FACULTY OF LAW

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Arbitration and European Community law

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Master thesis

20 points

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European Community law

Spring 1999

CONTENTS

SUMMARY

The national courts of the Member States in the European Community are obliged to apply the Community law when it is relevant to the case before them. This obligation arises out of the co-operation principle laid down in Article 5 of the EC Treaty. When a national court is to apply a Community provision, and finds itself in doubt about how the provision is to be interpreted, or applied, that court can refer a question to the European Court of Justice (ECJ) on the interpretation, or application, of the provision. This possibility to refer to the ECJ is reserved for the courts, or tribunals, of the Member States. In order to be regarded as a court or tribunal certain criteria have to be fulfilled. The arbitrators do not fulfil these criteria and are consequently not competent to refer a question to the ECJ on the interpretation, or application, of Community law. The arbitrators are however obliged to apply relevant Community provisions. This obligation to apply Community law, combined with the lack of the possibility to ask the ECJ for help on how to apply and interpret the Community law, is problematic. At the same time, as the arbitrators may need help on the application of Community law, a reference process might endanger the fundamental features of arbitration.

The arbitrators' competence to apply Community provisions is not always clear. The ECJ has not revealed its opinion on how far it is possible for Community law to be settled in arbitration. The arbitrators in the Community are nevertheless conferring on themselves extensive powers on the application of Community provisions. The only limits on the arbitrator's jurisdiction seems to be the exclusive powers of a Community Institution to apply a provision. This means that, in the competition area, the arbitrators are not competent to apply the competition provisions that are exclusively within the powers of the Commission to enforce. The arbitrator's decision on a dispute is binding on the parties to the arbitration agreement. One of the parties can nevertheless challenge the award or resist any attempt to have the award recognised or enforced. The possibilities to achieve this on the grounds of Community law are however limited. The only possibility for the resisting party is if the award is in breach of the Community competition provisions.

The duty of national courts is to apply binding and directly applicable Community provisions on their own motions. This obligation most certainly extends to cases when the courts are asked to recognise, or enforce, an arbitration award. Whether the arbitrators also are under such an obligation will soon be determined by the ECJ. An obligation for arbitrators to

apply Community law ex officio might however imperil the very nature of arbitration: that it is the parties concerned who set the limits to the arbitration agreement by their agreement.

1 INTRODUCTION

1.1 General

The national courts in the Member States of the European Community are obliged to apply Community provisions when it is relevant to the case before them. The legal order of the Community is however a legal system of its own, quite different from the national systems in the Member States. The national courts might therefore find it difficult to apply the Community provisions and the methods of interpretation used in the Member States will not always help the national courts to find the correct interpretation of a Community provision.

In order to make the work of the national courts easier, and to ensure that the Community provisions are applied correctly, the ECJ will provide the courts with the proper interpretation on relevant provisions. Whenever a national court has doubt about a question of Community law and considers that a decision on the question is necessary for its judgement, that court can request the ECJ to give a ruling on the provision.

The bodies entitled to request an interpretation on a Community rule are the courts and tribunals of the Member States. Which national bodies that shall be regarded as a court, or tribunal, is not always obvious. An important question in this context is if an arbitrator, or an arbitration tribunal, is allowed to ask the ECJ for help. The arbitrators are very important actors on the international arena since they provide a method of resolving disputes that is useful to business companies all over the world. These companies often prefer their disputes to be settled by arbitration instead of having them resolved in national courts of law. What, then, are the obligations of an arbitrator when called upon to resolve a dispute? Is there an obligation to apply Community provisions? If so, is the arbitrator allowed to seek help from the ECJ on the question of how these rules shall be applied? If not, how will he be able to apply Community provisions correctly, and how will uniform application of Community law be ensured?

This is not the only problem that arbitrators are faced with when it comes to Community law. There is a great deal of uncertainty on the powers of arbitrators to apply Community law. Are there certain points of Community law that are regarded as not capable of being settled in arbitration, and therefore have to be handled in the national courts? Another problem arises at

the enforcement stage, in those cases when the arbitrator's decision has to be carried out with the help of the national courts in the Member States. When can a court refuse to recognise, or enforce, an award because the award is in conflict with the Community law?

The national courts duty is to apply binding and directly applicable Community provisions on its own motion in order to protect the rights that these directly applicable provisions confer on individuals. Is this obligation extended to include the arbitrators?

1.2 Purpose

The purpose of this paper is to examine the relationship between the mechanism of preliminary ruling and arbitration in the European Community. A preliminary ruling by the ECJ on the interpretation of points of Community law is a suitable method to help the national courts. The work of arbitrators is however different from the work of the national courts of law and it is not evident that assistance from the ECJ is the right solution for the arbitrators. The question of the arbitrator's right to refer to the ECJ will be examined in the light of the rights and obligations of arbitrators in applying the European Community law. The paper intends to show that the area of arbitration and Community law is problematic, and that there is much to be done in order to achieve predictability of arbitration decisions.

The focus of this paper is on the preliminary ruling process and the arbitrators' work in applying the European Community provisions. I have not provided a complete description of the arbitrators' work in applying the Community law. Instead, I have focused on some of the problems I find most important and interesting in this complex area.

1.3 Outline

The starting point for this paper is the preliminary ruling process provided for in Article 177 of the EC Treaty. The opportunity to refer a question to the ECJ for help on the interpretation and application of Community provisions is only open to the courts or tribunals of the Member States. The concept of a "court or tribunal of a Member state" has been developed by the ECJ in a number of cases. These cases, and the conclusions drawn from them, are described in the first chapter of the text.

In the next chapter, the arbitration process is examined. The power of arbitrators to apply European Community law can be derived from the jurisdiction of other organs acting in the European Community, primarily the Commission and the national courts. The jurisdiction of these organs will therefore be described. The power of arbitrators to apply Community law is linked with the possibility to examine the content of the arbitrator's decision. In cases where the parties to the arbitration proceedings do not carry out the award voluntarily, the national courts may help to enforce the award. In doing so, the court will examine the award and determine if it is enforceable in that country. An important question that follows is may a court refuse to enforce the award on grounds of Community law. In this context it is interesting to see how the USA has dealt with the question of arbitrators applying fundamental American laws, like the competition rules.

After this, the obligations of national courts and arbitrators to apply Community law on its own motion are examined. This is done with the help of some important cases from the ECJ. At present, there is a case before the ECJ dealing with the ex officio application of Community law by arbitrators. The judgement in that case has not been delivered yet, but the facts of the dispute are presented in this paper.

I will use the abbreviation ECJ for the European Court of Justice.

2 PRELIMINARY RULINGS

2.1 General

The legal basis for preliminary ruling in the EC Treaty is Article 177. It reads as follows: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of ECB;

(c) the interpretation of the statues of bodies established by an act of the Council, where those statues so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

The preliminary ruling enables courts or tribunals from the Member States to request a ruling by the ECJ, on any point of European Community law, which they are called upon to decide.

2.2 The purpose and function of Article 177

Through the preliminary ruling process the individual is given the opportunity to challenge the legality of Community acts and acts taken by Member States with the help of the national courts. The preliminary ruling has thus a function of judicial review, and when national courts are faced with problems of exercising such judicial review they can refer the problem to the ECJ.[1]

[1] H.G. Schermers/ D. Waelbroeck: Judicial protection in the European Community, p. 393.

Apart from this judicial review function, the main object of Article 177 is to ensure the uniform interpretation and application of Community law. Due to the different legal systems and the different languages, the interpretation of Community law may vary in the Member States. Through Article 177, the ECJ can give authoritative rulings on the meaning of Community law, and this court has frequently pointed out that it is the purpose of Article 177 to provide such a mechanism: "Article 177 is essential for the preservation of the Community character of the law established by the Treaty, and has the object of ensuring that in all circumstances the law is the same in all States of the Community".[2]

Through this Article, the ECJ has been able to form a system in which the Community law can be uniformly interpreted, and applied, within the national courts of the Member States.[3] Through the uniform application of Community law the effectiveness of the same is guaranteed.[4] The preliminary rulings also enable co-operation between the ECJ and national courts. When national courts face problems in interpreting Community law, the preliminary judgements helps the national courts to overcome these problems. The ECJ emphasise that Article 177 is an article of co-operation, not of hierarchy, and members of the ECJ regularly visit national courts in order to promote co-operation. Close co-operation, built on mutual respect and trust between national courts of the Member States and the ECJ, is essential for the success of the preliminary rulings..[5]

2.3 The concept of "court or tribunal of a Member State"- the case law of the ECJ

Article 177 provides that "any court or tribunal of a Member State" can ask the ECJ for a preliminary ruling on a point of Community law that it is called upon to decide. What then constitute a court or tribunal within the meaning of this Article?

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[2] Case, 166/73 Rheinmülen-Düsseldorf v. Einfuhr- und Vorratstelle für Getreide und Futtermittel, [1974] ECR 33 at p. 43; J. Shaw: European Community Law, p. 135-136.
[3] J. Shaw: European Community Law, p. 135-136.
[4] Case 166/73, Rheinmülen, p. 38.
[5] H.G. Schermers/D. Waelbroeck: Judicial protection in the European Community, p. 394-395.

The case law of the Court gives some answers. The first important case on this issue is the ***Widow Vaassen case***[6], where a Dutch arbitration tribunal submitted a request for a preliminary ruling to the ECJ. The arbitration tribunal- Scheidsgerecht van het Beambtenfonds voor het Mijnberijf- was called upon to rule on the question of whether a widow to a Dutchman had the right to pension in the Netherlands even though she lived in Germany. The defendant, a pension fund, asserted that the Scheidsgerecht was not a court or tribunal within the meaning of Article 177 of the EC Treaty, and therefore not competent to request a ruling under that Article. The Government of the Netherlands, the Commission and the Advocat General expressed a contrary view. The Advocat General noted that, in order to ensure the uniform interpretation and application of Community law, the judges of the ECJ might have to recognise a body as a "court or tribunal" for the purpose of Article 177, even though the national legal system does not consider it as such.[7] The ECJ ruled the Scheidsgerecht to be a court or tribunal within the meaning of Article 177 on several grounds. First, the Scheidsgerecht was properly constituted under Netherlands law and its rules had to be approved by two Dutch ministers. It was also the duty of the Minister responsible to appoint the members, to designate its chairman and to lay down its rules of procedure. Furthermore, the Scheidsgerecht was a permanent body charged with the settlement of disputes and it was bound by rules of adversary procedures similar to those used by the ordinary courts in the Netherlands. Finally, the Scheidsgerecht was bound to apply rules of law.[8]

In the ***Nederlandse Spoorwegen case***[9], the Advocate General addressed himself to the question of whether the Raad van State, Afdeling Geschillen van Bestuur (Council of State, Litigation Section) was a court or tribunal within the meaning of Article 177. One of the functions of the Raad van State was to consult the Dutch government. In an appeal case the Raad van State referred three questions on the interpretation of Council Regulation 1191/69. The Advocate General thoroughly discussed the question of whether the Raad van State should be considered a court or tribunal within the meaning of Article 177. He found the answer to this question to be yes, mainly because it was a body entrusted with certain judicial powers and with a composition, also laid down by law, guaranteeing its impartiality.

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[6] Case 61/65, G. Vaassen (née Göbbels) (a widow) Management of the Beambtenfonds voor het Mijnbedrijf, [1966] ECR p. 261.
[7] Opinion of Advocate-General 61/65 p. 280.
[8] Judgement in case 61/65 p. 273.
[9] Case 36/73, Nederlandse Spoorwegen v. Minister and Verkeer en Waterstaat, [1973] ECR p. 1299.

Furthermore, the rules of procedure of the Raad van State were based on those that the courts of law apply in their adversary proceedings.[10] The ECJ accepted implicitly the conclusion of the Advocate General and did not find it necessary to deal with the question of admissibility.

