§ 2 Characterization of Competition Law as public policy

Max C. van Leyenhorst / Isabelle P. M. van den Nieuwendijk

I. Introduction

In this chapter we will examine the question of whether EC competition law (cf. Art. 81 et seq. of the EC Treaty[1]) can be classified as rules of public policy for the purposes of arbitral awards. The answer to this question is particularly significant where (i) proceedings to set aside an arbitral award on the grounds of an alleged breach of EC competition law are initiated, and (ii) a national court is asked to grant leave for the enforcement of an arbitral award that allegedly infringes EC competition law.[2] As will be explained below, the European Court of Justice has held, in response to a request for a preliminary ruling, that EC competition law must be put on a par with rules of public policy in as far as granting leave for the enforcement of arbitral awards or assessing claims for the setting aside of such awards is concerned. 1

In section II, the relevant legal framework for the setting aside of arbitral awards, and for the refusal of leave for their enforcement on the ground of failure to observe rules of public policy, will be set out. Section III will address the application of EC competition law by state courts in ordinary court proceedings. In section IV, we will discuss the application of EC competition law in arbitral proceedings and will show that this differs from the application of such law by state courts. The reasons for this distinction will be explained in section V. In section VI, the arbitrability of disputes which involve EC competition law will be discussed. Lastly, our conclusions will be set out in section VII. 2

[1] Formerly Article 85 EC Treaty. In the following (with the exception of quotations from case law), all references will be to Article 81, even if Article 85 was applicable at the time.

[2] In this chapter, 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, will be disregarded. The Regulation stipulates that national courts are authorised to directly apply Article 81(3) EC Treaty. The Regulation's implications on arbitral proceedings, if any, are as yet uncertain.

II. Legal Framework

1. Introduction

3 This section will discuss the legal framework within which judicial review of the correct application of EC competition law in arbitral awards takes place. Two types of legal proceedings are relevant in this respect: (i) proceedings to obtain leave for enforcement of an award (cf. II.2), and (ii) proceedings to set aside an award (cf. II.3).

2. Enforcement of Arbitral Awards

(a) Enforcement of Awards in the Netherlands

4 The enforcement in the Netherlands of a final or partial final arbitral award can take place only after the president of the relevant District Court has granted leave for enforcement further to a request by one of the parties (Art. 1062(1) Dutch Code of Civil Procedure, "DCCP"). Such leave will usually be granted summarily and *ex parte*. However, Art. 1063(1) DCCP states that leave for enforcement can be refused if the award or the manner in which it was made is manifestly contrary to public policy or good morals. Although Dutch state courts may not review the merits of an award, an exception is made if and in so far as the relevant award is alleged to be contrary to public policy. However, in order to be able to refuse leave for enforcement, the court must be of the opinion, based on a prima facie assessment, that the award, or the manner in which it was made, is *manifestly* contrary to public policy or good morals. Assuming that EC competition law is considered as constituting rules of public policy (cf. section IV), it is therefore doubtful whether the refusal of leave for the enforcement of an arbitral award involving EC competition law will be a regular occurrence, as an infringement of Art. 81 EC Treaty will not ordinarily become apparent based on a prima facie assessment.

5 Under Dutch law, the recognition and enforcement in the Netherlands of foreign arbitral awards is governed by Art. 1075 DCCP (in cases where a treaty concerning recognition and enforcement applies – cf. II.2(c) on the New York Convention) and Art. 1076(1)(b) DCCP (if no such treaty applies).

(b) Other European Countries

6 The procedure described above for obtaining leave for the enforcement of an arbitral award applies *mutatis mutandis* in other European countries (see e.g.,

for Belgium Art. 1710(1) Ger.W. (1998), for Germany § 1060(1) ZPO (1998), for France Art. 1477 NCCP (1981) (domestic arbitration) and Art. 1498 NCCP (international arbitration), and for England Art. 66(1) AA (1996)). With regard to a state court's refusal to recognise and enforce an arbitral award, one should also take into account the UNCITRAL Model Law (1985)[3] which sets out an exhaustive list of grounds for refusing recognition or enforcement in Art. 36(1):

> "1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> a. (…)
>
> b. if the court finds that:
>
> (i) (…)
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State."

