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**Revisiting the behavioural patterns of enforcing courts
reviewing foreign awards concerning strong public interests
under Article V of the New York Convention 1958:
From the perspective of foreign awards concerning EU
competition law disputes**

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PhD in Law

The University of Edinburgh

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Declaration

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Abstract

International commercial arbitration has unquestionably become one of the most commonly used alternative dispute resolutions owing to the high degree of reliable enforceability of arbitral awards, now enshrined in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’). According to the Convention, the enforcement of an arbitral award may be refused (other than for serious procedural violations) only when based upon the award’s incompatibility with the public interest of the enforcing state (further subdivided into the non-arbitrability of the subject matter of the dispute and an award’s violation of the enforcing state’s public policy), and such incompatibility is to be recognised in only rather exceptional circumstances.

Although this enforcement-friendly pattern, which restricts significantly the application of a public interest defence, appears workable and generally successful in dealing with arbitral awards in private disputes, its reliability and clarity are inevitably challenged when international arbitration enters the public domain, especially that of competition law. On the one hand, as competition law has generally come to be recognised as an area of significant public policy interest and the NYC does not enumerate subject areas which are excluded from arbitrability, it remains to be seen whether competition law disputes are in fact amenable to resolution by arbitration, which has become a common form of private dispute resolution. At the same time the increasing tendency of ensuring compliance of an award with competition policy may well come to extend the restriction binding the enforcing court and encourage it more proactively to review an arbitral award in the area of competition law disputes.

This thesis therefore sets out to analyse these challenges and explore a more balanced and uniform pattern of enforcing foreign awards which concern important public interests by focusing on EU competition law disputes. Moreover, since an arbitral award may be reviewed by a seat court before being brought before an enforcing court, the interrelationship between court of seat and court of enforcement is also considered and analysed. It is found that disputes concerning public interests being arbitrable tallies with the general trend. However, the current prevailing enforcement-friendly pattern may not strike the appropriate balance between enforceability and the developing tendency to ensure compliance of an arbitral award with relevant public policy. A new reviewing pattern is thus proposed.

Lay Summary

With the development and expansion of international business, international commercial arbitration has become one of the most commonly used methods to solve private transnational commercial disputes. Amongst the notable reasons for this is the readiness with which international arbitral awards are enforced by the national courts which give them effect (the ‘enforcing courts’). This reliable and effective enforceability is enshrined in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’, or ‘NYC’), to which 159 states are party. According to the Convention, an enforcing court may refuse give effect to an award (other than for serious procedural violations) only if the subject matter of the dispute is not one suitable to be resolved by means of arbitration, or if the enforcement of the award would violate the enforcement state’s public policy. These two public interest defences are rarely – and this is in keeping with the spirit of the Convention - successfully invoked. So long as the arbitral tribunal has examined relevant issues and there is no clearly flagrant violation of public order which is immediately apparent, enforcement is executed.

This enforcement-friendly pattern has been embraced worldwide, but is still challenged when disputes which concern not only private controversies but also public interests are brought before arbitral tribunals. A dispute involving competition law is a good measure of this. The NYC itself excludes no fields from the sphere of arbitration, so presumptively may apply. Yet there remains the more fundamental question of whether competition law disputes themselves are given to settlement by arbitration. And if so, whether it is within the proper province of the enforcing court to ensure compliance of the award with its own rules on and understanding of competition law as a function of its own public policy, and so perhaps here diminish the efficacy of arbitration as an appropriate means of dispute resolution. The thesis sets out to tackle the questions of whether a proper balance has been or can be struck between the desirable efficiency of arbitration and the necessity – if it be a necessity – of protecting a public order which recognises effective competition to be an essential component of it. If not, can a more balanced and more uniform standard be set out? As one of the most developed and complex systems of its kind in the world, attention will be upon the competition law of the European Union, whose many layers both within and without the system make it an excellent focus of inquiry.

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Chapter I - Introduction

I. Basic process of international commercial arbitration

International commercial arbitration is a dispute resolution mechanism with the involvement of multiple jurisdictions which could lead to both private and public legal consequences¹. An international arbitration usually starts with a private contractual relationship involving parties with different nationalities or places of business agreeing to arbitrate their private disputes in a country, i.e. the arbitral seat², which is generally not their own country, and consensually subjecting the procedural aspects of their arbitration to the law of the arbitral seat. Once the dispute between the parties is examined and an arbitral award is rendered accordingly, the private arbitration process would come to an end and the subsequence of the award will be clad in ‘public’ colours. First, although the parties merely intend to subject the procedural aspects of their arbitration to the law of the seat, it was stated that by choosing a particular country as the seat of arbitration, the choice ‘brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration’³ so that the seat court may be called to intervene to examine whether the arbitral award is on the one hand in line with its arbitration law (from the procedural aspect) whilst on the other hand complies with, for example, relevant mandatory rules or the fundamental public policy of the seat⁴ (from the substantive aspect). If any injustice is found, the seat court might *set aside*⁵ the award. Secondly, since the arbitral tribunal is merely a private panel with no coercive power to

¹ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, 5th ed., 2009, at para. 1.84.

² Notably, arbitral seat is also called as ‘the seat of arbitration’, or simply ‘the seat’.

³ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 3.61.

⁴ Although mandatory rule and public policy may to certain extent coincide (e.g. a mandatory rule of a jurisdiction may simultaneously be regarded by the jurisdiction as its public policy), they may not always be identical. See, for example, F. Vischer, *General Course on Private International Law*, 232 Hague Recueil (1992-I), at p. 165, as quoted in A. N. Zhilsov, Mandatory and Public Policy Rules in International Commercial Arbitration, *Netherlands International Law Review*, XLII 81-119, 1995, at 104. Vischer opined that the notion of public policy and mandatory rules express the different concern of a state. The former ensured the protection of basic moral values and principles of justice whilst the latter guarantee the functioning of a jurisdiction’s administration and related activities, e.g. a state’s supervision of certain private activities in the field of insurance and banking, the safeguarding of the economic order and social welfare, etc.

⁵ Setting aside an arbitral award may also be described as ‘annulling’ or ‘vacating’ an arbitral award.

facilitate the recognition or enforcement of the award⁶, the enforcing court(s)⁷, which is not necessarily the court of arbitral seat but that of where the losing party resides or has its place of business or assets,⁸ may be called to take the job if the losing party does not carry out the arbitral award voluntarily. Similarly, as the enforcement of an arbitral award would generally ask the national court of the enforcing state to dispose assets on its territory, the enforcing court is thus also understandably entitled to require that the enforcement of the arbitral award should also not violate its mandatory rules. Again, if any violation is perceived, it is likely that the enforcing court would refuse to enforce the award.

II. Guiding the enforcement of foreign arbitral awards: relevant provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration

In an international arbitration, one of the issues which is most concerned by the parties (including the losing party) and also what attracts the author most, is whether the arbitral award rendered by an arbitral tribunal would eventually be enforced. Although the basic framework of international commercial arbitration as introduced above is seemingly promising, it does not reveal much regarding the criterion of an enforcement court enforcing an arbitral award. Moreover, since in an international arbitration not only the enforcing court but also the seat court may be involved to review the arbitral award, one might also ask the question concerning that, first, whether seat court would always be involved in the review of arbitral awards; and secondly, whether the consequence of a seat court reviewing an arbitral award would make impact on an enforcing court's examination and hence eventually influence the enforcement of the arbitral award.

Guidance on these issues is hence needed. Luckily, the landmark Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the 'NYC' or

⁶ One of the most representative examples would be that most of arbitral awards would contain pecuniary remedies, which could only be enforced by national courts to seize the assets.

⁷ It is practically possible that the enforcing states will be more than just one since the losing party may have business or assets in multiple countries.

⁸ The term 'international arbitration' as mentioned in this thesis is hence refer to an arbitration of which the arbitral seat and enforcing state are two different places.

simply the ‘Convention’) ⁹ as well as the highly instructive UNCITRAL Model Law on International Commercial Arbitration¹⁰ (hereinafter the ‘Model Law’) to certain extent take the burden off, which essentially provide guidance on how a foreign arbitral award¹¹ should be reviewed at both setting-aside stage (i.e. before the national court of arbitral seat) and enforcement stage (i.e. before the national court of enforcement state). Key points could be concluded as follows:

- It is not necessary for an arbitral award to safely go through the scrutiny of seat court before it could be ‘allowed’ to enter the enforcement stage, unless the losing party intends to set aside the arbitral award, which is widely understood as the exclusive function of the seat court.¹² Notably, it was not the case before the NYC, as the mechanism of double *exequatur*, which was originally introduced in Article 1(d) of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (the predecessor of the NYC), required an arbitral award could only be enforced once it has become ‘final’ in the arbitral seat, i.e. a leave for enforcement should first be granted by the seat court so that the award could then be enforced by the enforcing court. This mechanism was subsequently abolished by Article V(1)(e) of the NYC which only requires an arbitral award to be ‘binding’ before entering the enforcement stage.¹³
- If an arbitral award is brought before a seat court for review, as *exhaustively* listed in Article 34(2) of the Model Law, the seat court could only examine the alleged procedural violations¹⁴ and look into whether the arbitral award runs

⁹ Which currently has 159 contracting states.

¹⁰ The legislation based on the Model Law has been adopted in 80 States in a total of 111 jurisdictions. This data is provided in

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
(Retrieved: 2019-01-18)

¹¹ i.e. an arbitral award which is made in the territory of a State whilst being recognised or enforced in another State. See Article I(1) of the NYC.

¹² Jonathan Hill, The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England, *Journal of Private International Law*, Vol. 8, No. 2, 2012, at 167.

¹³ See, for example, Albert Jan van den Berg, The New York Convention of 1958: An Overview, in E. Gaillard and D. Di Pietro eds., *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention Practice*, Cameron May, 2008, at p. 17. (‘The word “final” was interpreted by many courts at the time as requiring a leave for enforcement (exequatur and the like) from the court in the country of origin ... The drafters of the New York Convention, considering this system as too cumbersome, abolished it by providing the word “binding” instead of the word “final”. Accordingly, no leave for enforcement in the country of origin is required under the New York Convention. This principle is almost unanimously affirmed by the courts’).

¹⁴ See Article 34(2)(a)(i) to (iv) of the Model Law.

counter to the *arbitral seat's* fundamental public interest. The latter is further specified by the Model Law into two issues, namely whether the subject matter of the dispute is capable of settlement by arbitration (or whether the subject matter is 'arbitrable'), under *the law of the seat*¹⁵ and whether the arbitral award is in line with *the seat's* public policy¹⁶.

- When an arbitral award is brought before an enforcing court for enforcement, as *exhaustively* listed in Article V of the NYC (and also Article 36(1) of the Model Law¹⁷), the enforcing court could only examine the alleged procedural violations, and check whether the subject matter of dispute is capable of settlement by arbitration *under the law of the enforcing state*¹⁸ and whether the enforcement of the award would violate *the enforcing state's* public policy¹⁹ (which are fairly similar as that of provided in the Model Law for setting aside an arbitral award²⁰).
- It is widely recognised that the grounds for setting aside or refusing the enforcement of arbitral awards as set in both the Model Law and the NYC should be construed narrowly,²¹ especially for the two grounds concerning the forum's public interest: disputes arising from contractual or commercial relationships are almost always arbitrable²², and the public policy defence has been construed with extreme caution²³. Moreover, a *prima facie* review is widely applied – no merits

¹⁵ See Article 34(2)(b)(i) of the Model Law.

¹⁶ See Article 34(2)(b)(ii) of the Model Law.

¹⁷ Article 36(1) of the Model Law mirrors the provisions of Article V of the NYC.

¹⁸ See Article V(2)(a) of the NYC and Article 36(1)(b)(i) of the Model Law.

¹⁹ See Article V(2)(b) of the NYC and Article 36(1)(b)(ii) of the Model Law.

²⁰ See Article V of the NYC and Article 34 of the Model Law.

²¹ As for the grounds for setting aside arbitral awards, see Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished? ICSID Review*, 2014, at 268, in which the author mentioned the restrictive application of setting aside grounds and pointed that 'it is increasingly held that not every violation will lead to ... setting aside. The violation must have substance and not be *de minimis*'. As for the grounds for refusing the enforcement of arbitral awards, see Gary Born, *International Commercial Arbitration*, Kluwer Law International, 2014, at p. 3427. See also, for example, *Sojuznefteexport (SNE) v. JOC Oil Ltd.*, Court of Appeal of Bermuda, 7 July 1989, in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 1990 - Volume XV*, Kluwer Law International, at p. 397. ('... not only are the defenders under the New York Convention exhaustive, but that they must be narrowly construed so as to favour the enforcement of the award.');

China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corporation, 334 F.3d 274, at 283. ('Consistently with the policy favoring enforcement of foreign arbitration awards, courts strictly have limited defenses to enforcement to the defenses set forth in Article V of the Convention, and generally have construed those exceptions narrowly.')

²² Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, 2017, 3rd ed., at p. 243. ('In general, however, there are few cases in which awards have been denied on the ground of nonarbitrability')

²³ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at paras. 11.103 to 11.120.

of dispute should be re-examined²⁴ and an award or the enforcement of an arbitral award will be approved as long as there is no clearly flagrant violation of fundamental public policy which could be spotted by merely reading the award.²⁵

- As for the interrelationship between seat court and enforcing court, Article V(1)(e) of the NYC provides that the enforcing court may refuse to enforce an arbitral award once the award has been set aside by the seat court. Legal practice clearly shows that once an arbitral award has been annulled by the seat court based upon relevant procedural violation, the enforcing court would generally follow the seat court's decision and refuse to enforce the award since the law governing the procedural issues of an international arbitration would normally be the law of arbitral seat.²⁶ Notwithstanding, two exceptions could be observed:
 - The first concerns the scenario that the annulment decision was made based upon the subject matter of dispute being inarbitrable or the award violating the seat's public policy. Since as mentioned above that both the seat and enforcing court may examine these two issues by applying their own laws, discrepancy may hence exist when a seat court and an enforcing court hold different viewpoints, and it is therefore unnecessary for the enforcing court to follow the seat court's decision on these two issues.²⁷
 - The second concerns the scenario that an enforcing court follows the approach of delocalisation to diminish the importance of arbitral seat, i.e.

²⁴ Luca G. Radicati di Brozolo, 'Chapter 22 Court Review of Competition Law Awards in Setting Aside and Enforcements Proceedings', in Gordon Blanke & Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, at para. 22-021. See also, for example, Gordon Blanke, The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards: A Never Ending Saga, *Stockholm International Arbitration Review*, 2007, at 51-52; John Beechey, Arbitrability of Anti-trust/Competition Law Issues – Common Law, *Arbitration International*, Vol.12, Issue 2, 1996, at 186. ('a form of merits review ... would go well beyond any review called for under Article V of the New York Convention').

²⁵ Luca G. Radicati di Brozolo (2011) *op. cit.*, *supra* note 24, at paras. 22-032 and 22-059.

²⁶ See Margaret L. Moses (2017) *op. cit.*, *supra* note 22, at p. 63. ('The law applicable to the arbitration procedural is usually ... the arbitration law at the seat of arbitration'). This general compliance will be further discussed in *infra* Section IV(A) of Chapter III.

²⁷ See also, for example, Jonathan Hill (2012) *op. cit.*, *supra* note 12, at 183-184. ('Where, for example, a defence based on public policy is rejected by the courts of the seat, it does not follow that the defence of public policy under the NYC is bound to fail in other countries. *This is because Article V.2.b NYC refers to the public policy of the country of enforcement (rather than of the seat) and the content of public policy differs from country to country*'). This issue will be further discussed in *infra* Section IV(A) of Chapter III.

denying the connection between the law of arbitral seat and the procedure matters of an international arbitration.²⁸

III. Uncertainties and deficiencies of the existing enforcing standards – from the perspective of competition law

Following the guidance of both the NYC and the Model Law, the pro-enforcement principle is steadily upheld²⁹, which essentially form an enforcement-friendly environment for international arbitration. First, as provided by the Model Law, the grounds for setting aside an arbitral award is exhaustive and restrictively applied (especially for those concerning inarbitrability and violation of public policy as mentioned above), which largely limits the scope of an arbitral award being reviewed before a seat court. Therefore, an award being vacated would not be a routine, and would hence not commonly trigger the mechanism as provided by Article V(1)(e) of the NYC.³⁰ Secondly, since the NYC also provides exhaustive and restrictively applied grounds which are fairly similar to that of as provided in the Model Law for the refusal of enforcement, the review of arbitral award would also be conducted under a rather restrictive attitude and hence maintain the high enforceability of arbitral award. It is hence observable that international commercial arbitration has been greatly increasingly used in the resolution of private commercial dispute³¹ since the enforcement of arbitral award, which is also the matter most concerned by the parties, could normally be expected.³²

Notwithstanding, the enforceability of foreign arbitral award is shrouded with uncertainty when international commercial arbitration starts to take tentative steps

²⁸ This issue will be further discussed in *infra* Section IV(A)(3)(c) and Section IV(B) of Chapter III

²⁹ See, for example, Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 2004, at p. 457 ('... in most countries the "pro-enforcement bias" of the New York Convention has been faithfully observed'); Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 11.105; Fifi Junita, 'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview, *Indonesia Law Review*, Vol. 2, 2015; Vesselina Shaleva, The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia, *Arbitration International*, Vol. 19, No. 1, 2003, at 67.

³⁰ This, however, does not imply that any award which has been vacated will not be enforced at enforcement stage. See *infra* Section IV(A)(3) of Chapter III for more detailed discussion.

³¹ See, for example, the Foreword of Alan Redfern & Martin Hunter (2004) *op. cit.*, *supra* note 29.

³² See Margaret L. Moses (2017) *op. cit.*, *supra* note 22, at p. 244. ('Overall, the New York Convention has been one of the most successful international treaties ... Parties are willing to engage in international arbitration because they have confidence that if they obtain the award, it will be readily enforceable in almost any country in the world where the award debtor's assets can be found.')

into the intersection of both private and public domains. Dispute concerning competition law issues is one of the most representative examples: on the one hand, one of the contracting parties may be harmed owing to the anticompetitive conducts of the counterparty; whilst on the other hand, such anticompetitive conducts may not only influence the harmed party but also the third parties, e.g. downstream customers and other competitors, and the general competition legal order of the market.³³ With competition law disputes increasingly being raised in international arbitration, the pro-enforcement principle as established and consecrated by the NYC and the Model Law seems no longer provide sufficient and persuasive guidance on the enforcement of arbitral awards concerning competition law disputes. More specifically, the uncertainties and potential deficiencies would mainly focus on the interpretation and application of the grounds concerning public interests, i.e. inarbitrability and violation of public policy:

- First of all, although the NYC and the Model Law provide that an enforcing court may refuse to enforce an arbitral award on the ground that the subject matter of the dispute is non-arbitrable, they fail to specify what subject matter of dispute is non-arbitrable, and it hence remains to be seen whether subject matters concerning public interests, such as competition law, by being different from traditional arbitrable disputes which would not make noticeable impact on public interest but merely between the contracting parties, would be suitable for being resolved by international arbitration.
- Secondly, and similarly, since both the NYC and the Model Law remain silent to the precise definition of public policy, it is hence undetermined whether the violations of competition law could be deemed as the violation of public policy and hence lead to the refusal of enforcement.
- Thirdly, the importance as attached to certain laws which concern strong public interest, such as competition law, and the strong motivation of ensuring the compliance of arbitral awards to relevant public legal order may require the reviewing courts to focus more on the legality of an arbitral award

³³ For example, see *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F. 2d 821, 1968, at para. 19. ('A claim under the antitrust law is not merely a private matter ... Antitrust violations can affect hundreds of thousands – perhaps millions – of people and inflict staggering economic damage').

concerning relevant disputes and may therefore break the well-set rule that the reviewing courts shall not re-examine the merits of dispute.

- Fourthly, different jurisdictions may interpret and apply laws concerning strong public interests, such as competition law, differently, and different jurisdictions may also have public interest at different levels when encountering a specific arbitral award. Since as aforesaid that an enforcing court is not obliged to follow a seat court's annulment decision which was made based upon public policy concern, such difference may possibly lead to the uncertainty regarding how an enforcing court should perform when a seat court has already ruled on relevant public policy issues. The NYC itself does not provide a comprehensive answer for the application of this discretion as held by an enforcing court.

IV. Aim and focus of the research

By noticing these uncertainties and potential deficiencies of the existing pattern of enforcing arbitral awards concerning certain public interest, this thesis hence intends to delve into these issues and propose a more balanced and comprehensive standard of enforcing arbitral awards concerning strong public interests by focusing on foreign awards concerning competition law disputes. More specifically, out of the consideration of feasibility of this research, the thesis will focus on EU competition law, which is unquestionably one of the most well-developed competition law systems in the world and is therefore the ideal focus for conducting this research. Pursuant to this choice, the discussion in the following chapters will focus on the scenario under which the place of the performance of parties' contract is within the EU and the arbitral award would mainly influence EU competition legal order.

Speaking of EU competition law, two of the key provisions are Article 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter the 'TFEU')³⁴. As for Article 101, Section (1) of this Article explicitly provides the prohibition of

³⁴ It should be noted that, along with the development of the European Union, the name of the EU itself as well as the provision numbers of these two landmark Articles have undergone some changes. Article 101 and 102 were originally Article 85 and 86 of the Treaty establishing the European Economic Community ('TEEC') from 1957 to 1993 and Article 85 and 86 of the (re-named) Treaty establishing the European Community ('TEC'). The numbering was subsequently changed to Article 81 and 82 of the TEC from 1999 to 2009, and eventually Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) from 2009 to present.

anticompetitive agreements between undertakings, decisions by associations of undertakings and concerted practices which:

‘[M]ay affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market’

Within all prohibited practices, there are five types of practices which are emphasised in this Article:

‘[A]nd in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.’

Also, as stated in Article 101(2), ‘any agreements or decisions prohibited pursuant to this Article shall be automatically void (*nuls de plein droit*)’. Therefore, assuming that two parties enter into a contract which, or certain provisions of the contract which, concerns the practice or practices which fall within the scope of Article 101(1) or even directly concern those five typical scenarios, the contract or the certain provisions of the contract would be highly likely deemed as void (N.B., not voidable)³⁵ automatically.

Besides anticompetitive agreements or practices, another typical breach of EU competition law is abusing dominant position within the internal market, which is provided in Article 102 TFEU:

³⁵ Notably, not only would these five types of anticompetitive practices but also other practices which, although unspecified, fall within the scope of Article 101 would be deemed as void automatically.

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

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.’

It should, notwithstanding, be noted that EU competition law, if being interpreted broadly, would also cover other relevant provisions in the TFEU (e.g. Article 103 – 109 TFEU), EU regulations, directives, etc., which relate to the ‘achievement of the direct aims of safeguarding economic efficiency and promoting the integration of the EU’³⁶. However, the term ‘EU competition law’ as used in this thesis will mainly focus on the aforementioned two key provisions, since as stated that EU competition law issues raised in international arbitration concern typically breaches of Articles 101 and 102 TFEU.³⁷

V. Structure of the thesis

Based upon this focus of research, the thesis will be composed under the following structure. In Chapter II, the connection between international commercial arbitration and EU competition law disputes will be established, including the introduction of

³⁶ Phillip Landolt, *Modernised EC Competition Law in International Arbitration*, Kluwer Law International, 2006, at p. 11.

³⁷ Rolf Trittman & Boris Kasolowsky, ‘Chapter 6 EU Competition Law Arguments in International Arbitration: Practical Steps and Strategic Considerations’, in Gordon Blanke & Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, at para. 6-004. See also Gordon Blanke & Renato Nazzini, *Arbitration and ADR of Global Competition Disputes: Taking Stock (Part I)*, *Global Competition Litigation Review*, No.1, 2008, 46, at 48.

international arbitration as a way of the private enforcement of EU competition law and the basic modalities of arbitrating EU competition law disputes in legal practice. Following this connection, Chapter III of the thesis will then progress to reveal the potential obstacles which may be encountered when enforcing a foreign arbitral award concerning EU competition law under Article V of the NYC, namely the procedural violations as listed in Article V(1)(a) to V(1)(b), the annulment decision made by a seat court as considered in Article V(1)(e) and non-arbitrability/public policy concerns as provided in Article V(2), coupled with the general remarks on each obstacle, e.g. the analysis of the governing law of arbitrability and public policy as well as the general attitude of applying them in refusal of enforcement, and the introduction of remaining issues of the application of each grounds. The research will then focus on the latter three obstacles as they are the core parts which distinguish competition law arbitration from other types of arbitration. In Chapter IV, the evolution of the attitude towards the arbitrability of competition law issues will be examined to shed certain light regarding the development of the arbitrability of other subject matters of dispute which also concern certain public interests. After the research on the arbitrability issue, the focus of Chapter V will then be switched to public policy defence as listed in Article V(2)(b). The discussion will further divide the term ‘enforcing courts’ to the courts of EU Member States and non-EU jurisdictions and start by figuring out whether EU competition law would be categorised as the public policy of both EU and non-EU states. The discussion will then carry on listing three major types of potential breaches of EU competition law in international commercial arbitration and examine whether these breaches would always trigger the public policy defence under Article V(2)(b) of the NYC, followed by examining how an enforcing court, which could be either an EU or non-EU state’s national court, should perform when encountering these potential breaches. By examining on the pattern of an enforcing court reviewing arbitral awards concerning EU competition law issues under Article V(2)(b) of the NYC, a reflection will be made to see how this research would set an example for reviewing arbitral awards concerning other subject matters which also concern certain public interests. Following these discussion and analysis, this research will then progress to Chapter VI and examine the interrelationship between seat courts and enforcing courts. More specifically, since in an international arbitration the arbitral seat may commonly

differ from the enforcement state, it is possible that the seat and the enforcing state may share different viewpoints regarding relevant public policy concerns of competition law. This potential difference will be considered and the influence of a seat court's decision on an enforcing court's judgment will hence be examined, followed by proposing a comprehensive behavioural pattern of an enforcing court reviewing an arbitral award concerning EU competition law issues of which the public policy concern has been examined by the seat court. Again, it is expected that this research could also to certain extent shed light on the allocation of competence between a seat court and an enforcing court when a strong public policy concern is involved. After the discussion and analysis conducted in the previous chapters, Chapter VII will make up the last piece of the research by addressing the interrelationship between procedural autonomy, which is a potential influence factor of the applicability of the previously proposed behavioural patterns, and the protection of public interests, followed by the key points and main contributions of the thesis being concluded in Chapter VIII.

Chapter II – Connecting EU competition law with international commercial arbitration

This research starts with establishing the connection between EU competition law and international commercial arbitration to lay the foundation for the discussion and analysis in the following chapters.

I. International commercial arbitration as a private way of enforcing EU competition law

The relationship between EU competition law and international commercial arbitration begins with the recognition of the possibility of enforcing EU competition law in a private way. Different from the public enforcement of EU competition law of which the main enforcers are the European Commission (hereinafter the ‘Commission’) and national competition authorities³⁸ (hereinafter the ‘NCAs’) who investigate potential unlawful anti-competitive activities based not only upon complaints or reports but also by their own initiative, private enforcement would mainly be conducted by judicial authorities, such as Member States’ national courts or arbitral tribunals, who would only examine alleged violation of EU competition law pursuant to parties’ claims and issue remedies which would generally apply only *inter partes*.

Notably, the private enforcement of EU competition law could only be possibly conducted based upon two crucial prerequisites, namely that EU competition law needs to be, first, directly effective so that parties in disputes could invoke EU competition law to claim their rights as set in EU competition law before judicial authorities. As correctly stated, unless individuals are given rights by the Treaty which they may protect notwithstanding contrary or absent provisions of national law, the question of private enforcement of EU competition rules does not arise.³⁹ Secondly, EU competition law also needs to be applicable, no matter directly or not, before judicial authorities so that these authorities are able to apply relevant EU

³⁸ National competition authorities are designated by each EU Member State and, with the commission, responsible for the application of Article 101 and 102 TFEU. See Article 35 of the Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1. (hereinafter the ‘Regulation 1/2003’).

³⁹ Clifford A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford University Press, 1999, at p. 47.

competition law provisions to resolve disputes. Therefore, before actually connecting EU competition law with international commercial arbitration, both the direct effect and direct applicability of EU competition law should be confirmed first.

A. Direct effect of EU competition law

As for the direct effect of EU law, it has long been affirmed by the European Court of Justice (hereinafter the ‘ECJ’), starting from its decision in *Van Gend en Loos*, a case concerning the direct effect of Article 12 TEEC⁴⁰:

‘[T]his treaty [i.e. the TEEC] is more than an agreement which merely creates mutual obligations between the contracting States ... Community law has an authority which *can be invoked by their nationals before those courts and tribunals*. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.’⁴¹

Following this affirmation, the ECJ further specified the conditions of EU law being directly effective. First,

‘These rights arise not only where they are *expressly granted* by the Treaty, but also by reason of obligations which the Treaty imposes in a *clearly defined* way upon individuals as well as upon the Member States and upon the institutions of the Community.’⁴²

Moreover,

⁴⁰ This Article reads ‘Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other’. In this case, the ECJ was asked for a preliminary ruling in the face of a unilateral increase in Dutch tariff rates and so the question of whether Article 12 TEEC has direct application within the territory of a Member State; in other words, whether nationals of such a State can, on the basis of Article 12 TEEC, lay claim to individual rights which the courts of Member States must protect.

⁴¹ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, at 12. Emphasis added.

⁴² *Ibid*, at 12. Emphasis added.

‘The wording of Article 12 contains a clear and *unconditional* prohibition which is not a positive but a negative obligation. This obligation, moreover, *is not qualified by any reservation* on the part of states which would *make its implementation conditional upon a positive legislative measure enacted under national law*. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.’⁴³

Last but not least, it was opined by Advocate General Mayras opined in *Reyners v. Belgian State* that there remained a third condition,

‘[The application of a directly effective Community law] must not depend on measures being subsequently taken by Community Institutions or Member States with discretionary power in the matter.’⁴⁴

Hence, pursuant to this ‘groundbreaking and by now legendary’⁴⁵ judgment, a provision of EU law should be directly effective as long as it contains a precise and unconditional legal content which do not call for additional legislative measures.

Clearly, these conditions are also applicable when examining the direct effect of EU competition law. As for EU competition law, its compliance with the first condition is undoubted⁴⁶ -- the clarity of EU competition law could be easily seen in both Article 101 and 102 TFEU, which contains, first, clear legal requirements concerning the prohibition of incompatible anti-competitive and abusive behaviours; secondly, clear definition of the object of prohibition; and thirdly, an explicit enumeration of typical anti-competitive or abusive behaviours.

Moreover, as regards its compliance with the second condition, the unconditional nature of EU competition law could also be extracted not only from the wording Article 101 and 102 apply, which reads (in the English drafting style) that anti-competitive and abusive behaviours as caught by both provisions *shall* be prohibited

⁴³ *Ibid*, at 13. Emphasis added.

⁴⁴ The Opinion of Advocate General Mayras in Case 2-74 *Jean Reyners v. Belgian State* [1974] ECR 631, at 661. Emphasis added.

⁴⁵ Gordon Blanke, ‘Chapter 10 The Supranational Dimension of Arbitrating Competition Law Issues within the EU’, in Gordon Blanke & Phillip Landolt, *EU and US Antitrust Arbitration*, Kluwer Law International, 2011, at para. 10-041.

⁴⁶ Clifford A. Jones (1999) *op. cit.*, *supra* note 39, at p. 50.

and any agreements or decisions prohibited pursuant to this Article *shall* be automatically void; but also from the fact that such prohibition and automatic nullification are not subject to any other EU legislation or the reservation which EU Member States could make to evade these obligations. Notably, although Article 103 TFEU provides that the European Council shall lay down appropriate regulations or directives to give effect to the principles set out in Article 101 and 102 and it hence seems that the application of Article 101 and 102 is conditional subject to the Council's legislation, it should be seen that Article 104 TFEU authorises NCAs and Member States' national courts to enforce Article 101 and 102 immediately.⁴⁷ As affirmed in its previous judgment in *De Geus v. Bosch*, the ECJ clearly opined that:

‘The judgment of the Court of Appeal of The Hague raises the question whether Article 85 [now 101 TFEU] has been applicable from the time of entry into force of the Treaty. The answer to this question must in principle be in the affirmative. Article 88 and 89 [now 104 and 105 TFEU] of the Treaty, which confer powers on the national authorities and on the Commission respectively for the application of Article 85, presuppose its applicability from the time of entry into force of the Treaty.’⁴⁸

Notwithstanding, although the first two conditions are satisfied undoubtedly, it may not be the case for the third condition, namely the application of Article 101 and 102 should not depend on ‘further discretionary action by a Community [now Union] institution or Member State’⁴⁹. It could be seen that throughout the development of EU competition law the compliance to this criterion was not consistently affirmed.

Article 101(3) TFEU provided that anti-competitive agreement, decision or practice may be allowed if they contribute to improving the production or distribution of goods or to promoting technical or economic progress whilst allowing consumers a fair share of the resulting benefit. This exemptive power was once possessed exclusively by the Commission. According to Article 4(1) of Regulation No. 17: First Regulation Implementing Article 85 and 86 of the Treaty,

⁴⁷ *Ibid.*

⁴⁸ Case 13/61, *De Geus v. Bosch* [1962] ECR 45, at 51.

⁴⁹ Clifford A. Jones (1999) *op. cit.*, *supra* note 39, at p. 51.

‘Agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85 (3) *must be notified to the Commission*. Until they have been notified, no decision in application of Article 85 (3) may be taken.’⁵⁰

Moreover, Article 9(1) of the Regulation further centralised the power of the Commission by providing that,

‘Subject to review of its decision by the Court of Justice, the Commission shall have *sole power* to declare Article 85(1) inapplicable pursuant to Article 85(3) of the Treaty.’⁵¹

These two provisions thus inevitably placed the applicability of applying Article 85(3) TEEC in the exclusive territory of the Commission. Notwithstanding, this centralised situation has been greatly changed since year 2003. After being ‘beleaguered in holding back a flood of notifications’⁵² of which the majority ‘present[s] no hint of Community interest or threat to competition’⁵³, the Commission determined to refocus on ‘particularly threats to competition’⁵⁴ and hence spread around of responsibility for enforcing EC competition law to NCAs and the Member States’ national courts.⁵⁵ According to Regulation 1/2003, national courts and NCAs are now under no obligation of notification and also qualified to consider and render exemptions of anti-competitive activities as provided in Article 101(3) TFEU:

‘Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, *no prior decision to that effect being required*.’⁵⁶

Therefore:

‘The competition authorities of the Member States shall have the power to apply Article 81 and 82 of the Treaty in individual cases.’⁵⁷

⁵⁰ Emphasis added.

⁵¹ Emphasis added.

⁵² Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 39.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, at p. 38.

⁵⁵ *Ibid.*

⁵⁶ Article 1(2) of Regulation 1/2003. Emphasis added.

And that,

‘National courts shall have the power to apply Article 81 and 82 of the Treaty.’⁵⁸

Hence, since the introduction of the Regulation 1/2003, the applicability of applying Article 81(3) TEC (now Article 101(3) TFEU) has been dragged from the exclusive territory of the Commission, and there should be no further doubt that the application of Article 101 and 102 does not call for any additional measures, at either national or EU level.

It hence follows the foregoing considerations that, since the set criteria are fully satisfied, it is therefore fully tenable to conclude that Article 101 and 102 TFEU are directly effective.

B. Direct applicability of EU competition law

Once the direct effect of EU competition law is affirmed, it would be naturally expected that, based upon its clear and unconditional nature, EU competition law could also be directly applied by judicial authorities to examine disputes concerning EU competition law. Indeed, as for the direct applicability of Article 101(1) and 102, as the ECJ positively viewed in *BRT*:

‘The competence of those courts [i.e. Member States’ national courts] to apply the provisions of Community law, particularly in the case of such disputes [i.e. EU competition law disputes], *derives from the direct effect of those provisions.*

As the prohibition of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of the individuals concerned which the national courts must safeguard.’⁵⁹

⁵⁷ Article 5 of Regulation 1/2003.

⁵⁸ Article 6 of Regulation 1/2003.

⁵⁹ Case 127/73, *Belgische Radio en Televisie v. Société Belge des Auteurs Compositeurs et Editeurs de Musique* [1974] ECR 51, at paras. 15 to 16. Emphasis added. See also, for example, Case C-234/89, *Delimitis v. Henninger Bräu* [1991] ECR I-935, at para. 43; Case C-292/95 P, *Guérin Automobiles v. Commission* [1997] I-1531, at para. 39; Case C-453/99, *Courage Ltd. v. Crehan* [2001] ECR I-6297, at para. 23.

Moreover, since as aforementioned that the Regulation 1/2003 has removed the limitation of NCAs and national courts in applying Article 101(3) TFEU, both Article 101 and 102 have also been fully applicable before Member States' national courts.⁶⁰

Nevertheless, confirming the direct applicability of EU competition law before national courts may not necessarily lead to the conclusion that EU competition law is also applicable before arbitral tribunal -- it should be noted that Regulation 1/2003 remains silent on whether EU competition law, especially Article 101(3), is directly applicable before arbitral tribunals. However, such silence should not be interpreted as excluding the applicability of (now) EU competition law before arbitral tribunals. It is rather clear that 'The Modernisation project very much relies on the private enforcement of EC competition law to ensure the adequate overall enforcement of EC competition law'⁶¹. Since international arbitration is undoubtedly an important private dispute resolution mechanism and the prevalence of international arbitration in international commerce would clearly lead to that 'arbitral tribunal will often find themselves adjudicating matters of EC competition law'⁶², proposing that arbitral tribunal could not apply (now) EU competition law merely based upon the silence of Regulation 1/2003 would be simply unconvincing.

Still, a more plausible reason to exclude arbitral tribunals from applying EU competition law might be the consideration of EU competition law issues being inarbitrable, i.e. not suitable for settlement by arbitration, based upon the considerations of, for example, the 'inability of arbitrators to get involved'⁶³ in EU competition law issues. This concern will be addressed in more detail in Chapter IV, but it is worth noting at this point that this reason is a rather practical one which has no correlation to the inherent inapplicability of EU competition law before arbitral tribunal. In other words, besides this pragmatic consideration, one could see no theoretical reason to uphold such exclusion.

⁶⁰ Phillip Landolt (2006) *op. cit.*, *supra* note 36, at pp. 36-39.

⁶¹ *Ibid.*, at p. 39.

⁶² *Ibid.*

⁶³ Assimakis P. Komninos, 'Chapter 12 Arbitration and EU Competition Law in the Post-Modernization Era', in Gordon Blanke & Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, at para. 12-122.

II. Modalities of raising competition law issues in international arbitration

According to the discussion above, it is hence tenable to conclude at this point that, from a theoretical perspective, international commercial arbitration is clearly capable of being a private way of enforcing EU competition law pursuant to the well affirmed direct effective and applicability of EU competition law.⁶⁴ More specifically, the involvement of EU competition law in international commercial arbitration may be potentially observed in two main scenarios.

A. Raising competition law issues defensively

The first one concerns raising competition law issues defensively. The typical scenario is that two individuals entered a contract which contains an arbitration agreement and one of the parties subsequently claims that the counterparty breaches the contract by, say, failing to fulfil the obligation. In order to counter-argue this claim, the defendant then raises competition law issues as a ‘shield’⁶⁵ by stating that the contract is in violation of EU competition law and should be void, and his obligation under the contract could therefore be evaded.

B. Raising EU competition law issues proactively

In contradistinction to raising EU competition law as a defence, the second way concerns raising competition law issues as a ‘sword’⁶⁶. This could happen in a case concerning a damage claim of a co-contractor of an anti-competitive agreement based upon the harm incurred through his counterparty’s behaviour under the agreement.⁶⁷

Notwithstanding, a doubtful point of this scenario may be raised concerning the principle *ex dolo malo non oritur causa*, i.e. no right of action can have its origin in

⁶⁴ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 2.112 (‘In principle, any dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a national court.’)

⁶⁵ Tim Ward & Kassie Smith, *Competition Litigation in the UK*, Sweet & Maxwell, 2005, at para. 10-021.

⁶⁶ Assimakis P. Komninos (2011) *op. cit.*, *supra* note 63, at para. 12-093.

⁶⁷ *Ibid.*

fraud⁶⁸ – since the party claiming for damages is himself a co-contractor of the illegal anti-competitive agreement, his recourse should automatically fail, and competition law issues could not be raised offensively.

This issue was raised in *Courage v. Crehan*⁶⁹, although which did not directly concern raising EU competition law issues in international arbitration. In this case, Mr. Crehan signed a contract with Courage Ltd, a brewery. In accordance with the contract, Mr. Crehan rented a Courage pub for twenty years whereby he had to buy a fixed minimum quantity of beer exclusively from Courage. Mr. Crehan later fell into financial arrears, basically blaming this on Courage's supply of beer at lower prices to other non-tied pubs whilst in the same year, Courage brought an action for the recovery of Mr. Crehan's unpaid deliveries of beer. Mr. Crehan then alleged the incompatibility with Article 81(1) EC of the clause based upon the requirement of purchasing a fixed minimum quantity of beer from Courage and counterclaimed for damages for his financial arrears.

The case was first brought before the High Court of England and Wales and subsequently before the Court of Appeal. The latter then referred this case to the ECJ for preliminary ruling on the question that whether a party of a prohibited anti-competitive agreement retains his right to claim for damage. The ECJ opined that there should not be an absolute bar to the action of claiming damage being brought by a party to a contract which would be held to violate the competition rules⁷⁰ since:

‘The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to *any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition.

From that point of view, actions for damages before the national courts can

⁶⁸ This translation was given in Assimakis P. Komninos (2011) *op. cit.*, *supra* note 63, footnote 52, at para. 12-035.

⁶⁹ *Courage Ltd. v. Crehan (No. 1)* [1999] E.C.C. 455 (CA).

⁷⁰ Case C-453/99, *Courage Ltd. v. Crehan* [2001] ECR I-6297, at para. 28.

make a significant contribution to the maintenance of effective competition in the Community.’⁷¹

Therefore, instead of simply refusing the right to damages on the basis that Mr Crehan was a party of the illegal agreement, which would bar the claim in English law,⁷² the national court should take into account matters including the economic and legal context in which the parties find themselves and the respective bargaining power and conducts of the two parties to the contract:

‘In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.’⁷³

This ruling opened a new path for reconciling the potential conflict between the well-set principle *nemo auditur turpitudinem propriam (suam) allegans*⁷⁴ or estoppel and the right to claim damages: the latter should not be merely deemed as parties seeking for redress but also a motivation of revealing illegal anti-competitive agreements. As inspiringly pointed out,

‘Private antitrust actions, apart from their compensatory function, further the overall deterrent effect of the law. Thus, economic agents themselves become instrumental in implementing the regulatory policy on competition and the general level of compliance with the law is raised.’⁷⁵

Moreover, since from the perspective of the private enforcement of EU competition law there is no fundamental difference between court litigation and arbitration, the aforementioned rationale should also be applicable to the scenario of arbitrating EU competition law: a contracting party claiming damages in an international arbitration

⁷¹ *Ibid*, at paras. 26 to 27. Emphasis added.

⁷² See *Gibbs Mew PLC v. Graham Gemmell* [1998] EuLR 588 (CA).

⁷³ Case C-453/99, *Courage Ltd. v. Crehan* [2001] ECR I-6297, at para. 32.

⁷⁴ i.e. no one is heard when alleging one’s own wrong. This translation was given in Assimakis P. Komninos (2011) *op. cit.*, *supra* note 63, footnote 50, at para. 12-035.

⁷⁵ Assimakis P. Komninos (2011) *op. cit.*, *supra* note 63, footnote 62, at para. 12-038.

for counterparty's violation of an agreement which could be liable to restrict or distort competition should not be deemed as automatically failed.

Chapter III – The mechanism of reviewing foreign arbitral awards at enforcement stage under the NYC: basic understanding and remaining questions

It thus follows from the discussion in Chapter II that, from a theoretical perspective, there is no obstacle hindering EU competition law issues from being raised in international arbitration. Once an EU competition law issue was raised as either a ‘sword’⁷⁶ or as a ‘shield’⁷⁷ in an international arbitration and the tribunal has examined and rendered its award, the award will then enter the reviewing stage: it might go through the examination conducted by the court of arbitral seat, and will eventually have its destiny be decided before the court of enforcement.

The mechanism of reviewing international awards at enforcement stage, including those concerning EU competition law disputes, is laid down in the landmark provision Article V of the NYC, which consists of four main grounds for potentially refusing the enforcement of foreign arbitral award. First of all, Article V(1)(a) – (d) sets forth four intrinsic⁷⁸ procedural violations, namely the incapacity of parties or the invalidity of arbitration agreement⁷⁹, lack of proper notice or parties being unable to present their case⁸⁰, arbitrators acting *ultra vires*⁸¹, and the non-compliance of the composition of the tribunal or the arbitral procedure with parties’ agreement or the law of the arbitral seat⁸². Secondly, Article V(2)(a) allows the potential refusal of enforcement if the subject matter of parties’ dispute is not capable of settlement by arbitration under the law of the enforcing state. Thirdly, Article V(2)(b) provides that the violation of enforcing state’s public policy may lead to non-enforcement. Fourthly, Article V(1)(e) brings the court of arbitral seat into consideration and states that if an arbitral award has been set aside by the seat court, the enforcing court may refuse to enforce the award. Notably, since the procedural violations which may exist in arbitrating EU competition law disputes would not be distinguishably different

⁷⁶ Assimakis P. Komninos (2011) *op. cit.*, *supra* note 63, at para. 12-093. See also Tim Ward & Kassie Smith (2005) *op. cit.*, *supra* note 65, at para. 10-022.

⁷⁷ Tim Ward & Kassie Smith (2005) *op. cit.*, *supra* note 65, at para. 10-021.

⁷⁸ Georgios C. Petrochilos, Enforcing Awards Annulled in their State of Origin under the New York Convention, *International and Comparative Law Quarterly*, Vol.48, 1999, at 862.

⁷⁹ Article V(1)(a) of the NYC.

⁸⁰ Article V(1)(b) of the NYC.

⁸¹ Article V(1)(c) of the NYC.

⁸² Article V(1)(d) of the NYC.

from that of during the process of arbitrating disputes concerning other subject matters, they will not be particularly considered, and the focus of the research is hence placed upon the remaining three.

Although the application of the rest of three grounds in enforcing arbitral awards concerning EU competition law disputes will be delved into in the following Chapter IV to VI, it would be worth making a general remark on each of them at this point to establish a basic understanding as well as reveal relevant remaining questions of their application in legal practice, and hence lay the foundation for the analysis in the following chapters. Notably, since inarbitrability and violation of public policy are also two legitimate grounds for setting aside an arbitral award⁸³ and might hence be well invoked under both the annulment and enforcement stages, a comprehensive examination of Article V(2)(a) and V(2)(b) would inevitably touch upon the interrelationship between a seat court and an enforcing court. However, for the purpose of clarity, the following Section II and III of this Chapter will only focus on relevant public policy and arbitrability issues under the scenario that an arbitral award is directly brought before an enforcing court after it being rendered⁸⁴, whilst leaving the questions concerning the interrelationship between a seat court and an enforcing court's viewpoints of relevant inarbitrability and violation of public policy to Section IV of this Chapter, in which relevant issues of Article V(1)(e) will be examined.

I. The permissive wording as applied in Article V of the NYC and the discretionary power of enforcing courts

Before examining each of the three grounds, a distinct feature shared by all of them should be addressed first. It could be clearly observed through a brief peruse of the text of Article V that, instead of laying down compulsory grounds for refusing the enforcement of arbitral award, it applies a permissive tone, which reads that:

⁸³ See, for example, Article 34(2)(b)(ii) of the Model Law.

⁸⁴ Therefore, Chapter VI and V of this thesis which examine the uncertainties as raised by Section II and III of this Chapter will also focus on the scenario that an arbitral award is directly brought before an enforcing court after it being rendered.

‘1. Recognition and enforcement of the award *may* be refused ... only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

...

(e) The award ... has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award *may* also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.’⁸⁵

A. ‘May’ or actually ‘Shall’?

The term ‘may’ as applied in the text is clearly an attention catcher. It might well ‘lure’ a reader to reach the seemingly obvious conclusion that Article V ‘establishes a discretion that is general and equally applicable to each of the grounds for non-enforcement’⁸⁶. However, this rather plausible interpretation was questioned by those who noticed the ‘linguistic discrepancy’⁸⁷ between the French and English versions, which are both authentic versions of the Convention⁸⁸. Different from the English version, the French version reads that ‘La reconnaissance et l’exécution de la sentence ne seront refusées ... que si ...’⁸⁹, which, as opined, may suggest that the

⁸⁵ Emphasis added.

⁸⁶ Jonathan Hill, The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958, *Oxford Journal of Legal Studies*, Vol. 36, No. 2, 2016, at 305.

⁸⁷ Georgios C. Petrochilos (1999) *op. cit.*, *supra* note 78, at 858.

⁸⁸ See Article XVI of the NYC, which states that Chinese, English, French, Russian and Spanish versions of the Convention are all equally authentic.

⁸⁹ i.e. ‘recognition and enforcement of the award shall not be refused ... unless ...’ This translation was given in Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, *Arbitration International*, Vol. 14, No. 2, 1998, at 228.

authors of the French text might imply that under the grounds as listed, the enforcement of an arbitral award *shall* be refused.⁹⁰

However, this interpretation is simply based upon a suggested implication, of which the reliability is far from being persuasive. First of all, this interpretation would place the French version on a rather opposite situation to its four siblings. Besides the English version, it could be interestingly found that not only do the Chinese and Russian versions correspond fully to the English version⁹¹, but also the Spanish version, which is linguistic proximal to the French version, is somehow surprising congruent with the English one.⁹² One would hence have to ask that whether this is actually the case that this ‘singular nuance in the French text’⁹³ should be understood in this way.⁹⁴

Secondly, following the semantic discussion, it should also be noted that (in keeping with standard English drafting) the mandatory ‘shall’ is used in other provisions of the NYC, e.g. in Article II(1) and IV(1). With the presumption that the drafters of the Convention would be rather cautious of the wording they applied in the text standing plausible, such clearly observable distinction of wording applied would hence suggest ‘*inclusio unius est exclusio alterius*’⁹⁵, namely that the inclusion of a term will be the exclusion of another term as used in legal text.