The next dispute, ***the Borker case***[11] concerned a member of the Paris Bar who had been refused to act for a civil part in criminal proceedings before a German tribunal. The Conseil de l'ordre des Avocats à la Cour de Paris was asked to rule upon the conditions for the exercise as an advocate before the tribunals and courts of the Member States. As the Conseil de l'ordre not was under any legal duty to try the case, the ECJ declared that it was not competent to decide the case. The ECJ stated that it can only give preliminary rulings if requested by a court or tribunal that is called upon to give a judicial decision. The Conseil de l'ordre had before it only a request for a declaration regarding the dispute.[12]

In ***the Broekmeulen case***[13], a Dutch citizen and doctor of medicine with a diploma from Belgium, was authorised by the Netherlands Secretary of State for Health and the Environment to practice medicine in the Netherlands. However, he was refused registration as a general practitioner. Dr Broekmeulen challenged this decision before the Commissie van Beroep Huisartsgeneeskunde (Appeals Committee for General Medicine) in the Hague. The Committee stayed the proceedings in order to refer to the Court of Justice some questions regarding the interpretation of Council Directives 75/362 and 75/763 on the mutual recognition of diplomas. The ECJ found that the Appeals Committee was allowed to refer under Article 177 on several grounds. First, the composition of the Appeals Committee included a significant degree of involvement by the Netherlands public authorities. Second, the Appeals Committee settled the disputes on the adversarial principle. Furthermore, the ECJ held that the question of whether a body is entitled to refer a case to the ECJ can not be determined by national law. Instead, it has to be decided with regard to the remedies available under the national law for those who consider that their right under the Community law has been infringed. Finally, the ECJ pointed out that it is the duty of the Member States to take the necessary steps to ensure that Community provisions are correctly implemented in their territory. If the task of implementing such provisions, under the legal system of a Member State, has been assigned to a professional body, and that body creates an appeal system which

[10] Judgement in case 36/73 p. 1317-1320.
[11] Case 138/80, Borker, [1980] ECR p. 1975.
[12] Judgement in case 138/80 p. 1977.
[13] Case 246/80, Broekmeulen and Huisarts Registratie Commissie, [1981] ECR p. 2312.

may affect the possibility to exercise rights granted by Community law, the Court should have the opportunity to rule on issues of interpretation and validity arising out of such proceedings. These considerations, together with the absence of any right of appeal to ordinary courts, formed the ECJ's decision that the Appeals Committee must, in matters involving Community law, be considered as a court or tribunal within the meaning of Article 177.[14]

In ***the Nordsee case***[15] an arbitrator, who was called upon to decide a dispute between three German undertakings, referred to the ECJ for a preliminary ruling under Article 177 concerning the interpretation of Article 177 and the interpretation of certain Council Regulations. The original dispute related to several ship-owners, who had applied to the European Agriculture Guidance and Guarantee Fund for financial aid in the construction of factory ships for fishing. The financial aid was to be proportioned equally among the contracting parties. One of the undertakings, Nordsee, claimed payment of the share it was entitled to under the contract. A dispute arose and the subject was, according to the contract, submitted for arbitration. In the judgement, the ECJ discussed several points: that the arbitration tribunal was established pursuant to a contract between private parties, that the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration, that the German public authorities not were involved in the choice of arbitration and not called upon automatically to intervene in the arbitration proceedings. Furthermore the ECJ held that the Member State is responsible for the performance of obligations arising from Community law within its territory according to Article 5 and Article 177 of the EC Treaty, and it had not entrusted private parties such obligations in the current area.[16]

The ECJ did not consider the link between the arbitration proceeding and the organisation of legal remedies in the ordinary courts in the Member State sufficiently strong in this case. Therefore, the arbitrator could not be regarded as a court or tribunal within the meaning of Article 177. However, the ECJ declared the importance of Community law being observed in its entirety in all Member States and that contractual parties not may derogate from it. Thus, if questions of Community law were raised in arbitration, the ECJ declared that the ordinary courts might be called upon to examine them either in the context of their collaboration with arbitral tribunals or, in the case of review ,of an arbitration award. These

[14] Judgement in case 246/80, paragraphs 9-11, 15-16.
[15] Case 102/81, Nordsee Deutche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Freidrich Busse Hochseefischerei, [1982] ECR p. 1095.
[16] Judgement in case 102/81, paragraphs 7, 11-12.

ordinary courts can then refer questions to the ECJ in accordance with Article 177 if they find it necessary when exercising such assisting or supervisory functions.[17]

The commissione consultiva per le infrazioni valutarie (the Consultative Commission) in Rome, submitted to the Court several questions on the rules and principles of Community law relating to exchange control, in ***the Unterweger case***[18]. The Consultative Commission was an agency of an Italian Ministry with the duty to submit reasoned opinions on the sanctions that the Minister imposed on persons infringing the Italian legislation for transfer of foreign exchange. The Commission was composed of one judge and several high-ranking officials. The rules that lay down the proceedings of the Consultative Commission did not require it to conduct hearings and the persons concerned did not have the right to bring the matter before the Consultative Commission. The decision delivered by the Consultative Commission was not binding on the Minister, and the sanctions the Minister decided on after consulting the Commission could be challenged in ordinary courts. When the ECJ had established these facts it concluded that the Consultative Commission not could be regarded as a court or tribunal within the meaning of Article 177. The ECJ declared that it is only competent to give preliminary rulings on requests from a court or tribunal, which is required to give judicial decisions in its ruling.[19]

In ***the Pretore do Salò case***[20] the ECJ was dealing with a reference concerning the interpretation of a Council Directive on the quality of fresh water. In a criminal proceeding against persons unknown accused of having offended legislative provisions relating to the protection of waters, the Pretore di Salò considered it necessary to refer some questions to the ECJ. The Italian Government informed the ECJ that the Pretore di Salò in this case acted both as public prosecutor and as examining magistrate, and that his decision not was a judicial act since it could not acquire the force of res judicata. The Court held that it was possible for it to answer questions submitted from a court or tribunal that had acted in the general framework of its task of judging, even though some of its functions were not, strictly speaking, of a judicial nature. However, this required that the court or tribunal acted independently and in accordance

[17] Judgement in case 102/81, paragraphs 14-15.
[18] Case 318/85, Regina Greis Unterweger, [1986] ECR p. 955.
[19] Judgement in case 318/85, p. 957.
[20] Case 14/86, Pretore di Salò (Magistrate for the District of Salò) v Persons unknown, [1987] ECR p. 2545.

with the law. The ECJ considered that the Pretore fulfilled this requirement and were therefore entitled to refer a question under Article 177.[21]

The Danfoss case[22] concerned a Danish arbitration tribunal, the Industrial Arbitration Board, dealing with collective agreements. In the discussion as to whether the arbitration board was to be considered a court or tribunal within the meaning of Article 177, the Court emphasised the composition of the board. According to Danish law, disputes between parties to collective agreements were to be heard by an industrial board as the last instance. Both parties could bring a case before the board and the jurisdiction of the board was therefore not dependent upon the parties' agreements. Danish law also governed the composition of the board, which were therefore not within the parties' discretion. As a result, an answer toa request from the Industrial Arbitration Board had to be within the ECJ's jurisdiction.[23]

In ***the Corbiau case***[24] the Court received a request for preliminary ruling referred by the Directeur des Contributions Directes et des Accises (Director of Taxation and Excise Duties) of the Grand Duchy of Luxembourg. In an administrative appeal case the Directeur des Contri-butions had to deal with the question of repayment of excessive amounts of income tax and it considered a clarification on the interpretation of Article 48 of the EC Treaty necessary in order to rule on the case. The ECJ stated that a court or tribunal within the meaning of Article 177 is a concept of Community law, and that it can only include bodies which act independently from the authority who adopted the disputed decision. As there was a clear organisational link between the Directeur des Contributions and the departments that made the disputed tax assessment, he could not be regarded as a third party. Therefore the Directeur des Contributions was not competent to refer a question to the ECJ for a preliminary ruling.[25]

In ***the Almelo case***[26], a national court dealing with an appeal against an arbitration award submitted a request for preliminary rulings to the ECJ. The national court, on account of the arbitration agreement between the parties, had to give judgement according to what appeared fair and reasonable. The Court referred to its earlier case law[27] when dealing with the question of admissibility. It held that in order to be accepted as a court or tribunal within the meaning

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[21] Judgement in case 14/86, p. 2566-2569.
[22] Case C-109/88, Handels- og Kontorfunktionaerernes forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss, [1989] ECR p. 3199.
[23] Judgement in case C-109/88, p. 3224-3225.
[24] Case C-24/92, Corbiau v Administration des Contributions, [1993] ECR p. 1287.
[25] Judgement in case C-24/92, paragraphs 14-16.
[26] Case C-393/92, Gemeente Almelo and others, [1994] ECR p. I-1477.

of Article 177 the body has to be established by law, have a permanent existence, exercise binding jurisdiction, be bound by rules of adversary procedure, apply the rules of law and be independent. The ECJ then discussed its conclusions in the Nordsee case[28]: if an ordinary national court, for instance, is called upon to examine an arbitration award it can refer to the ECJ any question regarding the interpretation, or validity, of provisions of Community law which it may need to apply when exercising such assisting or supervisory functions.[29] The fact that the national court in the present case had to give its judgement according to fairness did not affect the ECJ's view-point. According to the ECJ, it follows from the principle of primacy of Community law, and the principle of its uniform application, that a national court dealing with an appeal against an arbitration award must observe the rules of Community law, in particular those relating to competition, even if it has to give judgement having regard to what appears fair and reasonable.[30]

In ***the Dorsch Consult*** *case*[31] the Vergabeüberwachungsausschuss des Bundes (Federal Public Procurement Awards Supervisory Board) referred to the ECJ a question on the interpretation of a Directive relating to the co-ordination of procedures for the award of public service contracts. The question had been raised in proceedings between Dorsch Consult Ingenieurgesellschaft mbH and Bundesbaugesellschaft Berlin mbH concerning a procedure for the award of a service contract. When determining whether the Vergabeüberwachungs-ausschuss was to be considered as a court or tribunal within the meaning of Article 177 the Court referred to its previous case law[32] for the relevant criteria that needed to be considered: if the body is established by law, if it is permanent, if its jurisdiction is compulsory, if its procedure is inter partes, if it applies rules of law and if it is independent.[33] On the question of whether the body was established by law, the ECJ pointed out the specific Paragraph in the German law under which the Supervisory Board was established, and held that its establishment by law not could be disputed. Nor could the permanent existence of the body be disputed. The ECJ also found that, as a party had to make the application to the Supervisory Board in order to establish a breach of the provisions governing public procurement and as the

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[27] Case 61/65, case 14/86 and case C-24/92.
[28] Case 102/81.
[29] Judgement 102/81, paragraphs 14-15.
[30] Case C-393/92, papagraphs 23-24.
[31] Case C-54/96, Dorsch Consult Ingenieurgesellschaft mbH and Bundesbaugesellschaft Berlin mbH, Judgement of the Court 17 September 1997.
[32] See the cases described above.

determinations of the board are binding, the jurisdiction of the board was compulsory. On the criterion of procedures inter partes, the Court held that this requirement not was an absolute one, but pointed out that the parties to the procedure before the Supervisory Board had to be heard before the decision in the case. Regarding the condition to apply rules of law, the ECJ stated that the board had an obligation to apply provisions laid down in the Community directives and in domestic regulations. Finally, the ECJ found that the Supervisory Board carried out its task independently and under its own responsibility and therefore met the requirement of independence. As a result, the Court held the Federal Supervisory Board to be regarded as a court or tribunal within the meaning of Article 177.[34]

In ***the Victoria Film case***[35], the ECJ had to deal with some questions referred by the Skatterättsnämnden (The Swedish Revenue Board) on the interpretation of certain Community provisions regulating turnover taxes. Victoria Film A/S, a Danish film production company, applied to the Skatterättsnämnden for a preliminary decision on whether the assignment of films was subject to VAT (Value Added Tax). The ECJ stated that it is competent to rule on a question referred by a court or tribunal which has a case pending before it and which is called upon to give judgement in proceedings intended to lead to a decision of a judicial nature. The ECJ here referred to the cases Unterweger[36] and Job Centre[37]. The doubts regarding the admissibility of references from the Skatterättsnämnden arise from the judicial or non-judicial nature of its preliminary decisions. The ECJ found that the Skatterättsnämnden, when giving its preliminary decisions on matters of assessment or taxation, performs administrative functions and are not called upon to settle a dispute. Therefore, the Skatterättsnämnden could not be regarded as a court or tribunal competent to make a reference according to Article 177.[38]

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[33] Judgement in case C-54/96, paragraph 23.
[34] Judgement in case C-54/96, paragraphs 24-38.
[35] Case C-134/97, Victoria Film A/S, judgment of the ECJ on 12 November 1998.
[36] Case 318/85.
[37] Case C-111/94.
[38] Judgement in case C-134/97, paragraphs 14-18.

2.4 Conclusions derived from the Courts case law

2.4.1 Criteria that has to be fulfilled

It is clear that it is of no importance whether the referring body is considered to be a court or tribunal under national law or not. The expression "court or tribunal" within the meaning of Article 177 is a Community law concept, and it is a matter for the ECJ in each specific case to decide if a national body has jurisdiction to refer a preliminary question to the ECJ.[39]

The ECJ has in its case law developed certain criteria that have to be considered when determining whether a body has jurisdiction to make a reference according to Article 177. These criteria are, however, not exhaustive and each factor is not always relevant.[40]

The first criterion is that the body must be *established by law*. This criterion was laid down in the Vaassen case where the ECJ found the referring body properly constituted under the national law.[41] There seems to be several levels in the fulfilment of this requirement. In the Broekmeulen case, the referring body was established by a society, which was constituted as a private association under the national law. The decisive factor in this case was rather the involvement of the national public authorities in the referring body's composition and procedures.[42]

The second criterion is that the referring body must be bound by rules of *adversary procedures*. In the earlier cases Vaassen[43] and Broekmeulen[44], this criterion was strictly upheld. In the later cases, however, the requirement has been eased and in the Dorsch Consult case the ECJ held that this requirement is not an absolute criterion.[45]

The third requirement is that the body needs to be *independent*. This criterion was introduced in the Pretore di Salò case where the Pretore had functions of both a public prosecutor and an examining magistrate. The ECJ found that the Pretore still acted independently and not

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[39] Opinion of Advocate-General in case 61/65, p. 281; opinion of Advocate-General in case 246/80; judgement of the ECJ in case C-24/92, paragraph 15; judgement of the ECJ in case C-54/96, paragraph 23; opinion of Advocate General in case C-134/97, paragraph 11.
[40] Opinion of Advocate General in case C-134/97, paragraph 20.
[41] Judgement in case 61/65, p. 273.
[42] Judgement in case 246/80, paragraphs 9, 13 and 16.
[43] Case 61/65, Vaassen.
[44] Case 246/80.
[45] Judgement in case C-54/96, paragraph 31.

as a party in the case.[46] In the Corbiau case the ECJ did not find the referring body independent enough in order to have jurisdiction to submit a preliminary question. The disputed body had a clear connection with one of the parties in the proceedings.[47] Independence is one of the most important requirements on any court or tribunal in the world since legal security is dependent upon it.