Similar provisions on the same subject can be found in the laws of, inter alia, Belgium (Art. 1710(3) Ger.W. and Art. 1723(2) Ger.W.), Germany (§ 1060(2) ZPO in conjunction with § 1059(2)(b) ZPO (domestic awards) and § 1061 ZPO (foreign awards)) and France (Art. 1488 NCCP and Art. 1498 NCCP in conjunction with Art. 1502[5] NCCP [international arbitration]). 7

(c) New York Convention; Recognition and Enforcement of Foreign Arbitral Awards

In cases where an arbitral award is to be recognised and enforced in a country other than the one in which the award was made, the New York Convention (1958)[4] ("NYC") may be applicable. The NYC relates to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where recognition and enforcement of such awards are sought" (Art. I NYC). Pursuant to Art. I and III NYC, contracting states must recognise foreign arbitral awards and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. Recognition and enforcement may be refused on only a limited number of grounds (Art. V NYC). For the purposes of this chapter, it is relevant to note that, pursuant to Art. V NYC, one of the 8

[3] The UNCITRAL Model Law (1985) has been adopted by 53 countries, albeit occasionally in a slightly amended form (cf. www.uncitral.org). Its objective is the harmonisation of existing legislation regarding international arbitration. For the traveaux préparatoires of the UNCITRAL Model Law, see HOLTZMANN / NEUHAUS.

[4] See for the New York Convention, VAN DEN BERG.

grounds for refusal is infringement of the public policy of the country in which recognition and enforcement is sought:

> "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (…)
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

9 The recognition and enforcement of a foreign arbitral award could thus be refused if the award violates the public policy of the country in which recognition and enforcement is sought. This ground for refusal may also be applied *ex officio* (cf. Art. V(2) NYC)[5]. Although state courts will usually not review the merits of arbitral awards, an exception is made when the relevant award is allegedly contrary to public policy.

10 Art. V(1)(e) and VI NYC set out the relationship between the refusal of recognition and enforcement of an award, on the one hand, and proceedings to set aside the award, on the other. Pursuant to Art. V(1)(e) NYC, the recognition 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, that award was made". Art. VI NYC states as follows: "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Art. V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

3. Setting Aside of Arbitral Awards

(a) The Netherlands

11 A party that objects to the content of an arbitral award may apply to have the award set aside. Proceedings for this purpose may be initiated before the District Court. The DCCP sets out an exhaustive list of five grounds on which arbitral awards may be set aside (cf. Art. 1064(2) and 1065(1)(a-e) DCCP). In this regard we refer to Art. 1065(1)(e) DCCP, which sets out the following ground: "the

[5] See also VAN DEN BERG, 359.

award, or the manner in which it was made, violates public policy or good morals". The Dutch Supreme Court has held that a violation of public policy within the meaning of Art. 1065(1)(e) DCCP can only be held to exist if the content of an award, or execution of the award, violates mandatory rules of law of such a fundamental nature that restrictions of a procedural nature should not stand in the way of compliance with these rules.[6] Although in principle a state court may not review an arbitral award on the merits in proceedings to set the award aside, this may be done when an infringement of public policy is alleged (under Art. 1065[1][e] DCCP). By contrast to proceedings regarding the granting or refusal of leave for enforcement (Art. 1063 DCCP; cf. II.2[a]), in proceedings to set aside an award it is not required that an infringement of public policy be established based only on a prima facie assessment. In other words, the District Court may conduct a full review in proceedings to set aside an award.

It should be noted in this respect that the Dutch courts are required to exercise restraint in setting aside an arbitral award on the ground of conflict with public policy.[7] Proceedings to set aside an arbitral award must be clearly distinguished from an appeal against the award, which, pursuant to Dutch law, may be lodged with an arbitral review tribunal if the parties have so agreed (cf. Art. 1050 DCCP). Proceedings to set aside an award may not be used as appeal proceedings in disguise. 12

It should also be noted that a claim for the setting aside of an arbitral award does not automatically lead to suspension of the enforcement of the award (Art. 1066[1] DCCP). However, a party may submit a separate request for suspension of the award's enforcement. If such a request is submitted, the court will assess whether the claim for the setting aside of the award could be justified (Art. 1066[2] DCCP). In addition, the court may, when granting or denying a request for suspension of enforcement, order the relevant party to furnish security (Art. 1066[5] DCCP). 13

(b) Other European Countries

The UNCITRAL Model Law, too, provides that an arbitral award may be set aside on the ground of conflict with public policy. In this regard, Art. 34 reads as follows: 14

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[6] Supreme Court of the Netherlands 21 March 1997, *Netherlands Law Report* 1998, 207 (*Eco Swiss / Benetton*), par. 4.2.