Thirdly, and most importantly, when tracing back to the historic development of the Convention, the inclusion of the term ‘may’ seem to be ‘intentional and formed part of a wider drafting compromise’⁹⁶. The predecessor of the NYC, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (hereinafter the ‘Geneva Convention’), provided grounds under which the recognition and enforcement of an arbitral award *shall* be refused, and such mandatory refusal was subsequently also

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, at 229. See also Georgios C. Petrochilos (1999) *op. cit.*, *supra* note 78, at 858.

⁹² Jan Paulsson (1998) *op. cit.*, *supra* note 89, at 229. The Spanish version reads ‘Sólo se podrá denegar el reconocimiento y la ejecución de la sentencia ... si esta parte ...’.

⁹³ *Ibid.*

⁹⁴ Another example which could support this doubt is that in other provisions which the Convention provides for some discretion, there seems to be no such discrepancy between the English and French versions. One of the most representative examples is that Article VI reads in English version as ‘*may*’ whilst in French version reads ‘*peut*’, which means ‘can’ in English. See Georgios C. Petrochilos (1999) *op. cit.*, *supra* note 78, at 860.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, at 859.

upheld in the Preliminary Convention drafted by the International Chamber of Commerce,⁹⁷ although the intention of which was to loosen the strict requirements as set in the previous Geneva Convention.⁹⁸ However, this mandatory term has been abandoned since the ICC initiative of amending the original Geneva Convention was taken over by the United Nations Economics and Social Council (hereinafter the ‘ECOSOC’), which subsequently recommended a new version of the draft Convention in which the term ‘shall’ was replaced by ‘may’ to further protect the finality of arbitral awards. Although there was no further discussion regarding this amendment but merely the replacement as reflected in the *travaux préparatoires* of the NYC, it is clear that such amendment should be interpreted as an intentional behaviour by the drafters, especially by considering the trend of marching towards a more enforcement-friendly environment.⁹⁹ As being correctly opined,

‘That the convention’s drafters specifically chose to use the word ‘may’ rather than ‘shall’ shows their intention to preserve the discretion of every legal system to decide for itself, and, based on its own standards, whether or not an arbitral award meets the conditions of recognition and enforcement.’¹⁰⁰

It hence follows the foregoing analysis that, the discretionary nature of Article V has been plausibly established. As stated,

‘The discretionary nature of Art V is now well accepted internationally. There is no longer any argument, or any sustainable argument, that would suggest that the word ‘may’ in Art V should mean anything other than a discretionary ‘may’ as opposed to a mandatory ‘shall’.’¹⁰¹

⁹⁷ See Article IV of the ICC draft Convention.

⁹⁸ See, for example, Enforcement of International Arbitral Awards -- Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953, at 2.

⁹⁹ This now unquestionable principle could be extracted from, for example, the ICC draft Convention in which it abandoned the requirement of arbitral award being final before being enforced. See also Enforcement of International Arbitral Awards -- Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953, at para. 14. (‘... going further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards’)

¹⁰⁰ Emmanuel Gaillard, The Representations of International Arbitration, *New York Law Journal*, Vol. 238, No. 67, 2007, at 1-2.

¹⁰¹ Teresa Cheng, ‘Celebrating the Fiftieth Anniversary of the New York Convention’, in Albert Jan van den Berg, *50 Years of the New York Convention: ICCA International Arbitration Conference*, Kluwer Law International, 2009, 679, at 680. See also, for example, Margaret L. Moses (2017) *op. cit.*,

B. Review the general application of the discretion in legal practice

Notwithstanding, notably, although the discretionary power of enforcing courts is persuasively affirmed, the NYC failed to make a step forward and touch upon the next key issue, i.e. how exactly this discretionary power should be exercised in legal practice. The silence of the Convention on this issue hence leaves, at least in theory, a huge space for the Contracting States of the Convention to interpret and establish their own specific mechanisms concerning how these provisions would actually be applied in practice, which would therefore lead to potential uncertainties.

Fortunately, the relevant legal practice shows the convergence upon the strict attitude towards the application of discretion based upon the so-called ‘pro-enforcement bias’ of the NYC, which was opined to be ‘designed for the purpose of facilitating the effective recognition and enforcement of foreign and nondomestic awards’¹⁰² and essentially puts enforcing courts at an auxiliary position of which the duty is to assist, but not freely intervene in, the enforcement of arbitral awards. The rationale is rather straightforward: if an enforcing court could unconditionally dismiss the decision made by an arbitral tribunal, what is the point of allowing the dispute to be examined by the tribunal at the first place? Therefore, as pointed out:

‘Developed international arbitration regimes adopt an avowedly “pro-enforcement” approach to the recognition [and enforcement] of international arbitral awards. Assuming that the existence of an award, satisfying applicable jurisdictional requirements, has been proven by the award-creditor, these regimes impose a *presumptive obligation* on national courts to recognize [or enforce] the award.’¹⁰³

supra note 22, at p. 238; Reyadh Seyadi, Enforcement of Arbitral Awards Annulled by the Court of the Seat, *Arbitration*, Vol. 84, No. 2, 2018, at 131-132.

¹⁰² Gary Born (2014) *op. cit.*, *supra* note 21, at p. 3411. See Article III of the Convention, which reads: ‘Each Contracting State Shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards’.

¹⁰³ Gary Born (2014) *op. cit.*, *supra* note 21, at p. 3410. Emphasis added.

This understanding of the purpose of the NYC was reported to be uniformly recognized,¹⁰⁴ and is reflected more specifically in legal practice in three main aspects. The first concerns the narrow interpretation on the grounds as listed in Article V.¹⁰⁵ For example, the Ninth Circuit, United States Court of Appeals in *Gould*, by firmly recognising the general pro-enforcement bias of the Convention, adopted a narrow interpretation of defence based upon arbitrator exceeding authority, which is provided in Article V(1)(c) of the Convention.¹⁰⁶ Similarly, when dealing with Article V(1)(b) of the NYC, it was reported that the key elements of this Article, such as the connotation of ‘proper notice’ and ‘unable to present his case’, are also interpreted narrowly.¹⁰⁷

The second concerns the threshold of the severity of relevant violations. It was opined that Article V should not lead to refusal if the violation of one of the grounds of Article V is only marginally present and if its absence would still have led to the same award.¹⁰⁸ A representative example is that although Article V(1)(d) of the Convention provides that the discordance between arbitral procedure or arbitral

¹⁰⁴ *Ibid*, at 3412. See also, for example, Margaret L. Moses (2017) *op. cit.*, *supra* note 22, at pp. 231-232; Italy No. 104, *Holzindustrie Schweighofer GmbH v. Industria Legnami Trentina – ILET srl*, Corte di Appello [Court of Appeal] of Florence, Not Indicated, 3 June 1988, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 1990 - Volume XV*, Kluwer Law International, at p. 499 (‘The New York Convention clearly aimed at making the enforcement of foreign arbitral awards easier’); *Aloe Vera of Am. Inc. v. Asianic Food (S) Pte Ltd.*, Singapore High Court [2006] 3 S.L.R 174, at para. 40 (‘there is the principle of international comity enshrined in the Convention that strongly inclines the courts to give effect to foreign arbitration awards’); *Industrial Risk Insurers v. Man GHH*, 141 F.3d 1434 (11 Cir. 1998), at 1440. (‘The purpose of the New York Convention ... is to “encourage the recognition and enforcement of international arbitral awards,” *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983), to “relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation.” *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11 Cir. 1981).’); *Parsons & Whittemore Overseas Co. Inc. v. Societe General De L’Industrie Du Papier*, 508 F.2d 969, 1974, at 973; *Dardana Ltd. v. Yukos Oil Co.* [2002] E.W.C.A. Civ 543, at para. 10; *Gater Assets Ltd v. Nak Naftogaz Ukrainy* [2007] E.W.H.C. 697, at para 29; *China Nanhai Oil Joint Serv. Corp. Shenzhen Branch v. Gee Tai Holdings Co.*, [1994] H.K.C.F.I. 215; *Renusagar Power Co. Ltd. v. General Electric Company*, Supreme Court of India [1994] AIR 860, at para. 22-23, 33, and 41.

¹⁰⁵ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 Edition, at p. 125. (‘courts in the Contracting States have generally construed the grounds for refusal under the Convention narrowly’)

¹⁰⁶ *Ministry of Defense of the Islamic Republic of Iran v. Gould, INC*, 969 F.2d 764 (9th Cir. 1992), at 770.

¹⁰⁷ See UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 Edition, at p. 157 and 166.

¹⁰⁸ Marike R. P. Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International, 2016, at p. 174. (‘[I]f a violation of due process was minor and did not affect the outcome of the arbitration, such a violation may be characterized as *de minimis* and should not lead to refusal of enforcement of the award.’)

authority and the agreement of the parties might lead to the refusal of enforcement, such discordance shall be obvious and may possibly lead to a different award. As could be found in the *Travaux Préparatoires* of the Convention:

‘It was pointed out that [Article V(1)(d)] could cause the frustration of awards if any differences, however small and insignificant, are found to occur in the arbitration procedure agreed upon between the parties and the laws prevailing in the territory where the arbitrators actually met.’¹⁰⁹

Another example is the severity threshold of the application of Article V(1)(b). As stated, ‘it is not uncommon for courts to require parties opposing enforcement under Article V(1)(b) to prove not only a breach of due process, but also that the outcome of the case would have been different had the alleged breach not occurred’¹¹⁰. Following this requirement, the *Oberlandesgericht Frankfurt* once ruled that violation of due process would be able to trigger the refusal of enforcement only when it would plausibly lead to a substantive change of the award.¹¹¹

Last but not least, the enforcement court, when examining whether there is a serious violation as listed in Article V of the Convention, may not review on the merits of the disputes. Since the role played by an enforcing court in an international arbitration is essentially an auxiliary court which is merely authorised to decide whether to enforce an award instead of hearing and judging on the merits of dispute,

¹⁰⁹ Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires – Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Note by the Secretary-General*, at 6. U.N. Doc. E/Conf.26/2 (6 March, 1958), at p. 6. See also, for example, *Creditor under the award v. Debtor under the award*, Oberlandesgericht [OLG] Karlsruhe, Germany, 14 September 2007, 9 Sch 02/07, in which the German court rejected the argument for the refusal of enforcement that the arbitral tribunal had been appointed by the wrong authority since the party could not convincingly prove that a different appointment procedure would have led to a different ruling.

¹¹⁰ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 Edition, at p. 168-169.

¹¹¹ Germany No. 104, *Buyer v. Seller*, Corte di Appello [Court of Appeal], Frankfurt, 26 SchH 03/09, 12 October 2009, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 2010 - Volume XXXV*, Kluwer Law International, at p. 380. (‘Due process, reasoned the court, is guaranteed when each party may express its opinion as to the factual and legal aspects of the case and the arbitral tribunal discusses and considers all relevant arguments of the parties. The latter condition does not mean, however, that the arbitrators must deal with all details of the arguments of the parties in the written reasons for their award, or that silence in respect of one argument necessarily means that it has been ignored, *unless that argument is essential for rendering the award.*’)

the enforcement procedure should therefore not be a ‘*de facto* appeal’¹¹². For example, the House of Lords clearly stated in *Lesotho Highlands*, that Article V must be construed narrowly and should never lead to a re-examination of the merits of the award¹¹³. By the same token, the *Cour Supérieure de Justice* once held that,

‘The New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits ... Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal’s award.’¹¹⁴

It could therefore be clearly seen that the discretion possessed by an enforcing court under the NYC is actually considerably restricted. Notwithstanding, it should also be noted that the review on the application of an enforcing court’s discretion under Article V as conducted above is a rather general one, and its specific connotation under Article V(2)(a)¹¹⁵, V(2)(b)¹¹⁶ and V(1)(e)¹¹⁷ should be further examined under each Articles. This would be particularly true for Article V(1)(e), since these three widely accepted golden rules do not directly concern the interrelationship between a seat court and an enforcing court.

II. Public policy and Article V(2)(b) of the NYC

The first ground to be examined is the public policy defence as provided in Article V(2)(b) of the NYC¹¹⁸, which draws the attention to the following preliminary questions.

¹¹² Marike R. P. Paulsson (2016) *op. cit.*, *supra* note 108, at p. 168. (‘The Court also must remain mindful of the principle that judicial review of arbitral awards is extremely limited and that this Court does not sit to hear claims of factual or legal error by an arbitrator in the same manner that an appeals court would review the decision of a lower court ... If the enforcing authorities were to proceed in each case with a full re-examination of such awards, the purpose of the Convention would be defeated’)

¹¹³ *Lesotho Highlands Development Authority v. Impregilo SpA and others* [2005] U.K.H.L. 43, at para. 30.

¹¹⁴ Luxembourg No. 1, *Kersa Holding Company Luxembourg v. Infancourtage, Famajuk Investment and Isny, Cour Supérieure de Justice* [Court of Appeal], Not Indicated, 24 November 1993, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 1996 - Volume XXI*, Kluwer Law International, at p. 624.

¹¹⁵ See *infra* Section III(D) of this Chapter.

¹¹⁶ See *infra* Section II(C) of this Chapter.

¹¹⁷ See *infra* Section IV(A) of this Chapter.

¹¹⁸ Although according to the order of the provisions of the NYC that Article V(2)(a) should come first and arbitrability issue is actually the most fundamental question since it concerns whether a subject matter could be arbitrated at the first place, as will be seen in Section III of this Chapter,

A. The definition of public policy under Article V(2)(b)

The first and also the most fundamental issues concerning the public policy defence is to understand what public policy is. Different from the provisions in Article V(1) which apply a relatively clear expression of each procedural violation, Article V(2)(b) fails to maintain such level of clarity -- although it explicitly provides that the violation of public policy could be potentially resorted to refuse the enforcement of arbitral awards, it fails to make a step forward to demonstrate what exactly public policy is.

1. Public policy as defined in national legislation

Since seeking the definition of public policy from the text of the Convention has stuck in an impasse, one hence needs to resort to other resources for a more detailed definition. One of the most authoritative resources is relevant national legislation. However, quite surprisingly, according to the Report on the Public Policy Exception in the New York Convention which covers more than forty jurisdictions, only three of them, i.e. the United Arab Emirates (hereinafter the 'UAE'), Australia and Sweden,¹¹⁹ have statutorily defined the term 'public policy'.

As for the UAE, Article 3 of the Civil Transactions Law states in general (which does not limit to arbitration) that:

'[public order] include[s] matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to system of government, freedom of trade, the circulation of wealth, rules of individual ownership and *the other rules and foundations upon which society is based*, in such a

arbitrability issue is essentially examined based upon the public policy concern of a jurisdiction. Therefore, based upon the consideration of logic inherence, the preliminary questions of public policy will be examined first. After examining the preliminary questions of both public policy and arbitrability and laying the foundation for the following chapters, the order of the provisions of the NYC will then be re-followed and relevant arbitrability issues will then be examined first when the consideration of these two grounds being further concretised under the scenario of enforcing foreign arbitral awards concerning EU competition law.

¹¹⁹ IBA Subcommittee on Recognition and Enforcement of Arbitral Awards – Report on the Public Policy Exception in the New York Convention, October 2015, at 2.

manner as not to conflict with the *definitive provisions and fundamental principles of the Islamic Sharia.*¹²⁰

Moreover, with regards to Australia, Section 8(7A) of the 1974 International Arbitration Act reads that ‘the enforcement of a foreign award would be contrary to public policy if (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of *the rules of natural justice* occurred in connection with the making of the award.’¹²¹

Last but not least, as for Sweden, Section 55(2) of the Swedish Arbitration Act, instead of using the term ‘public policy’, provides that:

‘Recognition and enforcement of foreign arbitral award shall also be refused where a court finds:

...

2. that it would be manifestly incompatible with the *fundamental principles* of Swedish law to recognise and enforce the arbitral award.’¹²²

The definitions given by these three jurisdictions do assist to form the outline of public policy: it should be the rules and principles upon which the legal system of the individual jurisdiction is based. Nevertheless, such definition is still too vague to be satisfactory -- wording such as ‘fundamental principles’, ‘the rules of natural justice’ and ‘rules and foundations’ are too broad to convey a precise understanding of public policy.

2. Public policy as defined in case law

Although the research on national legislations does not reveal much, there is still another option on the table: one who attempts to figure out what exactly public policy is could still shift his attention to analyse the court’s definitions of public policy.

¹²⁰ This translated version was provided in Hassan Arab & Laila El Shentenawi, The UAE Country Report on the Public Policy Exception in the New York Convention, at 3. Emphasis added.

¹²¹ Emphasis added.

¹²² This translated version was provided in Pontus Ewerlöf, Sweden Country Report on the Public Policy Exception in the New York Convention, at 2. Emphasis added.

Notwithstanding, again, the result is fairly discouraging. Although different jurisdictions may apply different wording, the essence of their definitions is the same. As reported, in the vast majority of jurisdictions, public policy is commonly defined as a vague term close to fundamental or basic principles or values by national courts.¹²³ For example, the German *Bundesgerichtshof* commonly defines public policy as ‘fundamentals of public and economic life’¹²⁴; the Swiss *Tribunal fédéral* stated in one of its decision that public policy was the ‘fundamental values of the Swiss legal order’¹²⁵, and public policy is generally construed as ‘fundamental principles and values that reflect public interest’¹²⁶ in Finland. It could be clearly found that, domestic courts seem, in general, have difficulty in ‘precisely defining the meaning and scope of the notion’.¹²⁷

3. Defining public policy precisely: feasible or impractical?

It hence follows from the research above that the difficulty of precisely defining public policy still remains even after examining both national legislation and case law of different jurisdictions. A query hence arises: can public policy be defined with any precision at all?

For answering this question, the decision of the Indian Supreme Court in *Brojo Nath Ganguly* is worthy quoting here:

‘From the very nature of things, the expressions ‘public policy’, ‘opposed to public policy’, or ‘contrary to public policy’ are *incapable of precise definition*. Public policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the

¹²³ IBA Subcommittee on Recognition and Enforcement of Arbitral Awards – Report on the Public Policy Exception in the New York Convention, October 2015, at 6.

¹²⁴ BGH NJW 1986, 3027, 3028, as quoted in Maxi Scherer, German Country Report on the Public Policy Exception in the New York Convention, at 2.

¹²⁵ Decision of the Swiss *Tribunal fédéral* dated September 25, 2014, ref. 5A_165/2014, cons. 5. This translated version was quoted in Dominique Brown-Berset, Switzerland Country Report on the Public Policy Exception in the New York Convention, at 2.

¹²⁶ Marko Hentunen & Thomas Kolster, Finland Country Report on the Public Policy Exception in the New York Convention, at 1.

¹²⁷ IBA Subcommittee on Recognition and Enforcement of Arbitral Awards – Report on the Public Policy Exception in the New York Convention, October 2015, at 6.

public interest has *varied from time to time*...Practice which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience'¹²⁸

This quoted paragraph conveys an important message: public policy is incapable of precise definition because the content of public policy is floating – it would change through the passage of time.¹²⁹ Furthermore, such message would also trigger the thought that, since public policy may float through its vertical development, it may well diversify through its horizontal development: the public policy of one state might not be indubitably embraced by other states. For example, different from many other jurisdictions, disputes arising from exclusive distributorship agreements performed in Belgium are still deemed as inarbitrable.¹³⁰ Another example would be the arbitrability of disputes concerning securities law, which, although being affirmed in most jurisdictions,¹³¹ does not seem to be entirely settled in Germany.¹³²

These two aforesaid reasons would make precisely defining public policy a daunting task, if not a totally impossible mission. They may also explain why the aforementioned Report on the Public Policy Exception in the New York Convention stated that the notion of public policy could even be *intentionally* not defined in the Convention¹³³ since it is practically out of the question. As once stated by the House of Lords, that ‘Considerations of public policy can never be exhaustively defined’¹³⁴. Hence, the best effort one could give when defining public policy is describing it as the fundamental and basic principles or values.¹³⁵

¹²⁸ *Central Inland Water Transport Corporation Limited and others v. Brojo Nath Ganguly and others*, Supreme Court of India [1986] AIR 1571. Emphasis added.

¹²⁹ Some scholars describe this vertical development of public policy as the ‘evolving character’ of public policy. See E. Gaillard & J. Savage (ed), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International, 1999, at para. 1650.

¹³⁰ See Alexis Mourre, ‘Chapter 1 Arbitrability of Antitrust Law from the European and US Perspectives’, in Gordon Blanke & Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, at para. 1-026.

¹³¹ *Ibid*, footnote 41, at para. 1-020.

¹³² *Ibid*, footnote 42, at para. 1-020.

¹³³ IBA Subcommittee on Recognition and Enforcement of Arbitral Awards – Report on the Public Policy Exception in the New York Convention, October 2015, at 1.

¹³⁴ *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell International Petroleum Co. Ltd.* [1988] 3 W.L.R 230 (CA), at 316.

¹³⁵ See Pierre Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’, in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy In Arbitration*, ICCA Congress Series, Kluwer Law International, Vol. 3, 1987, at para. 17, in which the

Expectedly, such fundamental and basic principles or values would convey a two-layer meaning: on the one hand, it is unquestionably that a state's public policy would cover its own fundamental political, social and economic public interest, which hence has a clearly domestic nature. On the other hand, a state's public policy would also cover those general value pertaining to morality, justice and internationally recognised public value, which hence also has a transnational nature. Nevertheless, its detailed connotation would still need to be materialised when specific limiting conditions are provided, e.g. which jurisdiction is involved, when the question of public policy is posed, etc.

B. The law applicable to public policy defence at enforcement stage

1. The *lex fori*

One of the most important determinants which should then be brought into consideration when examining the public policy defence at enforcement stage concerns which law should be applied to examine the issue. The answer to this question would be fairly straightforward, that the *lex fori*, i.e. the law of enforcing state under this scenario, should be the law applicable to public policy defence. This choice of law is explicitly provided in Article V(2)(b) which reads that:

‘2. Recognition and enforcement of an arbitral award may also be refused if the competent authority *in the country where recognition and enforcement is sought* finds that:

...

(b) The recognition or enforcement of the award would be contrary to the public policy *of that country*,¹³⁶

Undoubtedly, the term ‘that country’ refers to the enforcing state, and therefore the law of enforcing state will govern the public policy defence. Theoretically speaking, this approach is in line with the traditional conception of public policy which is

author described public policy as ‘a kind of ‘hard core’ of legal or moral values’; see also, for example, Sir Jack Beatson FBA, International arbitration, public policy considerations, and conflicts of law: the perspectives of reviewing and enforcing courts, *Arbitration International*, Vol. 33, Issue 2, 2017, at 176.

¹³⁶ Emphasis added.

essentially established upon the doctrine of territoriality¹³⁷. It is fairly straightforward that the courts of a jurisdiction would prioritise the public policy of the jurisdiction, which could be clearly extracted from the well-established principle of the conflict of laws that '[n]o nation can be justly required to yield up its own fundamental policy and institutions, in favor of those of another nation'¹³⁸. Following this sense, therefore, as correctly pointed out, that 'when a matter gets into the courts of a given jurisdiction there is a temptation to value that jurisdiction's own policy over that of the policy of one of the other sources/systems.'¹³⁹

Article V(2)(b) of the Convention thus 'establishes an exceptional escape device from Article V's generally-uniform rules'¹⁴⁰ which essentially allows a jurisdiction, by applying *its own* public policy concern, to refuse enforcement of arbitral award. Practically speaking, this approach was also reported to be 'internationally-settled'¹⁴¹. The Court of Appeal of England and Wales once clearly stated that 'it may be that the plaintiff can enforce it in some place outside England and Wales. But enforcement here is governed by the public policy of the *lex fori*'¹⁴². Similarly, the Supreme Court of New South Wales opined that 'the very point of provisions such as s(8)(7A) (which is the counterpart of Article V(2)(b) of the NYC) is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award'¹⁴³. Other jurisdictions which hold the same attitude includes the U.S.¹⁴⁴, India¹⁴⁵, Portugal¹⁴⁶, etc.

¹³⁷ Thomas Schultz & Niccolò Ridi, Comity and International Courts and Tribunals, *Cornell International Law Journal*, Vol. 50, No. 3, 2017, at 582.

¹³⁸ Joseph Story, *Commentaries on the Conflict of Laws, foreign and domestic: in regard to contracts, rights, and remedies, and especially in regard to marriages, divorces, wills, secessions, and judgments*, Hillard, Gray and Company, 1834, at p. 26. See also Authur K. Kuhn, *Comparative Commentaries on Private International Law*, The Macmillan Company, 1937, at p. 33.

¹³⁹ Sir Jack Beatson FBA (2017) *op. cit.*, *supra* note 135, at 185.

¹⁴⁰ Gary Born (2014) *op. cit.*, *supra* note 21, at p. 3642. According to the author, the two grounds listed in Article V(2), which allows local considerations to come into play, are different from those grounds listed in Article V(1) which provides 'internationally-applicable standards of procedural fairness'.

¹⁴¹ Maxi Scherer, England Country Report on the Public Policy Exception in the New York Convention, at 21.

¹⁴² *Soleimany v. Soleimany* [1998] Q.B. 785 (CA), at 800.

¹⁴³ *Corvetina Technology Ltd v. Clough Engineering Ltd.*, Supreme Court of New South Wales [2004] 183 FLR 317, at para. 18.

¹⁴⁴ *Parsons & Whittemore Overseas Co. Inc. v. Societe General De L'Industrie Du Papier*, 508 F.2d 969, 1974, at 971 ('Article V(2)(b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcement, on the defendant's motion or *sua sponte*, if 'enforcement of the award would be contrary to the public policy of [the forum] country.'')

2. Interpreting public policy as ‘international public policy’

Although being rather irrebuttable, certain doubts may be raised under the circumstance that certain jurisdictions interpret the term public policy under Article V(2)(b) of the NYC as ‘international public policy’, which focuses on the general principles or values recognised and embraced worldwide rather than those concerning merely domestic interest which may not be recognised elsewhere. For example, Article 1520, 5° of the French *Code de procédure civile*, which governs the enforcement of foreign arbitral award, reads that: ‘An appeal against the decision, which grants recognition or enforcement, will be available only in the following cases: ... 5° if the recognition or enforcement is contrary to the *international public order*’¹⁴⁷. It is hence distinguished from Article 1492, 5° of the Code, which governs the enforcement of domestic arbitral award and applies domestic public policy in the consideration.^{148 149}

¹⁴⁵ *Renusagar Power Co. Ltd. v. General Electric Company*, Supreme Court of India [1994] AIR 860, at para. 89. (‘While construing the provisions of Section 7(1)(b)(ii) of the Foreign Award Act [which is the counterpart of Article V(2)(b) of the NYC], we have held that under the said provisions the enforcement of a foreign award can be objected to only on the ground of such enforcement being contrary to public policy of India and that public policy of other countries e.g. country of the law of contract of the courts of the place of arbitration cannot be taken into consideration.’)

¹⁴⁶ *A v. B & Cia Ltda. & others*, *Supremo Tribunal de Justiça*, Portugal, 9 October 2003. In this case the *Supremo Tribunal de Justiça* affirmed that under the New York Convention, the recognition and enforcement of an arbitral award rendered in the territory of one Contracting State may only be denied in the territory of another Contracting State when Article V NYC so provides, and, specifically in what concerns this case, when the award is contrary to the *public policy of the state where recognition is sought*.

¹⁴⁷ The original text is ‘Le recours en annulation n'est ouvert que si: ... 5° La reconnaissance ou l'exécution de la sentence est contraire à l'ordre public international’. Emphasis added.

¹⁴⁸ Instead of ‘ordre public international’, this Article applies ‘order public’. See also Charles Nairac, France Country Report on the Public Policy Exception in the New York Convention, at 3. By quoting CA Paris, 14 June 2001, *SA Compagnie commerciale André v. SA Tradigrain France*, the author stated that ‘The Code of Civil Procedure thus draws a distinction between (domestic) public policy and international public policy.’

¹⁴⁹ Other jurisdictions which interpret their public policy as international public policy include but are not limited to, England, see *Tamil Nadu Electricity Board v. ST-CMS Electric Company Private Ltd.* [2008] 1 Lloyd’s Rep 93 (HC), at para. 42. (‘...in the context of an international treaty, ‘public policy’ means international public policy and differs from public policy in a domestic context.’); see also L. Collins et al. (eds), *Dicey, Morris & Collins: The Conflict of Laws*, Sweet & Maxwell, 14th ed, 2006, at para. 16-146; India, see *Renusagar Power Co. Ltd. v. General Electric Co.*, Supreme Court of India, [1994] AIR 860, at para. 66. (‘Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of *private international law*, the expression “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act [the counterpart of Article V(2)(b) of the NYC] must necessarily be construed in the sense the doctrine of public policy is applied in the field of *private international law*.’); Italy, see Massimo Benedettelli & Michele Sabatini, Italy Country Report on the Public Policy Exception in the New York Convention, at 10.

Defining a jurisdiction's public policy as an international one may, to certain extent, suggest that it is in some way a supranational principle¹⁵⁰ which 'entails the identification of fundamental principles that are recognised by different legal systems'¹⁵¹. Following this thought, the term 'international public policy' may hence be understood as a transnational, or as named by some scholars, a 'truly international public policy'¹⁵² which is not rooted in any specific legal forum. Therefore, Article V(2)(b) may not be understood as it reads literally that enforcing court may refuse enforcement if such enforcement violates *its own* public policy, and the conclusion that the law of enforcing state being the law applicable to public policy issues at enforcement stage would hence be challenged.

Nevertheless, first, this understanding of the term 'international public policy' would not be fully convincing. First of all, one should be aware that public policy at such a high level of general legal norms and abstract principles may be a mere legal aspiration¹⁵³, of which the achievement would require the sacrifice of domestic public interest. This would be hardly conceivable since a certain part of the function of public policy is to resist the 'intrusion' of foreign arbitral awards which are deemed to run contrary to an enforcement jurisdiction's own public policy. As stated,

'It is ... clear that Article V, paragraph 2(b) refers to the *host country's conception of international public policy*, and *not to a 'genuinely international public policy'* rooted in the law of the community of nations ... The logic of Article V, paragraph 2(b) of the New York Convention is ... to enable the country where recognition or enforcement is sought to refuse to

¹⁵⁰ *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, 2006, at para. 138.

¹⁵¹ Julian D. M. Lew, *Transnational Public Policy: Its Application and Effect by International Arbitration Tribunals*, De la edición, Fundación Universitaria San Pablo CEU, 2018, at 25-26. See also, for example, International Law Association, *Report on the Sixty-Ninth Conference*, London, 2000, at pp. 345-346, in which transnational public policy was defined as 'fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as "civilised nations"'.

¹⁵² Pierre Lalive (1987) *op. cit.*, *supra* note 135.

¹⁵³ Stavros Brekoulakis, *Public Policy Rules in English and International Arbitration Law*, *Arbitration*, Vol. 84, Issue 3, 2018, at 219. See also, for example, Jan Kleinheisterkamp, *Overriding Mandatory Laws in International Arbitration*, *International & Comparative Law Quarterly*, Vol. 67, Issue 4, 2018, at 912, in which such 'truly international' public policy was questioned and the author opined that there would be a 'void left by the absence of a global regulator, which States are not willing or able to create'.

accept into *its* legal order an award which contravenes *its* fundamental convictions.’¹⁵⁴

Therefore, by bearing this part of function of public policy in mind, eliminating domestic colour of public policy would not be tenable, and ‘domestic value preferences’ are still relevant.¹⁵⁵ Following this thought, it could be seen that the term ‘international public policy’ was once defined by the International Law Association in its Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards as not only the ‘fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned’¹⁵⁶ but also ‘rules designed to serve the essential political, social or economic interests *of the State*’¹⁵⁷.

Secondly, even by interpreting international public policy as the fundamental principles which apply when a state is not directly concerned, such compliance would still be based upon *the state’s understanding and wish*. As pointed out, the very fluid concept of international public policy is to be determined on the basis of a ‘comparative law approach and on the existence of international instruments adopted with respect to specific matters and which reflect a *broad consensus* among the community of states’¹⁵⁸. But such a ‘broad consensus’ on international legal norms could be achieved only based upon the consideration of each involved jurisdiction but not in abstract¹⁵⁹, and the answer regarding how this general norm is ‘distilled in precise legal rules’¹⁶⁰ may still vary in different national legal systems.¹⁶¹

¹⁵⁴ E. Gaillard & J. Savage (1999) *op. cit.*, *supra* note 129, at para. 1712. Emphasis added. See also, for example, Dicey, Morris & Collins (2006) *op. cit.*, *supra* note 149, at para. 32-230. (‘The courts of all countries insist on applying ... those principles of their own law which, *in their own view*, express basic ideas of public policy.’)

¹⁵⁵ William E. Holder, Public Policy and National Preferences: The Exclusion of Foreign Law In English Private International Law, *International and Comparative Law Quarterly*, Vol. 17, 1968, at 951.

¹⁵⁶ Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, *Arbitration International*, Vol. 19, No. 2, 2003, at 214.

¹⁵⁷ *Ibid.*

¹⁵⁸ Emmanuel Gaillard, *Legal Theory of International Arbitration*, Martinus Nijhoff Publishers, 2010, at p. 130.

¹⁵⁹ William E. Holder (1968) *op. cit.*, *supra* note 155, at 951.

¹⁶⁰ Stavros Brekoulakis (2018) *op. cit.*, *supra* note 153, at p. 219.

¹⁶¹ See Julian D. M. Lew (2018) *op. cit.*, *supra* note 151, at 64. (‘...just as there are no fixed transnational public policy rules, so too there is no standard and burden of proof to show its existence, relevance and effect.’)

Hence, it would be sounder to conclude that interpreting public policy as an international one does not take away the ‘domestic’ nature of it. In other words, even where a jurisdiction chooses to apply ‘international’ public policy when examining relevant public policy concerns at enforcement stage, the connotation of this term is still based upon its own understanding of what its fundamental public interests are, and hence pursuant to its own law. The term ‘international public policy’ should not leave the impression that it is a purely transnational rule but an enforcing state’s bottom line in reviewing international arbitral awards: those ‘international’ public policies, no matter whether they are actually transnational or national, are what an enforcing court would neither concede nor neglect when reviewing a foreign arbitral award at enforcement stage.¹⁶² The intention of stating a state’s public policy as an international one is hence to emphasize the high threshold of invoking public policy defence at enforcement stage but not to limit the connotation of public policy to merely cover those concerning internationally recognised public values. From this sense, a state’s public policy under Article V(2)(b) of the NYC which is interpreted as an international one would not, in essence, be different from another state’s public policy under the same provision which is simply interpreted without adding the qualifier ‘international’¹⁶³, and a specific public policy could be ‘international’ whilst

¹⁶² See Pierre Lalive (1987) *op. cit.*, *supra* note 135, at para. 59 (‘the function of international public policy may also be to enable the State of the forum to impose *its views and requirements* as to the proper and specific regulation *needed by international situations*’). See also, *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, 2006, at para. 138 (‘The concept of public policy (“ordre public”) is rooted in most, if not all, legal systems ... This narrow concept is often referred to as “international public policy” (“ordre public international”). Although this name suggests that it is in some way a supranational principle, it is in fact no more than domestic public policy applied to foreign awards and its content and application remains subjective to each State.’)

¹⁶³ See *infra* Section II(A)(3), in which the general term ‘public policy’ is also interpreted as containing not only a state’s own fundamental public interest but also general values which are internationally recognised. Notably, one might plausibly argue that jurisdictions which interpret their public policy as international public policy may apply a stricter attitude towards their application in enforcing a foreign arbitral award, it may not be the case in legal practice. See IBA Subcommittee on Recognition and Enforcement of Arbitral Awards – Report on the Public Policy Exception in the New York Convention, October 2015, at 5. (‘[I]n other jurisdictions, courts do not distinguish between domestic or national public policy with international public policy. This absence of distinction does not, however, always mean that courts adopt a broader interpretation of public policy than in the jurisdictions where the distinction exists.’). As reported, jurisdictions where courts restrictively interpret public policy, without distinguishing between domestic and international public policy includes but are not limited to: Canada (see Craig Chiasson & Kalie McCrystal, Canada Country Report on the Public Policy Exception in the New York Convention, at 3.); Poland (see Beata Gessel-Kalinowska vel Kalisz, Poland Country Report on the Public Policy Exception in the New York Convention, at para. 4.); and Austria (see Maxi Scherer, Austria Country Report on the Public Policy Exception in the New York Convention, at 3.) It was also opined that, no matter whether the term public policy is interpreted as international public policy or merely national public policy, its

refer to the public value of a specific jurisdiction simultaneously. It would therefore not be paradoxical to find that, on the one hand, the Court of Appeal of England and Wales once stated in *Soleimany* that enforcement sought before an English court is governed by the public policy of English law¹⁶⁴, whilst on the other hand, the High Court opined in *Tamil Nadu* that, ‘in the context of an international treaty, ‘public policy’ means international public policy and differs from public policy in a domestic context’¹⁶⁵. By the same token, it would also not be confusing to see that, in the context of international commercial arbitration, Italian public policy was defined as ‘*domestic international public policy*’¹⁶⁶.

3. The public policy of foreign states

The discussion on the law applicable to public policy issues at enforcement stage does not, however, end here. The rationale of the law applicable to public policy issues being the law of forum as revealed above essentially lies in the argument that public policy is the fundamental public value of a jurisdiction and the court of the jurisdiction would hence naturally prioritise the public policy of its own when encountering relevant public policy issues. Notwithstanding, such rationale could only logically lead to the conclusion that the law of forum is the law applicable to public policy issues, but not the conclusion that the law of forum is the *only* law applicable to public policy issues. Issues may arise when an enforcing court, having applied its own law, does not opine that the enforcement of the award would violate either its fundamental domestic public interests or the generally recognised public policy, and the party still argue that the enforcement would, notwithstanding, violate the fundamental domestic public interests of another jurisdiction and seek the refusal of enforcement.¹⁶⁷ Under this scenario, the aforementioned rationale could only lead

restrictive interpretation is recognised worldwide. See Dicey, Morris & Collins (2006) *op. cit.*, *supra* note 149, footnote 69, at para. 16-145.

¹⁶⁴ *Soleimany v. Soleimany* [1998] Q.B. 785 (CA), at 800.

¹⁶⁵ *Tamil Nadu Electricity Board v. ST-CMS Electric Company Private Ltd.* [2008] 1 Lloyd’s Rep 93 (HC), at para. 42. See also, for example, Robert Merkin & Louis Flannery, *Arbitration Act 1996*, 5th ed., Informa Law from Routledge, 2014, at p. 408.

¹⁶⁶ Massimo Benedettelli & Michele Sabatini, Italy Country Report on the Public Policy Exception in the New York Convention, at 10. Emphasis added.

¹⁶⁷ Notably, the party may also argue that the enforcement would violate the generally recognised public value under the law of another jurisdiction. This is theoretically possible since as discussed in *supra* Section II(B)(2) that the scope of the so-called generally recognised public value is still subject to each jurisdiction’s own understanding. However, the law of another jurisdiction would not have a say in this situation as the enforcing court would apply its own law in determining this issue.

to the conclusion that the enforcing court should apply its own law to examine relevant public policy issues (which the court has already done), but not the conclusion that the enforcing court should *only* apply its own law to examine relevant public policy issues. Following this thought, a question hence emerges: does Article V(2)(b), which allows an enforcing court to apply its own public policy concern to refuse enforcement, also allow an enforcing court to apply foreign public policy to refuse the enforcement of arbitral awards when its own public policy is not violated?

International comity may arguably come into play under this scenario. Although it is self-evident that comity cannot require an enforcing court to yield up its own public interest to enforce an arbitral award which merely successfully passed the public interests examination of other jurisdiction,¹⁶⁸ it may plausibly drive an enforcing court, after confirming that its own public interests would not be violated, to refuse to enforce an arbitral award if it is convinced that the enforcement would violate foreign public policy.

Notwithstanding, the author reckons that it would not be the case here based upon the consideration of the pro-enforcement bias of the Convention. Following the pro-enforcement bias, it has been widely recognised that the grounds as listed in Article V are exclusive and exhaustive¹⁶⁹ and they should be ‘strictly applied’¹⁷⁰ to ensure the general enforceability of arbitral awards. Allowing an enforcing court to refuse enforcement based upon the alleged violation of foreign public policy would thus fail to fulfil these rules and undermine the pro-enforcement spirit of the Convention as such behaviour would potentially reduce the possibility of an arbitral award being

Therefore, since the enforcing court has ruled that the involved subject matter or the enforcing of the award would not violate the generally recognised public policy, such argument would not be upheld.

¹⁶⁸ For example, international comity should not be used in supporting the argument that the enforcement of an arbitral award, although violating the public interests of the enforcement forum, should be approved since it would not violate the public interests of a foreign jurisdiction. See William W. Park, *Arbitration of International Business Disputes – Studies in Law and Practice*, Oxford University Press, 2nd ed., 2012, at p. 366. (‘Comity ... should not require violation of an enforcement forum’s own public policy.’)

¹⁶⁹ Gary Born (2014) *op. cit.*, *supra* note 21, at pp. 3426-3427.

¹⁷⁰ *Ibid.*, at p. 3421. See also, for example, *Blackwater Security Consulting LLC v. Nordan*, E.D.N.C., No. 2:06-CV-49-F, 2011, at 18. (‘The grounds for refusal to confirm are set forth in Article V of the Convention, which is *strictly applied* ... to effectuate the policy favouring enforcement of foreign arbitral awards.’); *Ario v. The Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account*, 618 F.3d 277, 2010, at 290-291. (‘Article V of the Convention sets forth the grounds for refusal, and courts have *strictly applied* the Article V defences ...’).

enforced by requiring an arbitral award to be in line with not only the enforcing state's (which is provided in Article V(2)(b)) but also foreign jurisdictions' public policy (which is not provided in Article V(2)(b)). From the author's viewpoint, Article V(2)(b) of the Convention should be understood as merely providing a defensive mechanism for enforcing courts to protect *their own* fundamental public interests but not an excessively generous provision allowing enforcing courts to also bring foreign public policy into consideration when its own public policy is not violated to further obstruct the enforcement of arbitral awards – respecting and applying foreign public policy is simply not the role an enforcing court should play under the Convention. From this sense, the consideration of maintaining the general enforceability would outweigh the consideration of showing international comity. It hence follows the analysis above that the discretion of enforcing courts applying foreign public policy to refuse enforcement would be largely restrained by the Convention, and the law applicable to public policy issues at enforcement stage would hence remain to be the law of the forum.

The analysis conducted above, notwithstanding, would not utterly eliminate the possibility of an enforcing court considering the public policy of another jurisdiction. A remaining possibility is that an enforcing state may deem respecting other jurisdiction's public policy as its own public policy, which would be another form of showing international comity.¹⁷¹ Under this scenario, when foreign public policy is potentially violated, the enforcing state's own public policy concern may also be triggered and the involved foreign public policy would hence be considered and applied. For example, it was stated that, 'if it is apparent on the face of the award that the contract was made with the intention of violating the law of a foreign friendly State, then the enforcement of an award rendered on the basis of such a contract may be contrary to English public policy'¹⁷², which could be naturally extended to the

¹⁷¹ See, for example, § 4-18 of Restatement (Third) U.S. Law of International Commercial Arbitration (Tentative Draft No. 2, 2012) stated that: 'By way of exception ... a U.S. court might plausibly regard recognition or enforcement of an award to be so deeply detrimental to a foreign State's paramount interests that it *offends international comity* and is, to that extent, repugnant to U.S. public policy.'

¹⁷² Dicey, Morris & Collins (2006) *op. cit.*, *supra* note 149, footnote 69, at para. 16-146. See also, for example, *Venture Global Eng'g LLC v. Satyam Computer Ltd.*, 233 F. App'x 517, 2007, at 523. ('well-settled that in the interest of international comity, this Court should not enforce an award in a country that would result in the violation of the law of that country'); *Regazzoni v. Sethia* [1958] A.C. 301 (HL), at 319. ('Just as public policy avoids contracts which offend against our own law, so it will

viewpoint that if a contract violates the public policy of a foreign friendly state then the enforcement of an award rendered based upon this contract would be contrary to English public policy.¹⁷³

It should, however, be emphasised that even under this scenario that foreign public policy may come into play to obstruct the enforcement of arbitral awards,¹⁷⁴ following such international comity to respect foreign states' public policy should by no means be understood as kicking an enforcing state's own public policy out of consideration. Rather, it would still be necessary to build the link between foreign states' public policy and the enforcing state's public policy since the latter is what the enforcing court is actually interested in. Just as the statement quoted above, that if a contract was made with the purpose of violating the law of a foreign friendly State, the enforcement of the award concerning the dispute arising out of the contract may be contrary to *English public policy* -- here one could clearly see that the reason of an English court deciding to examine the law of other jurisdiction essentially lies in that such clear violation of the law of other jurisdictions would also be deemed as a violation of *English public policy*.¹⁷⁵ Showing respect to another jurisdiction's public policy would thus not rewrite the conclusion that no enforcing court should be held obliged to uphold other jurisdiction's public policy, especially when other jurisdiction's public policy would not trigger the public policy concern of the enforcing state. It would hence be persuasive to conclude that, even when the public policy concern of a foreign jurisdiction comes into play, the law applicable to public policy issues would still be the *lex fori*.

C. The permissive wording and its application under Article V(2)(b)

avoid at least some contracts which violate the laws of foreign State, and it will do so because public policy demands that deference to international comity')

¹⁷³ See also, for example, *Soleimany v. Soleimany*, [1999] Q.B. 785 (CA), in which the Court stated that where a foreign arbitration award was made based on a contract which was illegal under the law of a friendly foreign state where the law governed the contract or the contract was to be performed in that state, the English court would not enforce that award as such enforcement would also violate English public policy.

¹⁷⁴ It was opined (and the author also agreed) that this application of foreign public policy to prevent enforcement was consistent with Article V(2)(b). See Gary Born (2014) *op. cit.*, *supra* note 21, at p. 3667.

¹⁷⁵ Similarly, in the example made in *supra* note 156, one could clearly see that foreign public policy would need to be connected to U.S. public policy to trigger the public policy defence under Article V(2)(b) of the Convention.

The analysis above further concretised the understanding of public policy under the NYC by specifying its applicable law, i.e. the law of enforcing state,¹⁷⁶ but it is still insufficient to present the full picture of the term. Another key issue which is yet to be examined concerns how an enforcing state would exercise its discretion as mandated by the permissive wording ‘may’ as applied in Article V(2).

Three widely accepted golden rules on the application of an enforcing courts’ discretion under Article V in general have been gone through above,¹⁷⁷ and it could be clearly seen that their application meets no difficulty when dealing with Article V(2)(b).

The first rule is that provisions in Article V should be narrowly interpreted. This is strictly followed when interpreting the key element of Article V(2)(b), i.e. the term ‘public policy’. It has been recognised worldwide that, following the ‘strong public policies favouring honouring agreements and finality’¹⁷⁸, or the so-called pro-enforcement bias of the NYC, the term public policy ‘must be given a narrow meaning’¹⁷⁹. Therefore, it could be clearly seen that, as shown above, public policy

¹⁷⁶ Subject to the rather rare scenario that an enforcing court regards respecting other jurisdictions’ public policy as its own public policy and the violation of other jurisdictions’ public policy could be clearly established by the parties. See *supra* Section II(B)(3) of this Chapter.

¹⁷⁷ See *supra* Section I(B) of this Chapter.

¹⁷⁸ Sir Jack Beatson FBA (2017) *op. cit.*, *supra* note 135, at 185.

¹⁷⁹ *Ibid.* See also, for example, Gary Born (2014) *op. cit.*, *supra* note 21, at pp. 3648-3649; Marike R. P. Paulsson (2016) *op. cit.*, *supra* note 108, at p. 225; *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 2004, at 306 (‘The general pro-enforcement bias informing the convention ... points to a narrow reading of the public policy defense’); *Switzerland No. 10, Chrome Resources S.A. v. Léopold Lazarus Ltd.*, *Tribunal Fédéral* [Supreme Court], Not Indicated, 8 February 1978, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 1986 - Volume XI*, Kluwer Law International, at pp. 538-542, in which the Court held that public policy was, in general, of an eminently subsidiary character; *Spain No. 9, Odin Shipping Co. (Pte) Ltd. v. Aguas Industriales de Tarragona*, *Tribunal Supremo* [Supreme Court], Not Indicated, 4 October 1983, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 1986 - Volume XI*, Kluwer Law International, at pp. 528-530, in which the Court referred to the ‘principles of universality of justice and of solidarity amongst civilised peoples’ when refusing to apply Article V(2)(b) and hence essentially interpreted this Article narrowly; *Korea No. 3, Adviso N.V. v. Korea Overseas Construction Corp.*, Supreme Court, 93Da53054, 14 February 1995, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 1996 - Volume XXI*, Kluwer Law International, at pp. 612-616. (‘The basic tenet of [Article V(2)(b)] is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement of the award is sought from being harmed by such recognition and enforcement. As due regard should be paid to the stability of international commercial order, as well as domestic concerns, this provision should be interpreted narrowly.’); *IPCO Nigeria Ltd. v. Nigerian National Petroleum Corp.* [2005] E.W.H.C. 726, at para. 13. (‘considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution ... [the public policy exception] was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards.’)

touches only upon the *fundamental* principles or values of a jurisdiction.¹⁸⁰ As reported, this narrow interpretation was exactly the intent of the drafters of the NYC, namely to give the term ‘public policy’ ‘the narrowest interpretation’¹⁸¹.