The fourth criterion is that the body must *apply rules of law*.[48] An exception to this requirement has been made by the ECJ in the Almelo case where an ordinary court of law had been called upon to rule on an appeal against an arbitration award. Due to the parties' arbitration agreement the national court had to give judgement according to what appeared fair and reasonable, not according to the rules of law. Having considered the principle of Community law primacy, and the principle of uniform interpretation and application of Community law, the ECJ held it necessary that the Community law was observed in cases of arbitration award appeals. Therefore the body should have the possibility of making a reference according to Article 177 when it considers it necessary.[49]

The fifth requirement is that the body has to make *judicial decisions*. In the Unterweger case, the ECJ held that:" According to Article 177 of the EEC Treaty, a request for a preliminary ruling may be submitted to the Court of Justice only by a court or tribunal of a Member State which is required to give a ruling in proceedings which are intended to result in a judicial decision."[50] The task of the referring body was to give an opinion and it therefore was not qualified to request for a preliminary ruling.[51] The ECJ repeated this statement in the Borker case, in which the judgement of the referring body was not intended to lead to a judicial decision.[52] Again, in the cases Job Centre and Victoria Film, the ECJ emphasised the importance of the judicial nature of the decisions made by the referring bodies.[53]

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[46] Judgement in case 14/86, paragraphs 6-7.
[47] Judgement in case C-24/92, paragraphs 15-16.
[48] Judgement in case 61/65, p .273; opinion of Advocate-General in case C-109/88, p. 3211; judgement in case C-54/96, paragraphs 23-33.
[49] Judgement in case C-393/92, paragraphs 22-24.
[50] Judgement in case 318/85, paragraph 4.
[51] Judgement in case 318/85, paragraphs 4-5.
[52] Judgement in case 138/80, paragraph 4.
[53] Judgement in case C-111/94, paragraph 9 and in case C-134/97, paragraph 14.

Furthermore the body needs to have *permanent existence* and exercise *compulsory jurisdiction*.[54] Many of the arbitration tribunals are ad hoc constellations, but there are a growing number of arbitration forums that have their seat on a permanent basis.[55]

2.4.2 Arbitration tribunals

An arbitration tribunal has to meet all these requirements in order to be considered a court or tribunal with jurisdiction to submit a request for preliminary ruling to the ECJ. Regarding the genuine arbitration tribunal, whose competence is established by agreement between private parties, these requirements are hard to fulfil. The arbitration tribunals established by law, or at least supervised by the public authorities, are, on the other hand, in a much better position. As for the arbitration tribunals, the most important factors seem to be the degree of public or legal involvement and whether the arbitration is mandatory.[56] This is illustrated in the Nordsee case. Despite the fact that the arbitrator was bound by rules of contradictory procedures, and that he had to decide the dispute according to the law and not to equity, the ECJ did not find the referring body a court or tribunal within the meaning of Article 177. The ECJ made this decision mainly on two grounds. First, because the parties were free to decide whether they wanted their dispute to be settled by arbitration or by a court of law the arbitration could not be considered mandatory. Secondly, the national public authorities were not in any way involved in the arbitration proceedings. Therefore, the link between the arbitration proceedings and the ordinary court system was not sufficiently strong.[57] Also in the Danfoss case the ECJ emphasised the public involvement in the arbitration proceedings. As the national law settles the mandatory statutory structure for the arbitration tribunal, the jurisdiction and composition of the tribunal was not within the parties' discretion and the tribunal was consequently authorised to refer a preliminary question.[58]

The ECJ did, however, seem to observe some of the problems regarding arbitration that might arise from the denial of an arbitrator’s right to refer. Since the arbitrator is equally

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[54] Judgement in cases 61/65, p. 273, C-393/92, paragraph 21and C-54/96, paragraph 23.
[55] B. Hanotiau: Competition law issues in international commercial arbitration: an arbitrator's viewpoint, The American review of international arbitration 6:287-299, 1995, p. 287.
[56] Judgement in case C-102/81, paragraph 11-12; G. Bebr: Arbitration tribunals and Article 177 of the EEC Treaty, Common Market Law Review 22:489-504, 1985, p. 494-495.
[57] Judgement in case 102/81, paragraphs 11-13.
[58] Opinion of Advocate-General in case C-109/88, p. 3211; judgment in case C-109/88, paragraphs 7-8.

bound by Community rules as the judge in a court of law,[59] but is not empowered with the right to refer, the arbitration process might be used as a way of avoiding the application of Community law. The ECJ stated that Community law must be observed in its entirety in all Member States and that parties to an agreement not may make exceptions to it.[60] Therefore the ECJ pointed out the possibility of an indirect reference procedure in arbitration proceedings via the intermediary of an ordinary court of law. Whenever the national courts, according to the law, are to assist the arbitration tribunal, or to review an arbitration award, they can examine any questions of Community law. If they find clarification on the proper interpretation of the relevant Community provision necessary, it is for those courts then to make a request for a preliminary ruling to the ECJ.[61]

2.5 Reasons for and against admitting a request from an arbitration tribunal to the ECJ

One of the objects with the reference procedure is to ensure the uniform interpretation and application of Community law. The ECJ has made it clear that arbitrators are bound by Community rules. Yet, as follows clearly from the Nordsee case, they can not make reference to the ECJ in order to get a correct interpretation of Community provisions. The absence of that right can lead to misinterpretations and misapplications of Community provisions by the arbitrators. Furthermore it can imperil the effectiveness of Community law by keeping the arbitrators in doubt about the Community rules, which they are obliged to apply, but do not always know *how* they should be applied.

Instead of allowing the arbitrators the right to refer, the ECJ came up with the solution of an indirect reference proceeding, via national courts of law. Well, is this enough to ensure the uniformity and efficiency of the application of Community provisions? Some remarks are appropriate. First, the review of an arbitration award by national courts is dependent upon whether a party asks for it or not. As a result, in most of the cases, there is no involvement by the national courts of law and therefore no possibility of a reference. This ensures no

[59] Judgement in case 246/80, paragraph 16; confirmed in judgement in case 102/81, paragraph 14.
[60] Judgement in case 102/81, paragraph 14.
[61] Judgement in case 102/81, paragraph 14-15; G. Bebr: Arbitration tribunals and Article 177 of the EEC Treaty, p. 494-495.

guarantees whatsoever on the uniform application of Community rules. In addition, the Member States have different procedural rules regulating reviewing and quashing of an arbitration award. German law, for instance, only allows the courts to annul an award, or refuse its enforcement, if they find the award contrary to public policy. A simple misinterpretation of Community provisions does not constitute a ground for the court of law to annul an award or to refuse an execution. As the national court of law can not do anything to stop the award, it is of little help to make a reference to the ECJ..[62] At present, there does not seem to be any possibility in the Member States of the Community to annul an arbitration award because of its violation of EC law other than when there is a breach of the competition rules in Articles 85 and 86.[63]

Yet, didn't the ECJ ruling in the Nordsee case mean that the national laws of the Member States have to allow the national courts to exercise control on a proper application of Community law by arbitration tribunals?[64] If the national laws do not confer a duty on the ordinary courts in the Member States to apply Community law when reviewing an arbitration award, then it is not possible for the intermediary reference system to work.[65]

In the absence of the arbitrator's right to refer another problem arises - the question of public policy (ordre public).[66] If the arbitrators in their proceedings are to apply the Community law correctly they must know which provisions and principles in the Community regulations that constitute public policy. The only body who can decide this is the ECJ. Therefore, in cases where the arbitrators are in doubt as to whether a Community provision has public policy character or not, it could be of great help if they were given the opportunity to ask the ECJ for a decision on the issue.[67]

In most cases, an arbitration tribunal appointed by the parties, is the "final" instance and as arbitrators often have to rule based upon Community provisions, it appears undesirable that they can not avail themselves of the preliminary reference procedure.[68] The absence of an appeal procedure against an arbitrator's award would, on the other hand, give rise to an

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[62] G. Bebr: Arbitration tribunals and Article 177 of the EEC Treaty, p. 497-499.
[63] H.G. Schermers et al: Article 177 EEC Experiences and problems, p. 212. See further under section 3.3.5.
[64] Judgement in case C-102/81, paragraph 14; W. Alexander/ E. Grabandt: National courts entitled to ask preliminary rulings under Article 177 of the EEC Treaty: The case law of the Court of Justice, Common Market Law Review, 1982, Vol 19, No 3, p. 413-420 at p. 420.
[65] P.J. Slot: The Enforcement of EC competition law in arbitral proceedings, Issues of European Integration, 1996/1 p. 101-113, at p. 106.
[66] See more about the concept public policy under section 3.2.
[67] G. Bebr: Arbitration tribunals and Article 177 of the EEC Treaty, p. 499.

obligation for the arbitrators to refer every instance when a question of Community law was raised. This would either further increase the burden of the ECJ in answering these questions, or result in arbitrators ignoring to make references despite being the last instance and this violation of Article 177 would be subversive for the Community law.[69] Furthermore, the distinction in Article 177 between a right and an obligation to refer may cause problems in determining which court is the court of last instance when the arbitration tribunal is similar to the tribunal as, for instance, in the Broekmeulen case.[70]

The right of an arbitrator to make a reference to the ECJ would also defeat several of the functions of arbitration. First of all, a general principle in arbitration is that public authorities and courts are not involved in the arbitration decision.[71] If the ECJ should be involved in the proceedings on Community law issues it would run counter to this principle. Secondly, an important feature in arbitration is that decisions are obtained quickly, which is of great importance to business. Since most countries do not allow an appeal against an arbitration award to go to the ordinary courts, arbitration is usually a quicker way of getting a final and binding decision in the case.[72] Thirdly, the arbitration proceedings seek to settle disputes as discreetly as possible, which is extremely important for many parties because of the confidential information related to their affairs. To let this information become public would, in many cases, endanger the whole company and result in no further collaboration between the parties. This discreteness and privacy would not be maintained if the arbitrators were allowed to refer to the ECJ.[73] Moreover, when arbitrators are called upon to solve a dispute it is often by recourse to what appears fair and reasonable (equity), and not to what the law says.[74] If the arbitrator has to follow the ECJ's ruling it might be contrary to the parties intentions.

Another argument why arbitrators should not be able to refer questions to the ECJ when they are in doubt on the interpretation of Community provisions, is that arbitration decisions are not published and therefore of almost no importance with regard to the development of

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[68] H.G. Schermers et al: Article 177 Experiences and problems, p. 366.
[69] M. Adenas: Article 177 references to the European Court of Justice- policy and practice, p. 47; H.G. Schermers/ D. Waelbroeck: Judicial protection in the European Community , p. 406; H.G. Schermers et al: Article 177 EEC Experiences and problems, p. 366.
[70] G. Bebr: Arbitration tribunals and Article 177 of the EEC Treaty, p. 502.
[71] H.G. Schermers/ D.Waelbroeck: Judicial protection in the European Community , p. 406.
[72] N. Mangård: Arbitration and the Judiciary, Svensk Juristtidning, 1980, Vo 2, p. 103-114, at p. 103;H.G. Schermers/ D.Waelbroeck: Judicial protection in the European Community , p. 406.
[73] G. Bebr: Arbitration tribunals and Article 177 of the EEC Treaty, p. 502; N. Mangård: Arbitration and the Judiciary p. 103-114, at p 104.
[74] H.G. Schermers/ D. Waelbroeck: Judicial protection in the European Community , p. 406.

Community law.[75] Still, if the arbitrator is allowed to ask the ECJ for a preliminary ruling, this ruling is published and can therefore give precedents to the arbitration tribunals.[76] The fact that the proceedings of arbitration tribunals are not published is one reason for the widespread uncertainty among arbitrators about how to deal with Community law issues. The right of an arbitrator to make a reference could also be contested on the grounds that the mechanism of preliminary ruling would undermine its authoritative function and turn it into an advisory opinion. If this is true is hard to say, but it appears to be easily solved if the problem did occur. The ECJ could declare the preliminary ruling to be binding on the referring arbitration tribunal and if the tribunal still disregards the ruling it would constitute a breach of the legal order sufficient for a national court to refuse enforcement of the award.[77]

If the arbitrators are allowed to make a reference to the ECJ, the question arises of why Community law should be put in a better position than the national law. There is always a risk that the arbitrators interpret and apply the law incorrectly. The right for an arbitrator to submit a question to the ECJ on the interpretation and application of Community law would thus give the Community law a greater degree of protection than the national law..[78]

A great risk created by giving the arbitrators the right to refer is that parties may seek arbitration outside the Community in order to escape the negative consequences resulting from the reference proceeding.[79] Then the Community has to deal with the problem that parties speculate over the best seat for arbitration and the possibility that Community law will be violated.