[7] Supreme Court of the Netherlands 17 January 2003, *Netherlands Law Report* 2004, 384 (*International Military Services/Modsaf-IR*).

"2. An arbitral award may be set aside by the court specified in article 6 only if:

a. (…)

b. the court finds that:

(i) (...)

(ii) the award is in conflict with the public policy of this State."

15 Similar provisions on the setting aside of an arbitral award on the ground that it is in conflict with the public policy of the relevant state can be found in the laws of other European countries. See for example Belgium (Art. 1704(2)(a) Ger. W.), Germany (§ 1059(2) (b) ZPO), France (Art. 1484(6) NCCP and Art. 1504 NCCP in conjunction with Art. 1502 NCCP [international arbitration]) and England (Art. 68(2)(g) AA).

16 In this chapter, it is assumed that the application of EC competition law in arbitral proceedings, as described in section 4 below, applies not only to proceedings before Dutch courts to set aside an award, but also to similar proceedings in other European countries.

III. Application of EC Competition Law in ordinary court proceedings

1. Introduction

17 When reviewing the manner in which EC competition law is applied by state courts, an important judgment to be examined is that of the ECJ in the *Van Schijndel* case[8], in which the ECJ replied to questions posed by the Dutch Supreme Court (the *Hoge Raad*) regarding the application of EC law in state court proceedings.

2. The *Van Schijndel* judgment

18 The dispute in the *Van Schijndel* case concerned a legal relationship that infringed Art. 81 EC Treaty. Neither of the parties had invoked this issue during the arbitral proceedings or the subsequent state court proceedings. In addition, the relevant District Court had not applied Art. 81 EC Treaty *ex officio*.

[8] ECJ 14 December 1995, C-430/93 and C-431/93 (*Van Schijndel / Van Veen*).

19 In cassation proceedings, the Supreme Court had to decide whether the District Court should have applied Art. 81 EC Treaty *ex officio*. Pursuant to Art. 177 (now Art. 234) EC Treaty, the Supreme Court posed six preliminary questions to the ECJ on the application of EC law by state courts. The Supreme Court stated that, under the DCCP, Dutch courts are required to raise points of law *ex officio* (cf. Art. 25 DCCP). However, the Supreme Court was also of the opinion that this obligation does not apply if and to the extent that it would require a court, in disputes relating to civil rights and obligations upon the establishment of which the parties are free to decide,[9] to go beyond the ambit of the dispute defined by the parties themselves or to rely on facts or circumstances other than those on which the claim is based.[10]

20 It can be deduced from the above decision of the Supreme Court that in disputes concerning civil rights and obligations upon the establishment of which the parties are *not* free to decide (e.g. disputes relating to issues of public policy), a Dutch state court is indeed obliged to raise points of law *ex officio*. This means that if Art. 81 EC Treaty was not considered to be a rule of public policy, the court would not be obliged to apply the provision *ex officio* if neither party invoked it, whereas the court would be obliged to apply Art. 81 EC Treaty *ex officio* if it was considered to be a rule of public policy.

The first three questions of the Dutch Supreme Court to the ECJ concerned the nature of Art. 81 EC Treaty:

> "1. In proceedings concerning civil rights and obligations freely entered into by the parties, should a national civil court apply Art. 3(f), 5 and 85 to 86 and/or 90 of the Treaty establishing the European Economic Community, even where the party to the proceedings with an interest in application of those provisions has not relied upon them?
>
> 2. If Question (1) must in principle be answered in the affirmative, does that answer also apply if in so doing the court would have to abandon the passive role assigned to it since it would be required (a) to go beyond the ambit of the dispute defined by the parties and/or (b) to rely on facts and circumstances other than those on which the party with an interest in application of those provisions relies in order to substantiate his claim?

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[9] i.e. rights and obligations that are not of a public policy nature.