Being in line with this rationale, in the landmark case *Parsons & Whittemore Overseas*, the U.S. Court of Appeal for the Second Circuit unsurprisingly held that:

‘The general pro-enforcement bias informing the Convention and explaining its suppression of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention’s basic effort to remove preexisting obstacles to enforcement.

...

We conclude, therefore, that the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s *most basic notions of morality and justice*.’¹⁸²

Notably, this requirement on the narrow interpretation of the term ‘public policy’ may also derive from the consideration of reciprocity. A jurisdiction widening the connotation of public policy and frequently applying public policy defence to refuse enforcement would likely encourage other jurisdictions to follow this behavioural pattern – this would clearly undermine the cooperation and harmony of international commerce. As stated:

‘Considerations of reciprocity – considerations given express recognition in the Convention itself – counsel courts to invoke the public policy defense

¹⁸⁰ See *supra* Section II(A) of this Chapter. As reported, in general, the public policies that have been invoked under Article V(2)(b) fall into a limited number of categories, including but not limited to mandatory criminal law, corruption and bribery, illegal contracts, etc. See Gary Born (2014) *op. cit.*, *supra* note 21, at pp. 3672-3683.

¹⁸¹ Marike R. P. Paulsson (2016) *op. cit.*, *supra* note 108, at pp. 223-224. See also, for example, Recognition and Enforcement of Foreign Arbitral Awards- *Travaux*. Summary Record of the Fourteenth Meeting, at 3 and 9, U.N. Doc E/Conf.26, SR.14, 12 September 1958, in which Indian delegate Mr. Adamiyat and Japanese delegate Mr. Urabe both greatly supported the narrow interpretation of the term ‘public policy’.

¹⁸² *Parsons & Whittemore Overseas Co. Inc. v. Societe General De L’Industrie Du Papier*, 508 F.2d 969, 1974, at 971. Emphasis added.

with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.’¹⁸³

Secondly, the prevailing application of Article V of the Convention requires that a violation of the grounds as listed in Article V, if being able to lead to the refusal of enforcement, should not be marginal and *its absence should plausibly lead to a different award*. Following this principle, under Article V(2)(b), if a violation of public policy could lead to the refusal of enforcement, such violation should be serious enough to trigger the public policy defence. The statement made by Sir John Donaldson M.R. in *Deutsche Schachtbau* was representative:

‘[When considering public policy issues] It has to be shown that there is some element of illegality or that the enforcement of the award would be *clearly* injurious to the public good or, possibly, the enforcement would be *wholly* offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised’¹⁸⁴.

Similarly, as once stated by the French *Cour de Cassation* in *SNF*, that only a ‘flagrant, effective and concrete’¹⁸⁵ violation of international public policy could trigger the public policy defence.¹⁸⁶

The third rule is that the merits of dispute should not be re-examined, and obviously this rule is widely followed when an enforcing court reviewing on relevant public policy issues of an arbitral award.¹⁸⁷ The message is clear: an enforcement court shall

¹⁸³ *Ibid.*

¹⁸⁴ *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell International Petroleum Co. Ltd.* [1988] 3 W.L.R 230 (CA), at 316. Emphasis added.

¹⁸⁵ French *Cour de Cassation* (1re Ch. civile), *Société SNF v. Société Cytec Industries BV*, 4 juin 2008. The original text is ‘flagrante, effective et concrète’. The translation is provided in Luca G. Radicati di Brozolo (2011), *op. cit.*, *supra* note 24, at para. 22-044.

¹⁸⁶ See also, for example, *Fitzroy Eng’g Ltd. v. Flame Eng’g Ltd.*, 1994 U.S. Dist. LEXIS 17781, at *11, in which the Court clearly held that to prevail on a public policy defence, an award-debtor ‘must convincingly show that a clear, direct conflict existed that could have affected the outcome of the proceeding.’

¹⁸⁷ Alexis Mourre & Luca G. Radicati di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, *Journal of International Arbitration*, Vol. 23, Issue 2, 2006, at 172, in which the author opines that the restriction on touching upon merits is prevailing in legal practice. See also, for example, Switzerland No. 28, *Inter Maritime Management SA v. Russin & Vecchi*, *Tribunal Fédéral* [Supreme Court], Not Indicated, 9 January 1995, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 1997 - Volume XXII*, Kluwer Law International, at p. 797 (‘the enforcement court does not decide on the arbitral award as an appellate instance; the merits of the award cannot be reviewed under the cover of public policy’); Greece No. 9, *Not indicated v. Not indicated*, Court of Appeal of Athens, 6886, 1984, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration*

not dig into the merits of disputes¹⁸⁸ but merely conduct a *prima facie* review to examine whether there is a violation of public policy.

More specifically, this rule covers two potential scenarios. The first is that when relevant public policy issues have already been examined, the enforcing court should be satisfied automatically that relevant public policy issues have been properly examined by the tribunal and not review the reasoning of the award. As pointed out:

‘The review should not entail a review of the merits, that is, a rejudgment of the dispute. The proceedings for the setting aside or the enforcement of the award should not be an opportunity for the losing party in the arbitration, so to speak, to have a second bite at the cherry.’¹⁸⁹

Bearing the fact that enforcement is not an appeal of the arbitration decision¹⁹⁰ in mind, it would therefore

‘make no sense to interpret Article V(2)(b) as allowing a Contracting State to ... review the merits of all arbitral awards for substantive correctness ... [which] would essentially annul a Contracting State’s ratification of the Convention and cannot have been intended by the Convention’s drafters or the States that have ratified the Convention.’¹⁹¹

Instead,

‘[w]hat must be understood is that in this respect the courts’ role is *not to revise arbitrators’ reasoning, or to nullify the award on account of their*

1989 - Volume XIV, Kluwer Law International, at p. 637. (‘Under the New York Convention, the enforcement court cannot examine whether the award was validly rendered under the law applicable to the merits, or whether the proper law was applied to the merits’); Korea No. 5, *Majestic Woodchips Inc. v. Hun-Geun Yu, as the receiver of the reorganized Donghae Pulp Co., Ltd. et al.*, Supreme Court, 28 May 2009 and 29 April 2010, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 2012 - Volume XXXVII*, Kluwer Law International, at p. 263 (‘the competent court in the country where recognition and enforcement is sought is not allowed to substantially and fully re-examine the right and wrong of the ruling on merits, such as facts admitted or rules applied by the arbitrators’).

¹⁸⁸ Luca G. Radicati di Brozolo (2011), *op. cit.*, *supra* note 24, at para. 22-021. See also Gordon Blanke (2007), *op. cit.*, *supra* note 24, at 51-52; John Beechey (1996), *op. cit.*, *supra* note 24, at 186.

¹⁸⁹ Luca G. Radicati di Brozolo (2011), *op. cit.*, *supra* note 24, at para. 22-066.

¹⁹⁰ ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, published by the International Council for Commercial Arbitration, ISBN 978-90-817251-1-8, footnote 5, at p. 15.

¹⁹¹ Gary Born (2014) *op. cit.*, *supra* note 21, at p. 3662.

pronouncements, but to prevent enforcement if the practical result thereof would be intolerable as a matter of fundamental social values'¹⁹²

The second concerns that relevant public policy issues were not examined by the arbitral tribunal. Under this circumstance, the enforcing court, instead of digging into the merits of the dispute, should only draw the conclusion on whether there is a serious violation of public policy by merely analysing the information as shown in the award. This approach is largely based upon the view that serious violation of public policy could be revealed without comprehensive in-depth review on the merits of dispute. As opined:

‘Where the violation is not *prima facie* apparent from a perusal of the award ... it is unlikely that the award can be so seriously flawed as to entail an actual violation of public policy.’¹⁹³

Therefore, as could be seen from the analysis above, although owing to the principle of territoriality (i.e. that no jurisdiction could be justly required to yield up its own fundamental public interests)¹⁹⁴ a jurisdiction could/should legitimately refuse to enforce an arbitral award when such enforcement would violate its own public policy,¹⁹⁵ this public policy defence is interpreted and applied in a rather narrow fashion.

Notably, a stricter attitude may suggest that an enforcing court, even when finding that the enforcement of an arbitral award violates its public policy, should first remit the award back to the arbitral tribunal and give the tribunal the second chance to render an enforceable award. The author does not consider this approach feasible as the enforcement stage of an international arbitration is essentially the final stage of resolving the dispute between the parties. With all the possibilities that relevant public policy issues could have been examined or even remitted to the tribunal at

¹⁹² Jan Paulsson, *The Ideal of Arbitration*, Oxford University Press, 2013, at p. 136. Emphasis added.

¹⁹³ Luca G. Radicati di Brozolo (2011), *op. cit.*, *supra* note 24, at para. 22-032.

¹⁹⁴ Joseph Story (1834) *op. cit.*, *supra* note 138, at p. 26.

¹⁹⁵ See Gary Born (2014) *op. cit.*, *supra* note 21, at p. 3694. (‘As the *ex officio* character of Article V(2)(b)’s public policy exception suggests, however, it would be unusual for a court to recognize [or enforce] an award notwithstanding the fact that it violated an applicable public policy.’) See also, for example, § 4-18, comment c of Restatement (Third) U.S. Law of International Commercial Arbitration (Tentative Draft No. 2, 2012): ‘although non-recognition [and non-enforcement] under Article V is not mandatory, it “seems virtually axiomatic ... that a court would not choose to confirm, recognize, or enforce an award if doing so would be repugnant to a fundamental public policy”’.

annulment stage,¹⁹⁶ the onus of an enforcing court is simply to determine whether to enforce the award. Therefore, out of the consideration of legal certainty of international arbitration, allowing an enforcing court to remit the award to the arbitral tribunal for reconsideration would unpleasantly prolong the process of international arbitration and run counter to the parties' expectation of a speedy and definitive dispute resolution. Therefore, as shown in legal practice, there is no observed case in which an enforcing court remit the award to the arbitral tribunal for reconsideration, and it is the author's viewpoint that an enforcing court should not be allowed to do so.

D. Remaining questions concerning public policy issues

The examination of the definition of public policy, the law applicable to public policy issues as well as the general attitude of the application of public policy defence as conducted above, although intending to provide a more comprehensive understanding of this term, may not be able to eliminate but even invite uncertainties.

As discussed above, there are three golden rules governing the behavioural pattern of an enforcing court reviewing foreign arbitral awards. The first two are straightforward and unquestionable. Since the NYC was designed to facilitate the enforcement of arbitral awards, it is therefore naturally inferred that any potential grounds for refusal, including the protection of public interests of enforcing states, should be applied only when necessary. As for the application of Article V(2)(b), such necessity hence requires an enforcing court first to interpret the term 'public policy' narrowly and secondly only refuse to enforce an award when the enforcement would violate relevant public policy in a substantive way.

Notwithstanding, the third may not be as indubitable as the first two. As discussed above, the rationale of restraining enforcing courts from conducting in-depth review is two-folded. The first is that when relevant public policy issues have been dealt with by the tribunal, the auxiliary role played by the enforcing court determines that

¹⁹⁶ See Section 69(7) of Arbitration Act 1996: 'On an appeal under this section the court [as the court of seat] may order -- ... (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination'. See also, for example, Article 34(4) of the UNCITRAL Model Law: 'The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.'

it is not at the appropriate position to review what the tribunal has ruled, therefore no in-depth review is required. The second is that even the tribunal did not examine and rule upon relevant public policy issues, a serious violation of public policy would be revealed without in-depth review on the merits of disputes, hence no in-depth review is needed. However, the author finds these two rationales not fully indubitable. As for the first rationale, it has been discussed above that Article V(2)(b) is essentially an escape mechanism allowing an enforcing court proactively to bring its own public policy concern in deciding whether to enforce an arbitral award. In this sense, relevant public policy issues which were revealed, examined and ruled in an international arbitration may also trigger the public interests of the enforcing state. If this is the case, the enforcing court's role played in the international arbitration would not be a merely auxiliary one but a more proactive one, depending upon what the enforcing court should do under its own public policy concern. This might be particularly true when international arbitration steps into the intersection of both private and public domains, where the growing concern of public interest may plausibly sway the balance between the protection of public policy and obligation of general enforcement as struck traditionally – the enforcing court may bear a heavier obligation to ensure the protection of relevant strong public interests, according to which it might then need to do more than merely following the arbitral tribunal's decision on relevant public policy issues, e.g. to review the reasoning of the award. As for the second rationale, from the author's viewpoint, it is more of an experiential judgment but not a settled conclusion. It still remains to be seen whether a serious violation of any public policy could always be revealed without touching upon the merits of dispute when the arbitral tribunal remained silent on relevant issues. If this is not the case, it would then be more legitimate to argue for an approach which would allow the enforcing court to dig deeper and touch more upon the merits of dispute.

The query on the legitimacy of these two rationales as well as a new behavioural pattern of an enforcing court reviewing awards concerning EU competition law will then be further examined and proposed under the scenario of enforcing arbitral awards concerning EU competition law in Chapter V below.

III. Arbitrability and Article V(2)(a) of the NYC

The second ground to be looked at concerns the arbitrability¹⁹⁷ of a dispute, i.e. whether a dispute is ‘amenable to settlement by arbitration’¹⁹⁸ or ‘belongs exclusively to the domain of the courts’¹⁹⁹, which further leads to three preliminary questions, namely that, first, why certain subject matter is not capable of settlement by arbitration; secondly, what the law applicable to arbitrability issues is; and thirdly, what the general attitude towards the application of arbitrability defence is.

A. The rationale of inarbitrability

One of the most fundamental issues to understand arbitrability defence is to figure out the rationale of inarbitrability.

The prevailing view of this issue is that inarbitrability is founded based upon public policy concerns,²⁰⁰ namely a State may put great value on certain public interests and take the viewpoint that arbitration is not an appropriate dispute resolution mechanism for effectively resolving relevant disputes and hence sufficiently protecting the involved public policy.²⁰¹ Arbitration would thus be excluded from application, and

¹⁹⁷ Notably, the term ‘arbitrability’ is also given another meaning in the U.S., which concerns whether a dispute is within the scope of arbitration agreement and should hence be submitted to arbitration. See, for example, Margaret L. Moses (2017) *op. cit.*, *supra* note 22, at p. 98; Laurence Shore, Defining ‘Arbitrability’ – The United States vs. The Rest of the World, *New York Law Journal*, June 15, 2009, at 1. For the purpose of this research, this interpretation of arbitrability will not be particularly considered.

¹⁹⁸ Ilias Bantekas, The Foundations of Arbitrability in International Commercial Arbitration, *Australian Year Book of International Law*, Vol.27, Issue 1, 2008, at p. 193.

¹⁹⁹ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 2.111.

²⁰⁰ Stavros Brekoulakis, ‘Chapter 2 – On Arbitrability: Persisting Misconceptions and New Areas of Concern’, in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, Kluwer Arbitration International, 2009, at para. 2-6. See also, for example, Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 2.116 (‘Whether or not a particular type of dispute is ‘arbitrable’ under a given law is in essence a matter of public policy for that law to determine’); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, at para. 9-2.; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration*, Sweet & Maxwell, 2007, at p. 292.

²⁰¹ Notably, the arbitrability of a specific subject matter may also be subject to the exclusive jurisdiction as provided in national provisions. For example, Article 97 of the Swiss Loi fédérale sur le droit international privé provides that ‘The courts at the place where real property is located in Switzerland have exclusive jurisdiction to entertain actions relating to real property rights’. (The original text is in French: ‘Les tribunaux du lieu de situation des immeubles en Suisse sont exclusivement compétents pour connaître des actions réelles immobilières.’). However, it was opined that such exclusive jurisdiction should not necessarily be construed as excluding the arbitrability of the dispute with respect to the subject matter of that exclusive jurisdiction. The key lies in the real purpose of setting such exclusive jurisdiction – it may be set merely due to the allocation of powers within the jurisdictional system and hence is irrelevant to arbitration or based upon certain public policy concern. Only the latter should be construed as setting a rule of non-arbitrability. (see Alexis

the enforcement of arbitral awards concerning these disputes may not be approved by the state since from its own understanding, these issues should not be arbitrated.

But why would a state hold such understanding and restrict the arbitrability of disputes based upon public interest? Usually, the incapability of a specific dispute resolution mechanism in resolving certain types of dispute would lie in two aspects: it is either because of the inappropriateness caused by its inherent mechanism or a result of the unfitness based upon other extrinsic reasons. Indubitably, the inappropriateness caused by inherent mechanism, if there is any, would be more fundamental and thus more decisive than that of caused by other extrinsic reasons.

In the context of international arbitration, the most notable potential incompatibility between its inherent mechanism and disputes concerning public interest lies in the essence that international arbitration is a dispute resolution mechanism of ‘contractual origins’²⁰². On the one hand, it is always conducted based upon the contracting parties’ consensual agreement to arbitrate their dispute.²⁰³ Therefore, those who are not contracting parties of an arbitration agreement would generally not be able to join the arbitration as they did not show their consensus of being bound by the arbitration agreement when it was made between the contracting parties.²⁰⁴ On the other hand, the fact that the jurisdiction of an arbitral tribunal originates from the parties’ arbitration agreement determines that the award rendered by the tribunal would only apply *inter partes*. As stated that by being constrained by the privity

Mourre (2011) *op. cit.*, *supra* note 130, at paras. 1-028 and 1-029; see also, for example, Jean-François Poudret and Sébastien Besson (2007) *op. cit.*, *supra* note 200, at pp. 293-295.)

²⁰² Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-42.

²⁰³ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 2.01. (‘The agreement to arbitrate is the foundation stone of international arbitration. It records ... a consent which is indispensable to any process of dispute resolution outside national courts. Such processes depend for their very existence upon the agreement of the parties.’)

²⁰⁴ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-52. See also Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 2.52. (‘Unlike litigation in State courts, where third parties can often be joined to proceedings, the jurisdiction of an arbitral tribunal to allow for the joinder or intervention of third parties to an arbitration is limited. The tribunal’s jurisdiction derives from the will of the parties to the arbitration agreement and therefore joinder or intervention is generally only possible with the consent of all parties concerned.’); J. Lew, L. Mistelis & S. Kröll (2003) *op. cit.*, *supra* note 200, at para. 16-74.

inherent in the source of his jurisdiction, an arbitrator has authority to dictate legal effects *inter partes* and not *vis-à-vis* third parties.²⁰⁵

These features then breed the possibility of the inherent inappropriateness of international arbitration being used in resolving disputes concerning public interests. First, although an arbitral tribunal is merely obliged to resolve the dispute between parties, it would be certainly possible that the award rendered by the tribunal would exert influence on third parties since the dispute does have certain public components. This may in effect run counter to the private nature of arbitration. As stated:

‘To the extent it would *dictate effects with respect to third parties*, the arbitrability of mixed/public rights would *simply conflict with the contractual nature of arbitration*’²⁰⁶

Secondly, the facts that the principle goal of international arbitration is to effectively resolve commercial disputes but not protect public interest²⁰⁷ and that non-signatory third parties, although being *de facto* interested, may not be the joinders to arbitration would also plausibly raise the doubt that international arbitration may not, from the perspective of the public, provide adequate redress to the involved violation of public policy. Such dissatisfaction may be aggravated by bringing the general confidentiality of international arbitration into consideration, which would possibly cause information asymmetry to other injured parties or affected public and hence block the way of other potential lawsuits or other types of dispute resolution.

Besides these inherent limitations, the unsuitability of international arbitration resolving disputes concerning public interests may also, although less decisively, be announced based upon some extrinsic reasons.²⁰⁸ One of the most representative examples would be the viewpoint that arbitrators may not be as qualified as court judges in dealing with disputes concerning public interest. As the opinion given by

²⁰⁵ Karim Abou Youssef, ‘Chapter 3. The Death of Arbitrability’, in Loukas A. Mistelis and Stavros L. Brekoulakis, *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, at para. 3-10.

²⁰⁶ *Ibid.*

²⁰⁷ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-47.

²⁰⁸ It is even opined by some scholars that those extrinsic reasons were actually largely ‘unsubstantiated’. See, for example, Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at paras. 2-5 to 2-39.

the U.S. First Circuit in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.* stated:

‘issues of war and peace are too important to be vested in the generals ... decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community – particularly those from a foreign community that has had no experience with or exposure to our law and values.’²⁰⁹

Apart from this allegation, international arbitration may also be queried from, for instance, the perspective of due process²¹⁰, such as the alleged generally less intensive fact-finding process and less rigorous evidential proceedings when compared to national courts²¹¹ and the limited or lack of reasoning of awards²¹². Moreover, distrust may also be placed upon arbitration pursuant to the viewpoint that ‘arbitrators, as private judges, are by nature in alliance with the interests of private corporations’²¹³ and would hence not protect the wider public interest.²¹⁴

B. Arbitrability and public policy: is Article V(2)(a) tautological?

Before continuing the analysis on the rest of preliminary questions of arbitrability, a point concerning the relationship between arbitrability and public policy should be raised here to further clarify the rationale of arbitrability. According to the analysis above, the close relationship between arbitrability and public policy has been firmly established, as the latter forms the base of the former. Such intersection may, however, invite certain doubt that, since arbitrability is in essence a public policy

²⁰⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 723 F.2d 155, 1983, at 162.

²¹⁰ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-10.

²¹¹ See *Alexander v. Gardener-Denver Co.*, 415 U.S. 36, 1974, at 57-58. (‘Moreover, the fact finding process in arbitration usually is not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.’) See also, for example, *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 1956, at 203; *Wilko v. Swan*, 346 U.S. 427, 1953, at 435-438.

²¹² *Scherk v. Alberto-Culver*, 417 U.S. 506, 1974, at 533. (‘An arbitral award can be made without explication of reasons and without development of a record, so that the arbitrator’s conception of out statutory requirement may be absolutely incorrect yet functionally unreviewable, even when the arbitrator seeks to apply our law.’)

²¹³ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-20.

²¹⁴ See, for example, *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 1981, at 729. (‘Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the [U.S. Fair Labour Standards Act], thus depriving an employee of protected statutory rights.’)

concern, is Article V(2)(a) a tautological provision to Article V(2)(b) and should hence be eliminated?

Some scholars did favour such interpretation of the relationship between arbitrability and public policy. As once suggested by Jan Paulsson, a leading scholar in international commercial arbitration, that:

‘Subparagraph V(2)(a) shall not prevent recognition and enforcement unless the non-arbitrability of the subject matter is a matter of such fundamental importance that recognition and enforcement would also violate subparagraph V(2)(b).’²¹⁵

Therefore, since the concept of arbitrability has been ‘absorbed or covered’²¹⁶ by the concept of public policy, the independent relevance of Article V(2)(a) should be denied.²¹⁷

Nevertheless, this understanding of the relationship between arbitrability and public policy could not stand unquestionable. These two concepts’ relationship should not be understood as one is absorbed or covered by another. On the one hand, as analysed above in Section A of this Chapter, it could be found that although inarbitrability is triggered by public policy concern, the core of it lies in the reason that a specific jurisdiction reckons that international arbitration is not suitable for resolving disputes concerning relevant public interest so that they should be exclusively resolved by national courts. In other words, arbitrability is more relevant to ‘the jurisdiction of a State authority, and constitutes an absolute *procedural bar* to the recognition of an arbitral award’²¹⁸. Therefore, the consequence of inarbitrability, namely the refusal of enforcing the arbitral award, would be unrelated to the substance of the award, but merely based upon a jurisdictional reason.

²¹⁵ Jan Paulsson, Arbitrability, Still Through a Glass Darkly, in *Arbitration the Next Decade*, ICC International Court of Arbitration Bullet, Special Supplement, ICC Publication No. 612E, 1999, at p. 98.

²¹⁶ Gerold Herrmann, Does the World Need Additional Uniform Legislation on Arbitration? The 1998 Freshfields Lecture, *Arbitration International*, Vol. 15, No. 3, 1999, at 220.

²¹⁷ *Ibid.* See also, for example, UN DOC E/CONF.26/SR.11, the Summary Record of the 11th Meeting of United Nations Conference on International Commercial Arbitration, New York, 27 May 1958, at 7, in which the French delegate, Mr. Holleaux, argued that ‘the exception of incompatibility with public policy was quite sufficient to cover the rare cases of inarbitrability.’

²¹⁸ Homayoon Arfazadeh, Arbitrability under the New York Convention: the *Lex Fori* Revisited, *Arbitration International*, Vol. 17, No. 1, 2001, at 86. Emphasis added.

On the other hand, public policy plays a different game. It essentially concerns whether the substance of an award would violate a state's understanding of its public policy, which 'sets standard to be respected by arbitrators and their awards'²¹⁹.

It hence follows the analysis above that, although these two concepts are indeed closely related, arbitrability should not be confused with public policy. The relationship between the concepts of arbitrability and public policy would be better interpreted as the former is based upon the concern of the latter, but essentially has a different focus.

C. The law applicable to inarbitrability defence at enforcement stage

The aforesaid inherent conflict between arbitration and disputes concerning public interest and those extrinsic reasons may hence lead to the viewpoint that international arbitration is inappropriate to be used in resolving public interests-involved disputes. Indeed, as will be seen in Chapter IV, these reasons also formed the base of the initial distrust on international arbitration in resolving disputes concerning EU competition law.

With this plausible connection being established, the next question which should be answered is what the law applicable to arbitrability is. As shown above, different jurisdictions may interpret their public policy differently.²²⁰ Each jurisdiction hence possesses the discretion to shape their own standard of arbitrability. As such standard may differ from jurisdiction to jurisdiction²²¹, it thus crucial to determine which law should be applied when considering the arbitrability question at enforcement stage.

1. The *lex fori*

The prevailing viewpoint regarding this issue is that *lex fori*, i.e. the law of forum, should be applied when determining whether a subject matter is arbitrable at enforcement stage,²²² which could be legitimised by the point of view that, since

²¹⁹ *Ibid.*

²²⁰ See *supra* Section II(A)(3) of this Chapter.

²²¹ See Alexis Mourre (2011) *op. cit.*, *supra* note 130, at para. 1-049; Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at paras. 2.116 and 11.100.

²²² Stavros Brekoulakis, 'Chapter 6 – Law Applicable to Arbitrability: Revisiting the Revisited *Lex Fori*', in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, Kluwer Arbitration International, 2009, at para. 6-3. See also, for example,

arbitrability is related to a state's public policy concern, applying the *lex fori* to govern it is hence based upon a 'sound territorial consideration'²²³. This rationale is also seemingly endorsed in Article V(2)(a) of the NYC, which reads that:

'2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the *law of that country*...'

It is irrebuttable that 'the law of that country' points to the law of the enforcing state,²²⁴ and therefore, as opined,

'[T]he express mandate of the New York Convention Article V(2)(a) leaves very little space, if any at all, for a different view.'²²⁵

2. A second-look on the rationale of applying the *lex fori*: towards a restrictive application of the law of forum

Although being prevailing and seemingly impeccable, this choice of law may suffer from an 'illogic leap'. There is a logic lacuna between 'considering certain subject matters inarbitrable based upon a state's own public policy concern' and 'applying its own law in examining arbitrability issues at enforcement stage', namely that the arbitral award brought before the state's national court should actually have influence on the state's public policy. For example, in a hypothetical case, a party of State X and a party of State Y entered a contract which provides an arbitration agreement and the contract was performed in State Y. Later, the collaboration relationship collapsed and one of the party refer the dispute to arbitration. After an arbitral award was rendered,

Piero Bernardini, 'The Problem of Arbitrability in General', in E. Gaillard & D. Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, Cameron May, 2008, at p. 516; Hosna Sheikhattar and Alexander Odle, Conflict of Laws in the Arbitration of IP Disputes, *European International Arbitration Review*, Vol. 7, Issue. 1, 2018, at 75; Jean-François Poudret and Sébastien Besson (2007) *op. cit.*, *supra* note 200, at p. 285.

²²³ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 222, at para. 6-1. See also the discussion of the law applicable to public policy in *supra* Section II(B) of this Chapter.

²²⁴ See for example, Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 11.100. ('The issue of 'arbitrability' under [Article V(2)(a)] of the New York Convention is, of course, an issue for the law of the enforcement State'); Stavros Brekoulakis (2009) *op. cit.*, *supra* note 222, at para. 6-30.

²²⁵ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 222, at para. 6-3.

the winning party brought the award to the national court of a neutral enforcing state which has no connection with the contract, say State Z, and sought for enforcement. The arbitrability of the subject matter of the dispute between the parties is arbitrable under the law of State Y but inarbitrable under the law of State Z. Under this scenario, should the national court of State Z refuse to enforce the arbitral award based upon the inarbitrability of the subject matter under its own law?²²⁶

The answer should be in the negative. As discussed above²²⁷, arbitrability is essentially a ‘jurisdictional requirement’²²⁸ which concerns a specific state’s understanding of the unsuitability of arbitrating disputes with certain subject matters of public interests which the state intends to protect. It should thus be noted that a key premise of the applicability of a state’s arbitrability rule is that the national court of this state should have the jurisdiction to hear the dispute if there were no such arbitration agreement. Following this rationale, in this hypothetical case, State Z is a purely neutral state which would have no jurisdiction on hearing the dispute even if there were no such arbitration agreement. In other words, the exclusive jurisdictional rule of State Z will by no means be harmed in this case. Therefore, the arbitrability rule of State Z in this case will not be applicable. This understanding hence adds a premise to the application of a specific jurisdiction’s arbitrability rule: if a dispute will under no circumstance fall within the jurisdiction of an enforcing state’s national courts, it will not call for the application of the arbitrability rule of the enforcing state.²²⁹

²²⁶ Notably, as discussed in *supra* Section II(A)(3) of this Chapter, a specific state’s public policy may consist of two parts, namely the public policy concerning the state’s own social or economic interests or the generally recognised values which do not particularly concern the state. The place of the performance of contract being different from the enforcing state would hence not necessarily lead to that an arbitral award would not influence the public interest of the enforcing state, since the award may reflect certain generally recognised values. However, for the purpose of the research, this situation is not considered in this hypothetical case at this point, but will be further examined in *infra* Section I(A)(2) of Chapter V under the scenario of enforcing foreign arbitral awards concerning EU competition law.

²²⁷ See *supra* Section III(B) of this Chapter.

²²⁸ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-63.

²²⁹ However, it should be noted that the generally recognised values which do not particularly concern the state, although may be recognised as its public policy, could not trigger the exclusive jurisdiction of the enforcing state’s national court, since such exclusive jurisdiction is essentially established based upon the territoriality principle, i.e. ‘jurisdiction obtains over acts that have been committed within the territory’. See Cedric Ryngaert, *Jurisdiction in International Law*, Oxford University Press, 2008, at p. 42. See also, for example, Alexis Mourre (2011) *op. cit.*, *supra* note 130, at para. 1-073.

This understanding of arbitrability would then lead to another question: if under such scenario the national court of State Z should not apply its own law, then which law would govern the arbitrability issue at the enforcement stage? A plausible answer would be that if the national court of State Z has considered that the law of State Z is inapplicable, it should then leave the issue alone and enforce the award -- since the court of State Z would only have the obligation to ensure that the enforcement of the arbitral award would not contravene the rule of exclusive jurisdiction of State Z's national courts. Once this obligation is fulfilled, no more action would be needed.

Following this answer, notwithstanding, it may still be argued that the plausibility of this answer is still partially based upon the fact that under the law of state Y, which is the substantively interested jurisdiction,²³⁰ the subject matter is arbitrable. Therefore, even State Z leaves the issue alone there would not be any substantial influence. This answer may however be questioned when the fact of the hypothetical case is slightly changed: different from the original fact, the subject matter of the dispute between the parties is now also inarbitrable under the law of State Y. Should the national court of State Z, although still reckoning that its own law is inapplicable, refuse to enforce the arbitral award by applying the law of State Y, of which the public policy would actually be influenced, and the national courts' exclusive jurisdiction would actually be contravened?

Similar to the conclusion drawn above concerning the application of foreign public policy in refusing the enforcement of arbitral awards, the author opines that applying foreign exclusive jurisdiction rule to refuse enforcement would cross the boundary set by the Convention since Article V(2)(a), which should also be 'strictly applied',²³¹. It only allows an enforcing court to refuse enforcement if the subject matter of the involved dispute is not arbitrable under the law of the forum, but not under the law of other jurisdictions. Article V(2)(a), just as Article V(2)(b), should also be interpreted as merely providing a defensive mechanism for an enforcing court to protect its own

²³⁰ The term 'substantively interested jurisdiction' in this research refers to a jurisdiction which will actually have the jurisdiction to hear the dispute if there were no arbitration agreement.

²³¹ Gary Born (2014) *op. cit.*, *supra* note 21, at p. 3421.

fundamental public interest,²³² but not to excessively amplify the effect of public interests concern so that an enforcing court could apply a foreign arbitrability rule to hinder the enforcement of arbitral awards even when its own arbitrability rule would not get involved.

Notably, international comity may still come into play when considering the application of foreign arbitrability rules. A potential scenario would be that an enforcing court deems the need to respect exclusive jurisdiction rules of other jurisdictions to be a matter of its own public policy, and therefore decides to respect such rule and refuse to enforce an arbitral award. However, it should be noted that if it is actually the case the enforcing court would in fact apply Article V(2)(b), rather than Article V(2)(a), to refuse the award. This would thus not alter the conclusion that the law applicable to arbitrability issues under Article V(2)(b) is the *lex fori*.²³³

Following the analysis above, the author hence reckons that the law applicable to arbitrability issues is the law of forum, but an enforcing court should apply its own arbitrability rule only if the involved dispute actually triggers its jurisdiction on it. If this is not the case, the question of arbitrability should be left out and the award should be enforced, subject to other public policy concerns the enforcing court may have.

3. The law governing arbitration agreement or the law of arbitral seat

It follows from the discussion above that the *lex fori* should be the law applicable to arbitrability, although it should be applied with certain restriction. However, the discussion on this issue does not end here as besides the *lex fori*, the law governing arbitration agreement and the law of arbitral seat may also require certain attention when examining the law applicable to arbitrability issues.

These two potential applicable laws come into play under Article V(1)(a) of the NYC, which reads that:

²³² *Ibid*, at p. 3699. ('... nonarbitrability under ... V(2)(a) has the character of an exceptional escape mechanism, comparable to the public policy exception, where the local forum is permitted to deviate from the Convention's otherwise applicable international standards and to apply local mandatory rules.')

²³³ It should also be reiterated here that even the enforcing court by applying Article V(2)(b) to apply foreign arbitrability rule to refuse enforcement, the applicable law would still be the law of forum as the reason for enforcing court to do so is that such enforcement would essentially violate *its own* public policy.

‘1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, *only if that party furnishes* to the competent authority where the recognition and enforcement is sought, proof that

(a) ... the said agreement is *not valid* under the *law to which the parties have subjected it*, or failing any indication thereon, under the *law of the country where the award was made*’²³⁴

Therefore, by interpreting inarbitrability as a component of the invalidity of arbitration agreement, the law applicable to arbitrability would then be diversified as multiple choices, including the law governing arbitration agreement and the law of the seat²³⁵, would then emerge and should arguably be considered at the enforcement stage.

Although such connection between the inarbitrability and invalidity of an arbitration agreement is, to certain extent, recognised²³⁶, the author opines that it is by no means a dominant view²³⁷ and should be questioned from the following perspectives. First, and most importantly, it should be noted that there is an essential difference between the validity of arbitration agreement and the arbitrability of dispute. The validity of arbitration agreement concerns the inherent effectiveness of the arbitration agreement itself, rather than the agreement’s extrinsic connection with the public policy concern of a state. As correctly stated,

‘Despite its procedural effects, the arbitration agreement is primarily a substantive contract by which the parties agree to refer their disputes to arbitration instead of the state courts. This implies that for the agreement to come into existence the requirements for the conclusion of a contract must be fulfilled. The parties must have agreed the extent of the referral to arbitration

²³⁴ Emphasis added.

²³⁵ i.e. the law of the country where the award was made.

²³⁶ See Bernard Hanotiau, What Law Governs the Issue of Arbitrability? *Arbitration International*, Vol. 12, No. 4, 1996, at 391. (‘Arbitrability is indeed a condition of validity of the arbitration agreement and consequently, of the arbitrator’s jurisdiction’). See also, for example, J. Lew, L. Mistelis & S. Kröll (2003) *op. cit.*, *supra* note 200, at para. 9-18. (‘... arbitrability is often considered to be a requirement for the validity of the arbitration agreement ...’).

²³⁷ Although this approach was once described as a prevailing view in Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-58.

and there should be no factors present which may vitiate their consent under general contract law. Furthermore, the parties must have had capacity to enter into an arbitration agreement. In this respect the *arbitration agreement is a contract like any other contract*.²³⁸

Notably, besides the parties' consent, the capacity of parties and other formal requirements, any other conditions of validity would put arbitration agreements 'in a disadvantageous position compared to other substantive contracts'²³⁹ and therefore 'the principle of the contractual nature of arbitration agreement would be violated'²⁴⁰.

Differently, the arbitrability of a dispute concerns more of a public policy rather than an inherent contractual requirement. As discussed above, arbitrability concerns whether a dispute concerning a specific subject matter would be inappropriate to be adjudicated in arbitration from the perspective of a specific jurisdiction – this is an extrinsic issue concerning the exclusive jurisdiction rule of a state but not the fundamental contractual relationship between the parties. This conceptual distinction would therefore understandably lead to that, for example, although an arbitration agreement is itself valid, an enforcing court may still refuse to enforce the arbitral award based upon that the subject matter of the parties' dispute as covered by the arbitration agreement is subject to the exclusive jurisdiction of the enforcing state (but not because of any inherent deficiency of the agreement itself).

Secondly, from a more pragmatic perspective, this connection between the validity of arbitration agreement and the arbitrability of the subject matter of parties' dispute does not seem to be approved by the NYC, at least one could not confidently establish it by perusing the text of the Convention. It could be clearly seen that the validity of arbitration agreement (as provided in Article V(1)(a)) and arbitrability (as provided in Article V(2)(a)) are placed in two different provisions, and such placement was arranged with certain reasons. One of the most potent reasons is that the role an enforcing court plays under Article V(1) and Article V(2) are different. Under the former, an enforcing court may examine relevant violations only if it is raised by the parties whilst under the latter, the court could examine arbitrability

²³⁸ J. Lew, L. Mistelis & S. Kröll (2003) *op. cit.*, *supra* note 200, at para. 7-3. Emphasis added.

²³⁹ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-61.

²⁴⁰ *Ibid.*

issues on its own motion.²⁴¹ Therefore, since interpreting arbitrability as a component of an arbitration agreement being valid would not render the inapplicability of Article V(2)(b) of the NYC, a practical dilemma would hence arise: could an enforcing court raise the issue of arbitrability on its own initiative or should an enforcing court only raise the issue of arbitrability based upon parties' claims? Moreover, allowing arbitrability issues to be raised under both the law governing arbitration agreement or the law of seat (if interpreting inarbitrability as a component of invalidity and hence under Article V(1)(a)) and the law of enforcing state (under Article V(2)(b)) would in fact expand the scope of scrutiny of arbitral award, i.e. subject the enforceability of arbitral award under not only the law of enforcing state but also the law governing arbitration agreement or the law of seat, which could arguably run counter to the pro-enforcement spirit of the Convention, and would thus also make this approach less persuasive.

Hence, based upon these considerations, the author reckons that it would be more tenable to believe that the drafters of the Convention have intentionally distinguished the validity of arbitration agreement with the arbitrability of parties' dispute, and the conclusion that the law governing arbitrability issues at enforcement stage should be the law of the enforcing state hence still remains defensible.

D. The permissive wording and its application under Article V(2)(a)

The previous research on the rationale and law applicable to inarbitrability seems to grant an enforcing court with the full discretion on arbitrability issues: once an enforcing court deems a specific subject matter inarbitrable under its own law, it could certainly refuse to enforce an award concerning a dispute of this subject matter. It hence leaves the impression that the permissive wording 'may' under Article V(2)(a) refers to a rather high level of discretion.

This, notwithstanding, is not the case in practice. Such seemingly wide discretion is in fact largely restricted under the consideration of the enforcement-bias borne by the NYC. Since as stated that the Convention was designed to 'encourage the recognition

²⁴¹ Article V(2) reads that: 'Recognition and enforcement of an arbitral award may also be refused if the *competent authority* in the country where recognition and enforcement is sought *finds* that ...'.

and enforcement of commercial arbitration agreements'²⁴², such arbitrability defence should be understood as an exception rather than an option to be applied freely.²⁴³ As inspiringly proposed by a leading scholar, the application of arbitrability should be restricted from two aspects, namely that a NYC Contracting State may only treat specific, rather than broadly-scoped subject matters²⁴⁴ as non-arbitrable in order to protect discrete and articulated public policy;²⁴⁵ and a Contracting State, when establishing its own nonarbitrability exceptions, should also examine the necessity of such exception by not only considering its own national conditions but also the evolving practice of other states.²⁴⁶ Following this restrictive attitude, it could be clearly noticed that the scope of arbitrability has experienced a remarkable expansion in the last two decades,²⁴⁷ and in general awards are now rather rarely denied on the ground of nonarbitrability.²⁴⁸

²⁴² *Scherk v. Alberto-Culver*, 417 U.S. 506, 1974, footnote 15, at 520. Notably, such enforcement-friendly attitude is also widely recognised and applied. See Gary Born (2014) *op. cit.*, *supra* note 21, at p. 129. ('[O]ver the past 50 years, virtually every major developed country has substantially revised or entirely replaced its international arbitration legislation, in every case, to facilitate the arbitral process and promote the use of international arbitration.')

²⁴³ Gary Born (2014) *op. cit.*, *supra* note 21, at p. 1039. ('The expansive application of judicially-created 'non-arbitrability' rules also contradicted the objectives of the New York Convention and most national arbitration legislation.')

²⁴⁴ For example, a hypothetical provision which generally provides that 'disputes concerning tort claims shall not be arbitrated' would clearly violate this principle.

²⁴⁵ Gary Born (2014) *op. cit.*, *supra* note 21, at p. 614.

²⁴⁶ *Ibid.*, at p. 616. This viewpoint has been recognised by jurisdictions such as the U.S., see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 1985, at 639 ('it will be necessary for national courts to subordinate domestic actions of arbitrability to the international policy favouring commercial arbitration')

²⁴⁷ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-3. See also, for example, Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 2.144; Margaret L. Moses (2017) *op. cit.*, *supra* note 22, at p. 244; Alexis Mourre (2011) *op. cit.*, *supra* note 130, at paras. 1-006 and 1-025. It should also be noticed that some jurisdictions even intentionally distinguish domestic arbitrability issues with international arbitrability issues and confine themselves from applying domestic standard in enforcing international awards. For example, although Article 2060 of the French *Code civil* provides that 'one may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and *more generally in all matter in which public policy is concerned*' (The original text is 'On ne peut compromettre sur les questions d'état et de capacité des personnes, sur celles relatives au divorce et à la séparation de corps ou sur les contestations intéressant les collectivités publiques et les établissements publics et plus généralement dans toutes les matières qui intéressent l'ordre public'. The translation was given in Stavros Brekoulakis, (2009) *op. cit.*, *supra* note 200, footnote 11, at para. 2-6.), its application is limited to domestic arbitration but not an international one as the latter is governed by French *Code de procédure civile*, in which such limitation cannot be seen. (See Jean-François Poudret and Sébastien Besson (2007) *op. cit.*, *supra* note 177, at pp. 292-293.)

²⁴⁸ Margaret L. Moses (2017) *op. cit.*, *supra* note 22, at p. 243. See also, for example, J. Lew, L. Mistelis & S. Kröll (2003) *op. cit.*, *supra* note 200, at para. 9-2; Karim Abou Youssef (2009) *op. cit.*, *supra* note 205, at para. 3-54.

Nevertheless, although it has been increasingly rare that arbitrability defence could be successfully invoked, it is premature to utterly disregard it since inarbitrability is still active in certain areas, especially those concerning strong public interest,²⁴⁹ and the scope of arbitrability as applied by different jurisdictions still, to certain extent, remains different.²⁵⁰ Therefore, it is still too early to announce the ‘death’ of inarbitrability²⁵¹, and the issues of arbitrability hence still remain a relevant subject matter to be considered.

E. Remaining questions concerning arbitrability issues

Through the introduction and analysis above, a basic mechanism of arbitrability is hence established by Article V(2)(a) of the NYC: the arbitrability of a specific subject matter at enforcement stage is determined pursuant to the enforcing state’s understanding of the inappropriateness of arbitrating this subject matter. If the dispute would fall within the jurisdiction of the enforcing state’s national courts, the law of forum would be applied. If not, inarbitrability should not be invoked as a bar to obstruct the enforcement of arbitral awards.

This basic mechanism, although being seemingly clearly established, is not free of uncertainty in legal practice. There is a remaining question concerning whether the reasons as listed in Section III(A) of this Chapter would always lead to a subject matter concerning public interest being inarbitrable.

- To begin with, a question mark would hang on those extrinsic reasons as they seem to be more empirically assumptive rather than being uniformly observed. For example, in the case of the alleged ‘less intensive fact-finding process and less rigorous evidential proceedings when compared to national courts’, it still remains to be seen whether this phenomenon could be observed both horizontally and vertically: as for the former, whether it could

²⁴⁹ Gary Born (2014) *op. cit.*, *supra* note 21, at p. 1040. (‘the demise of the nonarbitrability doctrine has occurred exclusively in the field of private rights of action, almost always in commercial disputes between business entities’)

²⁵⁰ Jean-François Poudret and Sebastien Besson (2007) *op. cit.*, *supra* note 177, at p. 314. (‘This survey of some restrictions to the arbitrability of disputes ... show[s] that limitations do exist and are not uniform.’) For example, different from many other jurisdictions, disputes arising from exclusive distributorship agreements performed in Belgium are still deemed as inarbitrable. See Alexis Mourre (2011) *op. cit.*, *supra* note 130, at para. 1-026.

²⁵¹ Stavros Brekoulakis (2009) *op. cit.*, *supra* note 200, at para. 2-86. (‘Inarbitrability is not dead; at least, not yet.’)

be observed in every jurisdiction? As for the latter, whether it could stand the test of time, especially with the development of international commercial arbitration as an increasingly widely applied dispute resolution mechanism?

- Moreover, although the reason concerning the inherent inappropriateness of the marriage of international arbitration and disputes concerning public interests could be much more persuasive and conclusive, several doubts would need to be resolved first before affirming its legitimacy.
 - First, as regards the argument that arbitrating public interests involved disputes would violate the contractual essence of international arbitration since it would inevitably exert influence on third parties, what are the nature of influence as exerted on the contractual parties and the third parties? Are these influences the same or should they be distinguished? If they are different, would such difference degrade the legitimacy of this argument?
 - Secondly, in regard to the argument that the confidentiality of international arbitration would possibly cause information asymmetry which may hence block subsequent adjudications and lead to the insufficient redress for behaviours violating relevant public interests, the uncertainty lies in that is confidentiality in international arbitration absolute? In other words, would confidentiality always lead to the alleged information asymmetry and the blockage of subsequent adjudications?

These issues will be further examined in Chapter IV, where the question will be further concretised and examined by placing the focus upon the arbitrability of EU competition law disputes.

IV. Exploring the interrelationship between seat courts and enforcing courts under Article V(1)(e)

The last ground addressed by this research is provided in Article V(1)(e), which reads that:

‘1. Recognition and enforcement of the award may be refused ... if ...

...

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.²⁵²

Although textually speaking, the expression ‘the country in which, or under the law of which, that award was made’ could be interpreted as a multi-directional provisions pointing to several potential jurisdictions, in legal practice, this provision is widely understood as referring to the arbitral seat of international arbitration.²⁵³ Therefore, this ground is usually interpreted as that if an arbitral award has been set aside by the court of arbitral seat, the enforcing court may refuse to enforce the vacated award.

A. The permissive wording and its application under Article V(1)(e)

An issue immediately following the interpretation of the text of Article V(1)(e) is where the permissive wording ‘may’ will lead the decision of an enforcing court to when encountering an arbitral award annulled by a seat court.

Expectedly, the involvement of both seat court and enforcing court would inevitably require an allocation of competence, which would theoretically fork three main paths.

²⁵² Notably, for the purpose of this research, the scenario that an award has not yet become binding on the parties will not be considered.

²⁵³ It could be noted that there are actually two options mentioned in this provision, namely the country in which the award was made and the country under the law of which the award was made. As for the former, it is rather uniformly understood to refer to the country of the seat of arbitration. (See, for example, Gary Born (2014) *op. cit.*, *supra* note 21, at pp. 3621-3622; *Steel Corporation of the Philippines v. International Steel Services, Inc.*, U.S. District Court, the Western District of Pennsylvania, U.S., 31 July 2006, Civil Action No. 06-386.). As for the latter, although theoretically speaking the expression ‘under the law of which the award was made’ could be interpreted as referring to the law governing the arbitration proceedings; the law governing the parties’ arbitration clause and the substantive law governing the parties’ underlying dispute, it is generally understood as referring to the country of which the law would govern the procedural aspects of an international arbitration. (See, for example, Nadia Darwazeh, ‘Article V(1)(e)’, in Herbert Kronke, Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Kluwer Law International, 2010, at p. 321.).

Notably, although being rather rare that an arbitration agreement would provide that on the one hand state X will be the seat of arbitration whilst on the other hand the law of state Y will govern the procedural aspects of the arbitration, it did happen occasionally. (See, for example, *Union of India v. McDonnell Douglas Corporation* [1993] 2 Lloyd’s Rep 48. (HC)). One of the prevailing ways, at least as observed in England, is to strike the balance and opine that the internal procedural aspects of the arbitration will be governed by the law of state Y whilst the external aspects of the arbitration (e.g. those concerning the involvement of seat’s court) will be governed by the law of state X. (See Jonathan Hill, Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements, *International and Comparative Law Quarterly*, 2014, at 527-534.) For the purpose of this research, this subtle potential difference between the country in which an award was made and the country under the law of which an award was made will not be further discussed and they will be understood as both referring to the seat of arbitration in the following discussion.