As we see, several things exist that speak in favour of an arbitrators' right to refer and several things exist that speak against it. Still there exists no common viewpoint by the lawyers in the Community and the Member States on this issue. Taking all the reasons for and against this right, it appears quite hard to describe an arbitration tribunal appointed by parties as a court or tribunal within the meaning of Article 177. Article 177 was, however, written long ago, and it is not certain that the authors even thought about arbitration tribunals when they wrote it. Furthermore, the involvement of the ECJ in the arbitrator’s decision is inconsistent with the objects and functions of arbitration.

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[75] H.G. Schermers/ D. Waelbroeck: Judicial protection in the European Community , p. 406.
[76] G. Bebr: Arbitration tribunals and Article 177 of the EEC Treaty, p. 502.
[77] G. Bebr: Arbitration tribunals and Article 177 of the EEC Treaty, p. 503-504.
[78] H.G. Schermers et al: Article 177 Experiences and problems, p. 366-367; G. Bebr: Arbitration tribunals and Article 177 of the EEC Treaty, p. 503.

3 ARBITRATION

What implication does the arbitrators' lack of the possibility to request the ECJ for a preliminary ruling have on arbitration in the Community? And how is the Community law applied by arbitrators? In order to understand these problems and to find some answers to them, a description of arbitration will first be presented.

3.1 Introduction

"Arbitration" is a private process which can be described by three significant characteristics. First, there has to be an agreement by the parties to submit a dispute between them to arbitration. The agreement by the parties can either relate to an already existing dispute or to a dispute that might arise between the parties in the future. An arbitration agreement is a declaration by the parties showing that they want the dispute to be resolved by arbitration – it is an expression of the will of the parties. This means that the agreement also has to be effective in countries other than the country in which the agreement was settled. It is the parties to the dispute who choose the tribunal, or appoint the arbitrators, and it is the parties that set the limits to the arbitration process by their agreement. The arbitrator's powers are dependent upon the parties, and he can not exercise any other powers than the ones the parties confer upon him; except for additional powers that the laws governing the arbitration can confer. Furthermore, the jurisdiction of the arbitral tribunal is exclusively derived from the parties' agreement. There is no other way an arbitral tribunal can obtain this jurisdiction.[80]

The second characteristic of an arbitration process is that the decision taken by the arbitrators is final and legally binding on the parties. This can appear peculiar since arbitration is a private process and the arbitrators are not empowered with a court's competence. This is however an important feature that distinguish arbitration from other means of resolving

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[79] H.G. Schermers/ D. Waelbroeck: Judicial protection in the European Community, p. 406.
[80] M. Huleatt-James/ N. Gould..: International Commercial Arbitration - A Handbook, p. 3;
A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 3-6.

disputes, such as mediation and conciliation. These two methods are intended to lead to a negotiation settlement rather than a binding decision.[81]

The third feature is that a valid decision (award) may be recognised and enforced by the courts of law if the award not is carried out voluntarily by the parties. This is an effect of the binding nature of the arbitral agreement. The award can consequently be enforced through legal proceedings, both in the country of the arbitral process and in other countries. The enforcement and recognition of foreign arbitral awards are regulated in regional and international treaties and conventions, the New York Convention being the most important.[82]

3.2 ARBITRABILITY

Even though parties to an agreement can confer powers on arbitrators to settle their disputes, not all kinds of disputes can legally be determined by arbitrators. A state still has the power to prohibit certain disputes from being determined outside the court of law. Such a dispute is thus not arbitrable and a settlement in an arbitration tribunal is accordingly not valid. Arbitrability is therefore a requirement that has to be fulfilled in order to enable the settlement of a dispute by arbitration; it is a condition of the arbitrator's jurisdiction.[83]

Arbitrability is related to public policy (ordre public) limitations on the arbitration process as a method of resolving disputes. It is for each state to determine which disputes can be settled by arbitration and which disputes need to be handled in the courts. In determining this, the state has to consider both the importance of safeguarding matters of public interest and the importance of encouraging the settlement of commercial matters by arbitration. The former interest may, for instance, protect human rights or criminal law issues from being disregarded in private proceedings.[84] The public policy considerations are therefore a defence for the court against foreign arbitration awards inconsistent with the economic, legal, moral and political principles of that state.[85] Public policy is a relative concept as its content varies

[81] M. Huleatt-James/ N. Gould: International Commercial Arbitration - A Handbook, p. 3;
A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 7.
[82] A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 7.
[83] B. Hanotiau: Competition Law Issues in International Commercial Arbitration, p. 289.
[84] A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 137
[85] A.N. Zhilsov: Mandatory and Public Policy rules in International Arbitration, Netherlands International Law Review, 1995 XLII:1 pp 81-119, at p. 95-96. See further about public policy in Zhilzov.

between the states. What constitutes public policy in one state may not be seen as a fundamental value in another state. Public policy is also relative in time. A country's values and standards change over time and since public policy is derived therefrom the meaning of that concept changes too.[86] The latter interest may be for reasons of reducing the burden of overloaded courts and the promotion of the country as a seat for international arbitration.[87]

An arbitration award in a non-arbitrable dispute can not be enforced or recognised and is therefore of little help to the parties. The question of arbitrability can arise in different stages in the proceedings. First, the question of arbitrability can arise in relation to the law of the arbi-tration agreement and then to the law of the place of arbitration. Then, it may arise when enforcement of the award is sought and is thus determined under the law of the enforcing country.[88] The object of public policy, to protect the fundamental values and standards of a community, indicates an ex officio application, at least by the courts of law.[89]

3.2.1 Arbitrability in relation to competition law issues

Competition law issues have traditionally been regarded as non-arbitrable. The reason is that the function of competition law is primarily to encourage free trade and the competition provisions are therefore designed out of public policy considerations. The competition law imposes mandatory obligations which have to be settled in ordinary courts and not by arbitrators. Over the last ten years, however, a development towards greater approval of arbitration as an alternative form of dispute solving has taken place. The country at the head of this evolution is the United States.[90]

3.2.1.1 The United States

In the United States the courts have traditionally based their judgements in competition law issues on the function and primacy of antitrust law. Antitrust matters were therefore found

[86] K.H. Böckstiegel: Public Policy and Arbitrability. Comparative arbitration Practice and Publiv Policy in Arbitration, p. 178-180.
[87] A. Redfern/M. Hunter: Law and Practice of International Commercial Arbitration, p. 137.
[88] B. Hanotiau: Competition Law Issues in International Commercial Arbitration, p. 289-290;
A. Redfern/M. Hunter: Law and Practice of International Commercial Arbitration, p. 137-138.
[89] M. Bogdan: Svensk internationell privat- och processrätt, p. 71.
[90] B. Hanotiau: Competition Law Issues in International Commercial Arbitration, p. 292; J.T. McLaughlin: Arbitrability: Current Trends in the United States, Arbitration International 12:113-136, 1996, at p. 114.

non-arbitrable. The arguments by courts in order to keep antitrust matters in the courts of law were many. An illustrative example is the *American safety v. McGuire*[91] case where the lawyers argued that the rights of third parties were better protected in courts and that the complex nature of antitrust issues made them better suited to be settled in courts.

In 1985 this attitude towards arbitrability of antitrust matters changed dramatically. The Supreme Court of the United States ruled international antitrust matters to be arbitrable in the *Mitsubishi Motors v. Soler* case[92]. The background to the case was a dispute between Mitsubishi Motors and Soler, a Puerto Rican company, concerning an agreement on the sale of Mitsubishi cars in Puerto Rico. The agreement contained an arbitration clause providing for arbitration in Japan under Japanese rules. The law governing the contract was Swiss law. Soler challenged the competence of arbitrators claiming antitrust matters.

The Supreme Court held that "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"[93] obliged it to enforce the arbitration agreement. The Supreme Court based its judgement on the decisions in *Scherk v. Alberto-Culver Co*..[94] and *The Bremen v. Zapata Off-Shore Co*.[95] which favoured arbitration. In Bremen, the Supreme Court pointed out that "we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts"[96]. It also held that in a time where all courts are overloaded with work and trade is internationalised, the arbitrators should not be withdrawn the jurisdiction to settle freely negotiated international commercial agreements.[97] The possibility to agree in advance on a forum acceptable to both parties was, according to the Court, an indispensable component in international trade.[98] The same considerations formed the Court's decision in Scherk.[99]

The Supreme Court found that the judgements in the Bremen and Scherk cases established a strong presumption in favour of arbitration. In order to determine the question of arbitrability of competition matters the Supreme Court examined what were viewed as the

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[91] American Safety v. McGuire, 391 F.2d 821 (2d Cir. 1968).
[92] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).
[93] Mitsubishi, 473 US 617 at p. 628.
[94] Scherk v. Alberto-Culver Co. 417 US 506 (1974).
[95] The Bremen et al. v. Zapata Off-Shore Co. 407 US 1 (1972).
[96] Bremen 407 US at p. 9.
[97] Bremen 407 US at p. 12-13.
[98] Bremen 407 US at p. 13-14.
[99] Scherk 417 US at p. 516-517.

four major ingredients in the American Safety doctrine (arguments for the non-arbitrability of antitrust matters). The Court found that none of them required that competition law issues in international commercial arbitration should not be arbitrable. Accordingly, arbitration agreements had to be effective also in these matters.[100]

However, the Supreme Court's decision to allow arbitrability of antitrust matters in inter-national cases was subject to two reservations. First, when the award was to be enforced in the United States the courts would have the opportunity to review the award for compliance with United States antitrust law and public policy. This has become known as the "second look doctrine". Secondly, if it was obvious that the parties to an arbitration agreement had made their choice of arbitration and choice of applicable law in order to avoid the application of United States antitrust legislation, then the court would rule that agreement to be contrary to public policy.[101]

The judgement of Mitsubishi thus changed the American approach to arbitrability of competition law issues. From being extremely restrictive in its view, the United States turned to be in favour of arbitrability of antitrust matters in international cases. But, the courts of America did not give up their control of antitrust disputes since they still have the power to a judicial review of the content of the arbitration award. Otherwise they would probably not have accepted the settlement of antitrust matters by arbitration.

However, the arbitrators can sometimes find themselves in a dilemma. In order to avoid the award from being set aside, the arbitrators have to accept the choice of law made by the parties, and at the same time they have to give effect to the competition law of the United States if the award is to be enforced there.[102] This means that when the award is to be enforced in the United States the arbitrators have to apply competition rules ex officio, even if the choice of law according to the contract is the one of another state.

3.2.1.2 European Communities

There are no rules harmonising the laws of arbitration of the Member States. Although Article 220 of the EC Treaty expressly provides that the Member States shall enter into negotiations in order to simplify the rules on recognition and enforcement of arbitration awards, nothing

[100] Mitsubishi 473 US 614 at p. 634-636.
[101] Mitsubishi 473 US 614 at p. 637; B. Hanotiau: Competition Law Issues in International Commercial Arbitration, p. 293.

has happened on this area. Behind this passivity lies the fact that the Community institutions regard arbitration as a global, not a regional task.[103] This has created an uncertainty among arbitrators on how the European Community law is to be applied in order to avoid awards being set aside.

When it comes to the competition legislation of the European Communities there exist different views on how far it is arbitrable. In order to examine whether they are arbitrable or not the competition rules and their application will briefly be presented. Article 85(1) of the EC Treaty prohibits agreements between undertakings that may affect trade between Member States if the agreement has the object or effect of preventing, restricting or distorting competition within the common market. An agreement having such an effect on the common market is automatically void according to Article 85(2), unless an exemption is granted under Article 85(3). Article 86 prohibits an undertaking abusing a dominant position. The competence to enforce the competition rules is shared between the institutions of the Community and national judicial institutions. This division of the enforcement jurisdiction is laid down in Articles 87-89 of the EC Treaty and in Regulation 17[104]. Through Article 88 national authorities were given the power to rule upon alleged infringements of Articles 85 and 86. The Council was authorised to enact implementing measures giving effect to Articles 85 and 86 and adopted Regulation 17 governing the practical application and enforcement of Community competition law. This regulation left the national bodies with wide enforcement powers at the same time as it conferred enforcement powers on the Commission. National authorities still had the power to apply Articles 85(1) and 86, but only as long as the Commission had not initiated any enforcement procedure. The object of the relevant provision in Regulation 17 (Article 9(3)) was to prevent concurrent application of Articles 85(1) and 86 between the national authorities and Community institutions so that conflicting decisions would not occur. However, the regulation did not have the intended effect, instead it increased confusion on the division of enforcement powers.[105]

What then are the powers of the Commission and the national bodies regarding the enforcement of Community competition law? *The Commission* has an overall obligation laid

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[102] A. Redfern/M. Hunter: Law and Practice of International Commercial Arbitration, p. 140.
[103] C.M. Schmitthoff: Arbitration and EEC Law, Common Market Law Review, 1987, p. 143-157, at p. 143.
[104] Council Regulation No. 17/62/EEC, OJ Spec. Ed. 1963-1964, . 47

down in Article 155 of the EC Treaty to ensure the application and implementation of Community law. In the competition field the Commission is, according to Article 89, obliged to ensure that the principles in Articles 85 and 86 are applied in the Community and through Regulation 17 the Commission was authorised to investigate and prosecute infringements of the competition rules. This regulation also gave the Commission power to adopt implementing measures in the competition field. The Commission is the only body with powers to grant exemptions to a collusive agreement under Article 85(3). The enforcement powers of the Community competition law lies thus primarily in the hands of the Commission. However, the Commission's principal duty is to protect and promote the interests of the Community as a whole, which means that it can not always protect the interests of individual parties.[106] Therefore, the interests of these parties have to be enforced on the national level.