[10] Supreme Court of the Netherlands 22 October 1993, *Netherlands Law Report* 1994, 94 (*Van Schijndel/Stichting Pensioenfonds voor Fysiotherapeuten*), par. 3.4.3.3.

3. If Question (2) must also be answered in the affirmative, can the Treaty provisions referred to in Question (1) be relied on before a national court of cassation for the first time if (a) the applicable procedural law provides that new arguments may be submitted in cassation only if they are on pure points of law, that is to say that they do not require any factual enquiry and are applicable in all circumstances, and (b) reliance on those provisions actually calls for factual enquiry?"

22 In response to these preliminary questions, the ECJ decided as follows:

"1. In proceedings concerning civil rights and obligations freely entered into by the parties, it is for the national court to apply Art. 3(f), 85, 86 and 90 of the Treaty even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court.

2. Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim."

23 It follows that national courts are obliged to apply Art. 81 EC Treaty where domestic law allows such application, even if neither of the parties has invoked the provision. However, EC law does not oblige the national courts to apply Art. 81 EC Treaty if this would entail the state court having to go beyond the ambit of the dispute defined by the parties themselves.

24 It can be concluded from this decision by the ECJ in the *Van Schijndel* case that Art. 81 EC Treaty was deemed *not* to be a rule of public policy, since the ECJ decided that state courts were not obliged to apply Art. 81 EC Treaty *ex officio* beyond the ambit of the dispute in question.

25 In § 3, the *Van Schijndel* judgment and its implications are discussed in more detail.

IV. Application of EC Competition Law in Arbitral Proceedings

1. Introduction

The application of EC competition law in arbitral proceedings was extensively discussed by the ECJ in the *Eco Swiss / Benetton* judgment.[11] 26

2. The *Eco Swiss / Benetton* judgment

The facts of the case were as follows: In 1986, *Eco Swiss* and *Benetton* entered into an agreement under which *Eco Swiss* was given the right to produce watches and clocks for a period of eight years, using a licence granted by *Benetton* for the benefit of *Eco Swiss*. *Benetton* terminated the agreement in 1991, well before the contractual termination date. The parties applied to the Netherlands Arbitration Institute in order to resolve the resulting dispute. 27

In a partial final award, the arbitral tribunal ordered *Benetton* to pay damages to *Eco Swiss*. In the subsequent final award, the tribunal established the total amount that *Benetton* had to pay *Eco Swiss*. *Benetton* thereupon initiated proceedings to set aside both arbitral awards on the ground that they were contrary to the rules of public order, arguing that the licence agreement was null and void because it infringed Art. 81 EC Treaty. This argument had not been raised by the parties during the arbitral proceedings; nor had the tribunal raised the issue. 28

After *Eco Swiss* had obtained leave for enforcement of both arbitral awards, *Benetton*, pending the court's decision in the proceedings to set aside the awards, requested the District Court of The Hague to suspend the enforcement of the awards. This request was rejected. On appeal, the Court of Appeal granted the request to suspend the enforcement of the final arbitral award on the grounds that Art. 81 EC Treaty was a rule of public policy, the infringement of which could result in the relevant award being set aside under Art. 1065(e) DCCP. The case was then brought before the Dutch Supreme Court. 29

The Supreme Court referred to the *Van Schijndel* judgment (discussed above in III.2), from which, according to the Supreme Court, it could be concluded that Art. 81 EC Treaty was not a rule of mandatory law of such a fundamental nature that failure to apply it would constitute an infringement of public policy within the meaning of Art. 1065(1)(e) DCCP (cf. II.3(a)). The Supreme Court thus con- 30

[11] ECJ 1 June 1999, case C-126/97 (*Eco Swiss / Benetton*).

sidered that if the criteria set out in the *Van Schijndel* judgment were applied, the arbitral award would not be set aside on the ground that it infringed Art. 81 EC Treaty.