The traditional path recognises the legitimacy of both seat court and enforcing court in examining the legality of arbitral award and anchors international arbitration in ‘a plurality of national legal order’²⁵⁴. It would also make a distinction between a seat court and an enforcing court by recognising a ‘primary jurisdiction’ between them, which would, quasi-exclusively, determine the legality of an arbitral award. Differently, the second path opines that international arbitration is ‘relegated to a component of a single national legal order’²⁵⁵. In other words, on this path, the court of a jurisdiction would possess the absolute primacy and the viewpoint of the court of the other jurisdiction would make no difference. Last but not least, the third path, which is the seemingly fairest way, treats arbitral seat and enforcing state equally – their legal requirements would essentially weigh the same.

As for these three paths, the third path may not be practical at all. Pursuing such seemingly fairness would almost unfortunately incur unpleasant uncertainty: equal importance would also mean equal unimportance. As sharply pointed out:

‘If no forum enjoyed the nullificatory power ... accorded to primary jurisdiction ... the winner of a defective award could fail in enforcement in any forum and still continue to go to others in an effort at enforcement, harassing the other party and forcing it either to settle for a nuisance value factored by the number of jurisdictions in which it could be pursued or to expend great amounts of time and effort to block and block again enforcement efforts without ever securing a terminal annulment.’²⁵⁶

The interrelationship between seat courts and enforcing courts under Article V(1)(e) should then follow either the first or the second path.

1. Two potential paths under the NYC

There seems to be no doubt that Article V(1)(e) steps on the first path as it impliedly grants seat courts a primary status whilst leaves certain space for the discretion of enforcing courts. As reflected in legal practice, the majority behavioural pattern is that the annulment decision made by a seat court would usually generate a universal

²⁵⁴ Emmanuel Gaillard (2010) *op. cit.*, *supra* note 158, at p. 24.

²⁵⁵ *Ibid.*, at p. 15.

²⁵⁶ W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*, *Duke University Press*, 1992, at p. 117.

effect which should be generally respected and followed.²⁵⁷ Even if an enforcing court decides to enforce the award, it could do so only under rather exceptional scenarios²⁵⁸ and such decision would not generate extraterritorial effect.²⁵⁹ Due to the wide acceptance of this approach, the first path will hence also be called as the ‘traditional path’ hereinafter.

However, such implied primacy of seat court under the Convention may arguably be subject to a potential exception pursuant to an interpretation of Article VII of the NYC. Article VII, also known as a ‘more-favourable-right’ provision²⁶⁰, reads that ‘[t]he provisions of the present Convention *shall not* ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and *to the extent allowed by the law* or the treaties of the country where such award is sought to be relied upon.’²⁶¹ It has been interpreted by certain jurisdictions as allowing an enforcing court, by excluding Article V(1)(e) from its own arbitration law²⁶², enforce an arbitral award which has been set aside by a seat court: since Article V(1)(e) is a provision of which the effect is to potentially block the enforcement, if an enforcing state’s arbitration law does not include this provision, it would in fact be qualified as a more lenient legal requirement as the chance of

²⁵⁷ *Ibid*, at p. 114. See also, for example, Jonathan Hill (2016) *op. cit.*, *supra* note 86, at 326. (‘The majority opinion among commentators seems to accept ... if an award has been set aside by the courts of the seat of arbitration, the courts of other countries should, as a general rule, refuse to enforce the award under the Convention’); *PT First Media TBK v. Astro Nusantara International BV* [2013] S.G.C.A 57, at para. 77. (‘While the wording of Art V(1)(e) of the New York Convention and Art 36(1)(a)(v) of the Model Law arguably contemplates the possibility that an award which has been set aside may still be enforced, in the sense that the refusal to enforce remains subject to the discretion of the enforcing court, the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce.’).

²⁵⁸ Which will be further looked at in *infra* Section IV(A)(3) of this Chapter.

²⁵⁹ W. Michael Reisman (1992) *op. cit.*, *supra* note 256, at p. 114.

²⁶⁰ Georgios C. Petrochilos (1999) *op. cit.*, *supra* note 78, at 874.

²⁶¹ Emphasis added.

²⁶² This is the position of France, of which the arbitration law does not include a counterpart provision of Article V(1)(e) of the Convention. See Livre IV of Code de procédure civile. See also French *Cour de cassation* decision of October 9, 1984, *Revue de l'Arbitrage*, 1985, at 341, commentary of B. Goldman; France No. 20, *Polish Ocean Line v. Jolasry*, *Cour de cassation*, 10 March 1993, Y.B. Com. Arb., 1994, at p. 662; France No. 23, *Hilmarton Ltd. v. Omnium de traitement et de valorisation – OTV*, *Cour de cassation*, 23 March 1994, Y.B. Com. Arb., 1995, at p. 665; France No. 26, *The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc.*, *Cour d'Appel*, Paris, 14 January 1997, Y.B. Com. Arb., 1997, at pp. 692-693. Notably, the U.S. also excludes the application of Article V(1)(e) from its own arbitration law and once enforced an annulled arbitral award. See *Chromalloy Aeroservices v. The Arab Republic of Egypt*, U.S. District Court, District of Columbia, 939 F. Supp. 907, 1996. However, different from French case law, it was reported that this decision has not been very influential in subsequent U.S. cases. See Margaret L. Moses (2017) *op. cit.*, *supra* note 22, at pp. 238-241.

enforcement of the allegedly flawed award would be greater. Also, it was argued that the mandatory feature of this provision ('shall not') would determine that it takes precedence over Article V(1)(e), which essentially reflects the discretion of enforcing court ('may').²⁶³ As stated by the U.S. District Court of the District of Columbia in *Chromalloy v. The Arab Republic of Egypt*:

'While Art. V provides a *discretionary* standard, Art. VII of the Convention requires that, [the text of Article VII]. In other words, under the Convention, Chromalloy maintains all rights to the enforcement of this Arbitral Award that *it would have in the absence of the Convention*. Accordingly, the Court finds that, if the Convention did not exist, the Federal Arbitration Act would provide Chromalloy with a legitimate claim to enforcement of this arbitral award.'²⁶⁴

Under this interpretation, if an enforcing state does not include the counterpart of Article V(1)(e) of the Convention in its own arbitration law, the enforcing court would ultimately determine the legality of arbitral award and a seat court's annulment judgment would in fact become trivial before it. This interpretation hence suggests that the Convention may also simultaneously pick the second path, or the 'unorthodox path' from the viewpoint of the author as it essentially runs counter to the traditional path the Convention seems to step on: the legitimacy of seat court examining the legality of arbitral award could be ignored, and the fate of arbitral award would be solely controlled by enforcing court.

2. Pick a sounder one: examining the reasons for driving on both paths under the NYC²⁶⁵

Although the two paths as shown in the interpretation of Article V(1)(e) and Article VII point to two opposite directions, they are both logically coherent and conforms to

²⁶³ Kenneth R. Davis, Unconventional Wisdom: A New Look at Article V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 37 *Texas International Law Journal* 43, 2002, at 82.

²⁶⁴ *Chromalloy Aeroservices v. The Arab Republic of Egypt*, U.S. District Court, District of Columbia, 939 F. Supp. 907, 1996, at 909. Emphasis added.

²⁶⁵ Different from the concept of the 'first' and 'second' paths as proposed in Section IV(A) of this Chapter, the 'first' and 'second' paths as mentioned in this Section refer to the paths as further specified in Section IV(a)(1) of this Chapter.

the letter of the Convention²⁶⁶, and could theoretically cohabit in the way that Contracting enforcing states should generally follow seat courts' annulment judgments unless their arbitration laws exclude Article V(1)(e). Nevertheless, this reflected incompatibility could not be simply reconciled in this way: it does not make any sense that the Convention on the one hand intends that an award being annulled would be a legitimate ground for potential refusal of enforcement whilst on the other hand allows an enforcing court, by unilaterally excluding Article V(1)(e) from its arbitration law, to totally ignore this ground. Accordingly, since the interpretation of an international treaty should not stop at the literal level²⁶⁷, besides the perusal of the text of these provisions, the practical rationale for driving on these two paths should also be considered to see whether a sounder path could be picked out rather than living with a self-contradictory theoretical possibility of cohabitation.

a. Seat designation and party autonomy

The first and also the most fundamental rationale for choosing the traditional path lies in the alleged connection between arbitral seat and parties' intention of subjecting the procedural aspects of their arbitration to the law of the chosen forum. As argued, parties' seat designation should be interpreted as a deliberate consideration on the jurisdiction over annulment of their arbitral award²⁶⁸ and the extent of control as exercised by the seat court²⁶⁹, rather than a mere reckless choice. As stated,

‘[T]he choice of the seat of the arbitration is not fortuitous, not is it simply a matter of convenience. When the parties make a choice in this respect, they

²⁶⁶ Christopher Koch, The Enforcement of Awards Annulled in their Place of Origin, *Journal of International Arbitration*, Vol.26, Issue 2, 2009, at 287.

²⁶⁷ See Article 31(1) of the Vienna Convention on the Law of Treaties, which reads ‘A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its *objects and purpose*’.

²⁶⁸ Hamid G. Gharavi, The International Effectiveness of the Annulment of an Arbitral Award, *Kluwer Law International*, 2002, at p. 129. See also, for example, William W. Park, Duty and Discretion in International Arbitration, *The American Journal of International Law*, Vol. 93, No. 4, 1999, at 823.

²⁶⁹ Some laws authorise parties to provide for stricter/less rigorous annulment grounds than those contained under the NYC or the UNCITRAL Model Law. See Emmanuel Gaillard (2010) *op. cit.*, *supra* note 158, at pp. 36-43.

are in fact expressing their intent to *subject themselves to a given national legal order*.²⁷⁰

Therefore, since the vast majority of grounds as listed in the Convention and applied in legal practice for setting aside an arbitral award concerns procedural violations,²⁷¹ and parties consensually subject the procedural aspects of their arbitration to the law of a designated arbitral seat, placing the court of seat on the position of primary jurisdiction with a granted authority of setting aside arbitral awards is hence strongly convincing based upon the concern of party autonomy, which is unquestionably prioritised by and hence also one of the most notable feature of international arbitration.²⁷²

Nevertheless, such interpreted connection between the chosen forum and the law governing arbitration does not stand unquestioned; instead, it has actually been challenged on several grounds, e.g. the choice of seat may actually be a matter of convenience in legal practice; the choice of seat is often determined not by the parties but by the arbitration institution they have selected; the choice of seat is often governed by the desire for neutrality, etc.²⁷³ As queried:

‘One has to admit that any reasoning which attempts to reconstruct the parties’ intention regarding their choice of the seat of their arbitration, as if all situations were the same, is a highly speculative exercise, even when the

²⁷⁰ *Ibid*, at p. 19. Emphasis added. See also, for example, Roy Goode, The Role of the *Lex Loci Arbitri* in International Commercial Arbitration, *Arbitration International*, Vol.17, Issue 1, 2001, at 32; Bruno Leurent, Reflections on the International Effectiveness of Arbitration Awards, *Arbitration International*, Vol. 12, No. 3, 1996, at 272. (‘The seat is typically fixed in a place where neither party has a place of business ... That location is not selected for its hotel facilities or charming setting, but essentially because of the parties’ confidence in the neutrality of the forum, the quality of the [arbitration law of the seat], the competence of [the jurists, arbitrators and judges of the arbitral seat]’)

²⁷¹ From a practical perspective, see Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 10.60. (In general terms ... there is seldom room for any form of appeal from an arbitral award, on the law or on the facts, or for any judicial review of the award on its merits. If the tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award – good, bad, or indifferent – is final and binding on the parties.)

²⁷² Alan Redfern & Martin Hunter (2004) *op. cit.*, *supra* note 29, at p. 315. (‘Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations.’). See also, for example, Report of the Secretary-General: possible features of a model law on international commercial arbitration, UN Doc. A/CN.9/207, at para. 17. (‘Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations.’)

²⁷³ J. Lew, L. Mistelis & S. Kröll (2003) *op. cit.*, *supra* note 200, at para. 4-48.

parties themselves have directly decided on the matter. The only certainty is that the parties have decided to have their dispute resolved by way of arbitration ... The idea that they nonetheless implicitly accepted that the fate of their dispute be ultimately subjected to the conceptions of the seat's legal order on arbitration – or, in practice, what the courts of the seat will decide – seems questionable to say the least.²⁷⁴

Therefore, it was opined by some scholars that an enforcing state which is not persuaded by the 'default' connection between seat designation and the law governing parties' arbitration may well disregard seat court's annulment judgment and step on the unorthodox path since as far as it is concerned,

'Between a State that simply hosts arbitral proceedings in its hotels or its conference centers and a State that authorizes the seizure and forced sale of assets on its territory, the latter manifestly has the strongest title to determine what it regards to be an arbitral award worthy of legal protection and, retrospectively, what it considers to be a valid arbitration agreement and proper arbitral proceedings.'²⁷⁵

However, simply relying on a possibility to query the legitimacy of another possibility is hardly tenable. Just as the advocates of the traditional path could be criticised that they fail to consider the scenario that a seat designation may be made based upon reasons other than parties' intention of subjecting their arbitration to the law of the seat, the reverse would also be true: those who picks the unorthodox path might also fail to realise the possibility that a seat designation may actually be made based upon the parties' intention to let the seat's arbitration law govern their arbitration. Moreover, and more pertinent, even if the parties designate an arbitral seat merely out of the consideration of, say, convenience, they still show their consensus on choosing a specific forum. The consequence of such choice would be that a connection, no matter how strong or scarce, between the forum and their arbitration would be established. But at the stage of agreeing on an arbitration agreement, such connection could generally not be seen between enforcing state and

²⁷⁴ Emmanuel Gaillard (2010) *op. cit.*, *supra* note 158, at p. 20.

²⁷⁵ *Ibid.*, at p. 32.

the parties' arbitration: since parties may not even know²⁷⁶ or confirm²⁷⁷ the enforcement state when entering an arbitration agreement, how would they intend to subject their arbitration to the arbitration law of an uncertain place? Hence, the author reckons that even though the connection between seat designation and the law governing parties' arbitration might be actually scarce, there would be no point for an enforcing court to simply disregard the connection and control the fate of an arbitral award, and interpreting parties' seat designation as choosing the law governing their arbitration would therefore be more persuasive.

b. The consideration of maintaining legal certainty

Nevertheless, merely depending on the analysis of party autonomy may not lead to the undisputed conclusion that the traditional path is a sounder one: under a rarer, yet still possible, scenario that an enforcing state excludes Article V(1)(e) from its arbitration law and the parties to an arbitration agreement fail to designate an arbitral seat, since no clear parties' intention is shown in this case, the unorthodox path would then be unobstructed. The question is then turned to that under this circumstance whether a presumptive arbitral seat should be proposed and mainly control the fate of arbitral award (the traditional path) or whether the enforcing court should now be the sole authority in examining the legality of arbitral award (the unorthodox path).

This is where the second rationale for driving on the traditional path, namely the concern of the legal certainty of international arbitration, comes into play, which is clearly one of the Convention's major objects.²⁷⁸ As for legal certainty, by choosing the traditional path, the legality of arbitral award would generally be controlled by a single jurisdiction, i.e. an arbitral seat, no matter being clearly designated or speculated, which would to a large extent ensure the certainty of international arbitration. Nevertheless, it may not be the case if the unorthodox path is chosen.

²⁷⁶ Georgios C. Petrochilos (1999) *op. cit.*, *supra* note 78, at 883. ('The enforcement forum is by definition a haphazard one')

²⁷⁷ Especially under the scenario that the counterparty may have assets in multiple jurisdictions.

²⁷⁸ David W. Rivkin, *The Impact of International Arbitration on the Rule of Law – The 2012 Clayton Utz/University of Sydney International Arbitration Lecture, Arbitration International*, Vol. 29, Issue 3, 2013, at 340. ('... the New York Convention ... facilitate[s] trade by providing certainty to businesses in their relationships with one another. Indeed, *certainty is the hallmark of the New York Convention ...*')

Unlike the seat of arbitration, the number of the recognition and enforcement state of an international arbitration may be more than one and the enforcement forum could therefore ‘hardly make any claim to extraterritorial effects’²⁷⁹. As one could not possibly ensure that the enforcement standard as applied around the world would be uniform, anchoring the legality of arbitral award in multiple potential forums may well lead to the facilitation of the creation of ‘floating awards’²⁸⁰, and lead to the possibility, or at least the theoretical possibility, of ‘forum shopping’²⁸¹, i.e. the losing party could be pursued by the winning party with enforcement actions from country to country until a court is found, if any, which excludes Article V(1)(e) in its arbitration law and is willing to grant the enforcement.²⁸² This would largely derogate the legal certainty of international arbitration and is undoubtedly an unsatisfactory result deviating from the original intention of the drafters of the NYC.

Moreover, driving on the unorthodox path may also preach down the legal certainty of international arbitration as it would, under certain situations, allow an enforcing court to re-examine what a seat court has already examined. It stands theoretically true that an enforcing court of a jurisdiction which is a NYC Contracting State could exclude Article V(1)(e) from its arbitration law and hence examine the legality of an arbitral award freely based upon Article VII, but such exclusion would not avoid that the legality of an arbitral award may still be examined by a seat court. Under this circumstance, although Article V(1)(e) is dismissed, the rest provisions of Article V are not – the enforcing court could still only examine the legality of the award pursuant to the rest of provisions as set in Article V²⁸³. Since these provisions are also mirrored in Article 34 of the UNCITRAL Model Law which regulates on the

²⁷⁹ Georgios C. Petrochilos (1999) *op. cit.*, *supra* note 78, at 883.

²⁸⁰ J. Lew, L. Mistelis & S. Kröll (2003) *op. cit.*, *supra* note 200, at para. 4-58.

²⁸¹ Hamid G. Gharavi (2002) *op. cit.*, *supra* note 268, at p. 125.

²⁸² Albert Jan van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*, Proefschrift: Erasmus Universiteit, Rotterdam, 1981, at p. 355. See also W. Michael Reisman (1992), *op. cit.*, *supra* note 256, at pp. 116-117. (‘The distinction between primary and secondary jurisdiction is, in my view, central to the control system of the New York Convention and has been an important reason for the attractiveness of the regime to its various consumers... Without primary-secondary jurisdictional distinction, all states-parties to the New York Convention would be jurisdictionally equal. If any of the almost eighty fora of the convention enjoyed the power accorded to primary jurisdictions, the unscrupulous arbitration loser could quickly abandon the neutral forum upon which both parties had agreed and seek a favourably inclined jurisdiction.’)

²⁸³ Article V of the NYC reads that ‘Recognition and enforcement of the award may be refused ... *only if* the party ... proof that ...’, which clearly shows that the grounds listed in this provision are exclusive but not exemplified.

annulment of arbitral award, it thus stands a good chance that what is raised before an enforcing court might have been examined by a seat court -- this is hardly what the drafters of the Convention expect. As correctly pointed out:

‘One of the problems with the concept of the stateless award is that it fails to respect this well-established principle of estoppel. A party against whom an award is made decides to challenge it in the courts of the seat of the arbitration. If he is unsuccessful, why should he be allowed a second – or a third or fourth – bite at the cherry in proceedings before a court or courts elsewhere? Why, having embarked on a challenge under the *lex loci arbitri*, should he not be required to accept the outcome?’²⁸⁴

c. The concern of local outdated idiosyncrasies

However, it is argued that such legal certainty should not be blindly revered and the advocates of the unorthodox path plausibly raise an issue to challenge the legitimacy of picking the traditional path. It was stated that, in practice there was a ‘double, contradictory, trend in international arbitration: on the one hand, the modernisation of laws and, on the other hand, the judicial exacerbation of idiosyncrasies’²⁸⁵ Therefore, choosing the traditional path and highly praising the primacy of seat court’s annulment judgment may possibly lead to an unsatisfactory result, namely that an arbitral award may eventually be invalidated because of being annulled either on an archaic understanding of the annulment grounds as mirrored in Article V of the Convention²⁸⁶ or on the basis of an exorbitant local annulment ground which is *not recognised* by the international arbitration community²⁸⁷. Following this possibility,

²⁸⁴ Roy Goode (2001) *op. cit.*, *supra* note 270, at 35. See also, for example, *Termorio S.A.E.S.P. & Leaseco Group, L.L.C. v. Electranta S.P. et al.*, 487 F.3d 928, 2007, at 937. (‘The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely *second-guess the judgment of a court in a primary State*, when the court in the primary State has lawfully acted pursuant to “competent authority” to “set aside” an arbitration award made in its country.’)

²⁸⁵ Emmanuel Gaillard (2010) *op. cit.*, *supra* note 158, at p. 23.

²⁸⁶ For example, although the UNCITRAL Model Law, by adopting an amendment in year 2006, provides a lower formal requirement of an arbitration agreement being valid (especially as for the requirement of arbitration agreement being ‘in writing’) than that of in the previous version of the Model Law, some jurisdictions may not adopt this amendment and still apply the archaic understanding of an arbitration agreement being in writing, and may hence set aside an arbitral award pursuant to Article 34(2)(a)(i) of the Model Law, which requires the validity of arbitration agreement.

²⁸⁷ Hamid G. Gharavi (2002) *op. cit.*, *supra* note 268, at p. 115. Emphasis added. See also Georgios C. Petrochilos (1999) *op. cit.*, *supra* note 78, at 882. It should be noted that such archaic understanding or exorbitant local annulment ground do not include what is recognised by a particular jurisdiction as its

driving on the traditional path may unreasonably derogate the finality and enforceability of international arbitral award, which is another landmark purpose of the Convention²⁸⁸, by applying archaic laws²⁸⁹, and the unorthodox path should then be chosen as it would prevent such obnoxious localism.²⁹⁰

The possibility of the enforceability of international arbitral award being derogated by outdated idiosyncrasies should not be overlooked, and it is rather persuasive that once an enforcing court encounters an annulment judgment which was made based upon an obsolete annulment standard, it should be allowed to overrule it – the enforceability of arbitral award should not be unconditionally sacrificed for fulfilling legal certainty. As Staughton, L.J. stated in *Soleh Boneh v. Uganda Government*,

‘[i]f the award is *manifestly* valid, there should ... be an order for immediate enforcement’²⁹¹.

Nevertheless, the author opines that simply relying on the possibility that the annulment standards as applied by some seat courts may be outdated to allow enforcing courts to *systematically* overlook seat courts’ annulment judgment would hardly be legitimised. First, and most obviously, the possibility that there may be some courts setting aside arbitral awards based upon their archaic annulment standards will not eliminate the possibility that there would also be other courts which are not excessively conservative²⁹². Allowing an enforcing court to simply ignore a seat court’s annulment judgment based upon the mere possibility that the seat court might apply outdated annulment standard would hence be rather overgeneralised. Following this argument, secondly, without first judging whether a

public policy. Since public policy concern the most fundamental values or interests of a jurisdiction, although it may be actually parochial or not in line with the common practice, it is still inappropriate to label it as archaic and should thus be ignored.

²⁸⁸ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UN Publications, at 1.

²⁸⁹ Hamid G. Gharavi (2002) *op. cit.*, *supra* note 268, at p. 115. (Which means to eliminate the impact of those ‘outdated’ states which still hold a rather strong conservative annulment standard, but not an international one, on international arbitration). See also, Jan Paulsson, Delocalisation of International Commercial Arbitration: When and Why It Matters, 32 *International and Comparative Law Quarterly* 53, 1983, at 59.

²⁹⁰ Hamid G. Gharavi (2002) *op. cit.*, *supra* note 268, at pp. 115-116.

²⁹¹ *Soleh Boneh v. Uganda Government* [1993] 2 Lloyd’s Report 208 (CA), at 212. Emphasis added.

²⁹² The author opines that the possibility of the latter scenario would be much higher than that of the former, especially given the consideration of the existence of other normative instruments, such as the UNCITRAL Model Law.

seat court's annulment judgment was actually made based upon an obsolete annulment standard and simply disregarding it and enforcing the annulled award by command and force is a rather dictatorial method²⁹³ -- it has been sharply pointed out that such behavioural pattern is somewhat 'arrogant and condescending'²⁹⁴. Although the Convention indeed allows an enforcing state a 'measure of latitude in evaluating whether the setting aside of an award in its place of origin was compatible with the overall international preoccupation of enforcing international arbitration awards'²⁹⁵, such latitude would by no means be extended to become a general mechanism of allowing an enforcing court, by simply taking no account of seat court's annulment judgment, to examine the legality of an arbitral award. Thirdly and ironically, even the aforementioned unreasonable mistrust on seat court's judgment and the somewhat dictatorial manner could by any chance be accepted, this approach may still not even ensure the effect as it preaches, namely to promote the enforceability of arbitral award, as it is entirely possible that a jurisdiction which applies outdated annulment standard could be the arbitral seat in one case whilst serve as the enforcing state in another case. Therefore, if a jurisdiction chooses to drive on the unorthodox path and excludes Article V(1)(e) from its arbitration law, the national courts of it may certainly annul an arbitral award based upon its archaic annulment standard in one case whilst refuse to enforce another arbitral award based upon the same standard in another case. Therefore, even though under certain circumstances some seat courts may actually apply their obsolete set-aside standards, allowing the enforcing courts to overrule such annulment decisions should nevertheless be confined to be exceptional but not conventional, and it is therefore the traditional path, but not the unorthodox path, which should still be selected.

d. The traditional path as a sounder choice

The rationales as discussed above essentially reveal the competition between arbitral seat and enforcing state in 'fighting' for more control over the legality of arbitral seat.

²⁹³ Hamid G. Gharavi (2002) *op. cit.*, *supra* note 268, at p. 132. See also, for example, Bruno Leurent (1996) *op. cit.*, *supra* note 270, at p. 270, who pointedly opined that French legal system, which excludes the general compliance to seat court's annulment judgment from its arbitration law and freely re-examine the legality of arbitral award, 'does not lack audacity', and a 'susceptible foreign judge might find it a touch arrogant in that it dispels his belief that he had certain competence over an award that seemed to him to result from a process having its foundation in his legal order'.

²⁹⁴ Hamid G. Gharavi (2002) *op. cit.*, *supra* note 268, at p. 132.

²⁹⁵ Christopher Koch (2009) *op. cit.*, *supra* note 266, at 289.

Indeed, as stated, the Convention attempted ‘an uneasy cohabitation between provisions reflecting different underlying philosophies’²⁹⁶ and eventually failed to ‘put in place a complete and harmonious system of control of arbitral awards’²⁹⁷. However, although both paths tally with the literal interpretation of the Convention, it would be hardly legitimised that the Convention actually intends to establish a potentially contradictory mechanism and such potential textual contradiction should by no means lead to the inconsistent interpretation of the Convention. By delving into the rationale of stepping on these two paths, the traditional path, namely that seat court is granted by a primary status and its annulment judgment should be generally followed by other enforcing courts, turns out to be the sounder one and should thus be picked. As correctly opined:

‘Article V(1)(e), by exhaustively defining the courts whose decisions may produce such collateral effect [i.e. the effect of issue estoppel], builds on a rule of allocation of international competencies ... The only, if any, “primary” control of validity which is internationally current is the one effectuated by the courts mentioned in subparagraph (e). The enforcement court *may only* refuse or grant enforcement.’²⁹⁸

In contrast to the traditional path, the unorthodox one, namely that enforcing court is allowed to unilaterally exclude Article V(1)(e) from its arbitration law and freely ignore seat court’s annulment decision, fails to be in line with the fundamental values as prioritised by the Convention, and should therefore be closed. It was hence argued that ‘Article VII(1) of the New York Convention was certainly not included with the aim of enabling the enforcement of annulled awards’²⁹⁹, and it could actually be

²⁹⁶ Which refers to Article V(1)(e) and VII of the Convention. See Georgios C. Petrochilos (1999) *op. cit.*, *supra* note 78, at 863.

²⁹⁷ Hamid G. Gharavi (2002) *op. cit.*, *supra* note 268, at p. 124.

²⁹⁸ Georgios C. Petrochilos (1999) *op. cit.*, *supra* note 78, at 862. Emphasis added. See also, for example, *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara et al. & Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 2004, at para. 27.

²⁹⁹ Hamid G. Gharavi (2002) *op. cit.*, *supra* note 268, at p. 81. It should also be noted that, the ‘legislative history of the Convention does not discuss the relationship between Article V(1)(e) and VII(1). In particular, there is no record that the State delegates or their governments contemplated whether an award that has been set aside or suspended could be enforced through the application of Article VII(1)’. See UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 Edition, at p. 301. See also, for example, Stephen T. Ostrowski & Yuval Shany, *Chromalloy: United States Law and International Arbitration at the Crossroads*, *New York University Law Review*, Vol. 73, No. 5, 1998, at 1661.

observed in legal practice that jurisdictions which actually step on the unorthodox path would be ‘rather out on a limb’³⁰⁰, and most countries do not ‘routinely enforce awards which have been set aside by the courts of the seat’³⁰¹.

3. Three potential exceptions of the primacy of seat court

However, notably, drawing the conclusion that seat court should be granted by a primary status in examining the legality of arbitral award and enforcing court should generally follow its decision should not be further exaggerated and leave the false impression that in legal practice enforcing court would always follow seat court’s annulment judgment. As will be seen, under certain scenarios, enforcing court does hold the discretion and may overrule seat court’s set-aside decision.

a. The procedural justice of annulment judgments

First of all, enforcing court may decline to follow seat court’s annulment judgment once it finds that the set-aside decision was made under certain procedural injustice. It should be noted that the general automatic compliance of an enforcement court is fulfilled based upon two prerequisites, namely the substantive and procedural justice of a set-aside judgment. Although the primary status of seat court in setting aside arbitral award would plausibly ensure the former, it could not automatically guarantee the latter. As Colman J stated:

‘In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand...I use the word ‘normally’ because there may be *exceptional cases where the powers of the supervisory court are so limited* that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or *where for unjust reasons*, such as corruption, they decline to do so.’³⁰²

³⁰⁰ Jonathan Hill (2012) *op. cit.*, *supra* note 12, at 173.

³⁰¹ *Ibid.*

³⁰² *Minmetals Germany GmbH v. Ferco Steel Ltd.* [1999] C.L.C 647 (HC), at 661. Emphasis added.

Hence, once an annulment could be proved to be procedural unjust, it would be a solid reason for the enforcement court not to follow the seat court's decision.³⁰³ This analysis was adopted in, for example, *Yukos Capital v. Rosneft*, in which the *Gerechtshof* Amsterdam enforced an arbitral award which has been set aside by the *Arbitrazh* Court of the City of Moscow based upon the finding that the setting-aside judgment was in fact made under corruption.³⁰⁴ By the same token, Burdon, J. held in *Maximov* that:

‘My own view would be that an English court should not simply accept that a foreign court had set aside an arbitration award, particularly one within its own jurisdiction, if there were at the least an arguable case that the award had been set aside in breach of natural justice.’³⁰⁵

It should, however, be emphasised that the test of examining the procedural justice of annulment judgment should be a stringent one. For an enforcing court to be justified in ignoring an annulment decision, the decision must be ‘*repugnant* to fundamental notions of what is decent and just’³⁰⁶.

b. Outdated or exorbitant annulment standard

The second potential exception, as discussed above³⁰⁷, concerns the outdated or exorbitant annulment standard. It is fairly straightforward that if a seat court applies an obsolete or unreasonable annulment standard which clearly runs contrary to prevailing legal practice to annul an arbitral award, such annulment does not need to be followed by the enforcing court. As correctly pointed out:

³⁰³ Dicey, Morris & Collins (2006) *op. cit.*, *supra* note 149, at para. 16-144. (‘where it has been set aside in the court of the seat, an arbitral award should be enforced only if recognition of the order setting aside the award would be impeachable for fraud or as being contrary to natural justice ...’) See also, for example, Talia Einhorn, The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards, 12 *Yearbook of Private International Law* 43, 2010, at p. 63; Michael Kotrly & Barry Mansfield, Recent Developments in International Arbitration in England and Ireland, *Journal of International Arbitration*, Vol. 35, No. 4, 2018, at 489-490.

³⁰⁴ *Gerechtshof te Amsterdam, Yukos Capital SARL v. OAO Rosneft*, 28 april, 2009, No. 200.005.269/01, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 2009 - Volume XXXIV*, Kluwer Law International, at p. 703. See also, for example, in which the Court suggested that an award that has been set aside by the courts of the seat may be enforced in the US under the NYC if the annulment is contrary to the procedural justice of the forum.

³⁰⁵ *Maximov v. Open Joint Stock Company* [2017] 2 C.L.C. 121 (HC), at para. 64.

³⁰⁶ *Termorio S.A.E.S.P. & Leaseco Group, Llc. v. Electranta S.P. et al.*, 487 F.3d 928, 2007, at 938. Emphasis added. See also, for example, Jonathan Hill (2012) *op. cit.*, *supra* note 12, at 170.

³⁰⁷ See *supra* Section IV(A)(2)(c) of this Chapter.

‘The purpose behind the Convention is reflected in the language of the 1996 Act. Enforcement ‘shall not be refused’ except in the limited circumstances listed in section 103(2) [the counterpart of Article V(1) of the NYC] where the court is not required to refuse but ‘may’ do so. Under subsection (5) [the counterpart of Article VI of the NYC] the court may adjourn but only if it considers it ‘proper’ to do so. The enforcing court’s role is not therefore entirely passive or mechanistic. The mere fact that a challenge has been made to the validity of an award in the home court does not prevent the enforcing court from enforcing the award if it considers the award to be *manifestly* valid.’³⁰⁸

c. Inarbitrability and violation of public policy

The third potential exception, which is also the most pertinent one to this research, lies in the relationship between a seat court’s and an enforcing court’s viewpoints on relevant arbitrability or public policy issues reflected in an arbitral award. As has been introduced above,³⁰⁹ subject matters being inarbitrable and the violation of public policy are two common grounds for both awards annulment (under Article 34(2)(b) of the Model Law) and refusal of enforcement (under Article V(2) of the NYC). Therefore, in legal practice, it is possible that an arbitral award, which has been examined on arbitrability/public policy ground, is brought before the enforcing court and the enforcing court would thus determine whether to follow the seat court’s decision. More specifically, this situation could be further divided into two sub-scenarios, namely that an arbitral award has passed the arbitrability/public policy examination and the enforcing court needs to determine whether to follow the seat court’s decisions; and an arbitral award has been annulled by the seat court based upon the seat’s inarbitrability rule or the violation of the seat’s public policy under Article 34(2)(b) of the Model Law and the enforcing court is called to refuse to enforce the award under Article V(1)(e).

As discussed above,³¹⁰ a key prerequisite for an enforcing court to follow the

³⁰⁸ *Nigerian National Petroleum Corp. v. IPCO (Nigeria) Ltd.* [2008] Civ. 1157, 2 C.L.C 550 (CA), at para. 15. See also, for example, *Soleh Boneh v. Uganda Government* [1993] 2 Lloyd’s Rep 208 (CA), at 212.

³⁰⁹ See *supra* Section II of Chapter I.

³¹⁰ See *supra* Section IV(A)(2)(a) and IV(A)(2)(b) of this Chapter.

annulment decision made by a seat court is that the review of the involved violation is conducted under the quasi-exclusive competence of the seat court – since the violations as listed in Article 34(2)(a) of the Model Law essentially concerns the procedural aspects of international arbitration and the law governing the procedural aspects of arbitration is almost always the law of arbitral seat, once relevant procedural issues have been examined by the seat court, it would then create the effect of issue estoppel and it would hence be inappropriate to re-examine what the seat court has ruled upon normally.³¹¹

However, as for subject matters being inarbitrable or the violation of public policy, the seat court may not be understood as possessing such primary status on these issues, and its decision on the legitimacy of awards would thus not be automatically followed by the enforcing court.

First of all, as drawn above,³¹² arbitrability rules and public policy concerns essentially reflect the fundamental public interests of a jurisdiction which such a jurisdiction would not yield. This solid territorial feature thus determine that when the exclusive jurisdiction rule or public policy of the enforcing state is violated, the enforcing court would apply its own law and may eventually refuse to enforce the award, and this applicable law is also confirmed by Article V(2)(a) and V(2)(b) of the Convention. This conclusion on the choice of law, from the author's opinion, would by no means be altered under the Convention by a seat court's judgment which does not reckon that the award violates its own arbitrability rule or public policy. Indeed, it would be hard to understand why the viewpoint of an enforcing court on its own fundamental public interest would be subordinated to the viewpoint of a seat court on the seat's fundamental public interest. It would also be rather confused if on the one hand the Convention confirms the law applicable to public interest issues being the law of forum whilst on the other hand tacitly permits the possibility of bypassing this choice of law. Therefore, under the first sub-scenario

³¹¹ Jonathan Hill (2012) *op. cit.*, *supra* note 12, at 181-183. ('If, for example, the courts of the seat dismiss a setting aside application and rule that the arbitration agreement was valid or that the arbitral procedure was in conformity with the applicable procedural rules, the award-debtor should be regarded as estoppel from resisting enforcement of the award in England based on the basis of Article V.1.a or Article V.1.d') See also, for example, *Hebei Import & Export Corporation v. Polytek Engineering Co Ltd*, Hong Kong Court of Final Appeal [1998] 1 HKLRD 287, at 295.

³¹² See *supra* Section II(B) and Section III(C) of this Chapter.

that an arbitral award has passed the arbitrability/public policy examination before the seat court which refused to vacate the award, this refusal to vacate would not generate extraterritorial effect and the enforcing court should still be able to refuse to enforce the award if either the enforcing state's exclusive jurisdiction rule or relevant public policy is seriously violated.

Secondly, it has been concluded above that the refusal of enforcement based upon violation of arbitrability rule or public policy are essentially two escape mechanisms provided by the Convention which allow an enforcing court to protect *its own* public interests but not two excessively wide pathways allowing an enforcing court to apply foreign arbitrability or public policy rule to obstruct the enforcement of arbitral awards. Similarly, the author does not reckon that this conclusion would be altered by bringing seat court's annulment decision and Article V(1)(e) into consideration. As correctly stated,

‘Article V(2) of the Convention establishes an exceptional escape device from Article V's generally-uniform rules, which permits a state to refuse to recognise an award in rare cases where its own local public policy or nonarbitrability rules are violated. What Article V(2) does not contemplate, however, is that a Contracting State deny recognition to an award merely because another state relied on its own conceptions of public policy, or nonarbitrability, to annul that award [i.e. under Article V(1)(e) of the Convention]; this would transform local public policy from an exceptional escape device into a generally-applicable decision binding in all Contracting States. That result would contradict both the nature of public policy doctrine and the Convention's text and purposes, which require recognition of agreements to arbitrate and arbitral awards.’³¹³

Therefore, under the second sub-scenario that an arbitral award has been vacated by the seat court on arbitrability or public policy ground, Article V(1)(e) should not be interpreted as impliedly indicating that the enforcing court should simply follow the seat court's annulment decision. Still, just as discussed above that an enforcing court may consider to respect foreign arbitrability rule or public policy if its own public

³¹³ Gary Born (2014) *op. cit.*, *supra* note 21, at p. 3642.

policy requires it to do so, this would also be well applicable to the interrelationship between a seat court and an enforcing court: an enforcing court may also consider to respect a seat court's arbitrability rule or public policy if it is its own public policy to do so.

Following these thoughts and given the consideration of previous discussion on relevant public policy and arbitrability issues, the behavioural pattern of an enforcing court under this second sub-scenario could thus be proposed³¹⁴:

- When an annulment decision was made based upon inarbitrability and the enforcing state is itself a substantively interested state, it would apply its own arbitrability rule no matter how the seat court has ruled on the arbitrability issue, since its rule of exclusive jurisdiction is actually influenced of which the application should not be subject to other state's exclusive jurisdiction rule.
- When an annulment decision was made based upon inarbitrability but the enforcing state is itself not a substantively interested state:
 - If the seat is not a substantively interested state either, this annulment judgment should not be able to influence the enforcing court's decision on enforcement as the arbitrability rule of the seat should not be applied in the context.
 - If the seat is, this annulment judgment should also not be able to influence the enforcing court's decision on enforcement in principle. However, if it is the enforcing court's public policy to respect other jurisdiction's exclusive jurisdiction rule, the enforcing court might under this circumstance consider whether the public policy defence under Article V(2)(b) of the Convention would be triggered by running a balancing test between maintaining the general enforceability and the urgency of upholding a foreign state's arbitrability rule. Based upon the solidly established pro-enforcement bias of the Convention, the level of such

³¹⁴ Although previous discussions on arbitrability and public policy were made without the consideration of Article V(1)(e) and the interrelationship between seat courts and enforcing courts, since bring this Article into consideration would not, as analysed above, alter the conclusions as drawn above, they should hence also be applicable here in proposing the behavioural pattern of an enforcing court.

urgency would be rather high if the latter is expected to outweigh the former. The enforcing court should then only refuse to enforce the award when the connection between arbitrating the dispute and the seat's relevant public policy being manifestly insufficiently protected could be persuasively established.

- If, under a rather rare scenario, the seat court refused to enforce the award based upon the arbitrability rule of a foreign substantively interested state, the enforcing court should also follow the suggested behavioural pattern in the last sub-point above to examine whether it should apply foreign arbitrability rule to refuse the enforcement.
- When an annulment decision was made based upon violation of public policy:
 - If the seat's public policy is understood by the enforcing court as covering either the enforcing court's fundamental domestic public interest or a generally recognised public value, the enforcing court would then apply its own standard of reviewing the seat court's annulment judgment and determine whether to enforce the arbitral award.
 - If the seat's public policy is not understood by the enforcing court as covering either the enforcing state's fundamental domestic public interests or a general public value which is also recognised by the enforcing state, the annulment decision would not influence the enforcing court's decision on enforcement in principle. However, if the enforcing state does deem respecting foreign public policy as its own public policy, the enforcing court may also consider following the seat court's decision if the applicant could persuasively prove that the enforcement of the award would manifestly derogate the public policy of the arbitral seat so that the derogation would outweigh the finality of arbitral award.
 - If, under a rather rare scenario, the seat court refused to enforce the award based upon the violation of a foreign state's public policy, the enforcing court should also follow the suggested behavioural pattern in the last sub-point above to examine whether it should apply foreign public policy to refuse the enforcement.

B. Remaining questions concerning the interrelationship between seat courts and enforcing courts

Through the discussion and analysis above the author hence introduced a fairly comprehensive behavioural pattern of an enforcing court when encountering an arbitral award which has been set aside before a seat court. On the one hand, if the award was vacated due to procedural violations which are not deemed to be outdated or exorbitant, the enforcing court would generally respect and follow the seat court's decision as long as such annulment judgment was made in accordance with procedural justice. On the other hand, if the award was vacated based upon the ground of inarbitrability or the violation of public policy, the specific behavioural pattern of the enforcing court would depend on the key influence factors, e.g. the connection between the dispute and the jurisdiction of the seat court, and the connotation of public policy as defined by the seat court when annulling the award, which have been listed and analysed above.

But there is still a notable uncertainty which has not been fully addressed, which concerns an enforcing court's behavioural pattern when deciding whether to enforce an arbitral award annulled based upon its violation of the seat's public policy. As concluded above, if the seat's public policy is understood by the enforcing court as covering either the enforcing court's fundamental domestic public interest or a generally recognised public value, the enforcing court would then apply its own standard of reviewing the seat court's annulment judgment and determine whether to enforce the arbitral award. This is where the uncertainty would emerge: what specific standard should the enforcing court apply? Should the enforcing court re-examine what the seat court has examined to ensure that the seat court has performed in the way which it would have performed if the public policy issue is directly raised before it after the award was rendered? Or should the enforcing court fully trust the seat court and simply follow the seat court's decision?

Since the answers of these questions may depend on what specific public interest is involved, this uncertainty will hence be further examined under a more concretised circumstance in Chapter VI, where it will be discussed and analysed in the context of enforcing an arbitral award concerning EU competition law dispute of which the relevant public policy issues have been examined by a seat court.

Chapter IV – Examining the application of Article V(2)(a) of the NYC under the scenario of enforcing foreign arbitral awards concerning EU competition law disputes

Having established a basic understanding of the mechanism of reviewing foreign arbitral award under the NYC, the next step of this research is further to examine the remaining questions of the application of this mechanism under a more specific scenario, i.e. the enforcement of foreign arbitral award concerning EU competition law disputes.

The first ground to be looked at is Article V(2)(a) of the Convention. As discussed in Section III(E) of Chapter III, although it has now been clearly understood that the inarbitrability of a specific subject matter may be set based upon a state's intention of protecting certain public interests and its understanding that arbitration would not sufficiently protect them, the rationale of such understanding may be questioned by querying the alleged inherent incompatibility between disputes concerning public interests and international arbitration and those extrinsic reasons concerning the incompetence or impartiality of arbitrators in adjudicating disputes concerning public policy.

This Chapter will hence, through the examination of how the arbitrability of competition law³¹⁵ was originally determined, subsequently developed and eventually remoulded, critically analyse the aforementioned rationales of disapproving the arbitrability of subject matters which concerns certain public interests. As will be seen in the following analysis, the link between a public interest-involved dispute and the dispute being inarbitrable would be increasingly scarce, and may eventually be disconnected.

I. The beginning of story: the distrust of arbitration in adjudicating competition law disputes

³¹⁵ It should be noted that, although this research focuses on the enforcement of foreign arbitral awards concerning EU competition law, it would not be necessary to emphasize this 'regional feature' when examining the arbitrability of competition law disputes since the development of the arbitrability of competition law disputes in general essentially reflects the development of the arbitrability of EU competition law.

In comparison with the arbitrability of some other subject matters which was approved *ab initio*, the development of the arbitrability of competition law disputes has had a rather abashed start. As stated, allegations of antitrust law violations used to be widely considered as non-arbitrable by national courts.³¹⁶ The discussion of this Chapter will hence start from tracing back to the ‘distrustful era’ and digging into the reasons of disapproving the arbitrability of competition law disputes.

A. The public element of competition law disputes and the private nature of arbitration

The first, and maybe also the most cogent, argument for opposing the arbitrability of competition law disputes concerns the conflict between the public element of competition law disputes and the private nature of arbitration.

As for the former, competition law contains norms to protect the wider public interest and not just the interests of particular individuals or undertaking.³¹⁷ As stated in *American Safety v. McGuire*:

‘[A] claim under the antitrust law is not merely a private matter ... Antitrust violations can *affect hundreds of thousands – perhaps millions – of people* and inflict *staggering economic damage*’³¹⁸.

As for the latter, arbitration is a private system of adjudication³¹⁹ which allowed the parties to customise the process of their dispute resolution. The whole arbitration process aims merely to put an end to disputes between the parties and the arbitral award is expected to affect only them. Moreover, such private nature is demonstrated not only by rendering arbitral awards binding only upon the parties, but also by the confidentiality of arbitral proceedings which is often taken to be one of the important

³¹⁶ Michael F. Hoellering, Arbitrability of Disputes, *The Business Lawyer*, Vol.41, No.1 (November 1985), at 135.

³¹⁷ Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 93. See also, for example, Ilias Bantekas (2008) *op. cit.*, *supra* note 198, at 212; Jean-François Poudret and Sebastien Besson (2007) *op. cit.*, *supra* note 177, at p. 296. (‘For a long time, the arbitrability of competition law disputes was doubtful because of its public policy nature and the fundamental importance of the legislations governing this field, both in the United States and in the European Community’).

³¹⁸ *American Safety Equipment Corp. v. J. P. McGuire*, 391 F.2d 821 (2d Cir. 1968), at para. 19. Emphasis added.

³¹⁹ Margaret L. Moses (2017) *op. cit.*, *supra* note 22, at p. 1.

features of arbitration.³²⁰ As Stephen Bond, a former Secretary-General of the ICC, stated:

‘It became apparent to me very soon after taking up my responsibilities at the ICC that the users of international commercial arbitration, i.e. the companies, governments and individuals who are parties in such cases, place the highest value upon *confidentiality as a fundamental characteristic of international commercial arbitration*.’³²¹

Here is where the conflict appears. Since the adjudication of competition law disputes would inevitably incur influence on public, e.g. on downstream customers and other competitors, and thus concerns a strong public interest, the private nature of arbitration determines that it is not at an appropriate position to examine the subject matter wearing a strong public colour. As being stated:

‘Because the private right is entangled with the public interest, its enforcement has public effects external to the parties ... Constrained by the privity inherent in the source of his jurisdiction, an arbitrator has authority to dictate legal effects *inter partes* and not *vis-à-vis* third parties. To the extent it would *dictate effects with respect to third parties*, the arbitrability of mixed/public rights would *simply conflict with the contractual nature of arbitration*’.³²²

Furthermore, and more importantly, even if a competition law dispute is allowed to be arbitrated and the infringement settlement is provided, the settlement would merely resolve the dispute between the parties. Since competition law infringement would inevitably bring impact upon parties other than the one entering the particular contract, it may be argued that the infringement settlement, i.e. the arbitral award, could not be an adequate address for the breach of competition law, especially when considering that the feature of confidentiality of arbitration would cause information

³²⁰ Alan Redfern & Martin Hunter (2004) *op. cit.*, *supra* note 29, at p. 32.

³²¹ See Expert Report of Stephen Bond Esq (in *Esso/BHP v. Plowman*), *Arbitration International*, Vol. 11, Issue 3, 1995, 266-268. Emphasis added.

³²² Karim Abou Youssef (2009) *op. cit.*, *supra* note 205, at paras. 3-9 and 3-10.

asymmetry to other injured parties or influenced public and thus block the way of other potential lawsuits or other types of dispute resolution.³²³

Therefore, it was opined that competition law which pursues public policy objectives is arguably most efficiently safeguarded by organs of the states,³²⁴ such as national courts or the National Competition Authorities under the context of EU competition law, but not arbitral tribunals. As has been clearly pointed out in the American context:

‘We do not believe that Congress intended such claims to be resolved elsewhere than in the courts ... The *pervasive public interest* in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make ... antitrust claims ... *inappropriate for arbitration*.’³²⁵

B. The distrust on arbitrators in adjudicating competition law disputes

Besides the aforementioned theoretical concern on the conflict between the public element of competition law disputes and the private nature of arbitration, there is another concern on the distrust of arbitration in adjudicating competition law disputes which could be much more practical, i.e. the distrust on arbitrators in adjudicating competition law disputes.

