainability of International Commercial Arbitration in the EU

Arbitral tribunals are not under an express duty to apply EU law when it does not belong to the *lex contractus*, nor to raise EU public policy considerations *ex officio* since they are not national courts, and are therefore not bound by the principles of loyal cooperation and effectiveness of EU law. They have the power, however, to do so as they are vested with a broad discretion anchored in arbitration rules and arbitration practice. Yet, the exercise of such a power being discretionary is

highly unpredictable. In order to promote certainty, Chapter 7 identified the main considerations which favour the exercise of arbitrators' discretion.

One argument often raised to justify the exercise of arbitrators' broad discretion is that arbitrators must render a valid and enforceable arbitral award, and avoid becoming the accomplices of an illegal scheme. Arbitral tribunals still perform their function within the grasp of national courts' post-award review mechanisms which attach importance to EU public policy. As a result, when the arbitral seat is located in a Member State, or when an arbitral award is likely to be recognised or enforced in a Member State, it is generally acknowledged that arbitrators should take EU public policy considerations into account.

This thesis developed a complementary argument finding its footing in the sustainability of international arbitration in the EU. It is submitted that arbitration would quickly become intolerable to States if parties could use it to systematically circumvent the application of mandatory provisions applicable to the dispute. It would lead to the sacrifice of public interests that would have been protected if the dispute had been litigated before a national court.

The EU liberalism is a recent phenomenon not totally or permanently acquired. As recently illustrated in the domain of investment arbitration, there are already signs that the ECJ is reversing its arbitration-friendly trend in order to protect EU rules deemed essential to the achievement of the internal market. Confronted with a purely pragmatic attitude of arbitrators, the EU could ultimately decide to adopt a stricter regime as to the arbitrability of EU law which could harm the development of international commercial arbitration.

While the foregoing showed that arbitral tribunals should consider the applicability of EU mandatory rules even when they do not belong to the *lex contractus* and have not been raised by the parties, this power cannot be exercised in a way that would deprive the parties of their right to be heard. It is therefore essential for arbitral tribunals to communicate to the parties their intention to consider EU mandatory rules that they deem applicable, and allow them to comment.

Public Policy as a Satisfying Ground to Uphold EU Public Policy in International Commercial Arbitration

To conclude, from the perspective of arbitration practitioners and users, there is an understandable preference to limit the judicial review of arbitral awards by national courts. From the perspective of the EU, international commercial arbitration should not undermine the regulatory efficiency and the public interest of the internal market. Both perspectives can be reconciled. On the one hand, the effectiveness of international commercial arbitration will not be hindered provided that the scope of EU public policy is construed narrowly. On the other hand, the integrity of the internal market will be preserved if arbitral tribunals ensure the application of EU overriding mandatory rules. Provided that these conditions are fulfilled, the possibility of reviewing arbitral awards at the recognition and enforcement stage under the ground of public policy appears as a workable compromise between preserving the parties' right to refer their dispute to arbitration, and safeguarding EU public interest. However, and until a balance between the demands of both legal orders is restored, national courts will remain in the cross-fire trying to reconcile contradictory demands.

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