31 However, the Supreme Court went on to ask whether the obligations of state courts in respect of EC competition law, as set out in the *Van Schijndel* case, also apply to arbitral tribunals. The reason for the court's hesitation was the ECJ decision in the *Nordsee* case.[12] In that case, the ECJ had held that an arbitrator does not have the status of "court or tribunal of a Member State" within the meaning of Art. 177 (now Art. 234) EC Treaty, and that this means that arbitrators cannot raise questions of EC law to the ECJ (cf. section V below). With respect to the applicability of the *Van Schijndel* criteria to arbitrations, the Dutch Supreme Court raised five preliminary questions to the ECJ, three of which are relevant for the purposes of this chapter:

> "1. To what extent are arbitrators obliged to apply Art. 81 EC Treaty *ex officio* if the parties failed to invoke the provision?
>
> 2. Is the state court obliged to grant a claim for setting aside an arbitral award if the award infringes Art. 81 EC Treaty?
>
> 3. Is the state court obliged to do so even if the application of Art. 81 EC Treaty was not the subject of discussion in the arbitral proceedings and if the arbitrators did not render a decision on the application of the provision?"

32 The ECJ provided an answer only to the second question. In this regard and insofar as relevant here, it held as follows:

> "1. A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Art. 85 of the EC Treaty (now Art. 81 EC), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy."

33 It follows that Art. 81 EC Treaty is deemed to be a rule of public policy in as far as proceedings regarding a request for leave for enforcement or for the setting aside of an arbitral award are concerned. With regard to the Netherlands, this relates to proceedings under Art. 1063(1), 1065(1)(e), 1075 and 1076(1)(b)

[12] ECJ 23 March 1982, *Netherlands Law Report* 1983, 149 (*Nordsee / Nordstern*).

DCCP. In the international context, the relevant provision is Art. V(2) NYC[13] (see II.2(c)).

The ECJ indicated that the answer to the second question rendered moot the first and third questions. The Attorney General had advised as follows in relation to the first question: 34

> "26. In the light of these considerations, I suggest that the Court's answer to the first question should be that Community law does not require arbitrators, when they have been asked to rule on the performance of an agreement, to raise of their own motion questions about the compatibility of that agreement with Community EC competition law if consideration of those questions would oblige them to abandon the passive role assigned to them, going beyond the ambit of the dispute defined by the parties and relying on facts and circumstances other than those on which the party with an interest in application of those provisions relied in order to substantiate his claim."

Although the ECJ did not directly hold that arbitrators are required to apply Art. 81 EC Treaty *ex officio* (after all, the court did not provide an answer to the first preliminary question), it can be concluded that they should. This is because, pursuant to the *Benetton* judgment, state courts are required to set aside an arbitral award if it infringes Art. 81 EC Treaty. As arbitrators will want to prevent this, they will have to apply Art. 81 EC Treaty correctly and, if it is not raised by either of the parties, do so themselves where appropriate. 35

The above applies regardless of whether a tribunal renders its award in accordance with the rules of law or as *amiable compositeur* (Article 1054[1] and 1054[3] 36

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[13] See paragraphs 38 and 39 on the New York Convention in the ECJ's decision:
"38. (…) the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member States, provides that recognition and enforcement of an arbitration award may be refused only on certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Articles V(1)(c) and (e) and II(b) of the New York Convention).
39. (…) the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention."

DCCP). This is because an arbitral award may be set aside on the ground of infringement of public policy in either scenario (Art. 1065[1][e] DCCP).

37 The Attorney General suggested the following in respect of the Supreme Court's third preliminary question:

> "46. I therefore propose that the Court answer the third question referred by the Hoge Raad to the effect that the national court must allow a claim for annulment of an arbitration award on the ground that it is contrary to Article 85 of the EC Treaty even if the question of the applicability of that provision remained outside the ambit of the dispute and the arbitrators therefore made no determination in that regard."

38 According to the above, state courts will therefore have to grant a claim for the setting aside of an arbitral award on the ground of infringement of Art. 81 EC Treaty, even in cases where the provision was not raised in the arbitral proceedings.[14]

V. Reasons for distinction

39 It can be concluded from the above that, as was held by the ECJ in the *Van Schijndel* case, state courts are not required to apply EC competition law *ex officio* if none of the parties raised the issue and if applying such law *ex officio* would entail the state court going beyond the ambit of the dispute defined by the parties. Therefore, Art. 81 EC Treaty is – for the purposes of the *ex officio* raising of points of law – not a rule of public policy. However, it can be concluded from the subsequent *Benetton* judgment that Art. 81 EC Treaty should be treated as a rule of public policy insofar as it is invoked in proceedings to set aside an arbitral award (cf. Art. 1065(1)(e) DCCP and Art. 34(2)(b)(ii) UNCITRAL Model Law) or in proceedings to obtain leave for enforcement (cf. Art. 1063 [1]DCCP, Art. 36[1] UNCITRAL Model Law, and Art. V(2) NYC).