The major argument propping up the distrust on arbitrators concerns the expertise and impartiality of arbitrators in adjudicating competition law disputes. First, as being stated, competition law is not easy to apply: it often involves complicated economic determinations not just about one or two undertakings but about broad

³²³ Notably, in the context of EU law, the Court of Justice has, since *Pfleiderer* (Case C-30/09 *Pfleiderer v. Bundeskartellamt* [2011] ECR I-5161), been trying itself in knots on the countervailing pressures of private (judicial) enforcement of the competition rules and encouragement in the use of its leniency or ‘whistle blowers’ programme, and the availability of documents submitted under the latter to parties seeking their discovery under the former. (See Case C-199/11 *Europese Gemeenschap v. Otis NV and ors*, EU:C:2012:684; Case T-344/08 *EnBW Energie Baden-Württemberg AG v. Commission*, EU:T:2012:242; Case C-536/11 *Bundeswettbewerbshörde v. Donau Chemie AG and ors*, EU:C:2013:366; Case T-376/10 *Mamoli Robinetteria v. Commission*, EU:T:2013:442; Case C-557/12 *Kone AG and ors v. ÖBB-Infrastruktur AG*, EU:C:2014:1317. The issues have also, necessarily, been taken up by national courts: see AG Bonn, 12. Januar 2012 (*Pfleiderer*) 51 Gs 53/09; *Natioanl Grid Electricity Transmission v. ABB Ltd and ors* [2012] EWHC 869 (Ch). For recent European Commission initiatives see its guidance documents on use of confidentiality rings in competition access-to-file proceedings and on confidentiality claims in competition proceedings, both published 12 December 2018.

³²⁴ Ilias Bantekas (2008) *op. cit.*, *supra* note 198, at 196. See also, for example, Alan Redfern & Martin Hunter (2004) *op. cit.*, *supra* note 29, at p. 164.

³²⁵ *American Safety Equipment Corp. v. J. P. McGuire*, 391 F.2d 821 (2d Cir. 1968), at paras. 19 to 23.

phenomena in markets.³²⁶ Therefore, a hesitant attitude would plausibly be applied since it is not unquestionable that arbitrators would all be well-educated as for competition law.

Secondly, arbitrators' expertise is also questioned based upon the consideration that arbitrators, when comparing to national courts or relevant public authorities, have limited fact-finding wherewithal.³²⁷ As being considered in *American Safety Equipment Corp. v. J. P. McGuire*:

‘[T]he issues in antitrust cases are prone to be complicated, and the evidence extensive and diverse, far better suited to judicial than to arbitration procedures ... Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest.’³²⁸

Thirdly, it was pointed out that arbitrators, when comparing to national courts' judges, do not have the public interest at heart:

‘The fear that private arbitrators would under-enforce public laws has very widely served as the reason to consider certain matters non-arbitrable. The image of arbitrators as “commercial men” biased to business and hostile to public regulation of commercial activity, or presumably unable to deal with complex public law issues has nourished this classic fear.’³²⁹

Hence, all these considerations lead to the viewpoint that arbitrators may not be fully qualified in adjudicating competition law disputes. The consequence of the misapplication of competition law may be even serious when considering the aforementioned private nature of arbitration, since once the arbitrators misapply competition law in adjudicating relevant cases, arbitration may in fact

³²⁶ Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 93.

³²⁷ *Ibid.*

³²⁸ *American Safety Equipment Corp. v. J. P. McGuire*, 391 F.2d 821 (2d Cir. 1968), at para. 20. Emphasis added. See also, for example, EC Resolution of the Parliament of 15 July 1994 on encouraging recourse to arbitration to settle legal disputes, OJ 1994/C 205/519, in which the Parliament stated that the submission of disputes to arbitration could ‘jeopardise the uniformity in the interpretation and application of Community law’.

³²⁹ Karim Abou Youssef (2009) *op. cit.*, *supra* note 205, at para. 3-9.

‘delivers a potent opportunity secretly to enforce contractual provisions which may be against competition laws and the private character of arbitration minimises and may even eliminate the opportunities for States to discover that their competition laws are being circumvented in this way.’³³⁰

II. The turning points: the development of arbitrability of competition law disputes

Although the aforementioned conflict between the public element of competition law and the private nature of arbitration as well as the distrust on arbitrators’ expertise caused the general non-confidence of numerous jurisdictions³³¹ upon arbitration in adjudicating competition law disputes, such situation did not last long. The rapid development of international business and trade drives international commercial arbitration to be increasingly recognised and used in adjudicating commercial disputes, as for both the quantity of arbitration and the categories of dispute which are now approved to be arbitrated -- especially the latter, it was stated that there has been, in the last three decades, a general trend towards the expansion of the category of arbitrable disputes.³³²

This development, as could be clearly seen, also affects the arbitrability of competition law disputes. As pointed out:

³³⁰ Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 93.

³³¹ Besides *American Safety v. McGuire* and the 1994 European Parliament’ Resolution as quoted above, other jurisdictions which have once shown their non-confidence on arbitration including, for example, Germany, see § 91 of the original Gesetz gegen Wettbewerbsbeschränkungen, vom 27, Juli 1957 (BGBl. 1957 I S. 1081) (GWB) which provided that arbitration clauses covering competition matters under the Act were void unless they provided each party with the alternative of proceeding in respect of these matters before the ordinary courts, see also Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 95; Belgium, see Brussels, *Preflex v. Lipski*, JT 1976, 493, in which the Rechtbank van de eerste aanleg Brussel held that if an arbitral tribunal could indeed assess whether a contract is valid under Article 85 of the EEC Treaty, a violation of said provision would have deprived it of its jurisdiction, as quoted by Alexis Mourre (2011) *op. cit.*, *supra* note 130, at para. 1-130; Republic of Lithuania, see Article 11.1 of Lietuvos Respublikos komercinio arbitražo įstatymas (The Republic of Lithuania Law on Commercial Arbitration): ‘1. Arbitražui negali būti perduoti ginčai, kylantys iš konstitucinių, darbo, šeimos, administracinių teisinių santykių, taip pat ginčai, susiję su konkurencija, patentais, prekių ir paslaugų ženklais, bankrotu, bei ginčai, kylantys iš vartojimo sutarčių.’ (1. Disputes arising from constitutional, employment, family, administrative legal relations, as well as disputes connected with *competition*, patents, trademarks and service marks, bankruptcy and disputes arising from consumption agreement may not be submitted to arbitration.).

³³² See J.-B. Racine, *L’arbitrage commercial international et l’ordre public* (Paris: LGDJ, 1999), 36, as quoted by Alexis Mourre (2011) *op. cit.*, *supra* note 130, at para. 1-006.

‘The arbitrability of competition law issues is a *fait accompli*. Both in the United States and in Europe, the question as to whether competition law disputes can be adjudicated by way of arbitration has been answered in the affirmative by the local courts.’³³³

Therefore, by being clearly aware of the huge change in attitude, there must be certain conceptual or practical developments which actually mitigate or even eliminate the aforementioned distrust.

A. The impetus of attitude change: the concern of promoting international commerce

One of, if not the most important, impetus for the attitude change lies in the concern of promoting international commerce. As could be clearly seen, since the mid-1980s the volume of global trade has steadily increased,³³⁴ and based upon the substantial benefits of international commercial arbitration, e.g. the neutrality of the forum and the likelihood of obtaining enforcement and confidentiality, arbitration has been greatly increasingly used in commercial dispute resolution,³³⁵ including in adjudicating competition law disputes.³³⁶ Therefore, in this context, jurisdictions

³³³ Gordon Blanke & Renato Nazzini (2008) *op. cit.*, *supra* note 37, at 48-49.

³³⁴ See the Foreword of Alan Redfern & Martin Hunter (2004) *op. cit.*, *supra* note 29.

³³⁵ *Ibid.* See also, for example, R. Whish & D. Bailey, *Competition Law*, Oxford University Press, 9th ed., 2018, at pp. 341-342.

³³⁶ There would be a concern regarding whether widely-scoped arbitration clauses (such as those provide that all disputes arising from the contract shall be referred to arbitration) actually cover competition law disputes since such disputes are usually unforeseeable when drafting the clause and it is thus arguable that the parties may not intend to refer the specific competition law disputes to arbitration. For example, the CJEU once stated in its judgement that ‘A jurisdiction clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship, which limits the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into ... In the light of that purpose, the referring court must ... regard a clause which abstractly refers to all disputes arising from contractual relationships as not extending to a dispute relating to the tortious liability that one party allegedly incurred as a result of the other’s participation in an unlawful cartel.’ See Case C-352/13 *CDC Hydrogen Peroxide SA v. Akzo Nobel NV et al*, EU :C :2015 :335. However, the author holds a different opinion here due to that, first, by stating that all disputes arising from the contract shall be referred to arbitration, the text clearly shows the parties’ intention to cover all the uncertainties, no matter foreseeable or not, which should naturally include those concerning competition law, which, although could not be ‘reasonably foreseen’, still amounts to potential disputes. Narrowly construing an arbitration clause would run counter to the well-established principle of the broad interpretation of widely-scoped arbitration clause. See, for example, *Fiona Trust & Holding Corp. v. Privalov* [2007] 2 C.L.C 553 (HL), at para. 27. (‘The purpose of the clause is to provide for the determination of disputes of all kinds, whether or not they were foreseen at the time when the contract was entered into’). See also *Microsoft Mobile v. Sony* [2017] 5 C.L.M.R. 5 (HC), at para. 81. Secondly, under the context of EU law, precluding competition law disputes from those

might be prone to reconsider and even approve the arbitrability of international competition disputes as being driven by

‘[the] basic reflections on the needs of international commerce; and in addition to the special reasons which founded arbitrability in the particular case, they typically contained arguments of a general nature which supported the parties’ freedom to arbitrate *per se*. The “*sensitivity to the need of the international commercial system for predictability in the resolution of disputes*”³³⁷ or to avoid damage to “*the fabric of international commerce and trade*”³³⁸ requires ... [to] enforce the parties’ agreement’³³⁹

In other words, as for arbitrating competition law disputes, the attention is now no longer paid solely on the concern of arbitrating disputes concerning public interest, but also on the consideration of promoting international commerce as complying with the parties’ intention to refer their disputes to arbitration would first maintain the ‘predictability in the resolution of disputes’³⁴⁰ and secondly, to certain extent, ensure that such disputes would be heard and judged in due course, and thus prevent the disruption of international commercial order. Therefore, under this situation, it seems that the arbitrability of competition law disputes is approved – arbitrators are now eligible to hear and examine competition law disputes and draw civil consequences accordingly.³⁴¹

being covered by an arbitration clause would be in contradiction with which has been clearly stated in the Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. (‘Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as ... arbitration’). Hence, based upon these concerns, it is opined that competition law disputes should be covered by widely-scoped arbitration clause. For further discussion on this issue, see, for example, James Segan, Arbitration Clauses and Competition Law, *Journal of European Competition Law & Practice*, Vol. 9, Issue 7, 2018, 423-430.

³³⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 1985.

³³⁸ *Scherk v. Alberto-Culver*, 417 U.S. S Ct 506, 1974.

³³⁹ Karim Abou Youssef (2009) *op. cit.*, *supra* note 205, at para. 3-9.

³⁴⁰ *Scherk v. Alberto-Culver*, 417 U.S. S Ct 506, 1974.

³⁴¹ It should be noticed that arbitrators could only draw civil consequences such as awarding damages or ordering the undertakings to comply by discontinuing certain practices or revising its prices. Awarding legal remedies which apply *erga omnes*, such as issuing fines and withdrawing underlying commitment decision, is still within the exclusive power of public enforcers such as national courts and national competition authorities. See Alexis Moure (2011) *op. cit.*, *supra* note 130, at para. 1-156. See also, for example, Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 323.

However, the emphasis on maintaining international commercial order and respecting the parties' autonomy on resolving their disputes do not virtually eliminate the distrust of arbitrating competition law disputes. The aforementioned conflict between the public element of competition law disputes and the private nature of arbitration is still unsolved, and the distrust on arbitrators' qualification in adjudicating competition law disputes is still not dispelled: how could it be ensured that competition law would be properly applied by arbitrators and the arbitral award would draw relevant consequence adequately? Hence, in order legitimately to approve the arbitrability of competition law disputes, several issues need still to be examined.

B. Gaining basic trust on arbitrating competition law disputes: revisiting the theoretical conflict between competition law disputes and international arbitration

The starting point of the examination will be the seemingly inextricable theoretical conflict between competition law disputes and arbitration. As aforementioned, the conflict lies in two main aspects. First, since the adjudication of competition law disputes would inevitably influence on the third parties, the inherent private nature of arbitration determines that it is not on the appropriate position to render an arbitral award affecting not only the contractual but also the non-contractual parties. Secondly, the principle of arbitral award merely binding between the contractual parties and the confidentiality of arbitration may plausibly lead to the inadequate redress of competition law infringements. These two will be discussed respectively in this section.

1. The inevitability of imposing impacts on non-contractual parties

The rationale of the first argument lies in that the arbitral awards of competition law disputes would inevitably 'dictate effects'³⁴² upon non-contractual parties, which originates from the principle of privity of contract, i.e. a contract cannot *confer rights* nor *impose obligations* upon any non-contractual parties.³⁴³ However, before legitimising this argument, prudence should be exercised by noticing the difference

³⁴² Karim Abou Youssef (2009) *op. cit.*, *supra* note 205, at para. 3-10.

³⁴³ Neil Andrews, *Contract Law*, Cambridge University Press, 2011, at p. 186. Emphasis added. See also, for example, Robert Stevens, *Torts and Rights*, Oxford University Press, 2007, at p. 173.

between dictating effects and conferring rights or imposing obligations upon non-contractual parties.

Distinction should be made clearly between an arbitral tribunal acting *ultra vires* in rendering an arbitral award which actually confers rights or imposes obligations upon the non-contractual third parties and an arbitral tribunal acting *intra vires* in rendering an arbitral award which solely binds upon the contractual parties but would inevitably impose impacts on non-contractual parties. Under the circumstance that an arbitral tribunal correctly act *intra vires*, it was clearly pointed out that:

‘What an arbitral tribunal can do is to draw the civil consequences of a violation of antitrust laws, by enjoining a party to cease violating the other’s rights, awarding damages, or invalidating the contract.’³⁴⁴

Accordingly, it could be clearly seen that, first, the aims of arbitration is putting an end to the disputes between the parties. Secondly, the arbitral award also solely targets upon the contractual-parties. The plausible interpretation of the effects dictated on the third parties should thus not be conferring rights or imposing obligations upon non-contractual parties since the arbitral tribunal would never judge upon them.³⁴⁵

The legal effects of relevant arbitral awards on third parties are hence inevitable and sometimes even unconscious. For example, in a hypothetical case concerning a contract between a raw material supplier who fixed price with other suppliers and a material processor, the cease of violating the processor’s right may lead to the consequence that the downstream consumers could purchase the products manufactured by the processor at a lower price. Clearly, although it may dictate

³⁴⁴ Alexis Moure (2011) *op. cit.*, *supra* note 130, at para. 1-093.

³⁴⁵ However, uncertainties might exist in circumstances concerning, for example, the extension of an arbitral award to the non-signatory parent company of the losing party or when the losing party is a state-owned company or entity, the extension to the state of the company. These scenarios essentially concern the precise definition and interpretation of the parties to contracts or to the arbitration clauses contained therein but not the actual possibility of legitimately rendering an arbitral award binding upon a non-signatory third party. Hence, although for the purpose of this paper, these issues would not be examined here since fully addressing them would be inevitably lengthy, the author does not opine that the result of the examination would provide a new ground for disapproving the arbitrability of competition law disputes. For a thorough discussion on these issues, see Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions*, Kluwer Law International, 2006. See also International Chamber of Commerce; International Court of Arbitration, *Complex arbitrations: Perspectives on their Procedural Implications*, Paris: ICC Publishing, 2003.

effects upon non-signatory third parties, it neither confers the consumers the right to sue the supplier based upon the specific contract nor does it impose obligations on them.

It hence follows the discussion above that it would be inadequately legitimate to deny the arbitrability of competition law disputes simply based upon the argument that the arbitral award would dictate effects upon non-contractual parties. As long as the arbitral award merely dictates inevitable effects which neither confers rights nor impose obligations on the third parties, the arbitrability of competition law disputes should be upheld at this stage, subject to the following examinations.

2. Does private enforcement actually block the way of subsequent adjudications?

The second argument focuses on the inadequacy of redress of arbitrating competition law disputes. Since competition law infringement would inevitably bring impacts upon parties other than the one entering the particular contract, the arbitral award may not be an adequate address for the breach of competition law since, first, the award would aim merely at the parties' disputes but not the non-signatory ones. Secondly, and more pertinently, the confidentiality of arbitration would prevent relevant information from disclosure, which may lead to information asymmetry or even blockage to other injured parties or influenced public and thus block the way of subsequent potential lawsuits or other types of dispute resolution.

Notably, different from the privity principle as being consecrated in arbitration, the confidentiality of arbitration, which is often regulated in national arbitration laws or institutional rules, is painted by a rather uncertain colour. Although it was asserted that 'It is generally considered that the arbitral award, like the existence of the arbitral proceedings, is confidential'³⁴⁶, the applicable scope of confidentiality vary from jurisdiction to jurisdiction and also from institution to institution.³⁴⁷

³⁴⁶ E. Gaillard & J. Savage (1999) *op. cit.*, *supra* note 129, at para. 1412.

³⁴⁷ George Burn & Alison Pearsall, 'Exceptions to Confidentiality in International Arbitration', in *Confidentiality in Arbitration – Commentaries on Rules, Statutes, Case Law and Practice*, ICC International Court of Arbitration Bulletin, 2009 Special Supplement. See also Michael Hwang S.C. & Katie Chung, Defining the Indefinable: Practical Problems of Confidentiality in Arbitration, *Journal of International Arbitration* Vol. 26, Issue. 5, 2009, at 628-641.

As for relevant national laws, for those jurisdictions which do regulate on confidentiality in their national laws, Norway and Spain are at both ends of the spectrum. According to § 5 of Chapter 1 of the *Lov om voldgift*³⁴⁸:

‘Unless the parties have agreed otherwise, the arbitration proceedings and the decisions reached by the arbitration tribunal are not subject to a duty of confidentiality.’³⁴⁹

Almost utterly conversely, Article 24(2) of *Ley 60/2003, de Arbitraje*³⁵⁰ provides that:

‘The arbitrators, the parties and the arbitral institutions, *if applicable*, are obliged to maintain the confidentiality of information coming to their knowledge in the course of the arbitral proceedings.’³⁵¹

Other jurisdictions lie in the middle, of which the national laws shares a similar pattern consisting of a general protective attitude towards confidentiality with a few exceptional scenarios, e.g. the parties’ explicit consensus on confidentiality, the establishment or protection of a party’s legal rights and the situation that certain disclosure is authorised or required by law or a competent regulatory body, under which the protection of confidentiality would be unavailable. One of the most representative examples would be the New Zealand Arbitration Act 1996, which on the one hand states that ‘Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information’³⁵² whilst on the other hand provides several scenarios under which the prohibition on disclosure of confidential information would be limited³⁵³.

³⁴⁸ i.e. Norwegian Arbitration Act.

³⁴⁹ The original text is ‘Hvis ikke partene har avtalt noe annet for den enkelte sak, er voldgiftsbehandlingen og voldgiftsrettens avgjørelser ikke underlagt taushetsplikt’. The translation was provided in Antonias Dimolitsa, ‘Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration’, in *Confidentiality in Arbitration – Commentaries on Rules, Statutes, Case Law and Practice*, ICC International Court of Arbitration Bulletin, 2009 Special Supplement, at p. 14. Emphasis added.

³⁵⁰ i.e. Spanish Arbitration Law.

³⁵¹ The original text is ‘Los árbitros, las partes y las instituciones arbitrales, en su caso, están obligadas a guardar la confidencialidad de las informaciones que conozcan a través de las actuaciones arbitrales’. The translation was provided in Antonias Dimolitsa (2009) *op. cit.*, *supra* note 349, at p. 17. Emphasis added.

³⁵² See Article 14B of the Act.

³⁵³ See Article 14C of the Act.

This diversity concerning the applicable scope of confidentiality could also be observed in institutional rules.³⁵⁴ On the one hand, some institutional rules clearly rule on confidentiality issues covering from the existence of arbitration to arbitral awards. For example, Article 30.1 of the LCIA Arbitration Rules explicitly provides that:

‘The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, *save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.*’³⁵⁵

On the other hand, some other institutional rules, e.g. the ICC and ICSID arbitration rules, remain silent on confidentiality issues.

Last but not least, for those jurisdictions which remain silent on confidentiality issues in their national laws, the examination of national case law also reflect such diversity. Some jurisdictions hold the attitude that confidentiality is not an essential feature of arbitration. Mason C.J. clearly stated in *Esso Australia Resources Ltd. v. The Honourable Sidney James Plowman* that:

‘I do not consider that, in Australia ... we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration ... It does not recognize that there may be circumstances, in which third parties and the

³⁵⁴ Institutional rules examined in this research include the arbitration rules of London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC), International Centre for Settlement of Investment Disputes (ICSID), American Arbitration Association (AAA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Kuala Lumpur Regional Centre for Arbitration (KLRCA), World Intellectual Property Organisation (WIPO), China International Economics and Trade Arbitration Commission (CIETAC), Singapore International Arbitration Centre (SIAC) and Hong Kong International Arbitration Centre (HKIAC).

³⁵⁵ Emphasis added.

public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a “*public interest*” exception.’³⁵⁶

Similarly, in *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, the *Högsta domstolen*³⁵⁷ refused to recognise the implied obligation of confidentiality in arbitration:

‘One of the advantages of having a dispute considered by arbitration proceedings as compared with judicial proceedings, and one which is very persuasive for companies to choose arbitration is believed to be the secrecy associated with arbitration proceedings ... However, this advantage does not have to mean that there is a preconceived duty of confidentiality binding the parties. The real meaning of this, as compared with judicial proceedings, is instead that the proceedings are obviously not public, i.e., that the public does not have any right of insight by being present at the hearings or having access to documents in the matter ... This is not contradicted by the parties at the same time being entitled to disclose information to outsiders concerning the arbitration proceedings.’^{358 359}

On the other hand, other jurisdictions, such as the UK and Singapore, embrace the implied obligation of confidentiality subject to certain exceptions. For instance, in *Dolling-Baker v. Merrett and Another*, Parker L.J. pointed out that:

‘As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some *implied obligation on both parties* not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed

³⁵⁶ *Esso Australia Resources Ltd. v. The Honourable Sidney James Plowman* [1995] 128 A.L.R. 391 (HC), at paras. 35 to 38. Emphasis added.

³⁵⁷ i.e. Swedish Supreme Court.

³⁵⁸ *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc., Högsta domstolen*, T 1881-99, 27 October 2000, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 2001 - Volume XXVI*, Kluwer Law International, at p. 295.

³⁵⁹ For jurisdictions holding similar attitude, see also, for example, *Contship Containerlines, Ltd. v. PPG Industries, Inc.*, S.D.N.Y., 23 April 2003, 2003 W.L. 1948807, in which the U.S. District Court for the Southern District of New York rejected the argument that confidentiality is implied in law as a part of the agreement to arbitrate.

not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court.’³⁶⁰

Following this general principle, in *Ali Shipping Corporation v. Shipyard Trogir*, Potter L.J. listed the exceptions to the broad rule of confidentiality as recognised by English law, namely:

‘(i) consent, that is, where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court. It is the practical scope of this exception, that is, the grounds on which such leave will be granted, which gives rise to difficulty. However, on the analogy of the implied obligation of secrecy between banker and customer, leave will be given in respect of (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party ... (v) where the “*public interest*” requires disclosure.’^{361 362}

Through the examination above, two points could be made. First, it could be clearly observed that confidentiality in arbitration is a principle which may be over-emphasised: the protection of it is not unconditional, even for those jurisdictions which apply a rather stringent protection on it.³⁶³ Secondly, and interestingly, by examining the relevant national laws, case law and institutional rules, it could be found that public interest seems to be a widely approved exceptional scenario under which confidentiality may not be protected. As being observed, the current trend in international arbitration has increasingly shown the distinction between the unquestioned privacy of the hearing and the confidentiality of the arbitral

³⁶⁰ *Dolling-Baker v. Merrett and Another* [1990] 1 W.L.R. 1205 (CA), at 1210.

³⁶¹ *Ali Shipping Corporation v. Shipyard Trogir* [1999] 1 W.L.R. 314 (CA). Emphasis added.

³⁶² For jurisdictions holding the similar attitude, see also, for example, *Myanma Yaung Chi Oo Co Ltd. v. Win Win Nu*, Singapore High Court [2003] 2 S.L.R. 547, at paras. 9 to 17; *Société True North et Société FCB International v. Bleustein et autres*, Tribunal de commerce de Paris, 22 February 1999, 2003 Revue de l' Arbitrage 1, as quoted in Antonias Dimolitsa (2009) *op. cit.*, *supra* note 349, at p. 20.

³⁶³ For example, see Article 24(2) of Ley 60/2003, de Arbitraje. The wording ‘if applicable’, from the author’s viewpoint, seems to imply the possibility that relevant information might still be disclosed in certain scenarios.

proceedings as a whole, especially concerning arbitrations in which there is a genuine public interest.³⁶⁴ Even under the circumstance that the parties have explicitly agreed upon a specific confidentiality agreement, such agreement may still be overridden if the relevant court considers it to be in the public interest that it should be.³⁶⁵ It is also suggested that in the scenario that the outcome of a dispute could affect persons who are not parties to the proceedings, ‘those others, or their representatives, should be able to have notice of the proceedings’³⁶⁶

Since it is unquestionable that competition law disputes concern a great extent of public interest, it could hence be plausibly deduced that in an arbitration concerning competition law disputes, key information such as the existence of such arbitration as well as the content of the arbitral award may be required to be disclosed to public due to public interest consideration, and arbitrating competition law disputes would thus neither hinder the disputes from being known nor impede subsequent adjudications from being raised by affected third parties. This deduction was supported in *American Central Eastern Texas Gas Co., Limited Partnership, et al v. Union Pacific Resources Group, Inc., et al*, in which the arbitral tribunal was required to judge on a competition law dispute and subsequently the losing party requested the court of arbitral seat, i.e. United States District Court for the Eastern District of Texas, to order that the result of the arbitration be sealed. By emphasising that any injunctive relief shall not ‘disserve the public interest’, the Court stated that:

‘Although the ... defendants may be harmed more than the non-movants by the public disclosure of the arbitration award, the court finds that the public interest in this case would be disserved by granting the requested relief. Even given the policies underlying the Federal Arbitration Act, the court believes that the public has *a strong countervailing interest in knowing the results of*

³⁶⁴ Alan Redfern & Martin Hunter (2004) *op. cit.*, *supra* note 29, at p. 34.

³⁶⁵ *Ibid*, at p. 41. See also, for example, *Lawrence E. Jaffee Pension Plan v. Household International, Inc.*, D. Colo., 13 August 2004, 2004 W.L. 1821968, in which the U.S. District Court of Colorado compelled the production of documents from an arbitration in response to requests made in parallel litigation, notwithstanding the existence of an explicit confidentiality agreement covering all documents disclosed by the parties in connection with the arbitration.

³⁶⁶ Janet Walker, Arbitrability: Are there Limits? Symposium paper, LCIA Symposium, The Promise of International Commercial Arbitration – Testing the Model: Expanding Arbitration to the Public Domain, Montreal, 4 October 2004, at 9.

*arbitration proceedings that involve allegations of anticompetitive and monopolistic conduct.*³⁶⁷

Although the legitimacy of this deduction is still subject to the definitions of public interest as well as the legal practice of jurisdictions other than the U.S., based upon the examination above and by bearing the public significance of competition law and the development trend of confidentiality in mind, it could be plausibly argued that disapproving the arbitrability of competition law disputes based upon the scepticism that the confidentiality of arbitration would block the way of subsequent adjudications would be increasingly untenable.

C. Gaining basic trust on arbitrating competition law disputes: re-examining the distrust on arbitrators

Based upon the discussion above, the theoretical conflict between the public element of competition law disputes and the private nature of arbitration has been, to certain extent, mitigated. However, by switching the focus to the practical facet of arbitrating competition law disputes, an arguably stronger hindrance impeding the acceptance of arbitration in adjudicating competition law disputes may still be found, namely the distrust on arbitrator's expertise in judging on competition law disputes.

The rationale of the hindrance lies mainly in two aspects, i.e. the complexity of competition law disputes and the impression of arbitrators being 'biased to business and hostile to public regulation of commercial activity'³⁶⁸. Although this suspicious attitude towards arbitrators in adjudicating competition law disputes may be deemed to be reasonable especially during the period when international commercial arbitration has not or merely made a tentative step into the traditional forbidden zone of public law facet, with the widely increasing emphasis upon national or regional competition law and the rapid development of international commercial arbitration in resolving private disputes, it would be unsound to assume that such attitude would still be prevailing, if not being unreasonably sceptical, which could be resorted to disapprove the arbitrability of competition law disputes.

³⁶⁷ *American Central Eastern Texas Gas Co., Limited Partnership, et al v. Union Pacific Resources Group, Inc., et al*, 2000 WL 33176064.

³⁶⁸ Karim Abou Youssef (2009) *op. cit.*, *supra* note 205, at para. 3-9.

As for the first concern that the complexity of competition law disputes would be way beyond arbitrators' full grasp, one major feature of international commercial arbitration should be reiterated, i.e. the parties to an arbitration are generally free to choose their own tribunal,³⁶⁹ which is almost universally embraced by national arbitration laws³⁷⁰ or institutional rules^{371,372}. Therefore, when encountering complex competition law disputes, it could be legitimately expected that the parties would select arbitrators with specific knowledge and experience in competition law for the proper resolution of their disputes. As stated in the cornerstone case *Mitsubishi v. Soler Chrysler-Plymouth*:

‘International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute *can be expected to select arbitrators accordingly*.’³⁷³

This feature itself forms a strong implication of the high expertise of arbitrators since they are selected to hear and judge on disputes, rather than acting as a full-time judge who may sometimes inevitably need to rule on cases out of his specialty. As has been pointed out:

‘In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal.’³⁷⁴

³⁶⁹ Exceptions may lie in specific rules of some arbitration institutions, for example, see Article 7 of the LCIA Arbitration Rules, in which the rules provide that ‘If the parties have agreed howsoever that any arbitrator is to be appointed ... Such nominee may only be appointed by the LCIA Court as arbitrator subject to that nominee’s compliance with Articles 5.3 to 5.5; and the LCIA Court shall refuse to appoint any nominee if it determines that the nominee is not so compliant or is otherwise unsuitable’. See also Article 24 of the CIETAC Arbitration Rules.

³⁷⁰ See, for example, Article 11 of the UNCITRAL Model Law; Section 16 of Arbitration Act 1996 (the UK); Section 5 of the Federal Arbitration Act (U.S.).

³⁷¹ See, for example, Article 12 of the ICC Arbitration Rules; Article 7 and 8 of the HKIAC Arbitration Rules.

³⁷² Alan Redfern & Martin Hunter (2004) *op. cit.*, *supra* note 29, at p. 216.

³⁷³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 1985, at note 21. Emphasis added.

³⁷⁴ *Ibid.*, at 633.

Moreover, from a more practical perspective, arbitrators with knowledge and experience in competition law facet, compared to court judges, might be placed at a more practically appropriate position to judge on competition law disputes. As has been correctly opined:

‘Arbitrators are not only as well-equipped as judges to deal with the complexities of competition law, but they are probably more suited than national courts, due to the *considerable time and attention* they are able to devote to the case and also to *their ability to frame the proceedings according to the particular features of each dispute*, in particular by combining civil law and common law procedural experience, such as assistance of tribunal-appointed experts and discovery or cross-examination of witnesses.’³⁷⁵

Accordingly, it seems that the impression that courts generally guarantee a more correct application of competition law is merely an illusion³⁷⁶, and it would thus be more persuasive to crush the suspicious impression shrouding upon arbitrators in adjudicating competition law disputes than being an adherent of such sceptical attitude insistently questioning the expertise of arbitrators. Without explicit evidences showing the general incompetence of arbitrators in arbitrating competition law disputes, it would be undoubtedly sounder to show basic trust to arbitrator’s expertise.

Compared to the first concern, the second concern regarding the substantive impartiality of arbitrators may seem to be more obsolete and imaginary: the argument concerning that the bias possibly held by an arbitrator may to certain extent lead to a deflective arbitral award should be verified through ‘facts, evidence, and possibly, previous relevant case law’ but not pursuant to ‘abstract principles or to the personal beliefs of the decision maker’.³⁷⁷ With international commercial arbitration becoming one of the most widely used and reliable dispute resolution mechanisms, it would be increasingly harder to build the connection between arbitrators being businessmen and arbitrators being ‘hostile to public regulation of commercial

³⁷⁵ Alexis Mourre (2011) *op. cit.*, *supra* note 130, at para. 1-089. Emphasis added.

³⁷⁶ Luca G. Radicati di Brozolo (2011) *op. cit.*, *supra* note 24, at para. 22-026.

³⁷⁷ *Ibid.*, at para. 2-29.

activity'³⁷⁸. A rather convincing argument supporting this viewpoint would be that, as will be seen below,³⁷⁹ competition law is increasingly treated as public policy worldwide and the intentional omission or carelessness on relevant competition law issues in an international arbitration may hence trigger the public policy defence of a jurisdiction, which might eventually lead to awards vacation or refusal of enforcement under both the Model Law and the NYC. This would, to certain extent, contaminate an arbitrator's reputation and erode one's career³⁸⁰ as it has been widely recognised that an arbitrator is obliged to make all reasonable effort to render an award which would not be set aside before the seat court or be refused for enforcement before the enforcing court.³⁸¹ Therefore, it would be increasingly untenable to argue that an arbitrator would take the risk of sabotaging his own career to ignore or apply a rash attitude to relevant competition law issues.

Accordingly, although one could plausibly argue that the integrity of the arbitration system might need to be particularly maintained when international commercial arbitration 'expands into new areas of dispute resolution in the public domain'³⁸², such necessity could still hardly legitimise such illusive viewpoint assuming the substantive partiality of arbitrators. Hence, unsurprisingly, in *Mitsubishi v. Soler Chrysler-Plymouth*:

³⁷⁸ Karim Abou Youssef (2009) *op. cit.*, *supra* note 205, at para. 3-9.

³⁷⁹ See *infra* Section I(A) and II of Chapter V.

³⁸⁰ For example, see Gary Born (2014) *op. cit.*, *supra* note 21, at p. 2013. ('Arbitrators are almost always selected because of their personal standing and reputation and it is the loss of such reputation, through parties' complaints, removal of the arbitrator, or annulment of an award that is by far the most effective deterrent against unsatisfactory performance.')

³⁸¹ As for the obligation to render an award which would not be set aside, see Alexis Mourre (2011) *op. cit.*, *supra* note 130, at para. 1-033 ('arbitrators also have a duty to make their best efforts to render a valid award, that is, an award that will not be invalidated at the seat of the arbitration.');

as for the obligation to render an enforceable award, it should be noted that viewpoints may differ regarding whether an arbitrator is simply obliged to render an enforceable award (for example, see Günther J. Horvath, The Duty of the Tribunal to Render an Enforceable Award, *Journal of International Arbitration*, Vol. 18, Issue 2, 2001, at 135: 'When one speaks of an arbitrator's duties, perhaps none is more important than the duty to render an enforceable award') or to *make all reasonable effort* to render an enforceable award (for example, see Margaret L. Moses (2017) *op. cit.*, *supra* note 22, at p. 151, which stated 'the most fundamental obligation is to render an enforceable award, or at least to *make best efforts* to render an enforceable award.');

Article 42 of the ICC Rules of Arbitration: 'In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law'). Here the author supports the latter view as from the author's viewpoint the duty of rendering an enforceable award should be understood as more of an ethical or a moral obligation but not a duty which has a fundamental nature. Following this thought, the author hence applies the wording 'to make all reasonable effort' here.

³⁸² Janet Walker (2004) *op. cit.*, *supra* note 366, at 10.

‘We also reject the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes ... We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain ... impartial arbitrators’³⁸³

D. The opportunity for enforcing courts to review the arbitral award concerning competition law disputes

Besides the reconciliation of the inherent conflict between international arbitration and disputes concerning competition law issues and the resumption of the trust on arbitrators’ expertise and impartiality, there is another safeguard which may further ease the misgiving that competition law disputes may not be effectively resolved through international arbitration.

This third-layer protection is the review conducted by seat courts and enforcing courts. As for the review conducted by seat courts, it has been introduced above that Article 34(2)(b)(ii) of the Model Law allows a seat court to review the legitimacy of an arbitral award regarding its compliance to the arbitral seat’s public policy, hence leaves certain room for the seat court to check whether the enforcement of the award would be in line with its competition law concerns as long as competition law is deemed as the public policy of the arbitral seat.³⁸⁴ Similarly, as for the review conducted by enforcing courts, both Article 36(2)(b)(ii) of the Model Law and Article V(2)(b) of the NYC do authorise an enforcing court to have a second-look on whether the award tallies with the enforcing state’s public policy. Therefore, as long as competition law is deemed as part of an enforcing state’s public policy, the enforcing court could hence review the arbitral award concerning its competition legal order to ensure that the tribunal’s judgment is in line with its competition law. As the U.S. Supreme Court pointed out in *Mitsubishi v. Soler Chrysler-Plymouth* when affirming the arbitrability of disputes concerning antitrust law issues,

³⁸³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 1985, at 634.

³⁸⁴ This issue will be further examined in details in *infra* Section I(A) of Chapter V.

‘[T]he United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.’³⁸⁵

Notwithstanding, one might argue that, since the prevailing way of applying public policy review would not allow a seat court or an enforcing court to dig into the merits of the dispute, this *prima facie* review may not be adequate to expose potential violation of competition law, and hence disputes concerning competition law issues should not be allowed to be arbitrated. As queried,

‘The “second” look doctrine is a problematic safety valve for ensuring that public law issues receive proper consideration. If it calls for review on the merits, it disrupts the arbitral process. But if it calls only for a mechanical examination of the face of the award, it may not provide an effective check on an arbitrator who mentions the Sherman Act [i.e. U.S. antitrust law] before he proceeds to ignore it.’³⁸⁶

This argument will be further examined in details in Chapter V where the author will propose a new reviewing standard to ease the misgiving regarding the inadequacy of a court’s scrutiny, but it ought to be sufficient to point out here that this issue concerns primarily the reviewing pattern of an enforcing court instead of questions of the inarbitrability of competition law disputes. The author opines that the behavioural pattern of national courts in scrutinising arbitral award is an *external* factor in comparison with the inherent flaw of the arbitration mechanism or the quality of arbitration. In other words, there is no necessary causation between the inadequacy of a court’s scrutiny and the potential of an arbitral award violating relevant competition law. Therefore, while the mechanism a court uses in its review may support the arbitrability of competition law disputes, a potential flaw of this reviewing mechanism would not, reversely, pronounce the inarbitrability of competition law disputes.

E. Some other concerns on approving the arbitrability of competition law

³⁸⁵ *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 1985, at 638.

³⁸⁶ William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, *Brooklyn Journal of International Law*, Vol. 12, 1986, at 642.

Last but not least, besides the major points discussed above, the approval of referring competition law disputes to arbitration may also be motivated by the concern that since international arbitration, as discussed above,³⁸⁷ is an important way of the private enforcement of competition law, approving competition law issues to be arbitrated would hence increase the chance of relevant violations of competition law being exposed, and therefore shares the burden of national courts or relevant national authorities (such as NCAs) and ultimately helps to promote market competition order. For example, when speaking of the private enforcement of (now) EU competition law, it was listed that there were seven major advantages of private enforcement, namely:

- It would increase deterrence against infringements and increase compliance with the law.
- The victims of illegal anticompetitive behaviour would be compensated for loss suffered.
- Private enforcement is an effective way to deal with certain types of cases, especially those involving a commercial dispute between two parties and those where the claimant has close access to evidence concerning the defendant's business activities.
- The Commission and the national competition authorities do not have sufficient resources to deal with all cases of anticompetitive behaviour.
- Actions before the courts can offer speedier interim relief to undertakings than public proceedings.
- Courts can order the unsuccessful party to pay the successful party's legal costs. An undertaking's legal costs are not recoverable in the case of a complaint to a public authority.

³⁸⁷ See *supra* Section I of Chapter II.

- Private actions will further develop a culture of competition amongst market participants, including consumers, and raise awareness of the competition rules³⁸⁸

Therefore, although private enforcement is not the primary mean of enforcement and are to a large extent a complement to public enforcement of competition law,³⁸⁹ its advantages would still be a strong incentive motivating the approval of the arbitrability of competition law.

III. The reflection on the development of the arbitrability of competition law disputes

These reasons as introduced and discussed above hence lead to the aforementioned change of attitude towards the arbitrability of competition law disputes. As stated,

‘From a practical perspective, the answer to [the arbitrability of competition law disputes] now seems to be pretty much universally agreed: competition law or antitrust issues are arbitrable. There is now a *jurisprudence constante* in all major jurisdictions that makes this clear.’³⁹⁰

More importantly, the research on the development of the arbitrability of competition law issues also clearly shows that the conflict between disputes concerning public interests and international arbitration would not be consistently irreconcilable. First and most fundamentally, as long as a dispute, although concerning certain public interest, arises out of a contractual relationship, it could then be resolved by arbitration from a theoretical perspective. The key lies in that the legal effect of

³⁸⁸ Donncah Woods, Ailsa Sinclair and David Ashton, Directorate-General Competition, unit A-1, Private Enforcement of Community Competition Law: Modernisation and the Road Ahead, *Competition Policy Newsletter*, Number 2 – Summer 2004.

³⁸⁹ Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 94.

³⁹⁰ Alexis Mourre, ‘Chapter 3 Arbitrating Competition Law Issues: The Arbitrator’s Perspective’, in Gordon Blanke & Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, at para. 3-007. See also, for example, Julian D. M. Lew, ‘Chapter 12 – Competition laws: Limits to Arbitrators’ Authority’, in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, Kluwer Arbitration International, 2009, at para. 12-68. (‘Arbitrability of competition law has ceased to be a significant issue in international arbitration.’) As for EU competition law, see Gordon Blanke, ‘EC Competition Law Claims in International Arbitration’, in *Austrian Arbitration Yearbook 2009*, Stämpfli Verlag AG, 2009, at p. 24. ([I]t is safe to say that ... there is a Europe-wide consensus on the arbitrability of competition law, in particular of Article 81 and 82 EC’). For a more detailed discussion on the arbitrability of EU competition law, especially Article 101(3) TFEU, see Alexis Mourre (2011) *op. cit.*, *supra* note 130, at paras. 1-143 to 1-158. See also, for example, Gordon Blanke & Renato Nazzini (2008) *op. cit.*, *supra* note 37.

examining and applying relevant public policy would be mainly confined to the contracting parties. Although the arbitral award would inevitably influence the non-contractual third parties, as analysed above,³⁹¹ the nature of such influence is essentially different than that of as exerted on the contracting parties. Therefore, as pointed out:

‘[While a dispute concerning EU competition law issues is based upon a contractual relationship], where one party to a commercial agreement wishes to contend that the other has engaged in some contravention of Article 101 and/or 102 TFEU which has impacted upon their commercial relationship and thereby given rise to loss and damage, or a right to have the agreement declared void, arbitration is both an attractive and efficient means of resolving such a claim.’³⁹²

Secondly, although international arbitration itself may not provide sufficient redress to violations of public interests since it would merely focus on the contracting parties but not on other influenced third parties, such focus and the privacy of international arbitration would not be a bar to derogate the sufficiency of protecting public interests -- the aforementioned non-absoluteness of confidentiality of arbitration proceedings and arbitral awards is one of the most representative examples. Thirdly, with the development of international arbitration and the improvement of the quality of arbitrators, when public policy issues are raised, it could be legitimately expected that the arbitrators are fully competent to examine and rule on them. As stated:

‘[O]n a pragmatic level, international arbitration and its users have reached a level of sophistication and acceptance that arbitrators can and should determine all issues regardless of complication or content.’³⁹³

Moreover, it should also be noted that the reviewing mechanism of enforcing court would also make certain contribution to boost the confidence of arbitrating public interest-involved disputes as it forms another layer of guarantee to ensure the arbitral awards’ compliance to the enforcing state’s public policy. Also, arbitrating disputes concerning public interests may also be encouraged as international arbitration is, to

³⁹¹ See Section II(B)(1) of this Chapter.

³⁹² James Segal (2018) *op. cit.*, *supra* note 336, at 424.

³⁹³ Julian D. M. Lew (2009) *op. cit.*, *supra* note 390, at para. 12-68.

certain extent, a complementary mechanism for resolving disputes concerning public interests -- it essentially establishes another platform for potential violation of public policy to be discovered, examined and determined.

It hence follows these points that international arbitration, from both theoretical and pragmatic perspectives, has the potentiality to become a reliable dispute resolution mechanism for resolving disputes concerning public interests. This potentiality, coupled with the aforementioned consideration of promoting international commerce, hence lead to the tendency towards a greater arbitrability.³⁹⁴ Although one should still not forget that the arbitrability of a specific subject matter (other than competition law) would essentially rest with a jurisdiction's own consideration of whether international arbitration could sufficiently protect relevant public interest of the jurisdiction and a jurisdiction would hence still hold the discretion to shape its own standard of arbitrability rule,³⁹⁵ under the steady development of international arbitration and the improvement of the competence of arbitrators, those 'tiny islands of non-arbitrability'³⁹⁶ concerning public interests-involved disputes may eventually submerge in the 'vast ocean of arbitrability'³⁹⁷. While it may still be premature to officially announce the death of arbitrability, it could be reasonably expected that arbitrability would be increasingly rarely invoked successfully in refusing the enforcement of foreign arbitral award, and it would eventually become a dust-laden ground. Just as a leading scholar once confidently stated:

“Arbitrability: are there limits?” I, for one, cannot see any.’³⁹⁸

³⁹⁴ See, Margaret L. Moses (2017) *op. cit., supra* note 22, at p. 243; Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit., supra* note 1, at para. 2.144; J. Lew, L. Mistelis & S. Kröll (2003) *op. cit., supra* note 200, at para. 9-5.

³⁹⁵ Potential factors which would influence a jurisdiction's decision on the arbitrability of specific subject matters may include but is not limited to, for example, the virtual trade-off between the consideration of promoting international commerce and protecting specific public interest of the state, and the result of the observation of arbitrators' competence of rendering arbitral awards which are in line with the state's public policy.

³⁹⁶ Jean-Baptiste Racine, *L'arbitrage commercial international et l'ordre public*, Paris: LGDJ, 1999, at p. 26, as quoted in Alexis Mourre (2011) *op. cit., supra* note 130, at para. 1-025.

³⁹⁷ *Ibid.*

³⁹⁸ Janet Walker (2004) *op. cit., supra* note 366, at 12. See also, for example, Karim Abou Youssef (2009) *op. cit., supra* note 205, at para. 3-54. ('Arbitrability is a concept whose success has banalized and, to a large extent, emptied of significance. The "commerciality" reservation and the defence of inarbitrability as ground for non-enforcement under the New York Convention have lost much of their role. With the gradual death of arbitrability, they would also fall in desuetude. The liberation of arbitrability from all references to local law, to favour the security of international contracts, has

Chapter V – Examining the application of Article V(2)(b) of the NYC under the scenario of enforcing foreign arbitral awards concerning EU competition law disputes

Having critically examined the rationales of disapproving the arbitrability of subject matters concerning public interests, the focus will now be switched to the second ground, i.e. Article V(2)(b), and the remaining issues concerning its application in legal practice will be examined.

As queried above, two key questions of the application of Article V(2)(b) lie in that, first, under the scenario of relevant public policy issues having already been considered by the arbitral tribunal, whether the enforcing court should fully trust the tribunal's decision without even reviewing the reasoning of it; and secondly, under the scenario that relevant public policy issues were not examined by the tribunal, whether the enforcing court should, under the pro-enforcement principle, merely read the information reflected in the award itself to draw the conclusion on the existence of serious violation of public policy. This chapter will hence examine these uncertainties from the perspective of enforcing foreign arbitral awards concerning EU competition law disputes. As will be seen, the simple mode of *prima facie* review may not well strike the balance between the finality and legality of an arbitral award concerning EU competition law dispute, and a series of more comprehensive enforcing pattern will be proposed. Following the examination of the reviewing pattern of enforcing courts examining potential breaches of EU competition law, a general reflection on the interrelationship between the finality and legality of an arbitral award as well as the specific behavioural pattern of an enforcing court will also be made to shed certain light to the enforcement of arbitral awards concerning other strong public interests.

I. Three preliminary issues

Before delving into the reviewing patterns of enforcing courts reviewing arbitral awards concerning EU competition law, three preliminary issues should be examined. It has been raised above that besides the potential query on an enforcing court's

stripped arbitrability of its *essentials* as a notion of national content, embodying political choices of a sovereign.')

behavioural pattern on reviewing arbitral awards concerning strong public interests, there are two principles which do stand the test of time, namely that only fundamental public interests could be able to trigger public policy defence under Article V(2)(b), and only serious violation of public policy could be condemned under this Article.³⁹⁹ Therefore, before digging into the behavioural pattern of an enforcing court reviewing awards concerning EU competition law issues, one should first examine whether EU competition law would be deemed as the public policy of enforcing states under Article V(2)(b), and whether any violation of EU competition law would be serious enough to trigger public policy defence under Article V(2)(b), to lay the foundation for subsequent discussion. More specifically, the latter question will be further divided into two, i.e. that what the modalities of an arbitral award violating EU competition law in international arbitration are and whether a potential breach of EU competition law as reflected in an arbitral award would always trigger the public policy defence under Article V(2)(b).