The *national courts*, then, were they deprived of the power to apply Articles 85(1) and 86 once the Commission had started proceedings of enforcement, or were they not included in the concept of "national authorities" within the meaning of Article 9(3) in Regulation 17? The ECJ answered this question through the SABAM[107] judgement. The "national authorities" referred to in Article 9(3) Regulation 17 were, according to the ECJ, the national bodies entrusted with the special function of applying the competition law and with their jurisdiction derived from Article 88 of the EC Treaty. National courts were not included in that category as they apply Article 85(1) and 86 by virtue of the direct effect of those provisions and not through Article 88. The ECJ ruled for the first time that Articles 85(1) and 86 produce direct effect and that national courts thereby were obliged to protect the rights conferred on individuals by those provisions. As a result, even when the Commission has started proceedings on a matter, national courts do not lose the power to apply the Community competition rules on the same subject matter. There are however several limitations on the jurisdiction of the national courts. As already mentioned, the Commission has the exclusive authority to grant individual exemptions to agreements under Article 85(3). National courts do however have the power to decide whether an agreement falls within the scope of Article

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[105] A. Waller..: Decentralization of the Enforcement process of EC Competition Law- the Greater Role of National Courts, Legal Issues of European Integration, 1996/2 p. 1-34, at p. 1-6; P. Craig/ G. de Búrca: EC Law. Text, cases and materials: p. 888-898, 938-948.

[106] Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ 1993 C93/05; C.S. Kerse: EC Antitrust procedure, p. 315-316.

85(1). They also have the power to decide whether an agreement falls within a block exemption[108], but, in doing so, they can not go beyond a normal interpretation in order to extend the content of the block exemption[109]. Furthermore, a decision by the Commission granting an individual exemption for an agreement is binding on the national courts and such an exemption can consequently not be ruled invalid by a national court. Comfort letters and negative clearance decisions are not binding on the national courts but must be taken into consideration before determining if the agreement infringes Article 85(1).[110] The reason for this is that the principle of legal certainty demands some kind of co-operation between the different bodies called upon to apply the competition law of the Community. The jurisdiction of *the national competition authorities* are limited in the respect that they are deprived of their power to apply the competition provisions as soon as the Commission initiates enforcement proceedings. They also lack the competence to grant individual exemptions under Article 85(3).[111]

But, where does this leave *the arbitrators*? What jurisdiction on competition law do they have? The ECJ has not ruled upon the arbitrability of the European Community competition rules and the jurisdiction of an arbitration tribunal is therefore not established. The scope of the arbitrators' powers can be derived from the jurisdiction of the Commission and the national courts, and it is probably not very different from the powers of the national courts. Member States of the Community seem to grant arbitrators jurisdiction to apply the competition provisions. In the Netherlands, the arbitrators have a duty to apply Community law under the same obligation as national courts.[112] France decided some years ago that the competition law is arbitrable. An arbitrator's power to apply Community law is however only extended to the directly applicable provisions and is limited by powers exclusively reserved for the Community institutions. The arbitrators can, as an example, not grant an individual exemption based on Article 85(3) since this lies within the exclusive powers of the Commission.[113] In Germany, an arbitrator is allowed to apply the competition rules as long as

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[107] Case 127/73, Belgische Radio en Televisie et al v. SABAM and NV Fonier, [1974] ECR 51.
[108] Case 63/75, SA Fonderies Roubaix-Wattrelos v. Société nouvelle des Fonderies A Roux et al., [1976] ECR 111.
[109] Case C-234/89, Stergios Delimitis v. Henninger Bräu AG, [1991] ECR 935.
[110] Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty p. 8-9.
[111] A. Waller: Decentralization of the Enforcement process of EC Competition Law, p. 7-9.
[112] P.J. Slot: The Enforcement of EC Competition law in Arbitral Proceedings, p. 102-103.
[113] B. Hanotiau: Competition Law Issues in International Commercial Arbitration, p. 294.

the parties still have the opportunity to go to court instead. The competition law is thus arbitrable but an arbitral proceeding does not deprive the parties to the agreement the power to bring the matter before a court of law.[114]

The powers of arbitrators to apply Community competition law seem to be the following. The jurisdiction only includes directly applicable Community provisions, such as Article 85(1) and 86 of the EC Treaty.[115] An arbitral agreement does not automatically become void by an alleged invalidity of a contract according to Article 85(1). The arbitral tribunal still has the jurisdiction to decide on the contract and the claim. The arbitrator may decide that the contract is valid on the grounds of Article 85(1), or on the basis of a block exemption issued by the Commission in accordance with Article 85(3). The arbitrator is not allowed to extend the block exemption in order to make an agreement fit in. What the arbitrator may never do is to apply the exemption under Article 85(3). The power to issue individual exemptions pursuant to this Article lies exclusively with the Commission. A decision by an arbitrator that a contract is exempt from the Community competition rules under Article 85(3) is thus ineffective. If an arbitrator has decided that an agreement is void according to Article 85(1) the parties still have the opportunity to seek an exemption under Article 85(3) from the Commission. The arbitrator should, in such a case, stop the proceedings in order to allow the parties to apply to the Commission for an exemption.[116] The parties to an exemption always have to notify the Commission of all arbitration awards relating to the agreement. The reason is that the Community competition rules could otherwise be evaded through arbitral awards extending an exemption beyond permissible limits. The obligation to notify arbitral awards is laid down in Regulation 17, and an award extending the exemption can result in a withdrawal of the exemption. [117]

An arbitrator is obliged to observe and apply Community law when it is relevant to the dispute he is called upon to settle.[118] The law of the European Community is an integrated part of the national legal systems and the arbitrators have, like the national courts, a duty to decide questions of fact and law. Compared with the national courts, the arbitration tribunal is however in a less favourable position since they are not allowed to refer a question to the ECJ

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[114] A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 140.
[115] See case 127/73.
[116] K-H. Böcksteigel: Public policy and Arbitrability p. 191-192; A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 141.
[117] A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 141.

on the interpretation, or validity, of a Community provision under Article 177 of the EC Treaty. When a question of interpretation of Community law arises in an arbitration proceeding the only way to get a correct interpretation by the ECJ is with the help of national courts. As already mentioned, this procedure via the national courts is not exactly in conformity with the nature of the arbitration.[119]

The arbitrators' duty to observe and apply Community law implies that there has to be a connection between this application and the possibility to examine the arbitral decision. The question is thus on which grounds an arbitral award in breach of Community law can be set aside, refused to be recognised or enforced. This will be discussed in section 3.3.

3.2.2 Arbitrability in relation to other community law issues

The competition provisions constitute a fundamental part of the Community law and the disregard of them may mean that Community objectives can not be obtained. There are, however, other parts of the Community law equally important in order to attain the goals of the Community. The objective of establishing a customs union and a common market[120] would never be realised without the creation of the *market freedoms*: the free movement of goods, the free movement of workers, the freedom of establishment and the provision of services, and the free movement of capital. These freedoms are considered part of the substantive law of the European Community. Is it then possible for the parties to an agreement to have a dispute involving the application of these rules settled in arbitration? In other words, are these fundamental rules arbitrable? Before answering this question it is necessary to examine the function of the freedoms.[121]

The provisions on the free movement of goods are created to establish the basic principles of a customs union: Articles 12 to 17 and 30 to 37 of the EC Treaty ensure the removal of duties, quotas and other quantitative restrictions on the free movement of goods within the Community, and Articles 18 to 29 are concerned with the establishment of a common customs tariff. The object of these provisions is to ensure that goods can circulate

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[118] See case 102/81.
[119] See under section 2.5.
[120] See Article 2 of the EC Treaty.
[121] P. Craig/ G. de Búrca: EC Law. Text, cases and materials, p. 548; P.F. Schlosser: Arbitration and the European Public Policy, p. 85.

freely without governmental provisions restricting the import of goods or provisions increasing the price of goods. Competition between goods coming from different Member States are in this way ensured. It is for the consumers in the European Union to decide the products that are to be produced and this will maximise the efficiency of production and thereby wealth-creation in the Community. The other freedoms are based on the same concept: an optimal allocation of resources within the Community will be secured if the factors of production are allowed to move to the area where they are most valued.[122] This would not only increase the wealth in the Member States and make their economies stronger, but also bring the Member States closer together.[123]

The fundamental freedoms do not, like the competition law does, have a counterpart in the national constitutions of the Member States. The right to economic activity outside the territory of its own state has traditionally not been a right guaranteed by the Member States.[124] However, through the EC Treaty, these market freedoms confer rights on individuals in the Community, which the Member States have to safeguard.[125] The function and object of the freedoms indicate that they constitute part of public policy in the Community and are thus not possible to evade. [126] There are however no indications that these rules are not arbitrable, and whether an arbitral award disregarding one of the freedoms can be refused to be recognised or enforced is still not certain. It will however be examined under section 3.3.5.

Another fundamental rule in the Community law is the principle of non-discrimination. This is recognised by the ECJ as a general principle. The principle is applicable whenever there is an unjustified unequal treatment of a person within the Community competence.[127] This principle also forms part of the public policy in the Community[128] and an arbitration award that is not in conformity with this principle would probably not be enforced or recognised. Still, a dispute involving the application of this principle is allowed to be settled by arbitrators and it is not yet known to what extent it is possible to refuse the enforcement of an award in conflict with this principle.

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[122] P. Craig/ G. de Búrca: EC Law. Text, cases and materials, p. 548-550.
[123] P. Craig/ G. de Búrca: EC Law. Text, cases and materials, p. 653-654.
[124] P.F. Schlosser: Arbitration and the European Public Policy, p. 87.
[125] See Article 5 of the EC Treaty.
[126] P.F. Schlosser: Arbitration and the European Public Policy, p. 87-88.
[127] P. Craig/ G. de Búrca: EC Law. Text, cases and materials, p. 356-357.
[128] P.F. Schlosser: Arbitration and the European Public Policy, p. 86-87.

Does this possibility to settle disputes involving fundamental Community rules imply that the Community is in favour of arbitration? The US Supreme Court has stated that the United States regard arbitration very favourably[129], but the ECJ has not made any statement or indi-cations on that subject. However, it seems as if the Community has accepted the arbitrability of Community law issues, but it is not clear to what extent an arbitral award disregarding one of the fundamental rules in the Community can be refused to be recognised or enforced.

3.3 CHALLENGE, RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

The agreement to settle a dispute between the parties in arbitration is a mutual understanding and it is therefore implied in the arbitration agreement that the award will be carried out by the parties. One of the parties may however be dissatisfied with the award and not willing to accomplish it. The options for this party are, in general, either to challenge the award on the grounds provided for under the relevant law or to resist any attempt by the other party to have the award enforced or recognised..[130]

Most of the countries in the world exercise some kind of control over the awards of inter-national arbitration tribunals. How far a state can go in this judicial control is determined by the state itself since no international conventions govern the permissible extent of the control. The degree of control over arbitrators varies consequently from state to state. When control is exercised it is usually by means of a review or challenge procedure.[131] An award can be subject to a review, either by the courts of the country in which the arbitration takes place or by the court of the country, or countries, in which the successful party seeks recognition or enforcement of the award.[132] The grounds for review have traditionally been wide and varied, but nowadays there is a tendency towards a greater convergence of the different national systems of law. The reason for this is twofold: a growing recognition of the importance of arbitration as a measure of resolving disputes, and the effect of international treaties on the

[129] See Mitsubishi Motors 473 U.S. 614 (1985).
[130] A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 416-417.
[131] A. Redfern / M. Hunter: Law and Practice of International Commercial Arbitration, p. 429.
[132] A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 412.

recognition and enforcement of inter-national arbitral awards, for instance the New York Convention.

3.3.1 Challenge

Even though there are no conventions governing the challenge of an award, the conventions set a minimum international standard for recognition and enforcement of an award, which then tends to be adopted as a standard for the challenge of an award. When a party challenges the arbitral award is it because it wants the award to be set aside, or at least changed. A challenge of an award is an attack on its validity and if the award is set aside it will consequently lose its legal validity and become ineffective. The award not only loses its validity in the country in which it was made but also in all countries that are parties to the New York Convention. The reason for this is that the convention provides that an award can be refused to be recognised or enforced if it has been set aside in its country of origin.[133] The award can be challenged in different ways and on different grounds. It can be challenged as an appeal before a court asking it to set aside the award or it can be challenged before the arbitral tribunal asking it for a revision.[134] As already mentioned, the grounds on which an award can be challenged vary between the states, but there are some grounds common for many countries. An award can generally be challenged on the ground that it doesn't fulfil the formal requirements of the local law or because the arbitrators have made a serious mistake of fact or law. Another common ground for challenge of an award is when the arbitrator lack jurisdiction to settle the dispute. An arbitral award can also be set aside if the dispute not was arbitrable in the country where the arbitration was held, or if the award is contrary to public policy[135] in the country in which it was held or in the country where enforcement is sought.[136]

3.3.2 Recognition and enforcement

A losing party will naturally try to have the award set aside by challenging it on an appropriate grounds. The winning party is however equally eager to have the award carried out. If the

[133] New York Convention, Article V.1(e).
[134] A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 430-431.
[135] See under section 3.2.

other party fails to bring the award into effect, or actively resists the award, the winning party has to seek recognition or enforcement of the award. Recognition of an arbitral award means that the court accepts the award as valid and binding between the parties with regard to the issues covered by the award. Recognition of an award also implies that all questions that the court has recognised as being binding upon the parties are prevented from being raised in new court proceedings between the parties; the arbitral award constitutes res judicata through its recognition by a court of law. Enforcement of an award goes one step further than the recognition of it. Enforcement means that the court helps the winning party to have the award carried out by using available legal sanctions. When the court decides to enforce the arbitral award it does so because it accepts that the award as valid and legally binding upon the parties; it recognises the arbitral award. The recognition of an award is therefore a prerequisite for the enforcement of it. The losing party in the arbitral proceeding can nevertheless resist the recognition or enforcement of the award. The grounds on which an international award can be refused are laid down in international conventions. The consequence of a court's refusal to enforce or recognise an award is that the party seeking enforcement does not get what he wants. The award is still valid and recognition or enforcement can be sought in other countries.[137]

3.3.3 International Conventions

The enforcement of an arbitral award has to be sought before the courts in the place of enforcement and the procedures in these courts vary from country to country. In order to achieve some degree of uniformity in the recognition and enforcement of awards the most important trading countries have adopted international treaties. It is important that the award can be recognised and enforced not only in the country in which the arbitration took place, but also in other countries, for instance where the losing party has its assets. The international conventions make this possible.[138]

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[136] A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 434-445.
[137] M. Huelett-James/ N. Gould: International Commercial Arbitration – A Handbook, p. 109-110; A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 447-453.
[138] A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 454-455.