40 The reason for this distinction can be found in the *Nordsee* judgment, in which the question of whether arbitrators can raise preliminary questions to the ECJ was discussed:

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[14] For a recent case similar to Benetton, see the Paris Court d'Appel decision of 18 November 2004 (*Thalès Air Defence / Euromissile et al.)*, Gaz.Pal., Les Cahiers de l'arbitrage 2004, No. 338–339, 53.

"10. It is true, as the arbitrator noted in his question, that there are certain similarities between the activities of the arbitration tribunal in question and those of an ordinary court or tribunal inasmuch as the arbitration is provided for within the framework of the law, the arbitrator must decide according to law and his award has, as between the parties, the force of res judicata, and may be enforceable if leave to issue execution is obtained. However, those characteristics are not sufficient to give the arbitrator the status of a 'court or tribunal of a Member State' within the meaning of Article 177 of the Treaty.

11. The first important point to note is that when the contract was entered into in 1973 the parties were free to leave their disputes to be resolved by the ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract. From the facts of the case it appears that the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration.

12. The second point to be noted is that the German public authorities are not involved in the decision to opt for arbitration nor are they called upon to intervene automatically in the proceedings before the arbitrator. The Federal Republic of Germany, as a Member State of the Community responsible for the performance of obligations arising from Community law within its territory pursuant to Article 5 and Articles 169 to 171 of the Treaty, has not entrusted or left to private individuals the duty of ensuring that such obligations are complied with in the sphere in question in this case.

13. It follows from these considerations that the link between the arbitration procedure in this instance and the organization of legal remedies through the courts in the member state in question is not sufficiently close for the arbitrator to be considered as a 'court or tribunal of a Member State' within the meaning of Article 177.

(…)

> 16. It follows that in this instance the Court has no jurisdiction to give a ruling."[15]

41 The distinction between the judgment in the *Van Schijndel* case and that in the *Benetton* case can be explained by pointing out that the parties must always be able to invoke EC law before the state courts, because the latter – and only the latter – can raise preliminary questions to the ECJ on the application of EC law. In this regard, we refer to the following consideration of the ECJ in the *Benetton* judgment:

> "40. Lastly, it should be recalled that (…) arbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law. However, 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 (Case C-88/91 Federconsorzi [1992] ECR I-4035, paragraph 7). It follows that, in the circumstances of the present case, unlike Van Schijndel and Van Veen, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 85(1) of the Treaty should be open 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."

42 As arbitrators do not have the competence to ask preliminary questions to the ECJ, the application of Art. 81 EC Treaty can be invoked only in proceedings before a state court. These could be either proceedings to obtain leave for enforcement or proceedings to set aside the arbitral award. If need be, the court could then pose preliminary questions to the ECJ as to the application of EC competition law. The obvious downside of this "solution" is that possibly protracted and costly arbitral proceedings may, in the end, turn out to have been conducted in vain. For this reason, attempts have been made to provide for the possibility of raising issues on, e.g., Art. 81 EC Treaty before state courts during, rather than subsequent to, the arbitral proceedings (cf. section VII). In the meantime, as long as this possibility does not exist, arbitrators should duly con-

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[15] ECJ 23 March 1982, Case 102/81 (*Nordsee / Nordstern*). See also the recent case ECJ 27 January 2005 C-125/04 (*Guy Denuit and Betty Cordenier / Transorient – Mosaique Voyages et Culture S.A.*).

sider whether the dispute they are adjudicating has any EC competition law implications. If so, they should apply EC competition law *ex officio* in order to prevent a waste of time and money.