A. Connecting EU competition law to enforcing states' public policy

The first issue to be examined concerns the connection between EU competition law and enforcing states' public policy within the meaning of Article V(2)(b) of the NYC. Notably, since the enforcing state of an arbitral award concerning EU competition law dispute would not necessarily be within the EU and EU competition law is indeed painted with a clear regional colour, it could hence be reasonably surmised that the degree of recognising EU competition law as part of public policy may differ between EU Member States and non-EU jurisdictions. This section will therefore examine the connection between EU competition law and public policy by distinguishing the enforcing courts as the courts of non-EU jurisdictions and the courts of EU Member States.

1. EU competition law, EU's fundamental public interests, and EU Member States' public policy

When connecting EU competition law and EU Member States' public policy, it could be found that these two are essentially at two different levels. The former is at EU level, which concerns the competition order of the EU's single market; whilst the

³⁹⁹ See *supra* Section II(C) of Chapter III.

latter is at national level. Therefore, before connecting these two terms, two questions should be examined. First, does EU competition law represent a fundamental public interest at EU level? If EU competition law could not obtain the fundamentally important status at EU level, it would be hardly imagined that its importance could be unanimously recognised by EU Member States. Secondly, if EU competition law represents an EU's fundamental public interest, as an EU-level term, how would it be assimilated by EU Member States and form part of their public policy?

a. Does EU competition law represent a fundamental public interests of the EU?

The first question to be examined is that whether EU competition law represents an EU's fundamental public interest, and the examination of this question should start from making a more precise definition of the term 'EU's fundamental public interests'.

i. What are EU's fundamental public interests?

To define this term, one of the most direct and efficient ways would be to resort to EU primary law which is expected to convey the core value cherished by the EU and would hence shed certain light to this question.

(1) The examination of EU primary law

The founding treaties

The starting point of the examination on EU primary law is the Treaty Establishing the European Coal and Steel Community (hereinafter the 'ECSC'), which was signed on 18 April 1951 and came into force on 25 July 1952. At that time, the whole of Europe was recovering from the aftermath of World War II. As enormous amount of coal and steel production was needed for reconstruction and given the consideration that German coal and steel industry had been dominant in Europe before the war, other countries in Europe were aware that without intervention German industry was likely to reacquire such dominance again.⁴⁰⁰ The idea of establishing a common

⁴⁰⁰ David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, 1998, Oxford University Press, p. 335.

market in coal and steel as a means of squaring the various interests of the founding member states (in particular those of Germany and France) was born, resulting in the creation of the ECSC.

The initial emphasis of the rudiment of the new community was hence mainly placed upon the recovery of European economic and maintaining the post-war peaceful relations among European countries.⁴⁰¹ But such short-term object turned to be not only a post-war recovery measure but also the start of progress towards a much more ambitious long-term goal. It was stated that the founders of the ECSC were also clear about their intention for the Treaty, namely that it was merely the first step towards a 'European Federation'⁴⁰² – 'the common coal and steel market was to be an experiment which could gradually be extended to other economic spheres, culminating in a political Europe'⁴⁰³.

This preliminary concept of integration of a European Community was further enhanced by two treaties which were signed later by the six founding members of the Coal and Steel Community, namely the Treaty Establishing the European Economic Community (hereinafter the 'TEEC') and the Treaty Establishing the European Atomic Energy (hereinafter the 'TEAE'). These treaties formed the root of the integration of Europe⁴⁰⁴, in which the concept of integration was further steadily revealed. As clearly reflected in the Preamble of the TEEC:

'[The Contracting States' leaders]

DETERMINED to lay the foundation of an *ever-closer union* among the peoples of Europe'⁴⁰⁵

The concept of establishing an 'ever-closer union' was further mainly concretised to economic integration -- it could be clearly seen that the TEEC listed in total eleven economic "activities" which the Community was to pursue, covering the elimination

⁴⁰¹ See the Preamble of the ECSC. See also, for example, Monnet Jean, *Memoirs – Translated from the French by Richard Mayne*, Doubleday & Company, Inc., 1978, at pp 292-294.

⁴⁰² See Primary legislation of the European Union –The first treaties, available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.1.1.html (Retrieved: 2018-09-10)

⁴⁰³ *Ibid.*

⁴⁰⁴ John McCormick, *Understanding the European Union – A Concise Introduction*, Macmillan Press Ltd., 1999, p. 69.

⁴⁰⁵ Emphasis added.

of customs duties, fiscal barriers, obstacles to freedom of movement for persons, services and capital to ensuring that competition in the common market is not distorted.⁴⁰⁶ Moreover, attempts of promoting political integration, although bringing rather limited effect, could also be seen. Tracing back to year 1961, according to Bonn Summit of that year, the Heads of State or Government of the six founding Member States of the European Community asked an intergovernmental committee, ‘to hold at regular interval meetings whose aim will be to compare their views, to concert their policies and to reach common positions in order to further the *political union of Europe*’⁴⁰⁷.

The Single European Act

Following the TEEC and TEAE, the European Community experienced development and the first rounds of enlargement from 1973 to 1986⁴⁰⁸. On 17 February 1986, twelve Member States of the European Community signed the Single European Act (hereinafter the ‘SEA’), which amended the Treaties establishing the European Communities and promoted the integration of Europe in a more systematic way. It set a deadline (1992) for establishing the internal market, which reiterated the importance of economic integration as a central short-term object of the Community.⁴⁰⁹ Moreover, besides the steady emphasis on the establishment of the internal market, the focus have gradually dispersed to cover other areas, e.g. social policy⁴¹⁰, research and technology⁴¹¹ and environment⁴¹². More importantly, it also touched upon political integration by providing provisions concerning (limited) cooperation in the field of foreign policy⁴¹³. In its first article, the Act explicitly stated that:

⁴⁰⁶ See Article 3 of the original TEEC.

⁴⁰⁷ Statement issued by the heads of State or Government (Meeting in Bonn on 18 July 1961), Bulletin of the European Economic Community, No.7/8, August 1961, at page 35. Emphasis added. Notably, based upon the consideration of the identity of the Member States, the incumbent French ambassador at that time, Christian Fouchet, rejected this federal option.

⁴⁰⁸ The first rounds of enlargement took place in 1973, 1981 and 1986, during which community membership doubled from 6 to 12. See John McCormick (1999) *op. cit.*, *supra* note 404, at p. 72.

⁴⁰⁹ See Article 13 of EEC Treaties (as amended by the SEA). (‘The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992’)

⁴¹⁰ See Sub-section III – Social Policy of the SEA.

⁴¹¹ See Sub-section V – Research and technological development of the SEA.

⁴¹² See Sub-section VI – Environment of the SEA.

⁴¹³ See Title III of the SEA.

‘The European Communities and *European Political Co-operation* shall have as their objective to contribute together to making concrete progress towards European unity.’⁴¹⁴

The Treaty on European Union and the newly established constitutional structure

The SEA clearly showed the transition of the focus from economic integration to political integration, which was described as ‘the last stage of the multinational integration process’⁴¹⁵. Such intention of promoting political integration was later further enhanced by the Treaty on Union (hereinafter the ‘Maastricht Treaty’), which was signed on 7 February 1992. With the Maastricht Treaty, the Community clearly went beyond its original economic objective, i.e. creation of a common market, and its political ambitions came to the fore. First, according to Title I, Article A of the Treaty, ‘the High Contracting Parties establish among themselves a European Union’, which for the first time publicly introduced the concept of ‘European Union’. It was stated that the creation of the EU symbolised the next stage in the process of European integration.⁴¹⁶ Secondly, the Union created by Maastricht Treaty was given more power, which were classified into three groups and were commonly referred to as ‘pillars’. The first pillar, as reflected in Title I to III of the Treaty, concerned Community activities which were brought into the Community sphere and conducted under the so-called ‘Community way’ or ‘*communautairisation*’⁴¹⁷, according to which the conducts of member states in Community activities was subject to an autonomous Community legal order.⁴¹⁸ The rest two pillars, which focused on common foreign and security policy⁴¹⁹ and justice and home affairs⁴²⁰, although not

⁴¹⁴ Emphasis added.

⁴¹⁵ Nicholas Moussis, *Access to European Union – Law, Economics, Policies*, Rixensart, 2011, at para 8.

⁴¹⁶ John McCormick (1999) *op. cit.*, *supra* note 404, at p. 80.

⁴¹⁷ David Edward and Robert Lane, *Edward and Lane on European Union Law*, Edward Elgar Publishing Limited, 2013, at pp. 32-33.

⁴¹⁸ *Ibid*, at p. 32. There was a single Council and a single Commission which were established in charge of Community activities and applied democratic method in making decisions or issuing legislations, regulations or directives binding to member states (see the Treaty establishing a Single Council and a Single Commission of the European Communities); there was also a judicial organ, i.e. the ECJ, to serve as the supreme judicial body to hear, examine and rule on applications concerning EU legal questions.

⁴¹⁹ Which aimed at safeguarding the common values, fundamental interests and independence of the Union, strengthening the security of the Union and its Member States, promoting international cooperation and developing democracy and the rule of law.

being within the Community sphere, presented a ‘*blueprint for, and a promise of, future (intergovernmental) cooperation*, implementation of which would be a matter for the competent institutions of the member states.’⁴²¹

As could be clearly seen, the Maastricht Treaty marked the further enlargement of the power of EU institutions by jumping out of the box of Community activity and being actually authorised in several areas previously labelled non-Community issues. It showed its ambition in achieving integration in not only the area of Community activity (which mainly concerned economic issues) but also that of concerning non-Community activities (which mainly concerned political issues).

The Treaty of Lisbon

The trend towards a political union finally reached its climax when all the 27 Member States at that time⁴²² signed the Treaty of Lisbon. First of all, issues which was originally excluded from the Community sphere has increasingly fused in and stepped onto the aforementioned ‘Community way’, or maybe more precisely for present context, the ‘Union way’. As stated:

‘The former intergovernmental structure ceases to exist, as the acts adopted in this area are now made subject to the ordinary legislative procedure (qualified majority and co-decision), using the legal instruments of the Community method (regulations, directives and decisions) unless otherwise specified.’⁴²³

⁴²⁰ The purpose of which was to develop common action to provide citizens within the fields of freedom, security and justice, especially concerning the free movement of persons. See Article K.1, Title VI of the original Treaty on European Union.

⁴²¹ David Edward and Robert Lane (2013) *op. cit.*, *supra* note 417, at p. 33. Notably, This asymmetry of legal effect between the first and the remaining two pillars were subsequently improved by the Treaty of Amsterdam, whereby certain parts of the third pillar were transferred to the first pillar (some components of the justice and home affairs, for example, asylum, immigration and rights of third country nationals, were transferred into the first pillar and the remaining part of third pillar was renamed ‘Provisions on Police and Judicial Cooperation in Criminal Matters’). Furthermore, later in 2004, the Treaty establishing a Constitution for Europe was even proposed to fuse both Community and non-Community pillars, but was eventually failed when French and Dutch voters rejected the Treaty in May and June 2005 and its ratification process thus came to an end.

⁴²² Except Croatia, which became the member state of EU in 2013.

⁴²³ Primary legislation of the European Union – The Treaty of Lisbon, available at http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_1.1.3.html (Retrieved: 2018-09-10).

One of the most representative examples would be the police and judicial cooperation in criminal matters, which was now wholly *communautairised*⁴²⁴.

Secondly, based upon the first development, as explicitly provided in Article 47 of the post-Lisbon TEU that the Union has now been officially granted full legal personality. The Union therefore acquired the ability to sign international treaties in the areas of its attributed powers or join an international organisation. Member States may only sign international agreements that are compatible with EU law.

Following these two major developments, the Treaty of Lisbon finally established a quasi-constitutional system, which marked unprecedented progress in the political integration of the European Union.

(2) The definition of EU's fundamental public interests

The definition of EU's fundamental public interests could then be further specified based upon the examination of the development of EU primary law.

It could be clearly found in the above examination that 'integration' is the key word running through the development process of the EU. This concept of integration is unchanged and evolving simultaneously. As for the former, the idea of the integration of the Europe has not changed since the very beginning of the first Treaties: it is worth recalling here that even the humble idea of uniting and controlling coal and steel resources had a much more ambitious plan of 'culminating in a political Europe'⁴²⁵. As for the latter, the development of the EU clearly has a phased feature, which presented the transition from economic integration (e.g. the TEEC) to political integration (e.g. TFEU and post-Lisbon TEU).

Pursuant to these two points, the definition of EU's fundamental public interests could hence be concluded as a complex of policies focusing on the integration of the European Union, with the emphasis now being placed upon the political integration.

ii. EU competition law as part of EU's fundamental public interests

⁴²⁴ David Edward and Robert Lane (2013) *op. cit.*, *supra* note 417, at p. 38.

⁴²⁵ See Primary legislation of the European Union –The first treaties, available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.1.1.html (Retrieved: 2018-09-10)

Having defined EU's fundamental public interests more specifically, the connection between EU competition law and EU's fundamental public interests should then be built to see whether EU competition law serves the purpose of EU integration and could hence be part of EU's fundamental public interests.

A brief retrospect of the development history of EU competition law seems to announce an affirmative answer. This would be particularly true when the emphasis of the integration was still placed upon economic integration. Tracing back to the ECSC, under the consideration that German coal and steel industry had been dominant in Europe before the war and other countries in Europe were aware that without intervention German industry was likely to reacquire such dominance, the concept of protecting competition was hence greatly valued since it was expected to break the prophecy pessimistically made by many observers who 'saw Europe's future as socialist – a high degree of state control of the economy and a decreasing sphere of operation for personal freedom and economic competition'⁴²⁶. It could hence be seen that two important competition law provisions were provided in the ECSC Treaty, namely Article 65 which focuses on the prohibition of anticompetitive agreements and Article 66 which concerns the regulation of concentrations and misuses of economic power, with the expectation that they could assist to create a 'real solidarity' and the 'common bases' for 'an economic community'⁴²⁷. EC competition law subsequently continued to perform as an indispensable support for the economic integration of the Community by constantly adjusting its role to comply with the development of the EU. For example, with the misgiving of German reacquiring dominance fading away, the attention of the Community hence switched from controlling state's actions to promoting economic growth, EC competition law hence also developed to protect the idea of common market and applied a more stringent mechanism – Regulation No. 17: First Regulation Implementing Article 85 and 86 of the Treaty is a representative example, which further centralised the power

⁴²⁶ David J. Gerber (1998) *op. cit.*, *supra* note 400, at p. 165.

⁴²⁷ See the Preamble of the ECSC Treaty. Emphasis added. Notwithstanding, it was also stated that the actual operations of the ECSC competition law system had a limited impact on the development of competition law in Europe. During the period the Commission did not prohibit any concentrations, and its enforcement of other provisions was quite limited, concentrating on the German coal sales agencies. (See *Ibid.*, at p. 342.) This fact might imply that the competition law as provided in ECSC Treaty mainly focus on the prevention of resource monopoly rather than creating and maintaining a healthy and competitive common market. See also, for example, Raymond Vernon, The Schuman Plan, *The American Journal of International Law*, Vol. 47, No. 2, 1953, at 197.

of examination and approval of relevant anti-competitive behaviours to the European Commission to guarantee both compliance and uniformity.

Hence, by acting as a guardian of the economic order of the Community, EC Competition law was unquestionably deemed as part of EU's most fundamental public interest. As the ECJ clearly stated in *Constern & Grundig*:

‘The [EEC] Treaty, whose preamble and content aim at *abolishing the barriers between States*, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could *not allow undertakings to reconstruct such barriers*. Article 85(1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process.’⁴²⁸

Similarly, in *Eco Swiss*:

‘[A]ccording to Article 3(g) of the EC Treaty ... Article 85 of the Treaty *constitutes a fundamental provision* which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.’⁴²⁹

But the connection between (now) EU competition law and EU's fundamental public interests seemed to be weaken when the emphasis of integration started to switch from economic integration to political integration. After the establishment of the internal market of which the deadline was set by the SEA⁴³⁰, the economic integration of the Europe seemed to gradually walk-off from the stage and the role of competition law hence changed from the guardian of economic integration to the monitor of a healthy and stable internal market environment among Member States. As stated in Regulation 1/2003, the main focus of the development of (now) EU competition law should be placed upon meeting the ‘challenges of an *integrated*

⁴²⁸ Cases 56 & 58/64 *Constern & Grundig v EEC Commission* [1966] ECR 299, at 340. Emphasis added. See also, for example, Case C-306/96 *Javico International and anor v. Yves Saint Laurent Parfums* [1998] ECR I-1983, at paras. 13 and 14.

⁴²⁹ Case C-126/97 *Eco Swiss China Time v. Benetton International* [1999] ECR I-3055, at para 36. Emphasis added.

⁴³⁰ See Article 13 of EEC Treaties (as amended by the SEA). (‘The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992’)

market'⁴³¹. It may hence be opined that since economic integration has almost completed, the importance of it would be allowed a 'back seat'⁴³². A question mark would therefore hang on whether economic integration would still be deemed as one of the most fundamental goals of the EU, and it would hence also be queried that whether EU competition law, of which the main function is to maintain the economic integration of the EU, should still be deemed as part of EU's fundamental public interests.

Such questioning of the importance of EU competition law continued along with the development of EU primary law. As could be found, different from its predecessors,⁴³³ the TFEU does not make clear reference to competition in the provision concerning the general economic duty of Member States.⁴³⁴ Rather, it could only be found that in Title VII of Part Three of the TFEU, that:

'For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy *with free competition*'⁴³⁵

and in Protocol (No.27) that:

'THE HIGH CONTRACTING PARTIES,

CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system *ensuring that competition is not distorted*,

HAVING AGREED that:

⁴³¹ Council Regulation No. 1/2003 JC 2003 L1/1 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty. Emphasis added.

⁴³² See Robert Lane, *EU Competition Law*, Edward Elgar, forthcoming. ('as the aims of the Treaties come to fruition and the internal market approaches completion they may progressively be allowed a back seat and emphasis re-directed to economic goals of competition')

⁴³³ As could be found, in both TEEC (Article 3(f)) and TEC (Article 3(1)(g)), they all clearly state that the Community shall ensure that 'competition in internal market is not distorted'.

⁴³⁴ See Article 5 of TFEU.

⁴³⁵ Emphasis added.

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.’⁴³⁶

This change then led to the doubt that whether EU competition law should still be granted with the high importance it possessed previously. As stated, given the ‘Treaty style of progression from the general to the specific, and the core to the peripheral’⁴³⁷, the change of location of the competition provisions from a Community activity to 27th of 37 protocols is ‘by any measure a demotion’⁴³⁸. Based upon this consideration, the questioning of the importance of EU competition law seem to be further legitimised: the downgrade or the new opacity as shown in the text of the Treaty may be read to imply that competition is no longer one of the primary objectives of the European Union.

This seemingly persuasive query may, notwithstanding, be proved to be a mere gloss, which could be broken from two ways. First, it should be noted that economic integration is a type of status rather than a mere task which would automatically terminate once it has been completed. Therefore, even though the completion of economic integration could be fulfilled at a certain point, EU competition law would still be a safeguard to maintain, if not promote, the economic integration of EU -- although the emphasis of EU competition law has now ‘re-directed to the economic goals of competition’⁴³⁹ and is no longer placed upon the economic integration of the EU, the pursue of a healthy and stable internal market would still be conducted based upon the idea of economic integration, and EU competition law would hence still strengthen the sense of economic unity among Member States. Secondly, based upon the first point, EU competition law would not only consolidate economic integration but also promote political integration as the concept of integration as reflected in EU competition law would also be applied in political facet. This broader function of EU competition law could even be observed in the founding treaties. As stated in the Preamble of the ECSC Treaty, competition law served for the creation of an ‘economic community’ which would be the foundation of a ‘broader and

⁴³⁶ Emphasis added.

⁴³⁷ Robert Lane, *op. cit.*, *supra* note 432.

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

independent community’, an ‘organised and vital Europe’ and maintain the ‘peaceful relations’⁴⁴⁰ among Member States.

Judgments of the ECJ also to certain extent reassured those who feared that EU competition law has been less important. As held in *Commission v. Italy*, two years after Lisbon Treaty entered into force,

‘As to the seriousness of the infringement, the vital nature of the Treaty rules on competition must be recalled ... which are the expression of one of the essential tasks with which the European Union is entrusted ... that vital nature is apparent from Article 3(3) TEU, namely the establishment of an internal market, and from *protocol No.27 on the internal market and competition*, which *forms an integral part of the Treaties* in accordance with Article 51 TEU, and states that the internal market includes a system ensuring that competition is not distorted.’⁴⁴¹

It could hence be observed that the aforementioned ‘demotion’ was not recognised by the ECJ, and EU competition law still concerns the core interest of the EU and greatly contributes to the economic integration of the European Union. With no doubt, EU competition law forms part of EU’s fundamental public interests.

b. Assimilating EU competition law in EU Member States’ public policy

Having linked EU competition law with EU’s fundamental public interests, the last missing connection is between EU competition law and EU Member States’ public policy: would EU competition law, although being part of EU’s fundamental public interests, be the public policy of EU Member States?

i. The primacy of EU law

The relationship between EU’s fundamental public interests and EU Member States’ public policy essentially concerns the relationship between EU law and Member

⁴⁴⁰ See also, for example, Nikola LJ. Ilievski, The Concept of Political Integration: The Perspectives of Neofunctionalist Theory, *Journal of Liberty and International Affairs*, Vol.1, No.1, 2015, in which the author opined that economic integration is the foundation of the integration in other areas, especially in political areas.

⁴⁴¹ Case C-496/09 *Commission v. Italy* [2011] ECR I-11483, at para 60. Emphasis added. See also Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige* [2011] ECR I-527, at para 20.

States' national law. One of the most long-established and crucial principles concerning this relationship is the principle of the primacy of EU law, which could be traced back to the period of the founding treaties.

One of the landmark decisions of the ECJ concerning the primacy of (now) EU law over Member States' national law was *Flaminio Costa v ENEL*, in which Mr. Costa, who was an Italian citizen owning shares of an electricity company and opposed to the nationalisation of the electricity sector in Italy. By refusing to pay his electricity bill, he was sued for non-payment by ENEL, which was a newly established national electricity entity. In his defence, he argued that the nationalisation of the electricity industry violated the provisions concerning competition and common market as provided in the TEEC as well as the Italian constitution. The *Giudice Conciliatore*, Milan, referred this case to the ECJ for preliminary ruling.

Before the ECJ, the Italian Government submitted that the request of *Giudice Conciliatore* was 'absolutely inadmissible', inasmuch as a national court which was obliged to apply a national law cannot avail itself to Article 177 TEEC (now Article 267 TFEU), which set out the scenarios under which the ECJ could give preliminary rulings. In its reply, the ECJ explicitly stated that:

'By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

...

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article

5(2)^[442] and giving rise to the discrimination prohibited by Article 7^[443]

...

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.⁴⁴⁴

Similarly, this attitude was also reflected in *Walt Wilhelm v. Bundeskartellamt*, a competition law case, in which the ECJ stated that:

‘The EEC Treaty has established its own system of law, integrated into the legal system of the Member states, and which must be applied by their court. It would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty... Consequently, conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence.’⁴⁴⁵

However, interestingly, during the process of European integration, the only treaty which clearly provided for the primacy of EU law, i.e. the Treaty establishing a Constitution for Europe⁴⁴⁶, came to its premature end. But it should be noted that such failure had nothing to do with the primacy of EU law – it was only the consequence of rash decisions and maybe the advocacy formalism.⁴⁴⁷ As could be

⁴⁴² ‘[Member States] shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.’

⁴⁴³ ‘Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

⁴⁴⁴ Case 6/64, *Flaminio Costa v E.N.E.L.* [1964] ECR 585, at 593-594. Emphasis added. See also *Thoburn v. Sunderland City Council*, [2003] Q.B. 151 (HC). This case concerned the European Communities Act 1972 which is an Act of Parliament of the UK legislating for the accession of the UK to the (now) EU and also the incorporation of (now) EU law into the domestic law of the UK. In this case, the High Court clearly stated that [‘The present state of our domestic law is such that substantive Community rights prevail over the express terms of any domestic law, including primary legislation, made or passed after the coming into force of the 1972 Act, even in the face of plain inconsistency between the two.’]

⁴⁴⁵ Case 14/68, *Walt Wilhelm v. Bundeskartellamt* [1969] ECR 1, at 14.

⁴⁴⁶ See Article I-6 of the Treaty establishing a Constitution for Europe.

⁴⁴⁷ It could be clearly found that, although the Treaty of Lisbon has eventually been ratified, it actually cannibalised much of the substance of the Constitutional Treaty.

found, although the Treaty of Lisbon said nothing regarding the primacy of Union law, a Declaration No.17 as annexed to the Treaties clearly provided that:

‘The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

“Opinion of the Council Legal Service of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 [1] there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty *shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.*

[1] “It follows (...) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”⁴⁴⁸

Therefore, based upon the examination, it could be undoubtedly concluded that EU law possesses the primacy over Member States’ national law -- where there is a conflict between EU law and Member States’ national law, the former prevails.

The confirmation of the primacy of EU law would therefore naturally lead to the conclusion that EU’s fundamental public interests, as explicitly enshrined in EU primary law which forms an integral part of and possesses the primacy over its

⁴⁴⁸ Emphasis added.

Member States' national laws and reflected the core interests of EU, should be respected and regarded as the public policy of its Member States. As stated, the integration of EU is a 'process by which domestic policy areas become increasingly subject to European policy-making'⁴⁴⁹. It involves the domestic assimilation of EU policy and politics⁴⁵⁰. A conclusion could hence be made to verify the thought as put forward above: EU's fundamental public interests is a series of policy concerning the dual-dimensional integration of the Union, which should form a part of each Member State's essential public interests, thus lies within the meaning of public policy under Article V(2)(b) of the New York Convention.

ii. Narrowing down the scope of EU competition law: Article 101 and 102 TFEU as matters of EU Member States' public policy within the meaning of Article V(2)(b) of the NYC

Following the discussion above, it would therefore be natural to draw the conclusion that, since EU law possesses primacy and takes precedence over conflicting Member States' national laws and EU's fundamental public interests should be assimilated as Member States' public policy, EU competition law as part of EU's fundamental public interests should also be deemed as EU Member States' public policy.

Notwithstanding, it should be borne in mind that in the context of international arbitration, the law applicable to public policy issues is the law of the enforcing state⁴⁵¹ and the term 'public policy' should be narrowly interpreted.⁴⁵² Accordingly, if the enforcing state is an EU Member State, the relevant public policy would be the EU Member State's public policy, which should also be narrowly interpreted. Following this rationale, although EU's fundamental public interests should be assimilated as EU Member States' public policy, EU law is essentially not the applicable law of public policy issues in international arbitration and EU's fundamental public interests in this research was not defined in a narrow way as the

⁴⁴⁹ Tanja A. Börzel, Towards Convergence in Europe? Institutional Adaptation to Europeanisation in Germany and Spain, *Journal of Common Market Studies*, Vol. 37, No. 4, 1999, footnote 1, at 574.

⁴⁵⁰ Claudio M. Radaelli, 'The Europeanization of Public Policy', in Kevin Featherstone & Claudio M. Radaelli, *The Politics of Europeanization*, Oxford University Press, 2003, at p. 31.

⁴⁵¹ See *supra* Section II(B) of Chapter III.

⁴⁵² See *supra* Section II(C) of Chapter III.

term ‘public policy’ should be defined within the meaning of Article V(2)(b) of the NYC. Instead, it was understood as the fundamental interests of EU in general and was hence defined in a rather broad way as covering all the relevant legal instruments aiming at maintaining and promoting EU integration. EU Member States’ public policy should by no means be defined in such a broad fashion; otherwise any violation of relevant legal instruments concerning the protection and promotion of EU integration would be a potentially legitimate ground for the refusal of relevant arbitral awards – this clearly runs counter to the pro-enforcement bias of the NYC.

Therefore, although EU competition law forms part of EU’s fundamental public interests, it may not automatically form part of EU Member States’ public policy within the meaning of Article V(2)(b) of the NYC.

The question is thus whether EU competition law is narrow enough to be part of EU Member States’ public policy in the context of international arbitration. From the author’s viewpoint, the key of this question lies in the scope of the term ‘EU competition law’. If defining EU competition law as all the relevant legal instruments, it would be part of EU’s fundamental public interests as they all serve the purpose of maintaining and promoting EU integration, but it should not be categorised as EU Member States’ public policy in the context of international arbitration as it would lead to an unpleasant result: the violation of almost all the relevant EU competition legal instruments would be potentially condemnable under Article V(2)(b) of the Convention. This could hardly be acceptable. Just as Advocate General Wathelet argued in his opinion in ‘*Gazprom*’ OAO,

‘I do not agree that the judgment in *Eco Swiss* and *Mostaza Claro* should be interpreted in such a way that the mere fact that a particular sphere forms part of the exclusive or shared powers of the European Union in accordance with Article 3 TFEU and 4 TFEU is sufficient to raise a provision of EU law to the rank of public-policy provisions. If that were the case, EU law in its entirety, from the Charter of Fundamental Rights to a directive on pressurised

equipment, would be a matter of public policy for the purposes of Article V(2)(b) of the 1958 New York Convention.’⁴⁵³

The scope of EU competition law, if to be recognised as part of EU Member States’ public policy, should therefore be narrowed down to those competition rules which is so fundamental that any breach of which would be unacceptable, hence be in line with the requirement of narrow interpretation of public policy under Article V(2)(b) of the NYC. Just as AG Wathelet once suggested, for a specific legal instrument or value to be understood as a rule of public policy within the meaning of Article V(2)(b) of the NYC, the violation of which should be intolerable by the legal order of the place in which recognition and enforcement are sought as such a breach would be unacceptable from the viewpoint of a free and democratic State governed by the rule of law.⁴⁵⁴

Following this rationale, the focuses of this research, i.e. Article 101 and 102 TFEU, should be recognised as part of EU Member States’ public policy as the breach of which would essentially be unacceptable. This is clearly reflected in the text of both Articles. For example, Article 101(2) reads that ‘Any agreements or decisions prohibited pursuant to this Article *shall be* automatically void’⁴⁵⁵. Similarly, Article 102 TFEU clearly provides that ‘[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it *shall be* prohibited’⁴⁵⁶. This well-set mechanism for condemning violation of both Articles hence clearly prove that any breach of them would be intolerable, and therefore Article 101 and 102 TFEU should be assimilated as EU Member States’ public policy.

This conclusion was essentially approved by the ECJ in *Eco Swiss*,

‘... according to Article 3(g) of the EC Treaty...Article 85 of the Treaty constitutes a *fundamental provision* which is *essential* for the accomplishment

⁴⁵³ The Opinion of Advocate General Wathelet in Case C-536/13 ‘*Gazprom*’ *OAO*, EU:C:2014:2414, at para. 182.

⁴⁵⁴ *Ibid*, at para. 177. See also The Opinion of Advocate General Wathelet in Case C-438/14 *Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Karlsruhe*, EU:C:2016:11, at para. 100. (‘[I]n order for a rule to be one of public policy, it must be a mandatory rule so fundamental to the legal order in question that no derogation from it would be possible in the context of the case at issue.’)

⁴⁵⁵ Emphasis added.

⁴⁵⁶ Emphasis added.

of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.

...

... the provision of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention.⁴⁵⁷

Since this landmark case, there has been no query that Article 101 and 102 TFEU has firmly constitutes a matter of EU Member States' public policy. As for (now) Article 101 TFEU, in *Marketing Displays International Inc. v. VR Van Raalte Reclame BV*, both the Hague *Rechtbank* and *Gerechtshof* confirmed that Article 81 EC is a public policy provision within the meaning of the New York Convention.⁴⁵⁸ Similarly, in *SNF SAS v. Cytec Industries BV*, the *Tribunal de première instance de Bruxelles* set aside the arbitral award due to its violation of Article 101 TFEU which therefore essentially violated its own competition public policy.⁴⁵⁹ As for (now) 102 TFEU, for example, in *Aéroports de Paris v. Commission* which was a case concerning the alleged violation of 86 EC, the Court of First Instance explicitly confirmed the public policy nature of this Article which was 'specifically designed to render its provisions mandatory and to prohibit traders from circumventing them in their agreements'⁴⁶⁰ and therefore should be understood as part of public policy of EU Member States.⁴⁶¹

⁴⁵⁷ Case C-126/97 *Eco Swiss China Time v. Benetton International* [1999] ECR I-3055, at paras. 36 and 39. Emphasis added.

⁴⁵⁸ Netherlands No. 29, *Marketing Displays International Inc. v. VR Van Raalte Reclame BV*, *Voorzieningenrechter, Rechtbank*, The Hague, 27 May 2004 and *Gerechtshof*, The Hague, 24 March 2005.

⁴⁵⁹ *SNF SAS v. Cytec Industries BV*, *Tribunal de première instance de Bruxelles*, 8 Mar. 2007 [2007] Rev. Arb. 303.

⁴⁶⁰ Case T-128/98, *Aéroports de Paris v. Commission* [2000] ECR-II-3929, at para. 241. This decision was subsequently confirmed by the ECJ in case C-82/01, *Aéroports de Paris v. Commission* [2002] ECR-I-9297. See also, for example, Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v. Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v. *Assitalia SpA* [2006] ECR I-6619, at para. 31. ('it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts')

⁴⁶¹ Although this research focuses on Article 101 and 102 TFEU, following the rationale raised above concerning whether a specific legal instrument could be regarded as a matter of public policy within the meaning of Article V(2)(b) of the NYC, it was opined that other relevant EU competition law, such as Article 106 & 107, should also be categorised as matters of public policy due to the clear intolerable nature of the behaviours concerned in these provisions. For further discussion, see, for example, Damien Geradin, *Public Policy and Breach of Competition Law in International Arbitration: A Competition Law Practitioner's Viewpoint*,

2. EU competition law and non-EU jurisdictions' public policy

The examination of the relationship between EU competition law and EU Member States' public policy leads to a somewhat unsurprising conclusion – it is expected that since EU competition law is a crucial component of EU legal order and EU law possesses the primacy over EU Member States' national law, certain legal instruments of EU competition law which are of fundamental nature, such as Article 101 and 102 TFEU, would hence be naturally regarded as the public policy of EU Member States.

But the situation would be largely different before non-EU jurisdictions based upon two main obstacles. The first which hinders EU competition law issues from triggering a non-EU jurisdiction's public policy concern lies in one of the basic mechanisms of Article V(2)(b) of the NYC. It has been discussed above⁴⁶² that under the framework of Article V(2)(b), the enforcement court would generally apply their own law in examining public policy issues. As being correctly stated that:

‘[R]eviewing courts are commissioned to apply domestic mandatory norms. In regard to mandatory foreign norms, they are never subject to anything more than a discretion to give effect to such foreign norms.’⁴⁶³

Therefore, since the ‘public policy focus is exclusively upon the values of the state of the reviewing court’⁴⁶⁴, if competition issues are not recognised by a non-EU enforcing state as its public policy, challenging an arbitral award based upon the violation of its public policy before its national court would be predestined to be a failure based upon the strong ‘pro-enforcement bias’ as reflected in the NYC.⁴⁶⁵

TILEC Discussion Paper, DP 2016-029, 2016, at 11-14, in which the author argued that Article 106-108 TFEU as well as the EU Merger Regulation should fall within public policy within the meaning of Article V(2)(b) of the NYC.

⁴⁶² See *supra* Section II(B) of Chapter III.

⁴⁶³ Phillip Landolt, Limits on Court Review of International Arbitration Awards Assessed in light of States' Interested and in particular in light of EU Law Requirements, *Arbitration International*, Vol. 23, No. 1, 2007, at 72.

⁴⁶⁴ *Ibid*, at 71.

⁴⁶⁵ Public policy could be regarded as a countervailing force against pro-enforcement bias. Once the non-EU enforcing court does not deem competition law as its public policy, it would hence be much less persuasive for it to review an arbitral award concerning competition law issue and much more legitimate for it to enforce the arbitral award. See Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 11.106; Neil Andrews, *Arbitration and*

Following the first obstacle, the second further concerns that, even under the scenario that a non-EU jurisdiction internalises competition law in its definition of public policy, it is likely that it would merely focus on its own competition law but not others. Therefore, when encountering competition law issues concerning the competition law of other jurisdictions, its own competition public policy concern may not be triggered.

One of the must-discussed cases concerning this issue is *X SA v. Z SA*, which, although not directly concerning the review of EU competition law award at enforcement stage, could still shed certain light to the discussion. In this case, the Swiss *Tribunal Fédéral*, by disapproving the losing party's argument at the annulment stage that the involved agreement (governed by Swiss law) between two EU Member States' companies violated Article 85 EC, stated that:

‘In so doing, the arbitrator did not violate public policy, as it is defined by the above-mentioned case law. *It is doubtful that the provisions of – national or EU – competition law are among those fundamental legal or moral principles that are recognised in all civilised countries, to the point that their violation should be seen as a violation of public policy*’⁴⁶⁶

It hence follows this judgment that a non-EU jurisdiction may limit the connotation of its competition public policy to cover only the competition law issues which would actually influence its own competition legal order, and EU competition law would hence not be deemed as its public policy.

These two obstacles may hence exclude EU competition law from being deemed as a non-EU jurisdiction's public policy. But this is not, especially from the perspective of the EU, a desirable result. Such exclusion may lead to an *asymmetry* that, under the scenario that an arbitral award concerning EU competition law dispute enters the

Contract Law – Common Law Perspectives, Springers, 2016, at pp. 151-152; *Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd.*, [2000] Q.B. 288 (CA), at 304-305.

⁴⁶⁶ *Le Cour Civile, X SA v. Z SA*, 13 november 1999, 1999, *ASA Bulletin*, Vol. 17, Issue 4, at p. 534. The original text is [‘Ce faisant, l'arbitre n'a pas violé l'ordre public, tel qu'il a été défini par la jurisprudence rappelé plus haut. Il paraît, en effet, douteux que les dispositions du droit – national ou européen – de la concurrence fassent partie des principes juridiques ou moraux fondamentaux reconnus dans tous les Etats civilisés, au point que leur violation devrait être considérée comme contraire à l'ordre public’]. The translation is provided in Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 149. Emphasis added.

enforcement stage immediately after being rendered by a tribunal, the legality of the arbitral award which the EU Member States would wish to assure would automatically drive into the safe harbour since an enforcing court would examine public policy issues under its own law, which, notwithstanding, does not reckon EU competition law as part of its public policy. This result may be regarded as something of a ‘loophole’ of international arbitration, and such asymmetry was deemed as ‘one of the unsatisfactory aspects of the intersection between competition law and arbitration’⁴⁶⁷.

The question which ought then to be asked is whether such dissatisfaction is inevitable and whether these two obstacles are unbreakable so that the link between EU competition law and non-EU jurisdictions’ public policy can never be built. The author opines that it is not the case in legal practice and two main ways out of his loophole can be observed. The first has been discussed above,⁴⁶⁸ namely that a non-EU state, although not recognising or deeming EU competition law as its own public policy, intends to respect the EU competition legal order out of public policy reasons. The national courts of the non-EU state would hence have the incentive to ensure that relevant EU competition law issues have been duly and reasonably reviewed since owing to the respect for EU competition law the non-EU enforcing courts would not tolerate an ill-founded or apparently-erroneous judgment on relevant competition law issues. If it is persuaded that relevant issues have not been reviewed in this manner, EU competition policy, and ultimately the non-EU state’s public policy, would be violated and it may therefore activate the non-EU state’s public policy defence under Article V(2)(b) of the Convention.

The second solution, by being different from the first, envisages the aforementioned two obstacles. The first would be the easier one to break, of which the core rationale

⁴⁶⁷ Tim Ward & Kassie Smith (2005) *op. cit.*, *supra* note 65, at para. 11-058. It should be noted that such ‘asymmetry’ may not only be observed in international arbitration but also in international litigation. See, for example, Article 45(1) of the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), which provides that ‘On the application of any interested party, the recognition of a judgment shall be refused: (a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed’, in which the term ‘Member State addressed’ clearly refers to the Member State called for enforcing a foreign judgment. See Tomaž Keresteš, Public Policy in Brussels Regulation 1: Yesterday, Today and Tomorrow, *LeXonomica*, Vol. 8, No. 2, 2016, at 82.

⁴⁶⁸ See *supra* Section II(B)(3) of Chapter III.

merely lies in the possibility that competition law may not be interpreted by non-EU jurisdictions as their public policy. It could be easily tackled by considering another possibility, namely that non-EU jurisdiction would also incorporate competition law in its public policy definition, and it could be actually observed that such possibility is not merely theoretical but also practical: as stated, since the time of the aforementioned Swiss *Tribunal fédéral*'s decision, 'competition law has continued its course of establishing itself as crucial to the economic ordering of States'⁴⁶⁹ and 'virtually every developed economy in the world now has competition law'⁴⁷⁰. It is therefore increasingly untenable that competition law cannot be regarded as public policy.⁴⁷¹

The second obstacle, notwithstanding, could be harder to crack since its hidden rationale is fairly straightforward and plausibly irrebuttable: since a non-EU jurisdiction would focus mainly on its own competition public policy and EU competition law does not concern its competition legal order, EU competition law would therefore not be regarded as the public policy of the non-EU state.

But one should bear in mind that the connotation of a state's public policy would usually convey a two-layer meaning: besides the fundamental political, social and economic public interest of the state, its public policy would also cover those general value pertaining to morality, justice and internationally recognised public value.⁴⁷² The rationale of the second obstacle hence omits this second layer of meaning and neglects the possibility of EU competition law conveying an internationally recognised public value so that the involved EU competition law issues would still trigger the public policy concern of a non-EU state.

A plausible extension of the connotation of EU competition law could hence be made, namely that besides addressing EU competition law issues and concerning EU competition legal order, it also conveys a general value of competition, i.e. to prevent economically and other socially harmful effects of cartels and other restrictions to competition and thereby to promote competition in the interest of a liberal market

⁴⁶⁹ Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 150.

⁴⁷⁰ *Ibid.*, footnote 81, at p. 151.

⁴⁷¹ *Ibid.*

⁴⁷² See *supra* Section II(A)(3) of Chapter III.

order⁴⁷³. Such general value may potentially extend beyond geographic boundaries and permeate non-EU jurisdictions' own public interest -- when the national court of a non-EU jurisdiction encountering an arbitral award concerning disputes relevant to EU competition law, the incentive of protecting EU competition legal order may resonate with the motivation of protecting general competition value as cherished by the non-EU jurisdiction and hence to certain extent also urges the non-EU state's national court to examine the arbitral award based upon its public policy concern and ensure relevant competition law issues have been duly and reasonably reviewed. As opined,

‘[I]n the international context, antitrust norms pertain to the public policy of the forum and are considered to fall under the category of mandatory norms ... Mandatory rules usually aim to protect the general political, social, economic, or cultural interests of a specific country. Rules protecting free competition are generally accepted to constitute such mandatory norms, irrespective of their EU or national provenance.’⁴⁷⁴

But such plausible connection between EU competition law and a non-EU state's public policy could be established only if the non-EU state regards competition law as part of its own public policy and generalises the concept of competition public policy from its specific competition legal order to the general competition value, which may still not be universally accepted. This uncertainty, notwithstanding, could be eliminated to a certain extent from three practical senses. First, with the growing recognition of the importance of competition law, the general competition value as cherished by EU competition law would be increasingly recognised and it would hence be increasingly less likely that EU competition law would be regarded as a pure regional public policy which has no connection with non-EU jurisdictions' own public policy. For example, the Zurich Commercial Court has started to recognise the ‘general goals of competition law’⁴⁷⁵ as reflected in (now) EU competition law and

⁴⁷³ Phillip Landolt (2006) *op. cit.*, *supra* note 36, footnote 81, at p. 150.

⁴⁷⁴ Assimakis P. Komninos, ‘Chapter 9 - Arbitration and EU Competition Law’, in Jürgen Basedow, Stéphanie Francq, and Laurence Idot, *International Antitrust Litigation: Conflict of Laws and Coordination*, Bloomsbury Publishing, 2012, at pp. 199-200.

⁴⁷⁵ Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 151.

apply it as mandatory norms.⁴⁷⁶ Secondly, as competition principles increasingly converge and may even be uniform across many jurisdictions⁴⁷⁷, it may hence be increasingly probable that ‘a breach of EU competition law, especially where it is a hardcore restriction, may also constitute a breach of other applicable competition laws’⁴⁷⁸ and ‘any award giving effect to such an agreement or such a provision may thus constitute a violation of the relevant public policy’⁴⁷⁹. Thirdly, a non-EU jurisdiction examining foreign arbitral awards concerning EU competition law issues based upon its own public policy concern of the general competition value may also be motivated by a reciprocal consideration: if it wishes that an arbitral award concerning its own competition law would be to certain extent examined by an EU enforcing state, it should then first hold the same mind when a foreign arbitral award concerning EU competition law issues is brought before it and first ‘open up its doors’⁴⁸⁰ for such friendly reciprocal legal environment. Such reciprocal concern may hence also encourage a jurisdiction to perform in a more actively way.⁴⁸¹ This would be wholly in harmony with the international law principle of comity.

Although it is expected that a certain level of uncertainty and asymmetry may still exist since the analysis conducted above still needs to be further verified in legal practice to see to what extent a non-EU jurisdiction would generalise EU competition law as conveying general competition value and hence examine arbitral awards concerning EU competition law under its own public policy concerns, it could plausibly be foreseen that, with the aforementioned development of competition law, the arbitral awards concerning EU competition law issues may increasingly resonate with and trigger other jurisdictions’ public policy concerns, and the aforementioned discordant asymmetry would thus be gradually mitigated.

⁴⁷⁶ See, for example, Commercial Court of Zurich, 21 June 2004, ZR 104 (2005) 97, (No. 27), as quoted in Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 151.

⁴⁷⁷ Rolf Trittman & Boris Kasolowsky (2011) *op. cit.*, *supra* note 37, at para. 6-072.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ This is a concept borrowed from Ilias Bantekas (2008) *op. cit.*, *supra* note 198, at 209.

⁴⁸¹ One might reckon that such reciprocal concern may also lead to a more robust approach which encourages a non-EU jurisdiction to treat EU competition law itself as its own public policy. But it should be noted that the application of such reciprocal concern is still subject to the non-EU jurisdiction’s judge and weigh between the legal expectation (i.e. an arbitral award concerning its own competition law would also be duly examined by an EU Member States’ national court), and the fact that it is not obliged to consider and examine the public policy of a foreign state as well as the consideration of the ‘pro-enforcement’ bias. The author holds the viewpoint that the former would generally not be strong enough to exceed the latter.

It hence follows the discussion above that EU competition law may be linked with non-EU jurisdictions' public policy in two ways. The first is that a non-EU state, although not considering EU competition law as its fundamental public interest, does regard respecting other jurisdictions' public policy as its own public policy and may hence trigger its public policy defence under Article V(2)(b) when the violation of EU competition law could be established. The second is that a non-EU jurisdiction treats EU competition law as focusing not only on the EU competition legal order but a general competition value which would also be recognised and cherished also by it,⁴⁸² and hence views EU competition law as its own public policy in this sense.

B. The modalities of potential breaches of EU competition law in international arbitration

After concluding that EU competition law would/could be treated as the public policy of EU Member States and may also, under certain circumstances, trigger the public policy concern of non-EU jurisdictions, the next step of the analysis will progress to examine the modalities of an arbitral award violating EU competition law in international arbitration.

The examination of public policy issues of an arbitral award at enforcement stage is essentially conducted through the review of the manifestation of an arbitral award.⁴⁸³ Hence, the examination of the modalities of potential breaches of EU competition law in international arbitration should be conducted by tracing back to the stage at which an arbitral award is rendered, i.e. the arbitration proceeding, to see what breaches may potentially occur when arbitrators solve disputes concerning EU competition law issues.

⁴⁸² It should be reiterated that there may be certain jurisdictions which still do not reckon competition law as part of their own public policy or, although recognising the fundamental importance of competition law, do not treat EU competition law as conveying a general competition value which could be recognised by even non-EU jurisdictions and do not regard respecting other jurisdictions' public policy as its own public policy. Under these circumstances, a potential breach of EU competition law as reflected in a foreign arbitral award may not trigger the public policy defence under Article V(2)(b) NYC before the national courts of these jurisdictions. However, as stated above, with the steady development of competition law around the world, these two scenarios would be increasingly rarely observed, and for the purpose of this research, these two scenarios will hence not be further examined in the following sections and chapters.

⁴⁸³ The review of the manifestation of an award may not only examine what the arbitrators said in an award, but also, under certain circumstances, the correctness of the award, namely whether the arbitrator has duly or even correctly examined relevant disputes. See *infra* Section II of this Chapter.

1. Non-application of EU competition law

One of the most likely manifestations of the potential breach of EU competition law during the arbitration proceedings would be that relevant EU competition law issues are not examined at all -- when arbitrating a dispute arising from a contract containing anticompetitive agreement or provisions, neither the parties nor the arbitral tribunal raise EU competition law during the arbitration proceeding. Under this circumstance, it is hence possible that a potential violation of relevant EU competition law provisions may not be captured, and potential breach of EU competition law could therefore happen, especially when the tribunal renders an award in favour of the party who is benefitted from the anticompetitive agreement.