The first important international conventions were the *Geneva Protocol of 1923*[139] and the *Geneva Convention of 1927*[140]. Both of these conventions had important limitations since they put the onus of proof on the party seeking enforcement or recognition. The party applying for enforcement had to establish certain grounds to justify the enforcement. This could be burden-some and certainly did not promote arbitration as a means of resolving international disputes.[141]

If the two Geneva texts did not support the use of arbitration, the quite opposite has to be said about the *New York Convention of 1958*.[142] This convention provides for an effective and straightforward method of obtaining recognition and enforcement of foreign arbitral awards. More than 100 states around the world have ratified the New York Convention, which replaces the Geneva Protocol and the Geneva Convention for all countries that are parties to both. One of the reasons why it is so effective is because it has reversed the onus of proof so that the burden to prove why the award not should be enforced or recognised lies on the party resisting the award.

3.3.3.1 Grounds for refusal to recognise or enforce an award

An application for enforcement or recognition of an award can be made under an international convention or treaty. It can also be made by relying on other means available in the enforcement country or by starting an action on the basis of the arbitral award. The most common way to apply for recognition or enforcement is under the New York Convention[143] and, for that reason, he grounds of refusal described in the following will be limited to those provided for in this Convention. Article V of the Convention lays down the available grounds. The first five grounds have to be raised and proved by the party resisting the recognition or enforcement of the award. These grounds refer to the incapacity of the parties or invalidity of the arbitration agreement, the denial of a fair hearing, the excess of authority or lack of

[139] Geneva protocol on Arbitration Clauses, League of Nations Treaties Series (1924) Vol. XXVII p. 158, No 678.
[140] Geneva Convention for the Execution of Foreign Arbitral Awards, September 26, 1927, League of Nations Treaty Series (1929-30) Vol. XCII p. 302.
[141] M. Huelett-James/ N. Gould: International Commercial Arbtration- A Handbook, p. 18-19; A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 455-456.
[142] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, United Nations Treaty Series (1959) Vol. 330, p. 38, No. 4739.
[143] M. Huelett-James/ N. Gould: International Commercial Arbtration- A Handbook, p. 118.

jurisdiction, procedural errors or the invalidity of the award[144]. The two additional grounds do not have to be raised by the resisting party and this party does not have to prove anything. The court may consequently raise these grounds of its own motion when it finds it relevant. The first of these grounds refers to arbitrability. The court may refuse recognition or enforcement of an award if it finds that the subject matter of the dispute was not capable of being settled by arbitration under the law of the enforcing country.[145] Arbitrability can thus arise both at the beginning of arbitration, as what kind of disputes are capable of settlement by arbitration under the applicable law (see above under section 3.2), and at the end, as what disputes are accepted to be settled in an arbitral process by the enforcing state. As mentioned above, arbitrability refers to the concept of public policy. What is regarded as public policy varies from state to state and changes in time and this makes it an unpredictable field of law. Accordingly, each state decides what kind of disputes they find capable of settlement by arbitration. The second of the grounds the court may raise of its own motion refers to public policy. The relevant court may refuse to recognise or enforce an award if it would be contrary to the public policy of the enforcing state.[146] The concept of public policy has been discussed above (see section 3.2).

3.3.4 The European conventions

So far the discussion has only concerned international conventions. There are however several regional conventions concerning the recognition and enforcement of arbitral awards, for instance the *Panama* and the *Moscow Conventions*[147] and, in the area of the European Community, the *Brussels Convention of 1968*[148]. The Brussels Convention is based on Article 220 of the EC Treaty, which demands that the Member States enter into negotiations in order to facilitate the enforcement and recognition of judgements and arbitral awards. The primary object of the Brussels Convention is to establish a legal framework for the jurisdiction of the courts in the Member States and for the recognition and enforcement of the judgements.

[144] New York Convention Article V1.(a)- (e).
[145] New York Convention Article V 2. (a).
[146] New York Convention Article V 2. (b).
[147] Panama Convention, Inter-American Convention on International Commercial Arbitration, Panama, January 30, 1975; Moscow Convention on the Settlement by Arbitration of Civil Law Disputes, Resulting from Economic, Scientific and Technological Cooperation, 1972.,

However, the Brussels Convention expressly states that it shall not apply to arbitration[149]. The scope of this arbitration exclusion has been a commonly discussed issue in the Community.[150] The current interpretation of the Article seems to be that the arbitration exclusion applies when the arbitration issue is the main subject matter of the proceedings. An arbitral award can therefore not be enforced or recognised under the Brussels Convention.[151] An application for recognition or enforcement of an arbitral award in another Member State than the one in which the award was made has to be handled in another way. Since all Member States in the European Community are parties to the New York Convention, the recognition and enforcement of arbitral awards within the Member States is provided for. The Community regards arbitration as a global task, not a regional one, and the exclusion of arbitration from the European Conventions was consequently in line with this policy.

In the same way as arbitration is excluded from the Brussels Convention, arbitration is excluded from the application of the Lugano Convention on jurisdiction and the enforcement of judgements in civil and commercial matters[152] and from the Rome Convention on the law applicable to contractual obligations[153].

3.3.5 Review, recognition and enforcement of arbitral awards in the European Community

Since the European Community is a special legal order without any counterpart in the world of today, it is interesting to see how it handles the judicial review and enforcement of arbitral awards. Under what circumstances is an award recognisable and enforceable, and when is it not?

During recent years, a growing tendency towards the limitation of legal remedies for the judicial review of arbiral awards, and even to exclude any review at all, has been observed in the Member States. In *England*, a party to an arbitral proceeding used to have many

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[148] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels 27 September 1968.
[149] Brussel Convention Article 1, second paragraph (4).
[150] For further reading see the Jenard Report, OJ 1979 No. C59/01and the Schlosser Report OJ 1979 C59/71.
[151] D.R. Thomas: The Arbitration Exclusion in the Brussels Convention 1968: An English Perspective, Journal of International Arbiration 1 no. 3:43-52 1990, at p. 48-49; C.M. Schmitthoff: Arbitration and EEC Law p. 154-155.
[152] OJ NO. L319, 25/11/1988 p. 0009-0033, Article 1.4.
[153] OJ NO. L266, 09/10/1980 p. 0001-0019, Article 1.2. d).

opportunities to refer a question to the court during an ongoing arbitration, but this liberal approach towards judicial review was changed by the Arbitration Act of 1979[154]. The findings of arbitrators based on the facts are conclusive and final, but the findings on the law may be subject to judicial review.[155] A review due to a mistake in law can, from now on, only be admitted with the consent of all the other parties to the reference or with the leave of the High Court.[156] The High Court will only grant leave when it considers that the mistake in law is so important that it will affect the right of one or more of the parties to a considerable extent.[157] Through an exclusion agreement between the parties an appeal can, under certain circumstances, even be prevented.[158] An application for recognition or enforcement of an arbitral award can however always be resisted on the grounds that it is not in conformity with public policy.[159] The Community competition provisions have been regarded as part of public policy by English courts.[160] *France* adopted a new act of civil procedure, le Noveau Code de Procédure Civile[161], in 1981 with the intention of creating a legal order suitable for international arbitration. An award in international arbitration can be set aside or refused recognition or enforcement if, for instance, the arbitrator has settled the dispute in the absence of an arbitration agreement, or if the award is contrary to public policy[162] (or ordre public as it is in French). The public policy concept referred to in this context is the international public policy, which is, according to French law, much narrower in its application than the domestic public policy.[163] In *Germany*, the provisions providing for the setting aside or refusal of recognition or enforcement of an award were changed by the German Code of Civil Procedure in 1986. The possibilities available for a resisting party to have the award set aside, or the enforcement or recognition refused, are now reduced. An award has to be obviously incompatible with the basic requirements of German law. The courts in Germany have traditionally regarded competition law provisions, including the Community competition law,

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[154] English Arbitration Act 1979, 43 MLR (1980) 45.
[155] C.M. Schmitthoff: Finality of arbitral awards and judicial review. Contemporary problems in international arbitration, p. 236.
[156] English Arbitration Act 1979, s. 1(3)(b).
[157] English Arbitration Act 1979, s. 1(4).
[158] English Arbitration Act 1979, s. 4.(1) (a)-(c).
[159] English Arbitration Act 1975, s. 5. (3).
[160] F.B. Weigand: Evading EC Competition Law by Resorting to Arbitration? p. 256.
[161] Le Nouveau Code de Procédure Civile, amended by Decree No. 81-500 of May 12 1981.
[162] Le Nouveau Code de Procédure Civile, Articles 1502 and 1504.
[163] F-B. Weigand: Evading EC Competition Law by Resorting to Arbitration? p. 256; A. Redfern/ M. Hunter: Law and Practice of International Commercial Arbitration, p. 445.

as being part of public policy[164], but they have also pointed out that an arbitral award may not be set aside only on the grounds that the law has been incorrectly applied.[165] That means that an award can only be set aside, or refused to be recognised or enforced, if it disregards mandatory provisions of Community Competition law. The parties to an arbitration agreement can however not exclude the possibility of judicial review.[166] *Belgium* adopted restrictive provisions regarding the review of arbitral awards in 1985. The setting aside of an award was now excluded if none of the parties had connections in Belgium.[167]

The opportunities of having an award set aside, or having its recognition or enforcement refused because the award conflicts Community law, thus seems to be limited in the Member States of the European Community. The possibilities available are related to public policy, either in the sense of the lack of arbitrability in the enforcing country, or because the award is contrary to public policy in that country. Both of them are clearly provided for in the New York Convention.[168]

The Community law issues recognised as not *arbitrable* are found in the area of competition law. An arbitrator is not competent to apply Article 85(3) since the power to grant exemptions under this Article is reserved for the Commission.[169] An arbitral award justifying an exemption pursuant to Article 85(3) should therefore not be recognised or enforced in the Member State in which enforcement is sought. A decision by an arbitral tribunal that an award is exempt from the competition rules of the Community under Article 85(3), is not binding upon third parties[170], however it can be binding upon the parties to the arbitral agreement if it is not challenged. The possibility of refusing the enforcement of an award because it contravenes the *public policy* in the enforcing state is also limited to the competition law issues. The competition provisions of the Community law are considered as part of public policy by the Member States, even though national legislation does not expressly identify it as

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[164] F-B. Weigand: Evading EC Competition Law by Resorting to Arbitration? p. 256; BGH 27.2.1969, NJW 1969, 978; BGH 31.5.1972, NJW 1972, 2180.
[165] F-B. Weigand: Evading EC Competition Law by Resorting to Arbitration? p. 256; BGH 26.9.1985, BGHZ 40, 46.
[166] F-B. Weigand: Evading EC Competition Law by Resorting to Arbitration? p. 257.
[167] Article 1717 No. 4 Code Judiciaire.
[168] New York Convention Article V 2. (a).
New York Convention Article V 2. (b).
[169] See under section 3.2.1.2.
[170] J. Beechey: Arbitrability of Anti-trust/Competition Law Issues – Common Law, Arbitration International 12:179-189, 1996, at p. 181.

part of public policy.[171] However, states seldom specify the different areas of public policy. The Commission also supports the view that the competition provisions, in particular Articles 85 and 86, form part of public policy.[172] The public policy concern can be invoked against an arbitral award in which the arbitrators have applied the Community competition provisions incorrectly, or in any other way disregarded the competition law. The possibilities to refuse the recognition or enforcement when other fundamental Community rules are incorrectly applied or disregarded in arbitration seems to be very few or to be none at all.