VI. Arbitrability and EC Competition Law

1. Introduction

The above discussion on the application of EC competition law in arbitral proceedings shows that disputes to which EC competition law applies can be submitted to arbitration. This will be examined in greater detail below. Firstly, the theory of arbitrability in general will be discussed (VI.2). Subsequently, we will address the arbitrability of disputes involving EC competition law (VI.3). 43

2. Arbitrability and public policy

The question of whether a dispute may be submitted to arbitration is a question of public policy. An arbitral tribunal must investigate *ex officio* whether a dispute that has been submitted to it can be decided by way of arbitration. Under Dutch law (Art. 1020(3) DCCP), an agreement to arbitrate may not serve to establish legal consequences which the parties are not free to determine. As issues of public policy cannot freely be determined by the parties, it follows that such issues cannot be submitted to arbitration. Whether an issue is one of public policy must be determined on a case-by-case basis. The mere fact that mandatory law or rules of public policy may be relevant for adjudicating a dispute does not mean that the dispute cannot be submitted to arbitration. However, the tribunal must apply rules of public policy and in any event may not decide in conflict with public policy, as the arbitral award will otherwise be subject to a refusal of leave for enforcement or to a decision to set aside the award (cf. for the Netherlands, Art. 1063(1) DCCP, Art. 1075 DCCP in conjunction with Art. V(2)(a) NYC, Art. 1076(1)(b) DCCP and Art. 1065 (1)(e) DCCP). See above under II.2 and II.3, respectively. 44

3. Arbitrability and EC competition law

45 Based on the above, it can be said that disputes involving rules of EC competition law may be submitted to arbitration[16] and that arbitrators should apply those rules (cf. IV.2 above).

46 In e.g. the landmark case of *Mitsubishi v. Soler Chrysler Plymouth*,[17] the United States Supreme Court decided as follows with regard to an international arbitration:

> "We now turn to consider whether Soler's antitrust claims are nonarbitrable even though it has agreed to arbitrate them. (…) we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."

47 However, the Supreme Court also recognised that the state court could still exercise a certain measure of review:

> "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The New York Convention 1958 reserves to each signatory country the right to refuse enforcement of an award where the recognition or enforcement of the award would be contrary to a public policy of that country."

48 Consequently, although disputes in which EC competition law is to be applied are capable of being submitted to arbitration, it is the state court that, in the end, assesses and decides whether the relevant rules of EC competition law were correctly applied in a particular award. The court is obliged to do so *ex officio* in proceedings for the recognition and enforcement of such an award or for the setting aside of the award.

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[16] See e.g., SHELKOPLYAS, Chapter 8.

[17] 473 U.S. 614, 105 S. Ct. 3346 (2 July 1985); see Yearbook Commercial Arbitration, A.J. VAN DEN BERG (ed.), Vol. XI (1986), 555–565.

VII. Conclusion

It has been shown that cases in which EC competition law is to be applied are in principle arbitrable, but that the question as to the correct application of such law is – in the end – open for state courts to assess. It follows from the ECJ judgments discussed above that EC competition law must be put on a par with rules of public policy whose infringement can constitute grounds for setting aside an arbitral award or refusing leave for its enforcement (*Eco Swiss v. Benetton*). It is for the state court to decide whether an arbitral award is in conformity with EC competition law. The court will be able to and must assess this when it hears a request for the enforcement or setting aside of an arbitral award. 49

Although arbitral tribunals do not have the authority to raise preliminary questions to the ECJ on the application of EC competition law, they will, however, have to correctly apply that law in order to make sure that awards made by them stand up to scrutiny in state court proceedings. 50

As a closing remark, it is noted that a Dutch working group that has made proposals for the amendment of the Dutch legislation on arbitration has suggested that arbitrators be allowed, through the state courts, to raise preliminary questions to the ECJ pending arbitral proceedings.[18] The aim of this is to prevent the conduct in vain of protracted and costly arbitral proceedings due to the incorrect application by tribunals of EC competition law. The working group's proposal is that tribunals be given the right, by statute, to request a state court (specifically, the District Court of The Hague) to raise preliminary questions to the ECJ. The tribunal would be authorised to submit such a request either *ex officio* or further to a request by one of the parties. While it is doubtful whether the ECJ would accept national legislation that tries to sidestep its *Nordsee* judgment, it is at the very least a welcome attempt to solve a major difficulty in arbitrating disputes that involve aspects of EC competition law. 51

[18] The proposal was made by a working group of experts, chaired by Prof. A.J. VAN DEN BERG. We refer the reader to their website: www.arbitragewet.nl.