This potential situation could be found, for example, in *Thalès*⁴⁸⁴, in which the plaintiff ('Thalès') and the defendant (GIE) entered into a framework agreement, according to which Thalès would end its production of a particular missile in the United States and allow GIE to produce this missile. In exchange, GIE agreed to stop producing a competing product and adapt the missile to its missile system. The parties also entered into a marketing agreement in which provided that Thalès granted GIE the exclusive rights to produce and distribute the missile. However, when Thalès approached GIE about the production of the missiles, the two were unable to agree a price, and Thalès then filed a request for arbitration seeking termination of the agreements, and unilaterally terminated the agreements few months later. This contention was denied by the tribunal and Thalès was ordered to pay GIE for its loss based upon its unilateral termination of the agreements. Thalès then sought to have this award annulled on the grounds that it blatantly violated Article 81 EC since the award was made without the examination of the potential violation of EU competition law.

2. Misapplication of EU competition law

Besides the non-application of EU competition law, another equally direct scenario posits that, although EU competition law arguments were actually put forward, the

⁴⁸⁴ *SA Thalès Air Défense v. GIE Euromissile, Cour d'appel de Paris* (1re Ch. C), Not Indicated, 18 November 2004.

arbitral tribunal misapplied relevant provisions and the award may hence violate EU competition law.

One of the most representative cases concerning this situation is *SNF v. Cytec*⁴⁸⁵. Here, SNF and Cytec entered into a contract, which was unilaterally rescinded by SNF. In response, Cytec brought ICC arbitration proceedings in Brussels. SNF claimed that the contract violated both Article 81 and 82 EC. The tribunal found the contract void owing to the breach of Article 81, for which SNF and Cytec shared responsibility, but Cytec's actions did not constitute abuse of a dominant position under Article 82. Based upon these judgments, the tribunal merely ordered damages against SNF as it was found not to have suffered loss. SNF then challenged the award in Belgium. The *Tribunal de première instance* annulled the award on the basis that the remedy was contrary to EU competition law.

3. Awards running contrary to European Commission or NCA decisions

The last situation, which might be less obvious than the first two, concerns an award being contrary to a decision of the European Commission or an NCA which concerns particular anti-competitive behaviour that is also the subject of the arbitration proceeding.⁴⁸⁶ An instructive provision concerning the link between an award running contrary to a Commission or a NCA decision and the potential violation of EU competition law is Article 16(1) of Regulation 1/2003, which clearly provides that:

‘1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they *cannot take decisions running counter to the decision adopted by the Commission*. They *must also avoid giving decisions which would conflict with a decision contemplated by the Commission* in proceedings it has initiated. To that effect, the national court may assess

⁴⁸⁵ *SNF SAS v. Cytec Industries BV, Tribunal de première instance de Bruxelles*, 8 Mar. 2007 [2007] Rev. Arb. 303.

⁴⁸⁶ This is an important prerequisite for an award runs contrary to an authoritative decision.

whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.’⁴⁸⁷

Although Regulation 1/2003 does not touch upon international commercial arbitration, given the consideration of the legal requirement of uniform interpretation and application of EU competition law, it is a tenable inference of Article 16(1) of the Regulation that once an arbitral award runs counter to what the Commission has decided, the award would breach EU competition law, since the message conveyed by Article 16(1) is essentially the prohibition of decisions running counter to the decision adopted by the Commission, no matter whether such decision is made by a national court or an arbitral tribunal.

Following the same rationale, it could also be deduced that if an arbitral award runs contrary to an NCA decision, it would also violate EU competition law. Although the Regulation merely provides that NCAs shall not render decisions running counter to the Commission’s decision⁴⁸⁸ and remains silent as to whether national courts should not render decisions running counter to NCA decisions, the Regulation does effectively delegate the Commission’s power to NCAs.⁴⁸⁹ As opined by the Commission:

‘The Commission sees no reason why a final decision on Article 81 or 82 taken by an NCA in the European Competition Network (ECN), and a final judgment by a review court upholding the NCA decision or itself finding an infringement, should not be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases.’⁴⁹⁰

Pursuant to this viewpoint, it was then suggested that:

‘National courts that have to rule in actions for damages on practices under Article 81 or 82 on which an NCA in the ECN has already given a final

⁴⁸⁷ Emphasis added.

⁴⁸⁸ See Article 16(2) of Regulation 1/2003.

⁴⁸⁹ See Recital (4) of Regulation 1/2003. (‘The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty’)

⁴⁹⁰ White Paper on Damages Actions for Breach of EC Antitrust Rules, COM (2008) 165 Final, at para. 2.3.

decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.⁴⁹¹

C. When would a potential breach trigger the public policy defence under Article V(2)(b) of the NYC?

Following the introduction of the three types of potential breach of EU competition law as reflected in arbitral awards, the question which should then be asked is that under what circumstance a potential breach of Article 101 or 102 TFEU would trigger the public policy defence under Article V(2)(b).

The simplest and most straightforward behavioural pattern of an enforcing court would be that any appearance of the manifestations of violating EU competition law would automatically trigger the public policy defence, i.e. when encountering arbitral awards which manifest the aforesaid three modalities, an enforcing court would automatically refuse to enforce the awards based upon Article V(2)(b). This rather simple mode, however, is not evident in legal practice. It was discussed above that Article V(2)(b) has been widely interpreted as meaning that only violations which are flagrant, concrete and effective could trigger the public policy defence.⁴⁹² Following this widely approved principle, as will be seen, the three modalities of potential violation of EU competition law would not always reach the threshold of severity and would thus not automatically trigger the public policy defence.

1. Non-application of EU competition law

As for the non-application of competition law, the severity of such potential error essentially lies in the severity of the relevant anti-competitive behaviour. From the EU perspective, such severity concerns the extent by which an agreement, decision or concerted practice affects trade or restricts competition within the internal market, or the severity of abusive conduct affecting trade between Member States. For example, not every agreement, decision, practice or abusive behaviour, even if it affects trade between member states and restricts competition, violates EU

⁴⁹¹ *Ibid.*

⁴⁹² See *supra* Section II(C) of Chapter III.

competition law. In other words, not every non-application of EU competition law would be serious enough to trigger the public policy defence under Article V(2)(b).

Basically, there are two main types of anti-competitive behaviours covered by Article 101 and 102, namely the ‘by-object’ and ‘by-effect’ anti-competitive behaviours. The ‘by-object’ behaviours under these two Articles refer to agreements, decisions or practices of which the *object* is to prevent, restrict and distort competition within the internal market⁴⁹³ or a behaviour with its *object* of being abusive of its dominant position.⁴⁹⁴ For these ‘by-object’ behaviours, once they are deemed as distorting competition by their very nature, it would be irrelevant whether such distortions are appreciable, and they would thus be deemed automatically as seriously violating EU competition law and trigger the public policy defence under Article V(2)(b) of the NYC. As Advocate General Kokott held in its Opinion in *Expedia Inc.*,

‘[R]estrictions of competition ‘by object’ are regarded, by their very nature, as being injurious to the proper functioning of normal competition. Agreements with an anti-competitive object are recognised as having harmful consequences for society. They can hardly be regarded as *de minimis* infringements. On the contrary, it must be presumed that undertakings which enter into an agreement with anti-competitive object always intend an appreciable effect on competition, irrespective of the size of their market shares and turnover.’⁴⁹⁵

Therefore, there should be no question that once a behaviour is classified as ‘by-object’ anti-competitive behaviours, it violates relevant competition public policy

⁴⁹³ See Article 101(1) TFEU.

⁴⁹⁴ Although Article 102 TFEU does not clearly define ‘by-object’ abusive behaviour, it could be observed in legal practice. For example, exclusive dealing would be categorised as being abusive by its very nature. See Case 85/76, *Hoffmann-La Roche & Co. v. Commission* [1979] ECR 461, at para 90.

⁴⁹⁵ See the Opinion of Advocate General Kokott in Case C-226/11 *Expedia Inc.* [2012] EU:C:2012:544, at paras. 44 to 57. See also, for example, R. Whish & D. Bailey (2018) *op. cit.*, *supra* note 335, at pp. 149-150; Case 56/65 *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH* [1966] ECR 235, at p. 249; Case C-209/07 *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.* [2008] ECR I-8637, at paras 15-16; Case C-67/13P *Groupement des cartes bancaires v. Commission*, EU:C:2014:2204, at para 50; Case C-373/14P *Toshiba Corp v. Commission*, EU:C:2016:26, at para 26.

within the meaning of Article V(2)(b) of the NYC as such violation is undoubtedly serious enough.

Notwithstanding, this would not be the case for ‘by-effect’ behaviours, which refer to agreements, decisions or practices of which the *effect* is to prevent, restrict and distort competition within the internal market⁴⁹⁶, or behaviours with the *effect* of abusing dominant positions.⁴⁹⁷ For these behaviours, their severity essentially lies in the behaviours’ impact: if they do not have an appreciable impact either on competition or on inter-state trade, they may nevertheless not be caught⁴⁹⁸ and would hence not be serious enough to trigger the public policy defence under Article V(2)(b) of the NYC. As the ECJ held in *Völk*:

‘If an agreement is to be capable of affecting trade between Member States it must be possible to foresee with a *sufficient degree* of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence ... Consequently an agreement falls outside the prohibition in Article 85 when it has only an *insignificant effect* on the markets, taking into account the weak position which the persons concerned have on the market of the product in question.’⁴⁹⁹

From the perspective of a non-EU jurisdiction, an appreciability threshold is also widely recognised and applied. For example, Section 3(1) of India Competition Act 2002 explicitly provides that:

⁴⁹⁶ See Article 101(1) TFEU.

⁴⁹⁷ Although Article 102 TFEU does not clearly define ‘by-object’ abusive behaviour, it could be observed in legal practice. For example, ‘margin squeeze’, which occurs when there is such a narrow margin between an integrated provider’s price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete, would be categorised as ‘by effect’ abusive behaviour. See Case C-280/08 P *Deutsche Telekom AG v. Commission* [2010] ECR I-9555, at para 250, in which the ECJ disapproved the argument which claimed that ‘the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article 82 EC’. See also Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I-527, at paras 60-77.

⁴⁹⁸ R. Whish & D. Bailey (2018) *op. cit.*, *supra* note 335, at p. 133. See also, for example, European Commission’s Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (the ‘*De Minimis* Notice’).

⁴⁹⁹ Case 5/69 *Franz Völk v. Établissements J. Vervaecke* [1969] ECR 295, at 302. Emphasis added. See also, for example, Regulation 330/2010 OJ 2010 L102/1, excluding from the prohibition of Article 101(1) all vertical agreements unless they contain hardcore restrictions of competition.

‘No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an *appreciable adverse effect* on competition within India.’⁵⁰⁰

Similarly, the Competition & Consumer Commission Singapore Guidelines also provides that ‘an agreement will fall within the scope of the section 34 prohibition [i.e. prohibiting agreements which prevent, restrict or distort competition] if it has its object or effect the *appreciable* prevention, restriction or distortion of competition’⁵⁰¹.

It could therefore be plausibly inferred that when encountering the non-application of EU competition law as reflected in a foreign arbitral award, only when an anti-competitive conduct is examined and confirmed to have sufficient appreciability or a clear anti-competitive object would failing to examine such conduct in an international arbitration trigger the public policy defence under Article V(2)(b). However, it has still been questioned that even if a ‘by effect’ anti-competitive behaviour reaches the appreciability threshold, it may still not be serious enough to trigger the public policy defence under Article V(2)(b) of the NYC since it was stated that even where conduct offends, for example Article 101 TFEU, EU law recognises gradients of injury and is more concerned about the so-called hard-core violations (which usually concerns ‘by-object’ violations, i.e. those anti-competitive agreements, decisions or practices of which the object is to prevent and distort competition) than soft-core violations (which usually concerns ‘by-effect’ violations).⁵⁰² Therefore, ‘less outrage would issue from the EU in the case of the non-application of EC competition law’ in soft-core violations⁵⁰³ and it may thus be plausibly suggested that the non-application of EU competition law in case of soft-core violation would not meet the threshold of severity as required to trigger the public policy defence.⁵⁰⁴ For example, it was opined that ‘[a] restriction of

⁵⁰⁰ Emphasis added.

⁵⁰¹ Emphasis added.

⁵⁰² Phillip Landolt (2006) *op. cit.*, supra note 36, at p. 215.

⁵⁰³ *Ibid.*, at p. 216.

⁵⁰⁴ Diederik de Groot, ‘Chapter 16 The Ex Officio Application of European Competition Law by Arbitrators’, in Gordon Blanke & Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, at para. 16-053

competition in a horizontal agreement is likely to be more detrimental for competition than a restriction in a vertical agreement'⁵⁰⁵ and '[a] cartel would certainly qualify as a repugnant infringement of the competition rules'⁵⁰⁶.

The author does not share this viewpoint as that paying main attention on hard-core violations does not mean to attenuate the importance of soft-core violation. It is merely out of practical reasons to focus more on hard-core violations, such as the fact that they generally cause 'greater harm to competition'⁵⁰⁷ and the practical experience that hard-core violations are 'almost never necessary for the obtaining of off-setting Article 81(3) EC-type benefits.'⁵⁰⁸ It, notwithstanding, never means that soft-core violation is not serious enough to be condemned – otherwise Article 101 would be deemed as ill-drafted since it on the one hand condemn anti-competitive conducts in such a non-derogative way⁵⁰⁹ whilst on the other hand actually give some of the wrongdoers a way out. In other words, EU competition law does not 'distinguish between serious and minor violations of competition law'⁵¹⁰ and the severity of violation is inherent in the provisions: as long as an anti-competitive behaviour could be caught under EU competition law, it is serious enough. This is also the case in the competition law of non-EU jurisdictions.⁵¹¹ Therefore, it could be seen that, although whether 'all parts of the edifice of European competition law partake in the paramount public policy rank' may still be 'unmapped territory'⁵¹², the ECJ in *Eco Swiss* did not consider such potential distinction but confirmedly held that, as long as an arbitral award 'is in fact contrary' to (now) Article 101 TFEU, it would trigger the public policy defence under Article V(2)(b) of the NYC.⁵¹³ This

⁵⁰⁵ Assimakis P. Komninos (2012) *op. cit.*, supra note 474, at p. 220.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Phillip Landolt (2006) *op. cit.*, supra note 36, at p. 215.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ See Article 101 TFEU, which clearly states that anti-competitive agreements, decisions and practices *shall* be prohibited and automatically void without further distinguishing 'by-object' and 'by-effect' violations.

⁵¹⁰ Damien Geradin (2016) *op. cit.*, supra note 461, at 15.

⁵¹¹ See, for example, neither the India Competition Act nor the Competition & Consumer Commission Singapore Guidelines provides that 'by-effect' violations of competition law would be less condemnable than 'by-object' violations.

⁵¹² Diederik de Groot (2011) *op. cit.*, supra note 504, at para. 16-053. It should be noted that the conclusion drawn above that EU competition law forms part of EU's fundamental public interests was made on the prerequisite that the term 'EU competition law' in this research refers to Article 101 and 102 TFEU.

⁵¹³ Case C-126/97 *Eco Swiss China Time v. Benetton International* [1999] ECR I-3055, at para 41.

viewpoint was subsequently firmly upheld by AG Wathelet in his opinion in *Genentech v. Hoechst*:

‘Even if there were a scale of infringements of Article 101 TFEU based on their obviousness and harmfulness including, in particular, restrictions by object and by effect, *there is nothing in Article 101 TFEU to support the conclusion that these restrictions would be permissible*. Indeed, Article 101 TFEU expressly prohibits agreements between undertakings ‘which have as their object or effect’ the restriction of competition. Accordingly, either there is an infringement of Article 101 TFEU, in which case the agreement between undertakings at issue is automatically void, or there is no infringement at all.

Consequently, it makes no difference whether the infringement of the public policy rule was flagrant or not.’⁵¹⁴

Following the discussion above, it is therefore highly reasonably believed that once an anti-competitive behaviour is condemnable under EU competition law, it is serious enough to trigger public policy defence. As for an enforcing court within the EU, it is self-evident that the mechanism of Article V(2)(b) would be activated to protect the Member State’s competition public policy since as concluded above that EU competition law forms part of EU Member States’ public policy.⁵¹⁵ As for a non-EU enforcing court, it has been opined above that for those non-EU jurisdictions which are driven by their own public policy to respect EU competition public policy or generalise EU competition law as conveying a general competition value which they also cherish as their own public policy, they would also have the incentive to ensure that relevant EU competition law issues have been *duly* reviewed⁵¹⁶. Therefore, once the severity of the non-application of relevant EU competition law could be established and recognised by a non-EU enforcing court⁵¹⁷ of this kind,

⁵¹⁴ The Opinion of Advocate General Wathelet in Case C-567/14 *Genentech v. Hoechst*, EU:C:2016:177, at paras. 65-66. Emphasis added.

⁵¹⁵ See *supra* Section I(A)(1) of this Chapter.

⁵¹⁶ See *supra* Section I(A)(2) of this Chapter.

⁵¹⁷ It should be noted here that the non-EU enforcing court may not actually apply EU competition law in examining the severity of the non-application issue as it has no obligation to ensure the compliance of the award to EU competition law but merely the incentive to confirm that relevant competition law has been duly and reasonably examined. Therefore, the examination of the severity of

such non-application could also trigger the public policy defence under Article V(2)(b) before it.

2. Misapplication of EU competition law and awards running contrary to authorities' decisions

Moreover, as for the misapplication of EU competition law and awards running counter to Commission or NCAs decisions, it should be noted that the terms 'misapplication' and 'running counter' could be defined in two plausible ways. The first interprets them as the application of EU competition law deviates from the *reasonable understanding* of relevant provisions or decisions. As implied by the French *Cour de Cassation* in *SNF SAS v. Cytec Industries BV*, under the context of international commercial arbitration, the misapplication of EU competition law should reach the level of being 'flagrant, effective and concrete'⁵¹⁸. Therefore, the misapplication of EU competition law and an award running contrary to a Commission or NCA decision should thus be interpreted as a *manifest* violation of EU competition law. On the other hand, the second definition understands them as the mere difference of application between an arbitral tribunal and a reviewing court or the Commission or a relevant NCA. In other words, as long as the arbitral tribunal's application is not in full accord with the reviewing court or the Commission or the relevant NCA decision, no matter how slight the difference is, there would be a misapplication of relevant EU competition law.

The essence of the difference of these two plausible definitions lies in the difference of the viewpoints on the extent of the allowed divergence of the application of EU competition law. As for the first definition, the application of EU competition law allows a certain level of flexibility and discretion – the application could be different as long as they are all within a reasonable range. Conversely, as for the second, the application of EU competition law is based on the premise that it should be

the non-application of relevant EU competition law may not be conducted by applying EU competition law but the non-EU enforcing state's competition law, and therefore 'be recognised' by the non-EU enforcing court. For further discussion, see *infra* Section II(C)(2)(a) of this Chapter.

⁵¹⁸ French *Cour de Cassation* (1re Ch. civile), *Société SNF v. Société Cytec Industries BV*, 4 juin 2008. The original text is 'flagrante, effective et concrète'. The translation is provided in Luca G. Radicati di Brozolo (2011), *op. cit.*, *supra* note 24, at para. 22-044.

conducted under a precise standard – there will always be a ‘correct’ answer to the application of EU competition law.

One might, based upon common sense, reckon that the correctness of an application implies such an exclusivity: except a specific correct application, there would be no other possibly correct options. The ECJ’s decision in *Amministrazione Delle Finanze Dello Stato v. Simmenthal S.p.A.* seems to support this viewpoint. In this case, the ECJ stated that:

‘[T]he rules of Community law must be fully and *uniformly applied* in all the Member States from the date of their entry into force and for so long as they continue in force.’⁵¹⁹

This uniformity as pursued by EU legal order may therefore be plausibly interpreted to mean that there should be a specific standard regarding what a correct application of EU competition law is, otherwise the EU competition order would not be applied uniformly. But this would not be the case in practice. As being pointed out, it would be ‘illusory’ to reckon that there would always be a clear distinction between ‘correct’ and ‘incorrect’ applications of, not only EU, but also all the non-EU jurisdictions’ competition law. It was stated that:

‘It is naive to believe that, in the presence of a subject matter replete with factual and legal complexities, as is the case in most disputes involving competition law, there is only one ‘correct’ solution to the issue.’⁵²⁰

A clear example supporting this viewpoint can be found in Article 3 of Regulation 1/2003, in which the Council states that, as for Article 82 (now 102 TFEU), ‘Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings’, which clearly indicates that a stricter application of competition law would not be regarded as a *wrong* application.

Accordingly, the object of being ‘uniformly applied’ should be interpreted as the

⁵¹⁹ Case 106/77, *Amministrazione Delle Finanze Dello Stato v. Simmenthal S.p.A.*, [1978] ECR 629, at para. 14. Emphasis added. See also, for example, Recital (1) of the Regulation 1/2003. [‘In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and *uniformly* in the Community.’]

⁵²⁰ Luca G. Radicati di Brozolo (2011), *op. cit.*, *supra* note 24, at para. 22-026.

competition order in general, but not the specific application of EU competition law. As long as the competition order is not distorted or derogated, a certain degree of discretion regarding the specific application of EU competition law would be approved. Therefore, the first definition should be upheld: the misapplication of EU competition law or awards running contrary to relevant decisions should be understood as a manifest deviation of understanding from the reasonable application of EU competition law.

Following this definition, again, it could be concluded that only when an arbitral tribunal manifestly misapplies relevant EU competition law or renders an arbitral award which was clearly contrary to a Commission or NCA decision would public policy defence under Article V(2)(b) be activated. Once such clear misapplication or contradiction is persuasively established, on the one hand, as for an EU enforcing court, such considerable deviation would be intolerable owing to its obligation to ensure the full and uniform application of EU competition law,⁵²¹ and would hence trigger the public policy defence under Article V(2)(b) of the NYC. On the other hand, as for a non-EU enforcing court, as discussed above a non-EU jurisdiction which regards competition law as its own public policy and generalises EU competition law as conveying a general competition value would also intend to ensure that relevant EU competition law issues have been *reasonably* reviewed.⁵²² Therefore, the severity of deviation is once established and recognised by a non-EU enforcing court of this kind, such misapplication and contradiction could also trigger the public policy defence under Article V(2)(b) before it.

II. Examining the behavioural pattern of enforcing courts reviewing potential breaches of EU competition law

Having established the link between EU competition law and enforcing states' public policy and introduced the basic modalities of potential breaches of EU competition law as reflected in arbitral awards as well as whether a violation of EU competition

⁵²¹ Case 106/77, *Amministrazione Delle Finanze Dello Stato v. Simmenthal S.p.A.*, [1978] ECR 629, at para. 14.

⁵²² See *supra* Section I(A)(2) of this Chapter.

law would be serious enough to trigger public policy defence under Article V(2)(b), the two questions posed above ⁵²³can now be examined.

These two questions, from the author's viewpoint, essentially concern that how well the *prima facie* reviewing standard, while being fully in line with the pro-enforcement principle, could satisfy the enforcing court's obligation under relevant public policy concern. Therefore, before reviewing the applicability of the *prima facie* reviewing standard in the context of arbitral awards concerning EU competition law, it is critical first to understand what an enforcing court is required to do under the concern of protecting competition legal order.

A. The obligation borne by an enforcing court under the connection between EU competition law and its competition public policy concerns

1. The obligation of EU enforcing court

As for an EU enforcing court, since EU competition law plays a significant role in the legal order of the EU,⁵²⁴ it is naturally expected that an obligation to ensure the adequate and reasonable application of EU competition law would be borne by an EU enforcing court. As clearly stated in Article 4(3) of the Treaty on European Union:

‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take *any appropriate measure*, general or particular,

⁵²³ i.e. first, when relevant competition law issues have been examined by the tribunal, whether the enforcing court should fully trust the tribunal's decision without reviewing the reasoning and merits of dispute; and secondly, when relevant competition law issues were not examined by the tribunal, whether the enforcing court should dig into the merits of dispute to determine the existence of serious violations of competition law or merely decide the fate of the award based upon the information reflected in the award.

⁵²⁴ See *supra* Section I(A)(1) of this Chapter. See also, for example, Hans van Houtte, Arbitration and Arts.81 and 82 EC Treaty – A State of Affairs, *ASA Bulletin*, Vol.23, Issue 3, 2005, at p. 432. [‘EC competition law aims at maintaining competition in the European market. It furthers social cohesion, protection of small and medium firms, promotion of regional and industrial policy and enhancement of the international competitiveness of European firms. These goals belong to the ‘public policy’, the fundamental principles and core values of the European Union.’] (Original footnote omitted). See also Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV* [1999] ECR I-3055, at paras. 36 to 40; Case 102/81, *Nordsee Deutsche Hochseefischerei v. Reederei Mond* [1982] ECR 1095, at para. 14.

to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'⁵²⁵

More specifically, as for Article 101 and 102 TFEU, it was potently opined that:

'Article 101 TFEU and 102 TFEU are ... fundamental provisions which are essential for the functioning of the internal market, without which the European Union would not function and the breach of which, whether or not flagrant or obvious, would be unacceptable from the standpoint of the EU legal order.'⁵²⁶

Therefore, since it is long-established EU law that the obligations of Article 4(3) are borne by all institutions of the state, including its courts⁵²⁷; and EU competition law is clearly a fundamental part of EU law, EU Member States shall therefore bear the obligation to ensure the adequate and reasonable application of EU competition law.

Moreover, it should be noted that such obligation may also be legitimised by the situation that EU Member States are in fact 'the first instance to have this responsibility'⁵²⁸ of 'policing what arbitration tribunals do'⁵²⁹ and 'ensure their compliance with EC competition law'⁵³⁰ since the ECJ has clearly stated in *Nordsee Deutsche Hochseefischerei* that arbitral tribunals are not to be considered as courts or tribunals within the meaning of 177 TEC (now 267 TFEU) and they could not therefore refer questions to the European Court for preliminary rulings.⁵³¹ Therefore, as Advocate General Wathelet held in his opinion in *Genentech v. Hoechst*:

'[T]he system for reviewing the compatibility of international arbitral awards

⁵²⁵ Emphasis added.

⁵²⁶ The Opinion of Advocate General Wathelet in Case C-567/14 *Genentech v. Hoechst*, EU:C:2016:177, at footnote 46.

⁵²⁷ E.g. the obligation of interpretation conforme. See Case C-106/89 *Marleasing v. La Comercial Internacional de Alimentacion* [1990] ECR I-435.

⁵²⁸ Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 203.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*, at p. 204.

⁵³¹ Case 102/81 *Nordsee Deutsche Hochseefischerei v. Reederei Mond* [1982] ECR 1095, at paras. 7 to 16.

with substantive EU law through the public policy reservation, whether in the context of an action against recognition and enforcement or an action for annulment, shifts responsibility for the review downstream, namely to the courts of the Member States, rather than upstream, to arbitral tribunals.⁵³²

It therefore follows these thoughts that an EU enforcing court bears a considerable onus in the task of, as the European Council held in the Preamble of the Regulation 1/2003, ensuring the effective and uniform application of Article 101 and 102.⁵³³

2. The obligation of non-EU enforcing court

By comparison, and to be expected, the obligation borne by non-EU enforcing courts is less heavy as that of an EU enforcing courts, since EU competition law does not have the ‘innate’ relationship with their own public policy concern. Therefore, under the two scenarios under which EU competition law may trigger the public policy concern of a non-EU enforcing court⁵³⁴, as stated above⁵³⁵, a non-EU enforcing court would bear only the obligation to ensure that relevant EU competition law issues have been duly and reasonably reviewed, but would not to ensure their compliance with EU competition law.

Notably, a distinction could further be made between the obligations borne by a non-EU enforcing court which merely respects EU competition public policy without regarding it as its own public policy and a non-EU enforcing court which generalises EU competition law as conveying a general competition value and hence deems EU competition law as its own public policy. The respect as shown in the former situation would not drive the non-EU enforcing court proactively to examine relevant EU competition law issues but rather merely examine relevant issues when raised by the parties -- in essence the non-EU enforcing court still not actually building the connection between EU competition law and its own public policy. By comparison, the respect as shown in the latter situation is an active one which would require the

⁵³² The Opinion of Advocate General Wathelet in Case C-567/14 *Genentech v. Hoechst*, EU:C:2016:177, at footnote 60.

⁵³³ Regulation 1/2003, preamble, 1st indent.

⁵³⁴ i.e. the scenario that a non-EU enforcing court is driven by its own public policy to respect other jurisdiction’s public policy so that it would respect EU competition public policy once a manifest violation of it is spotted, and the scenario that a non-EU enforcing state generalises EU competition law as conveying a general competition value which it also cherishes.

⁵³⁵ See *supra* Section I(C) of this Chapter.

non-EU enforcing court actively to examine relevant public policy concern as it considers that its own public interest is drawn into the fray.

B. Revisit the *prima facie* reviewing standard on arbitral awards concerning EU competition law disputes: challenge the orthodoxy

With the obligations of both EU and non-EU enforcing courts being summarised, the next step is to examine whether the *prima facie* reviewing standard could fulfil these obligations.

According to the *prima facie* reviewing standard, when encountering a query of the legality of an arbitral award concerning an EU competition law dispute, an enforcing court should, as the *Cour d'appel de Paris* did in *SNF SAS v. Cytec Industries BV*, not delve into the merits of dispute but merely conducted *prima facie* review on the award, i.e. 'only verify whether the tribunal gave consideration to the relevant competition law issues at all, without, however, undertaking a review of the merits of the tribunal's analysis'⁵³⁶. Once the enforcing court could affirm that the tribunal has examined the competition law issues, it should then approve the enforcement of the award without further probing the award's reasoning. This *prima facie* approach as applied by the *Cour d'appel de Paris* was subsequently vigorously approved by the French *Cour de Cassation*, which stated that:

'The latter [the *Cour d'appel de Paris*] having reviewed the awards in the light of the application of Community competition law within the limits of its powers, i.e. *without review of the merits*, it correctly held that their recognition and enforcement did not violate international public policy.'⁵³⁷

⁵³⁶ Gordon Blanke (2007), *op. cit.*, *supra* note 24, at 52.

⁵³⁷ French *Cour de Cassation* (1re Ch. civile), *Société SNF v. Société Cytec Industries BV*, 4 juin 2008. The original text is ['que celle-ci, qui a procédé — dans les limites de ses pouvoirs, c'est-à-dire sans révision au fond de la sentence arbitrale — au contrôle des sentences au regard de l'application des règles communautaires de la concurrence, a exactement dit que leur reconnaissance et leur exécution n'étaient pas contraire à l'ordre public international']. The translation is provided in Luca G. Radicati di Brozolo (2011) *op. cit.*, *supra* note 24, at para. 22-044. Emphasis added. For views supporting this approach, see, for example, A. Komninos, Paris Court of Appeal refuses to set aside arbitral award for public policy violation, *White & Case International Dispute Resolution*, Vol.17, No.4, 2004, at 2-3. Also, the U.S. Supreme Court's judgment in *Mitsubishi v. Soler Chrysler-Plymouth* seems to support this viewpoint as the Court stated that '[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed'. Here one could clearly

Moreover, following the *prima facie* review, even when an enforcing court finds that the arbitral tribunal actually failed to examine relevant EU competition law issues, it should merely run a *prima facie* review on the basic information as shown in the award to judge (or sometimes, speculate) whether there is a serious violation of EU competition law or a clear discrepancy to authoritative decisions. This was the approach applied by the *Cour d'appel de Paris* in *Thalès*⁵³⁸ which concerns the non-application of EU competition law scenario. In this case, the Court followed the *prima facie* approach and refused to examine on the merits of dispute but merely decide whether there was a serious violation of (now) Article 101 TFEU by reading the award.

By applying this *prima facie* approach, the enforcing court does almost nothing but merely confirms that relevant issues have already been examined by the tribunal. Even under the scenario that the arbitral tribunal failed to examine relevant EU competition law issues, the enforcing court would not dig into the merits but solely rely upon the information contained in the award to decide (or more likely speculate) whether there is a serious violation of EU competition law. This behavioural pattern hence invites the query that how fully trusting an arbitral tribunal's decision or merely judging from the manifestation of an arbitral award could fulfil an enforcing court's obligation to, as revealed above, at least ensure that relevant competition law issues have been not only duly, but more importantly, reasonably, reviewed.

1. The fulfilment of obligation may require an enforcing court to act more proactively than fully trusting arbitral tribunal's decision on competition law issues

The first scenario to be examined concerns that the arbitral tribunal has already examined and decided on relevant EU competition law issues, and the query is that whether fully trusting arbitral tribunal's decision would fulfil an enforcing court's obligation under their public policy concern.

This should not be the case before an EU enforcing court, as the EU enforcing

see that the emphasis of the Court was placed upon whether relevant competition law issues have been addressed but not whether they were reasonably examined.

⁵³⁸ See, for example, *SA Thalès Air Défense v. GIE Euromissile, Cour d'appel de Paris* (1re Ch. C), Not Indicated, 18 November 2004.

court's obligation would be to ensure the effective and uniform application of EU competition law, which is, at least from the viewpoint of the author, a rather active obligation which would require an EU enforcing court to do more than fully trusting an arbitral tribunal's decision. A careful perusal of the ECJ's ruling in *Eco Swiss* would reveal that an EU enforcing court should bear a more proactive responsibility in reviewing arbitral awards concerning EU competition law. In this case, the ECJ did bear in mind that,

'it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances'⁵³⁹

However, after recognising the limited application of the refusal of enforcement, the ECJ emphasised on the fundamental nature of (now) Article 101 TFEU and categorised this Article as a matter of public policy within the meaning of Article V(2)(b) of the NYC, and further stated that,

'Community law requires that questions concerning the interpretation of the prohibition laid down in Article 85(1) of the Treaty should be *open to examination by national courts when asked to determine the validity of an arbitration award*'⁵⁴⁰

Although the ECJ did not in this case go further clearly to make its standpoint on what specific behavioural pattern an EU enforcing court should apply when reviewing arbitral awards concerning EU competition law, it sent a clear message: EU competition law (or more specifically Article 101 TFEU), as part of EU Member States' public policy, requires EU Member States to stay more active to examine but not be satisfied by the mere fact that relevant competition law issues have already been examined by the arbitral tribunal.

Notwithstanding, one might argue that requiring a more in-depth review of awards concerning EU competition law essentially 'conflicts with the desire of the parties to

⁵³⁹ Case C-126/97 *Eco Swiss China Time v. Benetton International* [1999] ECR I-3055, at para. 35.

⁵⁴⁰ *Ibid*, at para. 40. Emphasis added.

opt for a one-shot, streamlined dispute settlement mechanism'⁵⁴¹. But it should also be remembered that the essential purpose of Article V(2)(b) of the NYC is to provide an enforcing state the opportunity to protect what constitutes its own fundamental public interest. Although based upon the pro-enforcement bias of the Convention Article V(2)(b) should be narrowly interpreted and strictly applied, this public policy defence should not be understood as a mere superficial ground. Instead, when a specific public interest passes the narrow-interpretation test and is deemed as public policy within the meaning of Article V(2)(b) of the NYC, its protection would essentially prevail and the enforcing court should be able to act as the gatekeeper and do what is needed to make sure relevant public policy is not breached. In other words, the compliance with the pro-enforcement principle should not be fulfilled at the price of sacrificing the protection of public interests.

Therefore, since relevant EU competition law provisions are firmly and widely recognised as EU Member States' public policy and the protection of EU competition legal order inevitably requires an EU enforcing state to ensure the effective and uniform application of EU competition law, it should then be allowed to 'ensure', which clearly refers to a more proactive reviewing behaviour than merely following the tribunal's decision. Hence, as could be seen in *Almelo*, the ECJ clearly held that,

'It follows from the principles of the primacy of Community law and of its uniform application, in conjunction with Article 5 of the Treaty, that a court of a Member State to which an appeal against an arbitration award is made pursuant to national law *must*, even where it gives judgment having regard to fairness, *observe the rules of Community law, in particular those relating to competition.*'⁵⁴²

Following this judgment, Advocate General Saggio, in his opinion in *Eco Swiss* delivered in 1999, also opined that,

'[A]s the Court recognized in the course of its judgment in *Almelo* ... the need to supervise arbitration awards to ensure that they are compatible with

⁵⁴¹ Damien Geradin (2016) *op. cit.*, supra note 461, at 18.

⁵⁴² Case C-393/92, *Gemeente Almelo and Others v. Energiebedrijf Ijsselmij NV* [1994] ECR I-1477, at para. 23. Emphasis added.

Community law is particularly great in an area, *such as competition*, where there is a *general interest in observance of the rules* to ensure the smooth functioning of the common market.⁵⁴³

In a recent case⁵⁴⁴, the Danish *Højesteret* rejected a challenge of an EU competition law award on the ground that it violated Article 101 and was hence contrary to public policy. In this case, the *Højesteret* did not comment on the logic of the reasoning and concluded that the award is not in violation of the EU competition law rules merely based upon its observation that the tribunal has given sufficient consideration to the relevant EU competition law issues. It was then questioned whether this approach may actually fail to ‘detect a potential manifest violation of the EU competition law’⁵⁴⁵ as well as fail to ‘safeguard the effectiveness of [the] private enforcement [of EU competition law] through arbitration’⁵⁴⁶.

Notwithstanding, as far as a non-EU enforcing court is concerned, it may be less certain that a *prima facie* reviewing standard would be insufficient since the obligation borne by a non-EU enforcing court would be less heavy than that of borne by an EU enforcing court – the non-EU enforcing court would merely be obliged to ensure that relevant competition law issues have been duly and reasonably reviewed. It would, however, be rather difficult to envisage that how an enforcing court could, by merely relying upon the fact that relevant competition law issues have been examined, reach the conclusion that relevant competition law issues have been duly and reasonably reviewed -- the mere confirmation that the arbitral tribunal has examined on relevant competition law issues would not *per se* guarantee the quality of the examination.

2. The fact-intensity of competition law disputes may require an enforcing court to dig deeper than merely reading the award

⁵⁴³ The Opinion of Advocate General Saggio in Case C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV* [1999] ECR 631, at 661. Emphasis added.

⁵⁴⁴ *Taewoong Inc. v. AH Industries A/S* (142/2014) ruling of the Danish Supreme Court (s. 2) of 28 January 2016, available online in an unofficial English translation on the official website of the Danish Institute of Arbitration at http://voldgiftsinstitutet.dk/wp-content/uploads/2016/04/danish-supreme-court_s-judgment-of-28-january-2016.pdf (Retrieved: 2018-10-08)

⁵⁴⁵ Gordon Blanke, Case Comment – Danish Supreme Court rejects challenge of EU competition law award on grounds of public policy, *Global Competition Litigation Review*, Vol.10, Issue 2, 2017, at R-21.

⁵⁴⁶ *Ibid.*

The second scenario to be looked at is that relevant competition law issues have not been examined by the arbitral tribunal. Following the conclusion drawn above that an enforcing court should be allowed to protect its public interest and both an EU and non-EU enforcing courts would at least be obliged to ensure that relevant competition law issues have been reasonably and duly examined, there is no question that under the scenario of the non-application of EU competition law an enforcing court should be able to rule on relevant competition law issues and determine whether there would be a serious violation of competition public policy. Notwithstanding, it is debatable whether the enforcing court should determine the fate of the award by merely reading the information revealed in the award without digging into the merits of the dispute.

The strongest argument made by the proponents of the *prima facie* reviewing standard is that *prima facie* review would be sufficient to reveal any manifest violation of competition law. As opined:

‘Where the violation is not *prima facie* apparent from a perusal of the award ... it is unlikely that the award can be so seriously flawed as to entail an actual violation of public policy. Even if such a review were not to weed out all awards that could be conceived to endorse an incorrect application of competition rules, this would not *per se* be fatal to competition policy.’⁵⁴⁷

Although seemingly persuasive, this may not always be the case as the legitimacy of this conclusion would rely largely upon the level of vigilance and sensitivity of an enforcing court on the existence of relevant anti-competitive behaviour⁵⁴⁸ or the clear deviation from the reasonable application of competition law⁵⁴⁹, which, however, may not be consistently observed. As may be seen in *SA Thalès Air Défense v. GIE Euromissile*, the *Cour d’appel de Paris*, by showing solid trust in *prima facie* review, refrained from examining the merits of the dispute and decided that the non-application of EU competition law in arbitrating the dispute which was based upon a

⁵⁴⁷ Luca G. Radicati di Brozolo (2011), *op. cit.*, *supra* note 24, at para. 22-032.

⁵⁴⁸ As under the circumstance of non-application of competition law.

⁵⁴⁹ As under the circumstance of manifest misapplication of competition law and contradiction to previous authoritative decisions.

market-sharing agreement did not violate EU's fundamental public interests.⁵⁵⁰ This conclusion was subsequently sharply criticised.⁵⁵¹

Moreover, and more pertinently, even a decent level of vigilance and sensitivity could be generally maintained in legal practice, such *prima facie* review would merely guarantee the capture of hard-core violations of competition law, i.e. violations of competition law 'by object', whilst to a certain extent leave soft-core violations, i.e. violations of competition law 'by effect', undetected owing to the strong fact-intensity of competition law caused by the economic nature of it.⁵⁵² From the perspective of EU competition law, as held in Commission Staff Working Paper accompanying the White Paper on Damages Actions for breach of the EC antitrust rules:

'Competition cases are *particularly fact-intensive*. The finding of an antitrust infringement, the determination of damages and the establishment of the relevant causal links all require the assessment of a variety of often *complex factual elements*.

...

[I]t is important to recall that cases on antitrust damages often require an *unusually complex assessment of economic interrelations and effects*.'⁵⁵³

⁵⁵⁰ *SA Thalès Air Défense v. GIE Euromissile, Cour d'appel de Paris* (1re Ch. C), Not Indicated, 18 November 2004.

⁵⁵¹ Therefore, it was opined that 'it is doubtful whether a limited review of facts is compatible with EC law; even more doubt may reign with respect to the *prima facie* test': Christoph Liebscher, *The Healthy Award – Challenge in International Commercial Arbitration*, Kluwer Law International, 2003, at p. 61. For scholars criticising the *Cour d'appel de Paris*'s approach, see, for example, Mihail Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, Hart Publishing, 2011, at p. 267. ['But if a market-sharing agreement is not enough justification for the French court to check whether an arbitral award is not based on a contract that is void under Arts 101 and/or 102 TFEU, then it is difficult to see what will be.']; Phillip Landolt (2006) *op. cit.*, *supra* note 36, at pp. 201-204; Emmanuel Gaillard, Extent of Court Review of Public Policy, *New York Law Journal*, Vol.237, No.65, 2007.

⁵⁵² Diederik de Groot (2011), *op. cit.*, *supra* note 504, at para. 16-050. See also, for example, C-453/99, *Courage v. Crehan* [2001] ECR I-6297, at para. 27. ('Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, *which are frequently covert ...*') It was also reckoned that the 'instances where a breach of EU competition law is "obvious" and "flagrant" will not be common'. See Damien Geradin (2016) *op. cit.*, *supra* note 461, at 7.

⁵⁵³ Commission Staff Working Paper accompanying the White Paper on Damages Actions for breach of the EC antitrust rules, at paras. 65 and 88. Emphasis added. See also, for example, Damien Geradin (2016) *op. cit.*, *supra* note 461, at 7. ('With limited exceptions, it is rare that a given agreement or

Moreover, from a more general observation of competition law around the world,

‘Antitrust analysis is becoming increasingly complex [A]dvances in industrial organization (and economics more generally) have rendered antitrust a more mathematically rigorous and technically demanding field ... There is now little doubt that complex economic and econometric analyses are standard fare in modern antitrust litigation.’⁵⁵⁴

Therefore, as opined, ‘by effect’ anti-competitive conducts may ‘not ordinarily become apparent based on a *prima facie* assessment’⁵⁵⁵. Where it is not possible to confirm that the object of an agreement is to restrict competition, ‘a full analysis of the agreement in its market context must be carried out before it is possible to determine whether its effect is to restrict competition’⁵⁵⁶. For both an EU and a non-EU enforcing court of which the obligation is at least to ensure that relevant competition law issues have been duly and reasonably reviewed, the fact-intensity of competition law would therefore reasonably require them to rely more than the superficial information revealed in an award to determine whether the enforcement of the award would violate relevant competition public policy. Notably, the need for an in-depth review of the award when necessary for ensuring that it is in line with relevant public policy is also recognised by the International Law Association in its final report on public policy as a bar to enforcement of international arbitral awards:

‘When the violation of a public policy rule of the forum alleged by a party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the facts of the case, the court should be allowed to undertake such reassessment of the facts.’⁵⁵⁷

practice can be declared incompatible with EU competition law without an in-depth analysis of the factual context of the alleged infringement, as well as its economic effects.’)

⁵⁵⁴ Michael R. Baye and Joshua D. Wright, Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals, *Journal of Law and Economics*, Vol. 54, No. 1, 2011, at 1-3.

⁵⁵⁵ Tobias Zuberbühler & Christian Oetiker (Eds.), *Practical Aspects of Arbitrating EC Competition Law*, Schulthess Verlag, 2007, at p. 26.

⁵⁵⁶ R. Whish & D. Bailey (2018) *op. cit.*, *supra* note 311, at p. 134. See also, for example, Phillip Landolt (2006) *op. cit.*, *supra* note 36, at p. 216; Case 23/67 *Brasserie de Haecht v. Wilkin* [1967] ECR 407, at 415; Case 234/89 *Delimitis v. Henninger Bräu AG* [1991] ECR I-935, at para. 13.

⁵⁵⁷ Pierre Mayer & Audley Sheppard, Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, *Arbitration International*, Vol. 19, Issue 2, 2003, at 262.

C. Proposing new reviewing patterns of enforcing courts examining potential breaches of EU competition law

Following the analysis above, it could hence be reasonably concluded that *prima facie* reviewing pattern, although being in line with the pro-enforcement principle, may not fulfil the obligation borne by an enforcing court under its public policy concern as such reviewing pattern may be ‘excessively liberal or as driven by a pro-arbitration bias and perhaps even at odds with the thinking of competition law enforcers’,⁵⁵⁸.

A new behavioural pattern of an enforcing court reviewing an arbitral award concerning EU competition law issues should hence be proposed, and this is where the second uncertainty was raised, namely the specific behavioural pattern an enforcing court should apply. Notably, as for the reviewing pattern of an enforcing court examining such an arbitral award, three key factors merit particular attention. The first concerns whether an enforcing court should raise a potential breach of EU competition law *ex proprio motu* or examine the breach only when it is raised by the parties. The second is the extent of an enforcing court examining the merits of dispute: could/should an enforcing court re-examine the merits as shown in the case freely or under certain restrictions? The third concerns the applicable law, namely the law an enforcing court applies when examining a potential breach of EU competition law.

Notably, although it has been discussed above that the *prima facie* reviewing standard may not protect relevant competition public policy well, a proposal on the new reviewing patterns should not run in the utterly opposite direction. Instead, the proposal should try to strike the optimal balance between the undebatable pro-enforcement principle and the protection of competition public policy. Therefore, as could be seen below, the new reviewing patterns would not allow an enforcing court unlimitedly to dig into the merits of disputes but attempt to find the ideal balancing point.

1. The reviewing pattern of an EU enforcing court examining potential

⁵⁵⁸ Luca G. Radicati Di Brozolo, Antitrust: a paradigm of the relations between mandatory rules and arbitration – a fresh look at the “second look”, *International Arbitration Law Review*, Vol. 1, 2004, at 32.

breaches of EU competition law

The first scenario to be considered is an EU enforcing court examining potential breaches of EU competition law.

a. Non-application of EU competition law

Under the scenario of the non-application of EU competition law, an EU enforcing court may notice not only the probability of a failure to apply EU competition law based upon parties' claims, but based also upon its own observation by questioning that there may be a conduct as described in Article 101 or 102 TFEU⁵⁵⁹ but the arbitral tribunal has not examined it, or such examination is not reflected in the award. This then triggers the examination of the first issue as listed above, namely whether the EU enforcing court should, when suspecting or spotting non-application of EU competition law, carry on examining the severity of relevant behaviour *ex proprio motu* even when the parties do not raise the issue.

The obligation borne by the EU enforcing court would suggest it should proactively raise and examine relevant competition law issues. The rationale is rather straightforward as an EU enforcing court is obliged to ensure the full and uniform application of EU competition law, which is essentially a positive obligation requiring an EU enforcing court to perform proactively. Therefore, once the EU enforcing court suspects a non-application violation which, as analysed above⁵⁶⁰, has the potential of violating EU competition law, it should be able to carry on determining the severity of the potentially anti-competitive behaviour and determine the fate of the arbitral award.

Once a non-application violation is on the table, the next issue is the extent to which an EU enforcing court should probe the merits of the dispute to examine relevant competition law issues. Generally, on a spectrum of which the opposing ends are the finality and legality of an arbitral award, the more a tribunal has examined and showed it has done so in the award rendered, the less legitimate and necessary an in-

⁵⁵⁹ It should be noted that the behaviour as mentioned here refers merely to the manifestation of those behaviours, i.e. the agreement, decision, practice and exploitation of dominant position which may trigger relevant competition law concerns. It does not refer to the anti-competitive behaviour which *actually* breaches EU competition law.

⁵⁶⁰ See *supra* Section I(C) of this Chapter.

depth review for the enforcement court, and the more the pointer on the spectrum would move towards the finality end. In the case as discussed here, non-application of EU competition law means that the arbitral tribunal, no matter what the reasons are, showed no evidence of examination of relevant competition law issues in the arbitral award. Therefore, the pointer on the spectrum would move towards the legality end, and it is fully legitimate for the EU enforcing court to probe the merits of the dispute *to the extent* that it could determine adequately the severity of the existing potentially anti-competitive behaviour.

Last but not least, as for the law applicable to the enforcing court's examination, it is unquestionably the case that EU competition law should be applied, since EU competition law has been incorporated into EU Member States' national competition law⁵⁶¹ and EU enforcing courts are obliged to ensure the full and uniform application of EU competition law.

b. Misapplication of EU competition law

As for the misapplication of EU competition law, an EU enforcing court may also likewise notice the existence of a clear deviation from the reasonable application of EU competition law pursuant either to the claims of the parties or through its own observation by perusing the arbitral award in which the examination of relevant EU competition law is presented. Hence, as discussed above, since an EU enforcing court bears the obligation to assure the compliance of an arbitral award with EU competition law, it should be able to raise and examine its concern on potential misapplication of EU competition law even *ex proprio motu*.