When the award is not challenged and not asked to be enforced or recognised there will, in most cases, be no control of the award. The arbitrators are obliged to apply Community law, but in doing so they are not always familiar with how the rules shall be applied. Since they are in no position to refer a question to the ECJ on the interpretation, or application, of a Community provision[173] they have to apply and interpret the Community law by themselves. The Community law can consequently be interpreted and applied in different ways by different arbitrators. This certainly does not promote the uniform application of Community law. The ECJ has, however, pointed out that the national courts have the opportunity to ask the ECJ questions on the interpretation and application of Community provisions when they are assisting arbitral tribunals, or when the courts review an award or are asked to recognise or enforce it.[174] As we have seen, it is only possible to apply for the setting aside of an award or for the refusal of enforcement in limited cases. In all other cases there is no review and therefore no possibility to refer to the ECJ for a proper interpretation of Community law.

[171] K-H. Böcksteigel: Public policy and Arbitrability p. 192; P.J. Slot: The Enforcement of EC Competition law in Arbitral Proceedings p. 104.
[172] F-B. Weigand: Evading EC Competition Law by Resorting to Arbitration? p. 254.
[173] See under section 2.3.
[174] See under section 2.3.

4 EX OFFICIO APPLICATION OF COMMUNITY LAW

4.1 General

The national courts of the Member States are under a duty to apply Community provisions; an obligation based on the principle of co-operation laid down in Article 5 of the EC Treaty. If one of the parties to an enforcement proceeding raises the issue of Community law, the national court, asked to enforce the award, has to regard the Community law. But what happens if none of the parties raises the question of applicability of Community provisions? Is the national court in the enforcement proceedings obliged to apply Community rules ex officio? Neither the ECJ nor the Court of First Instance has been addressed with this question. Two cases from the ECJ will how-ever help us in the examination of the national courts obligations in the enforcement proceedings and furthermore the obligation of arbitrators to apply Community law ex officio.

4.2 The van Schijndel case[175]

The case concerned a dispute between Mr van Schijndel and the Stichting Pensioenfonds voor Fysiotherapeuten (Pension Fund Foundation for Physiotherapists) and another between Mr van Veen and the Fund. By a decree issued by the State Secretary for Social Affairs, membership of the Fund was made compulsory for physiotherapists working in the Netherlands. Mr van Schijndel and Mr van Veen, both acting as physiotherapists in the Netherlands, applied for exemption from compulsory membership of the Fund. The Fund refused exemption and Mr van Veen and Mr van Schijndel challenged the decision of the Fund on the ground that the agreement was contrary to the law regulating the compulsory participation in an occupational pension scheme, and to the pension scheme regulations of the Fund. The court that Mr van Veen had turned to ruled against him, while the Court concerned

[175] Joined cases C-430/93 and C-431/93, Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten, [1995] ECR p. I-4705.

with Mr van Schijndels case found in favour of van Schijndel. However, on the appeal, the Breda Rechtbank ruled in favour of the Fund. The plaintiffs then applied to the Hoge Raad (the Supreme Court of the Netherlands) in order to get the judgements quashed. At this stage in the proceedings Mr van Veen and Mr van Schijdel put forward a new submission, which they had not relied on before the other courts. They asserted that the application of the Pension Law to the pension system in question was incompatible with Articles 3(f), 5, 85 to 86 and 90 of the EC Treaty. The plaintiffs claimed that it followed from the nature of those provisions that the Rechtbank, on its own motion, should have considered the question of the compatibility of the matter in the case with the Community law. They contended that the Community competition provisions were made ineffective by the requirements for compulsory membership. According to the Netherlands law, there were no possibility to introduce new submissions that require investigation of the facts in the case. Therefore, in order to get the ECJ's opinion, the Hoge Raad stayed the proceedings and referred to the ECJ for a preliminary ruling on some questions.

The first question was whether a national civil court, in proceedings concerning civil rights and obligations freely entered into by the parties, should apply Articles 3(f), 5, 85 to 86 and 90 of the EC Treaty in cases where neither of the parties has relied upon them. The second question concerned the role of the court. If it was found that the national court had to apply those Community provisions on its own motion, did that have the implication that the court has to abandon the passive role which it normally has to observe?

First of all the ECJ pointed out that the competition rules in question were binding and directly applicable in the national legal order of the Member States. Where the national procedural rules provide that the court must apply binding domestic rules on its own motion, the same obligation exists in relation to such binding Community provisions.[176] The Court referred to the judgement in the case *Rewe v Landwirtschaftskammer für das Saarland*[177], in which the ECJ had ruled that the rights conferred by Community law, in the absence of harmonising measures, must be exercised before the national courts in accordance with the conditions laid down by national rules. The rights that the direct effect of Community law

[176] Judgment in joined cases C-430/93 and C-431/93, paragraph 13.
[177] Case 33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, [1976] ECR 1989.

gives to individuals should therefore be protected in the court to the same extent as the rights conferred by national provisions.[178]

If the national procedural rules do not require that the court apply binding rules of law of its own motion, but confer on it a discretion, the same has to be applied in relation to the binding Community law. The ECJ argued that it followed from the principle of co-operation laid down in Article 5 of the EC Treaty that national courts should ensure the legal protection that the directly applicable Community law confers on individuals.[179] A viewpoint that already had been settled by the ECJ in the *Factortame and Others case*[180].

The answer to the first question was therefore that a national court on its own motion has to apply the binding and directly applicable Articles 85, 86 and 90 of the EC Treaty if domestic procedural law allows such application.[181]

On the question as to whether the national court had to abandon its passive role, the ECJ held that it is for the national courts to lay down the rules of procedure, but that they can not be less favourable than the rules governing similar domestic actions. If national rules make it im-possible, or excessively difficult, to exercise the rights conferred by Community law, such rules must be set aside. In order to determine whether a national procedural provision has such an effect on the application of Community rules, the role of the provision in the domestic procedure has to be analysed. In this context the principle of the protection of the rights of a defence, the principle of legal certainty and the proper conduct of procedure have to be considered. [182] In this analysis of the domestic procedures of the Netherlands, the ECJ found the national courts did not to have an obligation to abandon their passive role.[183]

4.3 The Peterbroeck case[184]

In this case the ECJ was concerned with the interpretation of Community law concerning the power of a national court to consider of its own motion the question whether national law is

[178] Judgement in case 33/76, paragraph 5.
[179] Judgement in joined cases C-430/93 and C-431/93, paragraph 14.
[180] Case C-213/89, The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others, [1990] ECR I-2433.
[181] Judgement in joined cases C-430/93 and C-431/93, paragraph 15.
[182] Judgment in joined cases C-430/93 and C-431/93, paragraph 19.
[183] Judgment in joined cases C-430/93 and C-431/93, paragraph 22.
[184] Case C-312/93, Peterbroeck, Van Campenhout and C:ie SCS v Belgian State, [1995] p. I-4599.

compatible with Community law. A Belgian company, Peterbroeck, protested against the applicable rate of non-resident tax in Belgium. After having all its complaints rejected by the Regional Director of Direct Contributions, Peterbroeck brought the proceedings before the Cour d'Appel in Brussels. For the first time in the proceedings Peterbroeck pleaded that application of a tax rate to a company having its seat in the Netherlands higher than the rate applied to a Belgian company constituted a restriction on the freedom of establishment laid down in Article 52 of the EC Treaty. The procedural rules of the Netherlands did not allow the Court to consider the new argument as it was raised outside the time limits.

The Cour d'Appel therefore stayed the proceedings and asked the ECJ if a national procedural rule, resulting in the preclusion of the national court to consider of its own motion whether a measure of domestic law is compatible with Community law when the Community law provision has not been invoked by the litigant within a certain period, is precluded by Community law.

The ECJ held in its judgement that the Member States are obliged to ensure the legal protection conferred on individuals by the direct effect of Community law. This duty is established by the co-operation principle in Article 5 of the Treaty. When no Community rules exist in the area, it is for the Member States to establish procedural rules protecting the Community rights. These rules must enable the observance of Community rights in the same way as national rights, and the application of these rules must not make the exercise of Community rights impossible.[185] In order to determine whether a national provision hinders the exercise of Community rights the role of the provision in the procedure has to be examined. This analysis is to be made in the light of the fundamental principles of Community law.[186]

The ECJ found that the Court d'Appel never had the opportunity to consider the compatibility since the time period during which the litigant could raise new pleas had already expired by the time the Cour d'Appel held its hearing. There was no other court in following proceedings that could, on its own motion, determine the question of compatibility of a national measure with Community law. Furthermore, the ECJ did not find the lack of possibility for the national courts to raise points of Community law on their own motion

[185] Judgement in case C-312/93, paragraph 12.
[186] Judgement in case C-312/93, paragraph 14.

justifiable on principles as the requirement of legal certainty or the proper conduct of procedure.[187]

As a result, the ECJ ruled that if a domestic procedural rule prevents a court from considering of its own motion the compatibility of a national measure with a Community law provision when the latter provision has not been invoked by the appellant within a certain period, then Community law precludes the application of that national rule.[188]

4.4 The ECJ's considerations that formed the judgements

The ECJ has most certainly determined the case with regard to three important factors: the primacy of Community law, the principle of the effectiveness of Community law and the need to ensure the uniform application of Community law.

4.4.1 The primacy of Community law

The principle of the supremacy of Community law over national law was established by the ECJ in the cases *Van Gend en Loos*[189] and *Costa v Enel*[190]. The ECJ held that the goals set out in the Treaty could only be realised if all Member States applied the Community law to the same extent and with equal force. When the Member States had created the Community they transferred some of its powers to the newly established political institutions, which they equipped with sovereign rights. The laws of a Member State could therefore not prevail over the laws stemming from those institutions.[191]

However, this principle of primacy of Community law can not have the consequence that Community law shall override the national laws in all circumstances. How far-reaching this principle is has to be determined in the light of the principle of proportionality and the principle of subsidiarity. Regarding the national procedural rules, the case law of the ECJ has indicated that as long as national courts ensure the enforcement of Community rights in

[187] Judgement in case C-312/93, paragraphs 19-20.
[188] Judgement in case C-312/93, paragraph 21.
[189] Case 26/62, Nv. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] ECR 1.
[190] Case 6/64, Flaminio Costa v. Enel, [1964] ECR 585.
[191] See judgement in cases 26/62 and 6/64.

national pro-ceedings, and in accordance with national procedural rules, a national rule does not have to be set aside unless it renders it impossible, or unduly difficult, to enforce those rights.[192] These conditions emanate from the aim to establish a balance between the need to respect the Member States' procedural autonomy and the need to ensure the effective protection of Community rights in the national courts.[193]

4.4.2 The effectiveness of Community law

It follows ultimately from the principle of co-operation laid down in Article 5 of the EC Treaty that the national courts are obliged to give full effect to Community provisions and to enforce rights conferred on individuals by Community law.[194] However, this does not mean that there can be no limits on the application of those provisions. Sometimes, for instance, the need of legal certainty has to limit the full application of the Community provisions. The legal systems of a state always impose restrictions on the rights of an individual, for instance time limits and limits on retrospective claims.[195]

4.4.3 The uniform application of Community law

The need for a uniform application of the law is naturally very important in a system like the Community, which consists of Member States with different legal systems. These disparities make it however difficult to apply and interpret Community law uniformly in all Member States. If a national court has to apply Community law provisions of its own motion where it has to apply of its own motion a similar national provision, then there will consequently be a non-uniformity in the application of Community law since the possibilities to apply a provision ex officio are laid down in the national procedural rules by each Member State. This is perhaps inevitable in a system with such a variety of legal systems when there are no harmonised rules of procedure.

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[192] See Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal, [1978] ECR 629, where the national court had to give full effect to the Community provisions it was called upon to apply, without waiting for the national constitutional court to set aside the conflicting national measures, paragraphs 22-24; and case C-213/89, where the House of Lords had to grant interim measures in order to protect the Community rights claimed before it, although that remedy not was available under national law, paragraphs 19-21.
[193] P. Craig/ G. de Búrca: EC Law. Text, cases and materials, p. 200-212.
[194] Opinion of Advocate General in Joined cases C-430/93 and C-431/93 p. 4715-16.
[195] Opinion of Advocate General in Joined cases C-430/93 and C-431/93, p. 4721.

These three factors are, as we can see, closely linked together. Unless the Community law is given priority over conflicting national law there can be no effective enforcement and no uniform application of Community law.

4.5 The obligation of national courts when asked to enforce or recognise an arbitration award

The van Schijndel case clearly expresses that national courts are under a duty to apply binding and directly applicable Community provisions ex officio whenever the national procedural rules allow this.[196] How far this is applicable on the national courts' obligations in an enforcement proceeding is not easy to determine, but the ex officio application by national courts should include Articles 85 and 86, which were expressly dealt with in the van Schijndel case.[197] This is also in conformity with the New York Convention, which provides for an ex officio application of public policy provisions by the enforcing court.[198] As mentioned above, the Member States and the Commission regard the Community competition rules as public policy provisions.[199]

4.6 The obligation of arbitrators to apply Community provisions

An arbitrator is under a duty to apply Community provisions when it is relevant for the case, and when a party invokes those provisions in the proceedings. [200] What happens if a party does not raise the issue of a Community provision and the application of such a provision is relevant to the case? Is the arbitrator, under such circumstances, obliged to apply the relevant Community rule on its own motion?

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[196] See under section 4.2.

[197] P.J. Slot: The Enforcement of EC Competition law in Arbitral Proceedings p. 108-109.
[198] New York Convention Article V 2. (b).
[199] See under section 3.3.5.
[200] Case C-102/81.

The rights of the parties to the arbitral proceeding may be affected if the Community law is not applied when it is relevant, but these parties always have the opportunity to invoke the Community provisions in the proceedings. However, the rights of third parties may also be affected by arbitration. A third party is not in a position to invoke Community provisions in the proceedings, and if the arbitrator does not rely on the relevant Community rules, then the rights of third parties might be endangered. An obligation for the arbitrator to apply Community pro-visions ex officio would secure the rights of third parties. This solution will however probably not be favourable for the parties to the arbitration. After all they are the ones who confer jurisdiction on the arbitrator and set the limits for the arbitration proceeding. Third parties have other ways of enforcing their rights. There is always the possibility to bring a lawsuit and, if the case concerns the competition rules, a complaint to the Commission is a possibility available to that party.[201] It seems as if the Member States regards there to be no obligation for an arbitrator to apply the Community rules on its own motion..[202] The very core of arbitration is that it is the parties to the dispute that set the limits to the arbitration proceedings by their agreement. An obligation for arbitrators to apply Community provisions ex officio might consequently be contrary to this central characteristic of arbitration.

In a case now pending before it, **the Benetton case**[203], the ECJ is concerned with questions regarding the arbitration and Community law. The origin to the dispute is the breach of a contractual obligation. In 1986, Benetton International NV, Eco Swiss China Time Ltd and Bulova Watch Company, made an agreement on brand licensing. The contract contained an arbitration clause and when Benetton revoked the contract three years in advance, the other parties to the agreement submitted the dispute to arbitration. Neither the parties nor the arbitrators raised the question of compliance with Community competition rules in the proceedings. The arbitrators ordered Benetton to pay damages for the loss suffered by Eco Swiss and Bulova due to the breach of the contract. The arbitrators left to the parties to agree

[201] The Commission has discretion as whether it will act on the complaint or not. In the case C-24/90, Automec srl v. Commission, [1992] ECR II-2223, the Court of First Instance ruled that the Commission not is obliged either to take a decision on the existence of an alleged infringement or to proceed with an investigation. The Commission was also entitled to give priority to certain of its cases out of the consideration for Community interest. In the notification on cooperation with nation courts in applying Articles 85 and 86 of the EEC Treaty, OJ 1993 C39/05, the Commission stated that it would pay special attention to cases with particular political, economic or legal significance to the Community. The other cases should preferably be handled by national courts.

[202] P.J. Slot: The Enforcement of EC Competition law in Arbitral Proceedings, p. 104-105.

[203] Case C-126/97, Eco Swiss China Ltd v. Benetton International NV, Opinion by Advocate General delivered on 25 February 1999.

on the amount of the damages. However, the parties were not able to agree on an amount, whereby Eco Swiss turned to the arbitrators again to obtain a decision on the amount of the damages. The arbitrators enjoined upon Benetton to pay 23 750 000 USD to Eco Swiss. Benetton refused to pay and demanded the Rechtbank, which had controlled the award earlier, to annul the two arbitral awards, claiming that the contract between the parties contravenes Article 85 of the EC Treaty. Benetton argued that Article 85 forms part of public policy which, according to the procedural rules in the Netherlands, enables the arbitration award to be set aside. The Rechtbank rejected the demand, a decision against which Benetton appealed to the Court of Appeal. Benetton asked the Court of Appeal to suspend the execution of the second award and the Court of Appeal ruled in favour of this demand since it found the contract to be in breach of Article 85. Eco Swiss did not accept this decision and appealed to the Supreme Court of Appeal. This Court, Hoge Raad stayed the proceedings in order to refer some questions to the ECJ.. According to the procedural rules in the Netherlands can a private party demand the annulment of an arbitral award exclusively on the ground that it contravenes public policy. The Hoge Raad pointed out that an arbitral award only is contrary public policy if it, to its content or enforcement, is in breach of a mandatory provision, whose application no national procedural rules could prevent. The fact that a decision by an arbitrator is contrary to the internal competition rules is not enough to regard it as contravening public policy. The Hoge Raad wonders if the same conclusion can be drawn from the mandatory Community provisions.[204]

The Hoge Raad now asked the ECJ to what extent the principle of ex officio application of Community provisions, laid down in van Schijndel, could be applied in analogy to arbitrators when they, according to the rules they have to apply, not have the power to apply rules on their own motion. The Hoge Raad also asked what powers the national courts have regarding the arbitration awards.[205]

The core of the Benetton case is thus the question of the arbitrators' obligations to apply Community provisions ex officio and the question of the powers of national courts when asked to set aside an award, or refuse its enforcement. The Benetton case is also about whether Article 85 of the EC Treaty forms part of public policy in the sense that it constitute grounds for the annulment, or refusal to recognise or enforce, an arbitration award..

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[204] Opinion in case C-126/97, paragraphs 4-9. My translation from Italian..
[205] Opinion in case C-126/97, paragraph 10. My translation from Italian.

This case can be a perfect opportunity for the ECJ to solve the problems regarding arbitration and the Community law. We will see if it seizes this opportunity.

5 CONCLUSIONS

This presentation shows that there exist some serious problems concerning arbitration in the European Community. Fundamental questions like which issues are regarded as capable of being settled by arbitration and in which cases an arbitral award, involving Community law matters, shall be enforced, have not been solved in a satisfying manner.

In the United States, the Supreme Court has expressly proclaimed that it is in favour of arbitration. Even the competition provisions, which constitute the very core of the American liberalism, are arbitrable in international matters. The work overload in the courts and the increasing globalisation of trade made the Supreme Court realise the need for arbitration as a method of resolving international commercial disputes.

The ECJ has not expressed, or even indicated, its view of the arbitrability of European Community provisions. The arbitrators do, however, seem to have extensive powers regarding the application of Community provisions. Arbitrators apply directly applicable Community pro-visions with the only limit of provisions that are exclusively within the competence of a Community institution. In the area of competition law, the arbitrator does not have the power to grant an individual exemption under Article 85(3) of the EC Treaty. In other areas of Community law the competence of arbitrators is even more uncertain than in the competition field. As long as the powers to apply a Community provision do not lie exclusively within the jurisdiction of a specific Community institution, the arbitrators will settle a dispute involving that provision if they are called upon to decide on it. Thus, the ECJ hasn’t expressly stated that it is in favour of arbitration, but at the same time it hasn’t objected to the fact that the arbitrators confer on themselves extensive powers regarding the application of Community provisions.

There seems to be an international trend that arbitrability is more widely accepted in world trade. Behind this trend lies several factors, one of which is that courts in most countries are over-loaded with work and incapable of handling the increasing number of cases before them. Another is the fact that arbitration is a good method of resolving international disputes since a decision can be obtained quickly, and discreetly, which is of great importance to business companies. The need for arbitration as an instrument for settling international disputes has consequently become obvious.

There is however another side to this positive trend indicating that the greater acceptance of arbitrability is combined with a control of the arbitral award. The United States Supreme Court made the competition rules arbitrable through the Mitsubishi case. At the same time as it accepted the arbitrability, it declared that the courts of the United States had the power to make a judicial review of the content of the award. Whenever a court, when it was asked to recognise or enforce an arbitral award, found a non-compliance with the US competition rules it might refuse to accept the recognition or enforcement of the award. This is referred to as the second look doctrine.

In the European Community there is no expressed second look doctrine. An arbitral award can nevertheless be set aside, or refused to be recognised or enforced, under certain circumstances. If the subject matter of the dispute not is regarded as arbitrable in the enforcing country, the award can be refused to be enforced. Herein lies a problem. If the dispute is regarded as capable of being settled in arbitration at the beginning of arbitration in the Member State of the European Community where arbitration takes place, but not at the end of arbitration when it is asked to be enforced in another Member State, then the predictability of arbitration will be endangered. It would be better if the question of arbitrability of Community law issues was definitely determined at the beginning of the arbitration proceeding. A possible way to achieve this is if the ECJ determined which Community provisions it regards as non arbitrable. The ECJ is the only institution capable of determining this question since it has exclusive powers on the proper interpretation and application of Community provisions. Another way to achieve this would be if the arbitrator, when in doubt on how to settle a dispute, could refer a question to the ECJ on whether a specific provision is arbitrable. For the time being this is not possible since arbitrators are not competent to refer questions to the ECJ under Article 177. It seems as if Community law issues are accepted as arbitrable to a great extent in the Member States of the Community, but still there exist a moment of uncertainty about what can happen at the enforcement stage.

An arbitral award can also be refused to be enforced or recognised if it contravene the public policy in the enforcing country. The Member States of the European Community regard the Community competition rules as part of public policy, and an award conflicting with the competition rules might consequently be refused to be enforced by the national courts. Are there other parts of Community law that constitute public policy in the Member States? There are no indications what so ever that the incorrect application of other parts of the Community

law might constitute grounds for refusal to recognise or enforce an arbitral award. There are however several provisions fundamental to the existence of the European Community whose infringement would contravene the main objectives of the Community. The provisions regarding market freedoms and the principle of non-discrimination are some of these important rules. It is equally important that an arbitral award infringing these provisions can be refused to be enforced as the enforcement of an award infringing the competition rules can be refused. Again, the possibility to ask the ECJ for help would make it easier for the arbitrator. The arbitrator has to know what constitute public policy, otherwise the award might run the risk of not being enforceable.

It is only when the award is challenged, or recognition or enforcement is sought, that the award is controlled. In most of the cases the arbitral award is carried out voluntarily by the parties and the content of these awards can vary greatly depending on the arbitrator. Arbitrators are obliged to apply Community law, but they do not always know how the rules shall be interpreted and applied. Unlike the national courts of law, the arbitrators are not allowed to dispel this uncertainty with the help of the ECJ. This is made very clear from the case law of this court. The fact that the Community provisions are arbitrable but the arbitrators not can avail themselves with a proper interpretation of the provisions by the ECJ is a complicated situation. The arbitrator consequently has to interpret the provisions in a manner he finds suitable, and apply Community provision when he finds it appropriate. This can of course lead to a non-uniform interpretation of the Community law. The ECJ has however declared, in the Nordsee case, that the uniform application and efficiency of Community law is ensured by the national courts since they can refer to the ECJ when assisting the arbitrators or when asked to recognise or enforce the award. This solution can be problematic for at least two important reasons. First, only few of the arbitral awards go through the national courts. In most cases will there be no possibility to make a reference under Article 177 and the uniform application of Community provisions will not be secured in these cases. Second, if an arbitrator would ask a national court of law for help and that court refer a question to the ECJ that would be contrary to the very nature of arbitration. Some of the central characteristics of arbitration -the possibility of a quick and discreet proceeding and the lack of involvement by national authorities- might be imperilled.

There is always a possibility to evade Community law by resorting to arbitration even though the arbitrators are obliged to apply the relevant Community provisions. The national

courts in the Member States are under a duty to apply binding and directly applicable Community provisions ex officio if the domestic procedural rules allow it. This was determined by the ECJ in the van Schijndel case. This applies most certainly to the national courts also when they are asked to enforce or recognise an award. The cases of incorrectly applied Community law and attempts at evading the Community law can be discovered here. Does the obligation to apply binding and directly applicable Community rules ex officio extend also to the arbitrators? If so, it would probably reduce the possibility to evade Community rules. One problem arises out of this: the arbitration procedure is characterised by the parties' will. It is the parties that decide that the dispute shall be settled by arbitration, and it is the parties who set the limits to the arbitration proceedings by their agreement. An obligation for arbitrators to apply Community rules on its own motion would contravene this specific feature of arbitration. The Member States do not seem to favour the idea that arbitrators should be obliged to apply Community provisions ex officio. Soon we will learn what the ECJ has to say about it.

However, if the arbitrators are imposed with the duty to apply Community law ex officio there has to be a way for them to avail themselves with the proper interpretation and application of that law. Therefore, they have to be empowered with the possibility to refer a question to the ECJ. It is neither fair nor practicable to confer upon arbitrators such an obligation without providing them with the power to refer. In such a case the ECJ either has to declare arbitrators as being "a court or tribunal" within the meaning of Article 177 or the text of that Article has to be changed in order to include arbitrators.

But how is the uniform interpretation of Community law by arbitrators to be ensured in the best way? Well, it isn't possible, or even desirable, to guarantee the uniform interpretation completely. There is always a risk that arbitrators misinterpret or misapply the laws, may it be the national law or the Community law. There is no reason why the Community law should be better protected than the national law. On the other hand it is desirable to provide arbitrators with help on the interpretation and application of Community law when they need it. In my opinion, the preliminary ruling process is not suitable for arbitration. A ruling from the ECJ may take years to obtain and in the meantime the arbitrator has to stop the proceedings. The specific characteristics that make arbitration an excellent way to solve disputes between business companies will consequently vanish. The important features in this context being the quickness and discreteness of arbitration proceedings and the lack of involvement by national

authorities. The risk that the parties will try to evade the Community law by seeking arbitration outside the Community will also increase if the arbitrators were allowed to refer to the ECJ. Instead, an advisory body, specialised in Community law, assisting the arbitrators in their work might promote the uniformity in the arbitral awards and make them more predictable. Another way of obtaining more uniformity of the application of Community law by arbitrators would be to have consultants, specialised on Community law, helping the arbitrators in the proceedings. This assistance can be quick and discrete and the national authorities can be kept outside the arbitration proceedings. In this way, better protection of Community law will be achieved and, at the same time, the very nature of arbitration will not be endangered.

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