It is otherwise in the event of misapplication of EU competition law, following an examination of the relevant EU competition law issues by the tribunal. On the aforesaid spectrum, the pointer would move towards the finality end, and it would thus be inappropriate for the EU enforcing court to dig freely into the merits of the dispute. In this case, it is therefore proposed that if the enforcing court suspects the potential misapplication of EU competition law, the starting point of its examination should be the reasoning evident in the arbitral award but not the examination on the merits of dispute. The EU enforcing court should first peruse the reasoning given by

⁵⁶¹ See *supra* Section I(A)(1) of this Chapter.

the tribunal and consider the following options: if the reasoning could lead sufficiently and logically to the conclusions drawn by the tribunal without a clear deviation from the basic facts of the case, the award should be enforced; if the reasoning cannot or it greatly deviates from the facts of the case which could plausibly lead to the result of the determination, the enforcing court should be able to examine the substance of the dispute *to the extent* that it could reasonably reach a conclusion on whether the arbitral award has greatly deviated from a reasonable application of EU competition law.

c. Awards running contrary to authoritative decisions

Last but not least, as for the scenario of an arbitral award potentially running contrary to a Commission or NCA decision on the same anti-competitive behaviour, such violation could also either be spotted by an EU enforcing court⁵⁶² or raised by the parties, and following the rationale as discussed above an EU enforcing court should be able to raise its concern on potential contradiction even *ex proprio motu*, and examine the level of the discrepancy between the award and relevant previous authoritative decision under EU competition law.

Notably, pursuant to the allegation that an arbitral award runs counter to a previous authoritative decision, the conflict does not lie in the deviation between the award and the reasonable application of EU competition law, but rests mainly with the discrepancy between the award and a previous authoritative decision. It is therefore proposed that the EU enforcing court should then merely make a comparison between the award and the previous authoritative decision and touch upon the merits of dispute to the extent it could reasonably judge on the level of the discrepancy between these two.

Notwithstanding, this conclusion is based upon a key prerequisite, namely the default correctness of Commission and NCAs decisions. A much trickier situation may occur when such default correctness was challenged by either the parties (e.g. the

⁵⁶² In legal practice, the author opines that it would be less likely that an EU enforcing court would always be aware of a specific Commission or NCA decision, and the latter scenario, i.e. a party raises the discrepancy between an arbitral award and relevant authoritative decision, would hence be much more commonly observed. However, since it is still practically possible (especially when the involved anti-competitive behaviour has been examined and ruled by the NCA of the enforcing state), it would still be discussed here.

losing party may argue at enforcement stage that the arbitral award runs counter to a previous NCA or Commission decision, but the winning party counter that the previous NCA or Commission decision was actually erroneous) and the arbitral tribunal (e.g. the arbitral tribunal may be aware of the previous NCA or Commission decision but still render an award running contrary to it by disagreeing with the decision). Under these circumstances, the question is raised: should the EU enforcing court then simply ignore such challenge and refuse to enforce the arbitral award?

The author considers that, as discussed above, since that NCAs and the Commission act essentially as the authoritative guardian of EU competition law,⁵⁶³ decisions made by them should attract a very strong presumption that relevant EU competition law issues have been reasonably and duly reviewed. Compliance with those decisions would hence be legitimate as a default choice, leaving very limited space for an EU enforcing court to query the legitimacy of those decisions. Nonetheless, meanwhile, it should still be noted that Commission or NCAs decisions may not always be beyond reproach. In a recent judgment of the ECJ, a Commission decision on the compatibility of a merger with the internal market was overruled.⁵⁶⁴ Moreover, it can also be seen in, for example, the 2008 White Paper on damages⁵⁶⁵ that in all member states, NCA decisions are subject to judicial review, so if unchallenged are binding for the addressees of the decision (as *res judicata*) but are not necessarily legally correct.

Accordingly, since EU enforcing courts are obliged to ensure EU competition law's full and uniform application and should therefore not act merely as the follower of Commission or NCAs decisions, once an authoritative decision was challenged by an arbitral tribunal, an EU enforcing court should not simply ignore such challenge and refuse to enforce the arbitral award.

The author hence suggests that a more sophisticated solution would be first to analyse the parties' or the arbitral award's reasoning regarding such challenge. If the reasoning is untenable or excessively terse which could not justify the conclusion the tribunal drew, a basic trust should be shown to the Commission or the relevant NCA

⁵⁶³ See *supra* Section I(B)(3) of this Chapter.

⁵⁶⁴ Case T-394/15, *KPN BV v. European Commission*, EU:T:2017:756.

⁵⁶⁵ White Paper on Damages Actions for Breach of EC Antitrust Rules, COM(2008) 165 final, at footnote 9.

decision and the arbitral award should be refused enforcement. Only if the reasoning is actually plausible and it could reasonably be doubted that the authoritative decision is clearly erroneous should the EU enforcing court step forward to examine the legitimacy of the arbitral award.

More specifically, by considering the practical relationship between EU national courts and the Commission/NCAs, as for a challenge of a Commission decision, although EU Member States' national courts cannot overrule Commission decisions⁵⁶⁶, it should be noted that Article 31 of Regulation 1/2003 provides that 'The Court of Justice shall have the unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed'. Following this provision, it could hence be expected that when a national court of an EU Member State suspects that the relevant Commission decision might be erroneous, it could then activate the jurisdiction it enjoys under Article 267 TFEU and invite the Court of Justice to consider the validity of the decision. Unlike the action of annulment under Article 263 TFEU, there is no time bar. It should be re-emphasised here that since a relevant EU competition law issue has already been examined by the Commission and it would be a considerable delay for the enforcement of arbitral award by considering the caseload of the ECJ and the inherent complexity of competition law case, by bearing the pro-enforcement bias of the Convention in mind, an enforcing court deciding to refer the issue to the ECJ ought first to ensure that the errors in the Commission decision are so plausible and significant that it may actually need to postpone the enforcement and prioritise the legitimacy of the arbitral award.

Moreover, as for a challenge of an NCA decision,

- if the decision is final, namely that the decision 'can no longer be reviewed, i.e. decision that were not appealed within the applicable time limits and thus accepted by their addressees, and those that were confirmed by the competent

⁵⁶⁶ See Article 16(1) of Regulation 1/2003. ('When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.')

review courts'⁵⁶⁷,

- if the relevant NCA is the competition authority of the enforcing state, Directive 2014/104/EU requires the enforcing court to treat the NCA decision as 'irrefutably established'⁵⁶⁸, but the enforcing court could still refer the issue to the ECJ for preliminary ruling on the interpretation of relevant involved EU competition law issues.⁵⁶⁹ Again, only when the erroneous of the NCA decision is serious and plausibly established should the enforcing court refer the relevant issues to the ECJ.
- If the relevant NCA is the competition authority of another EU Member State, the enforcing court can review the legitimacy of the NCA decision.⁵⁷⁰ Notably, this Article requires the enforcing court to treat the NCA decision as 'at least prima facie evidence that an infringement of competition law has occurred'. Hence, by also considering the pro-enforcement bias of the Convention, an error in an NCA decision should be serious and be plausibly adduced so that the enforcing court would have a strong enough incentive to review the decision.
- If the decision is not final, the EU enforcing court could then act as the reviewing court of such decision. Since relevant EU competition law issues have already been examined by the ECJ, the enforcing court should be limited to perusal of the NCA decision and the evidence adduced by the parties first but not re-examine the merits on its own. If it finds that such erroneous is serious and could actually be clearly established, the award should be refused for enforcement, otherwise the award should be upheld and enforced.

2. The reviewing pattern of a non-EU enforcing court examining potential breaches of EU competition law

After examining the reviewing pattern of an EU enforcing court examining potential breaches of EU competition law, the focus should then switch to the reviewing pattern of a non-EU enforcing court. As said above, the scenario of a non-EU

⁵⁶⁷ White Paper on Damages Actions for Breach of EC Antitrust Rules, COM(2008) 165 final, at footnote 9.

⁵⁶⁸ Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L349/1, Article 9(1).

⁵⁶⁹ *Ibid*, Article 9(3).

⁵⁷⁰ *Ibid*, Article 9(3)

enforcing court examining potential breaches of EU competition law could be further divided into two sub-scenarios based upon the enforcing courts' obligations: a non-EU enforcing court may generalise EU competition law as conveying a general competition value and hence examine relevant competition law issues in a relatively proactive way, for relevant violation of EU competition law would also ultimately violate its own public policy; or merely deeming as its own public policy the need to respect EU competition public policy and thus examine relevant competition law issues in a relatively passive way since its competition order would not actually be affected. Owing to this the specific reviewing pattern of a non-EU enforcing court would largely depend on its specific obligation as borne in examining relevant EU competition law issues, it would hence be reasonably expected that there would be differences regarding the reviewing patterns of these two different types of non-EU enforcing courts, and these two scenarios should therefore be examined respectively in this section.

a. Non-application of EU competition law

The potential breach concerning the non-application of EU competition law will be examined first, beginning with a consideration of whether a non-EU enforcing court should raise the non-application of EU competition law *ex proprio motu* even when the parties do not raise the issue.

The answer to this question should be in the affirmative for the non-EU enforcing court which generalises EU competition law as conveying a general competition value and has the incentive proactively to ensure the arbitral tribunal has duly and reasonably examined relevant competition law issues. Therefore, once a non-EU enforcing court of this kind suspects the existence of a serious violation of competition law which was not examined or reflected in the rendered award, the non-EU enforcing court should be allowed to continue its examination until it reasonably reaches its conclusion concerning the severity of the involved anti-competitive behaviour.

However, it is not clear whether such reasoning could also be applicable under the scenario that the non-EU enforcing court merely respects EU competition public policy. The author takes the view that since under these circumstances the public

interest of the non-EU enforcing court is merely to respect EU competition policy and the violation of EU competition law would not actually trigger the competition policy concern of the non-EU state, it would thus be more plausible to propose that the non-EU enforcing court under this scenario would only examine relevant competition law issues when they are raised by the parties, even it does suspect the existence of a potential violation of competition law from its own perspective.

Following the examination on the proactivity of two different types of non-EU enforcing court, the next issue would be the extent to which a non-EU enforcing court should dig into the merits of the dispute to examine relevant competition law issues. As for the non-EU enforcing court which considers a potential violation of EU competition law would also trigger its own public policy concerns, since the award remains silent on relevant potentially anti-competitive conduct, the pointer on the aforementioned spectrum would move towards the legality end, and it is hence proposed that the enforcing court should be able to dig into the merits of the dispute to the extent it considers necessary. As for the non-EU enforcing court which merely respects EU competition public policy, since it was concluded above that a non-EU enforcing court of this kind would examine only relevant competition law issues if put forward by a party, the target of its examination would hence be confined to only the merits as contained in the party's claim. Two potential consequences would follow the examination: if the non-EU enforcing court is persuaded by the parties' claim which manages to prove the high severity of the relevant anti-competitive conduct, the non-EU enforcing court would reckon that conduct to violate EU competition policy and would thus ultimately violate its own public policy to respect EU competition policy, and the enforcement of the arbitral award would hence be refused. Moreover, if the non-EU enforcing court is not convinced, the arbitral award would then be enforced as the non-EU enforcing court would be assured that relevant EU competition policy was not violated, and would thus not violate its own public policy to respect EU competition policy.

Based upon the reviewing pattern proposed above, the last issue to be examined concerns the law applicable to the review conducted by a non-EU enforcing court. An instinctive response is that the competition law of the non-EU enforcing state should be applied since relevant competition law issues are brought before the non-

EU enforcing court and, as discussed above, the law applicable to an enforcing court's examination on relevant public policy issues is the law of the enforcing state.⁵⁷¹ But one might still argue that the relevant potentially anti-competitive behaviour as reflected in an arbitral award, if actually being recognised, would essentially influence the EU, but not the other states', competition legal order, and EU competition law should thus be applied, especially when considering that different jurisdictions may interpret and apply their own competition law in different ways and therefore the conclusion drawn by a non-EU enforcing court by applying the competition law of the non-EU enforcing state may differ from that in applying EU competition law.⁵⁷² However, first, it should be borne in mind that for a non-EU enforcing court, it is not obliged to ensure the compliance of the award with EU competition law. Instead, its own public interest, under the situation of a non-application of EU competition law, would merely be that relevant EU competition law has been duly and reasonably reviewed, and such adequacy would hence be judged under the perspective of the non-EU enforcing court itself. As correctly stated,

'Public policy review is in fact often restricted by operation of a sort of negative 'comity' in accordance with which 'courts should refrain from applying domestic law to foreign cases' ... Positive comity, the actual express taking into account of foreign law, is as yet a rarity.'⁵⁷³

Secondly, even the possibility that the application of the competition law of the non-EU enforcing state would reach a conclusion different to that if applying EU competition law is also unconvincing, especially when finding that, although the difference between different jurisdictions' competition laws 'will not disappear completely, nor should they'⁵⁷⁴, 'professionals in different parts of the world are

⁵⁷¹ See *supra* Section II(B) of Chapter III.

⁵⁷² See, for example, Phillip Landolt (2007) *op. cit.*, *supra* note 463, at 72, in which the author, by questioning that non-EU national courts may not adequately and correctly examine relevant EU competition law issues, opined that a non-EU enforcing court, when being called for determining the legality of an arbitral award concerning EU competition law issues, should not examine the legality of the arbitral award by itself but refer the issue to the national court of the EU Member States which has the connection with the merits of the dispute for determining whether the arbitral award is in conformity with EU competition law.

⁵⁷³ *Ibid*, at 71. See also Ulrich Haas, Articles on the 1958 New York Convention in Frank-Bernd Weigand (ed.), *Practitioner's Handbook on International Arbitration*, Verlag C. H. Beck, Munich, 2002, at p. 521.

⁵⁷⁴ David S. Evans, Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules, *Chicago Journal of International Law*, Vol. 10, No. 1, 2009, at 187.

converging in their views on the purpose of competition policy and the economic principles that underlie it'⁵⁷⁵, and there is hence 'far more similarity among countries in their approaches to competition policy'⁵⁷⁶. One of the most representative examples is that, as stated, Swiss competition law is increasingly modelled upon EU competition law.⁵⁷⁷ It can also be seen from the drafting history that EEC competition law provisions also adapted American practice and experience for reference.⁵⁷⁸ Hence, instead of distrusting non-EU jurisdictions in a general way, it may seem to be more plausible to assume that, at least for the jurisdictions of which their competition laws have certain connections with EU competition law, it would be highly likely that the conclusion drawn by applying their own competition laws would not differ considerably from that of by applying EU competition law.

b. Misapplication of EU competition law

The second scenario to be examined concerns a non-EU enforcing court encountering a potential misapplication of EU competition law. As is the case in the non-application scenario, the misapplication of EU competition law may also be suspected or identified by a non-EU enforcing court, and it follows the reasoning as raised above that, for a non-EU enforcing court which generalises EU competition law as conveying a general competition value, it should be allowed to examine whether the arbitral award actually clearly deviates from a reasonable application of competition law; for a non-EU enforcing court which merely has the incentive passively to respect EU competition public policy, it would examine relevant misapplication only when raised by the parties.

As for the question of the extent of an enforcing court digging into the merits of a dispute, it was discussed above that since under the circumstance of a potential misapplication of EU competition law the arbitral award has already touched upon the relevant anti-competitive behaviour and the tribunal has ruled on it, it would be less legitimate and necessary for the EU enforcing court to re-examine what has been

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Ibid.*, at 186.

⁵⁷⁷ Phillip Landolt (2006) *op. cit.*, *supra* note 36, at footnote 81, p.151.

⁵⁷⁸ See William Diebold, *The Schuman Plan: A Study in Economic Cooperation, 1950-1959*, Council on Foreign Relations, 1959, at 352. See also David J. Gerber (1998) *op. cit.*, *supra* note 400, at pp. 337-339; George W. Ball, *The Past has Another Pattern: Memoirs*, New York: Norton, 1982, at p. 89.

examined by the tribunal. This rationale is also applicable for the reviewing pattern of a non-EU enforcing court, no matter what specific type the non-EU enforcing court is.

Last but not least, the law applicable to a non-EU enforcing court's examination on a potential misapplication of EU competition law should, as concluded above, be the competition law of the non-EU enforcing state: although it is the EU competition legal order which is potentially influenced, the non-EU enforcing court's public interest under this scenario is merely to ensure that relevant EU competition law has been reasonably examined but not the compliance of the arbitral award with EU competition law, and the test would thus be examined under the law of the non-EU enforcing state.

c. Awards running contrary to authoritative decisions

The last scenario concerns a non-EU enforcing court encountering an arbitral award which potentially runs contrary to a Commission or NCA decision. Again, at least theoretically, awards running contrary to authoritative decision could be spotted by either the non-EU enforcing court or the parties' claims, although the author opines that the former situation would be more rarely observed in legal practice as a non-EU enforcing court may not always be aware of a specific Commission or NCA decision.⁵⁷⁹

Once a potential contradiction between an arbitral award and an authoritative decision is spotted or raised, as discussed above, the focus of the examination would be placed upon the actual discrepancy between these two. Therefore, since relevant competition law issues has been reviewed, the non-EU enforcing court should then merely compare the award involved and relevant authoritative decision. If the award actually runs counter to the decision, the non-EU enforcing court would then refuse to enforce the award based upon the enforcement violating its own public policy because either it violates the general competition value it recognises, or it would violate EU competition policy and hence ultimately violate its public policy to

⁵⁷⁹ The author considers that a more plausible situation would be that, although a non-EU enforcing court would not be sensitive enough to suspect a clear discrepancy between an arbitral award and a previous authoritative decision, it may, by perusing the arbitral award, spotting a potential misapplication of EU competition law.

respect a foreign jurisdiction's public policy.

Yet again, the situation may be complicated when a party arguing that the previous authoritative decision suffered from concrete errors or the arbitral tribunal stated its reason for disagreeing with the previous authoritative decision. Several factors should then be considered when proposing the behavioural pattern here of a non-EU enforcing court:

- The first is the fact that relevant EU competition law issues have already been reviewed;
- The second is that relevant EU competition law issues were reviewed by the Commission or an NCA, which, as discussed above, is the official guardian of EU competition law;
- The third concerns the public interest of the non-EU enforcing state. As analysed above, a potential violation of EU competition law may trigger a non-EU enforcing state's public policy if either the non-EU enforcing state recognises the general competition value as reflected in EU competition law as its own public policy, or the non-EU enforcing state deems respecting EU competition policy as its own public policy. Notably, under both scenarios, the potential violation of EU competition law would generally not actually injure the competition order of the non-EU enforcing state.

Given the consideration of these factors, the author thus takes the view that, first, since relevant competition law issues have already been reviewed by the authority which takes the official responsibility of maintaining the competition order within the EU, this creates a strong presumption that relevant competition law issues have been duly and reasonably reviewed, and it so leaves limited room for the non-EU enforcing court to query the legitimacy of the relevant authoritative decision. Secondly, since under both scenarios the competition order of the non-EU enforcing state is not actually influenced, the non-EU enforcing court would, by comparison to an EU national court, be more reluctant to review the authoritative decision, especially for a national courts of a non-EU enforcing state of which the public interest is merely to respect EU competition policy. Hence, when encountering the situation that the legitimacy of an authoritative decision is challenged, the author

suggests that the non-EU enforcing court should generally simply respect the decision and refuse to enforce the arbitral award based upon its own public policy concerns.

A trickier situation, nonetheless, is where the non-EU enforcing court is convinced that the previous authoritative decision may actually be erroneous pursuant to evidence adduced by the parties or the analysis made by the arbitral tribunal in its award. Under this situation, it may be argued that since the non-EU enforcing court could not ensure that EU competition law has been reasonably reviewed, its public interests, no matter whether it is to respect the general competition value or to merely respect EU competition policy, could arguably not be satisfied. A key question is thus raised: should the non-EU enforcing court then examine the legitimacy of the authoritative decision on its own and then determine the fate of the award?

One may argue that since both the Commission and NCAs decisions have their own reviewing channels, the non-EU enforcing court is not in the appropriate position to interfere with a decision made by relevant authorities under EU law. As mentioned above, the Commission decision could still be subject to the ECJ's review⁵⁸⁰ and the NCAs decisions could be reviewed by EU national courts⁵⁸¹ as well as the ECJ⁵⁸², even when it is final.

Although fairly persuasive, this argument could still be countered that these reviewing channels are designed for EU national courts, but not for non-EU national courts. For example, Article 267 TFEU merely provides the possibility of an EU national court referring issues to the ECJ for preliminary rulings but not for a non-EU court to do so; a reference lodged by a national court of a non-member state is inadmissible.⁵⁸³ Therefore, since these reviewing mechanisms may not be applicable before a non-EU enforcing court, the non-EU enforcing court should then examine the legitimacy of relevant EU authoritative decisions by its own.

However, this counterargument may omit the possibility that a non-EU enforcing court may refer the issue back to a national court of an EU Member State which has a

⁵⁸⁰ See Article 31 of the Regulation 1/2003.

⁵⁸¹ See Article 9(1) and (2) of the Directive 2014/104/EU.

⁵⁸² See Article 9(3) of the Directive 2014/104/EU.

⁵⁸³ For a discussion of the issue see Cases T-377 etc./00 *Philip Morris International and ors v. Commission* [2003] ECR II-1.

connection with the case at hand, e.g. an EU national court which would have jurisdiction to hear the dispute had the parties not agreed to arbitrate their dispute, and the EU national court could hence apply relevant mechanism further to review the authoritative decision.⁵⁸⁴ Following this approach, the non-EU enforcing court could on the one hand avoid the inappropriate interference with a foreign judgment which would be certainly better reviewed via its own reviewing process, whilst on the other ensure that relevant competition law issues could be reasonably reviewed so that the non-EU enforcing state's own public interest could be satisfied.

It should, notwithstanding, be noted that this approach would to a certain extent run counter to the pro-enforcement bias of the NYC as it may prolong considerably the process of enforcement, especially when considering the possible heavy caseload an EU Member State's national court may have. This is hence essentially the choice between prioritising the pro-enforcement bias of the Convention and respecting the internal reviewing process of a jurisdiction. From the author's viewpoint, although the principle of favouring enforcement has been steadily established, it should not be able to outweigh a jurisdiction's judicial procedure. The latter concerns the exclusive jurisdiction of a state's (or a transnational organisation's) higher judicial authority (such as the ECJ) reviewing the judgments or decisions made by a lower judicial authority (such as the Commission), which should not yield to the former which merely concerns the discretionary pro-enforcement *bias*, but not the mandatory pro-enforcement *obligation*, of an international convention. Therefore, when a non-EU enforcing court encountering a decision made by an EU authority, it should not review the decision on its own but to refer the decision back to relevant reviewing process. Yet, it should be noted that this approach should be applied only with extreme caution and only when the non-EU national court is convinced that the previous authoritative decision may actually be seriously flawed, which in the author's view is unlikely to arise commonly in practice.

Following the discussion above, it is therefore proposed that non-EU enforcing

⁵⁸⁴ This idea derives from Phillip Landolt's suggestion in Phillip Landolt (2007) *op. cit.*, *supra* note 463, at 72, in which he suggested that when a non-EU enforcing court encountering a potential violation of EU competition law, the enforcing court should not examine the issue by its own but refer it to a connected EU national court, and the enforcing court would determine whether to enforce the arbitral award based upon the result of the EU national court's examination.

courts should generally respect and follow the authoritative decisions made by the Commission or NCAs but not examine the legitimacy of such decision on its own. When serious errors in an authoritative decision could plausibly be adduced by the parties, the author suggests that the non-EU enforcing court could refer the issue back to an EU national court which is connected to the case involved so that the EU national court could then apply the reviewing mechanism as provided in relevant EU law to review the authoritative decision. Notably, this approach should be cautiously applied as it would to a certain extent prolong the enforcement process, and therefore only when the non-EU enforcing court considers it necessary should the approach be applied.

III. The reflection on the behavioural pattern of enforcing courts reviewing potential breaches of EU competition law

It is undeniable that the vitality of a dispute resolution mechanism lies in the enforceability of the judicial decisions made through it, and this is also the case for international arbitration. With the principle of pro-enforcement being steadily upheld and standing the test of time, it could be naturally expected that the legality of arbitral award should rarely be doubted, and the merits of dispute rarely touched upon.

But, equally, the vitality of a dispute resolution mechanism lies also in the general reliability of its judicial decisions. While the so-called *prima facie* review prevails in shaping the behavioural pattern of enforcing courts reviewing international arbitral awards, the legality of an arbitral award is still not necessarily settled and the inertia of applying *prima facie* review should not subliminally drive an enforcing court to treat that legality as a mere superficial pillar of international arbitration of no substantial importance: the awkward situation in *SA Thalès Air Défense v. GIE Euromissile* as discussed above should hence be avoided.

It is therefore still necessary to remain vigilant on how well the balance is struck between the finality and legality of an arbitral award, especially when the traditional weight ratio between these two parameters oscillates when international arbitration steps into unfamiliar public law territory. The starting point would hence be to examine whether the orthodox *prima facie* review can always ensure the

maintenance of a reasonable level of legality, or more specifically, whether *prima facie* review can always enable an enforcing court to spot the manifest violation of relevant public policy since it is a widely-recognised rule of thumb that only flagrant and concrete violations of public policy trigger public policy defence under the NYC. The research conducted in this section challenged the orthodoxy and raised a counter-example: when encountering an arbitral award concerning EU competition law, the traditional and prevailing *prima facie* review may not always spot the manifest violation of EU competition law under certain circumstances owing to the strong fact-intensity of competition law issues. This finding then triggers the thought that *prima facie* review should not be a steady default choice, of which the application should be subject to the extent that an enforcing court could reasonably reach the conclusion on the severity of an involved behaviour which may trigger the public policy defence before the enforcing court: if *prima facie* review could adequately reveal a manifest violation, then it should be applied; if not, a further step digging into the merits of dispute should take place.

Once the default application of *prima facie* review is reasonably challenged, the following question is how the balance between the finality and legality of an arbitral award concerning a specific public interest should be resolved. Through the research on the reviewing pattern of enforcing courts examining arbitral awards concerning EU competition law, two key parameters should be particularly focused. The first concerns the manifestation of the violation of relevant public policy as reflected in an arbitral award, which may essentially influence the balance point between finality and legality. For example, as shown in the analysis above, an EU enforcing court would be prone to focus more on the legality of an arbitral award concerning EU competition law issues if relevant issues have not been examined by the arbitral tribunal or not reflected in the arbitral award, whilst this EU enforcing court would tend to prioritise the finality of arbitral award if relevant issues have already been examined and reflected in the arbitral award. The second concerns the specific obligation as borne by an enforcing court when encountering a potential violation of a specific public policy. For example, as analysed above, an EU enforcing court would on its own motion examine the non-application of EU competition law since it is obliged to ensure the full and uniform application of EU competition law and

hence the compliance of an arbitral award to EU competition law, whilst a non-EU enforcing court which is merely motivated to respect EU competition public policy would only examine relevant competition law issue under its own competition law when the issue is raised by the parties.

It hence follows the research of this Chapter that the interrelationship between the finality and legality of arbitral award should not be a single-ended model which over-emphasises the importance of the finality of arbitral award and to a large extent underestimates the importance of legality. Although it was once opined that public policy is ‘a very unruly horse’⁵⁸⁵ and ‘once you get astride it you never know where it will carry you’⁵⁸⁶, such misgivings based upon the strong respect of the finality of arbitral award should not be an excuse to marginalise the public policy defence as clearly listed in the NYC, and hence the legality of arbitral award. With the thought that the balance between finality and legality should be struck being borne in mind, a more reasonable way is thus to explore a more comprehensive behavioural pattern based upon the examination of relevant parameters to carefully ride on this ‘unruly horse’, rather than taming it by unconditionally limiting the examination of public policy issues and then keep it in the stable. Although public policy has been opined to be a ‘rather obtrusive, not to say blundering, steed in the law reports’⁵⁸⁷ and ‘at times the horse has looked like even less accommodating animals’⁵⁸⁸, it would be more effective if it could be applied in a more comprehensive and systematic way, and hopefully it would eventually become a Pegasus that could shake off the unnecessary chains on it.⁵⁸⁹

⁵⁸⁵ *Richard v. Mellish* [1824] 2 Bingham 229 (Court of Common Pleas), 130 E.R. 294, at 252.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Percy H. Winfield, Public Policy in the English Common Law, *Harvard Law Review*, Vol. 42, No.1, 1928, at 91.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*

Chapter VI – Examining the application of Article V(1)(e) of the NYC under the scenario of enforcing foreign arbitral awards concerning EU competition law disputes

After examining the application of Article V(2)(b) of the NYC under the scenario of enforcing foreign arbitral awards concerning EU competition law disputes, the last ground to be examined is Article V(1)(e) of the Convention. As discussed above,⁵⁹⁰ a remaining uncertainty of the interrelationship between a seat court and an enforcing court lies in that, when the public policy of the arbitral seat is understood by the enforcing court as covering either the enforcing court's fundamental domestic public interest or a generally recognised public value, what specific standard the enforcing court should apply to decide whether to follow the seat court's annulment decision which was made based upon the violation of the seat's public policy. Should the enforcing court re-examine what the seat court has examined to ensure that the seat court has performed in the way which it would have performed if the public policy issue is directly raised before it after the award was rendered? Or should the enforcing court fully trust the seat court and simply follow the seat court's decision?

I. Exploring the interrelationship between seat courts and enforcing courts when examining EU competition law issues: three potential scenarios

This uncertainty will be examined in this Chapter under the scenario that an arbitral award concerning EU competition law dispute has been reviewed by a seat court and is then brought before an enforcing court for enforcement. As discussed above,⁵⁹¹ EU competition law would trigger the public policy concern of both EU, and under certain circumstances, non-EU States. Since it is entirely possible that an EU or a non-EU national court could act as the court of seat or the court of enforcement in an international arbitration, the question as raised above should hence be examined under a higher-resolution microscope, and three main scenarios will be delved into, namely that both the seat and the enforcing state are EU Member States, either the seat or the enforcing state is an EU Member State, and neither the seat nor the

⁵⁹⁰ See *supra* Section IV(B) of Chapter III.

⁵⁹¹ See *supra* Section I(A) of Chapter V.

enforcing state is an EU Member State.

A. Both the seat and the enforcing state are EU Member States

The first scenario to be examined is that both the seat and the enforcing states are EU Member States.

When considering the interrelationship between two national courts on relevant public policy issues in an international arbitration, since different courts might bear different obligations under their own public policy, the key of this interrelationship would therefore lie in whether fulfilling the obligation of one could simultaneously fulfil the obligation as borne by another. If the answer is always in the affirmative, then the enforcing court should automatically follow the seat court's decision on the potential violation of EU competition law. If the answer is not always affirmative, a more comprehensive interrelationship should accordingly be proposed.

Following this formula, the interrelationship between two EU national courts could easily be shaped: since both courts bear the same obligation to ensure the uniform application of EU competition law and hence the compliance of an arbitral award to EU competition law, it could be reasonably inferred that once relevant potential anti-competitive behaviour has been reviewed by an EU seat court, an EU enforcing court's obligation would be automatically fulfilled, and it should hence simply follow the decision made by the EU seat court.

Nonetheless, it should be noted that the actual application of this interrelationship may be hindered by two potential obstacles. The first lies in a plausible interpretation of Article XI(1) of the European Convention on International Commercial Arbitration (hereinafter the 'European Convention'). This Article, by taking a step further than the UNCITRAL Model Law, intentionally provides that the enforcement of an arbitral award could not be refused based upon the fact that the award has been set aside by the seat court due to substantive public policy concern. It seems that the European Convention lifts the pro-enforcement principle to another level, and it is strongly implied that it is the enforcement state's public policy which matters most. As being rather bluntly pointed out:

‘[I]t would have been completely illogical to have provided for public policy

as a ground for the setting aside of an award *with international effect*. Otherwise the situation might well arise in which an award made in State A, between nations of State B and State C, which was to be enforced in either State B or C, could not be because it had been set aside in State A as violating public policy, and notwithstanding the fact that the award was not contrary to the public policy of either State B or C.’⁵⁹²

Moreover, as stated,

‘It is submitted that it would not be in conformity with the spirit of Art. IX to refuse enforcement of an award when suspension has been ordered on the basis of a ground for setting aside *having no international effect* within the meaning of Art. IX(1).’⁵⁹³

Therefore, under the scenario that both the seat and the enforcing state is an EU Member State and both of them are Contracting States of the European Convention,⁵⁹⁴ the enforcing court would hence simply not need follow what the seat court has examined and review the potential violation of EU competition law by its own and under its own reviewing standard.

This interpretation of Article IX of the European Convention, notwithstanding, involves a *non sequitur* and would hardly be tenable therefore. Removing ‘public policy’ from the grounds presents the resolution of the European Convention’s drafters of further facilitating the uniform enforcement formula within its Contracting States -- domestic public policy which is not recognised by all the Member States should not be treated as a legitimate ground for disturbing the enforcement of an arbitral award before the enforcing court of a Contracting State. In this respect, the European Convention ‘goes further than the New York Convention

⁵⁹² P. I. Benjamin, Notes: The European Convention on International Commercial Arbitration, 37 *British Year Book of International Law*, 1961, at 494. Emphasis added.

⁵⁹³ Dominique T. Hascher, European Convention on International Commercial Arbitration of 1961 – Commentary, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 2011 - Volume XXXVI*, Kluwer Law International, at p. 540. Emphasis added.

⁵⁹⁴ The contracting parties of the European Convention are: Albania, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Croatia, Cuba, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Kazakhstan, Latvia, Luxembourg, Montenegro, North Macedonia, Poland, Republic of Moldova, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Turkey and Ukraine.

and so avoids the problem of local annulments⁵⁹⁵. However, the drafters may have neglected the possibility that certain value, such as EU competition legal order, would gradually evolve to become part of the public policy concern of both a seat and an enforcing state which are also the Member States of the European Convention. Therefore, a possible unsatisfactory situation would be that, for example, an EU enforcing court, by applying Article IX(1) of the European Convention, ignores the annulment judgment on an arbitral award concerning EU competition law as made by an EU seat court on the ground that the enforcement would violate EU competition policy. However, since ensuing the uniform application of EU competition law is also the EU enforcing court's public policy, it would hence re-examine relevant EU competition law issues, even though relevant EU competition law issues have already been examined by another EU Member States' national court. Such repetition would likely to be meaningless and may thus unnecessarily prolong the process of enforcement.

Therefore, the author's view is that only pure domestic public policy should be filtered by the European Convention, and the Convention should leave a certain breathing space for public policy, such as EU competition law, which has the observable potentiality of generating regional or even international effect. Hence, Article IX(1) of the European Convention should not be interpreted as allowing such exclusion of annulment judgment which is made based upon the violation of a public policy which has a regional or quasi-international effect, such as EU competition law, and it should therefore not be able to hinder an EU enforcing court from trusting and following an EU seat court's decision on whether an arbitral award violates EU competition law.

The second obstacle, and the more cogent one, concerns the potential disparity between the attitudes of an EU seat court and an EU enforcing court on relevant potential anti-competitive behaviour. More specifically, a disparity may appear in two situations. The first, and also the more likely, concerns that the seat court and the enforcing court apply two different reviewing patterns. This was the case in *SNF v.*

⁵⁹⁵ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter (2009) *op. cit.*, *supra* note 1, at para. 11.126.

Cytec,⁵⁹⁶ in which the seat court, i.e. the Brussels *Tribunal de première instance*, annulled the arbitral award based upon its in-depth review whilst the enforcing court, i.e. the *Cour d'appel de Paris*, granted the enforcement based upon its *prima facie* review. The second situation concerns a much rarer situation that the seat court and the enforcing court, although applying the same reviewing pattern, reach different conclusions on the potential anti-competitive behaviour and hence on whether to enforce the arbitral award.

Once such disparity occurs, the EU enforcing court would then have a final say on the fate of the arbitral award since it does not need to follow the EU seat court's decision, and the aforementioned general compliance of an EU enforcing court to an EU seat court's decision may therefore not be observed. Under this situation, since the correctness of the EU enforcing court's decision could not be guaranteed, it is possible that the uniform application of EU competition law may not be maintained. A plausible way to eliminate this potentiality would be to suggest the EU enforcing court, when encountering an EU seat court's decision with which it does not agree, to invoke Article 267 TFEU and ask the ECJ for a preliminary ruling on the core legal issues concerning the interpretation of relevant EU competition law as reflected in the disparity, as the existence of such disparity between two EU Member States should be sufficient to trigger the alert that EU competition law may not be uniformly applied. Notwithstanding, the feasibility of this suggestion would essentially rely upon the willingness of the EU enforcing court, since the mere existence of a disparity would not necessarily lead to the incorrectness of the EU enforcing court's decision, and it may thus not doubt the legitimacy of its own judgment and reckon that it is not necessarily to ask the ECJ for the preliminary ruling.

Another proposal would be to invite the ECJ to rule on what reviewing pattern (the in-depth one, the *prima facie* one, or a specific pattern lies in the middle) an EU national court should apply when examining potential anti-competitive behaviours. Although this would still not completely eliminate the possibility that EU competition law be not uniformly applied since as stated above that it is still, at least

⁵⁹⁶ *SNF SAS v. Cytec Industries BV, Tribunal de première instance de Bruxelles*, 8 Mar. 2007 [2007] Rev. Arb. 303.

theoretically, possible that an EU seat court and an EU enforcing court would apply the same reviewing pattern but reach different conclusions, it could be reasonably expected that the scenario that a disparity caused by different courts applying the same reviewing pattern would be much rarer than a disparity caused by different courts applying different reviewing patterns, and this proposal would thus be an ideal first-step towards the uniform application of EU competition law. As stated, it is ‘regrettable and astonishing that none of the domestic courts found it worthwhile to ask the ECJ for guidance concerning the scope of court review required under community law’⁵⁹⁷ and hopefully ‘on the next occasion, the question will be put to the ECJ’⁵⁹⁸. Nevertheless, before the ECJ actually rules on this issue, it could be expected that the specific interrelationship between an EU seat court and an EU enforcing court would still be subject to a certain randomness.

B. Either the seat or the enforcing state is an EU Member State

The next scenario to be looked at is that either the seat or the enforcing state is an EU Member State, which could then be further subdivided into two sub-situations, namely when the seat is an EU Member State whilst the enforcing state is a non-EU state, and when the seat is outside the EU whilst the enforcing state is in the EU.

Following the formula as raised above that the interrelationship between a seat court and an enforcing court in an international arbitration would essentially depend on whether the fulfilment of one’s obligation would also fulfil the obligation of another’s, the starting point of shaping the interrelationship between an EU (or a non-EU) seat court and a non-EU (or an EU) enforcing court is thus to understand the obligations as borne by each court, which essentially depends on their attitudes towards the importance of EU competition law.⁵⁹⁹

As for the former, the unquestionable supremacy of EU competition law as well as its exigent legal requirement of uniform application would cause the direct internalisation of EU competition law in EU Member States’ public policy. Conversely, as for the latter, although under certain circumstance EU competition

⁵⁹⁷ Christoph Liebscher, ‘Chapter 23 EU Member State Court Application of *Eco Swiss*: Review of the Case Law and Future Prospects’, in Gordon Blanke & Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011, at para. 23-111.

⁵⁹⁸ *Ibid.*

⁵⁹⁹ See *supra* Section I(A) of Chapter V.

law may trigger the public policy concern of a non-EU national court, it would only trigger the concern in an indirect way.⁶⁰⁰ Such essential difference would then lead to different obligations as borne when encountering an arbitral award concerning EU competition law issue. As examined and proposed in Chapter V above, a non-EU national court, if connecting EU competition law with its own public policy concerns, may either *actively or passively* ensure that relevant competition law issues have been duly and reasonably reviewed,⁶⁰¹ whilst an EU national court would be obliged to guarantee the compliance of the arbitral award to EU competition law.

1. The arbitral seat is an EU Member State whilst the enforcing state is a non-EU state

In the situation in which the seat is an EU Member State whilst the enforcing state is a non-EU state and the EU seat court has examined relevant potential violation of EU competition law, it is reasonable for the non-EU enforcing court to expect that, because an EU Member State's national court, which bears the obligation to ensure the effective and uniform application of EU competition law, has already examined the potential violation of EU competition law and made its own decision, the question as whether relevant competition law issues have been duly and reasonably reviewed, which is what the non-EU enforcing court would concern pursuant to their own public interests, would have also been examined by the EU seat court, and its obligation would have hence also be fulfilled. Therefore, under the scenario that the seat is an EU Member State whilst the enforcing state is outside the EU, it seems to be logical to propose that the non-EU enforcing court should automatically follow the decision made by the EU seat court.

This proposal, however, omits the subtle distinction between a non-EU enforcing court which merely has the incentive to respect EU competition public policy and a non-EU enforcing court which generalises EU competition law as a general competition value.

⁶⁰⁰ i.e. either because the non-EU national court have the incentive to respect EU competition legal order or because the non-EU national court understands EU competition law as conveying a general competition value which is also understood by the non-EU state as its public interest.

⁶⁰¹ Although this conclusion was drawn under the situation that the non-EU national court is the enforcing court of an international arbitration, the author opines that it would not be changed if the non-EU national court is now the seat court of an international arbitration.

As for a non-EU enforcing court of which the public interest is merely to respect EU competition policy, since relevant competition law issues have been examined by an EU Member State's national court, its public interest to respect EU competition policy would not require it to go further and would lead to automatic compliance with the EU seat court's decision. Under this scenario, such respect would be more of a political gesture than an actual action.⁶⁰²

But the situation would be different for a non-EU enforcing court of which the public interest compels to respect general competition value it cherishes. A non-EU enforcing court of this type would essentially apply its own standards in assessing whether the enforcement of an arbitral award concerning EU competition law satisfies its own public interest. A potential disparity may hence arise when the reviewing standards applied by the EU seat court and the non-EU enforcing court does not match. For example, if the enforcing court in *Thalès*⁶⁰³ were a non-EU national court which applies a relatively in-depth reviewing pattern as proposed above⁶⁰⁴. It might query the legitimacy of the decision made by the seat court, i.e. the *Cour d'appel de Paris*, based upon a *prima facie* review that a market partitioning agreement did not violate EU competition law, and doubt that its public policy to respect general competition value is not fulfilled by the examination of the EU seat court. Another example would be that although an EU seat court, such as the Brussels *Tribunal de première instance* in *SNF*⁶⁰⁵, by applying a rather stringent reviewing standard on an arbitral award concerning EU competition law, vacated the award, the non-EU enforcing court, if not reckoning such stringency necessary and holding that its own public interest has already been satisfied, may eventually

⁶⁰² Although one might argue that under Article IX(1) of the European Convention on International Commercial Arbitration, if both the EU seat and the non-EU enforcing state are the Contracting States of the European Convention, the non-EU enforcing court could then not simply follow the EU seat court's annulment decision based upon relevant violation of EU competition policy since this Article provides that setting-aside an arbitral award due to the violation of public policy should not be a legitimate ground for non-enforcement, and therefore the non-EU enforcing court could then not simply follow the annulment decision. Nonetheless, as analysed above, this Article should not be interpreted as allowing such exclusion of annulment judgment which is made based upon the violation of a public policy which has a regional or quasi-international effect, such as EU competition law, and it should therefore not be able to hinder a non-EU enforcing court following an EU seat court's annulment decision based upon the violation of competition policy.

⁶⁰³ *SA Thalès Air Défense v. GIE Euromissile, Cour d'appel de Paris* (1re Ch. C), Not Indicated, 18 November 2004.

⁶⁰⁴ See *supra* Section II(B)(2)(b) of Chapter V.

⁶⁰⁵ *SNF SAS v. Cytec Industries BV, Tribunal de première instance de Bruxelles*, 8 Mar. 2007 [2007] Rev. Arb. 303.

approves the enforcement of the award. Besides, another potential disparity may appear when the EU seat court and the non-EU enforcing court, although applying the same reviewing pattern, reach different conclusions on the potential anti-competitive behaviour and hence on whether to enforce the arbitral award.

Based upon this consideration, the author therefore takes the view that it would be more practical to propose at this point that, by being aware of the potential disparity of the reviewing patterns as applied by an EU seat court and a non-EU enforcing court or the examination results drawn by both the seat court and enforcing court, a non-EU enforcing court which bears an active obligation should be allowed first to consider the reasoning of the decision made by an EU seat court and then decide whether it would follow the decision under its own reviewing standards.

2. The arbitral seat is a non-EU state whilst the enforcing state is an EU Member State

Furthermore, under the situation that the seat court is a non-EU national court whilst the enforcing court is an EU national court, as analysed above,⁶⁰⁶ a non-EU seat court would examine relevant competition law issues based upon its own public interest which merely drives it either to respect EU competition policy or respect the general competition value but not actually ensure the compliance of the award with EU competition law. Even when the non-EU seat court does reckon that its public interest is not satisfied and decides to examine relevant violation of competition law, it would do so by applying its own law, but not EU competition law.⁶⁰⁷ Therefore, it could be plausibly argued that the examination on relevant competition law issues made by a non-EU seat court would not automatically fulfil the obligation borne by an EU enforcing court which is to ensure the compliance of the award with EU competition law, and hence the EU enforcing court need not follow the seat court's decision and decide whether to enforce the award on its own.

This proposal, however, should not be taken to mean that the non-EU seat court's

⁶⁰⁶ See *supra* Section II(B)(2)(b) of Chapter V.

⁶⁰⁷ It has been discussed and proposed above in *supra* Section II(B)(2)(b) of Chapter V that a non-EU enforcing court may examine relevant competition law issues under its own competition law. The author reckons that this behavioural pattern concerning a non-EU enforcing court examining an arbitral award without any previous decision made by other national court could also be applicable under current scenario that a non-EU seat court examining an arbitral award since under this scenario the non-EU seat court would also be the first judicial authority examining the arbitral award.

decision would be trivial, and the EU enforcing court would always re-examine relevant EU competition law issues. Here is where the consideration of the convergence of competition law comes into play. As stated, the convergence of competition law has been a ‘lurking possibility in discussions of transnational competition law development’⁶⁰⁸ which could ‘narrow differences among some states in some areas of competition law’⁶⁰⁹ and ‘facilitate the transmission of ideas and information’⁶¹⁰, and the phenomenon that competition principles are increasingly converging and may even be the same across many jurisdictions⁶¹¹ can therefore be observed. Following from this observation, it would be increasingly untenable for an EU enforcing court to presume to distrust that the decision on a potential violation of EU competition law as made by a non-EU seat court, although under the non-EU seat court’s law, would not be consonant with EU competition law as a default. A more reasonable way, from the author’s viewpoint, would therefore be that the EU enforcing court first consider the reasoning of the non-EU seat court’s decision and examine its *adequacy* (namely whether the reasoning given by the non-EU seat court in its decision could adequately lead to the conclusion it drew), and *applicability* (namely whether the decision made by the non-EU seat court under its own competition law could also be applicable when the decision being reviewed under the context of EU competition law). If the answer is in the affirmative, no further examination would be required and the non-EU seat court’s decision should be followed; if the answer is in the negative, the EU enforcing court should then be allowed to examine relevant competition law issues under the reviewing standard as proposed in Chapter V, and make its own decision on the fate of the arbitral award.

C. Neither the seat nor the enforcing state is an EU Member State

The last scenario to be looked at arises where neither the seat nor the enforcing state is an EU Member State. Again, the key of examination is to figure out whether the fulfilment of a non-EU seat court’s obligation would automatically fulfil the obligation as borne by a non-EU enforcing court.

⁶⁰⁸ David J. Gerber, *Global Competition: Law, Markets, and Globalization*, Oxford University Press, 2010, at p. 292.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

⁶¹¹ See *supra* Section I(A)(2) of Chapter V.

As stated above, there are two types of non-EU court of which the public policy concerns could be triggered by potential violations of EU competition law. The first is non-EU national courts which merely have the incentive to respect EU competition public policy, of which the obligation as borne when encountering an arbitral award concerning EU competition law is *passively* to ensure that relevant competition law issues have been duly and reasonably reviewed. The second is non-EU national courts which interpret EU competition law as conveying a general competition value, of which the obligation is *actively* to ensure that relevant competition law issues have been duly and reasonably reviewed. Based upon these two different obligations, the following interrelationship between a non-EU seat court and a non-EU enforcing court could hence be proposed. First, since a non-EU court which merely respects EU competition public policy plays essentially a passive role, it would simply follow the non-EU seat court's decision (no matter which type of non-EU court) when it acts as an enforcing court since its attention would be placed upon the fact that relevant competition law issues have been examined by the seat court but not upon the correctness of the seat court's decision. Secondly, as for a non-EU court which interprets EU competition law as a general competition value, since it essentially plays an active role, it would be motivated to examine relevant competition law issues under its own competition law by applying its own reviewing standard when acting as an enforcing court. Under this circumstance, since relevant competition law issues have already been examined by a non-EU seat court, by considering the legal certainty of international arbitration, it is hence proposed that the non-EU enforcing court should first peruse the reasoning as shown in the non-EU seat court's decision: if it is satisfied by the decision under its own reviewing pattern, the decision should be followed; if it is not, it should then examine relevant competition law issues under its own law and reviewing standard, and determine whether to enforce the arbitral award.

II. The reflection on the interrelationship between seat courts and enforcing courts when examining EU competition law issues

The existing framework as laid down in the NYC leaves certain uncertainty in the interrelationship between seat courts and enforcing courts. Whilst a clearly-defined relationship is called for, the Convention merely provides a suggestive option that

once an arbitral award has been vacated by a seat court, the enforcing court has discretion whether to refuse enforcement or not. Such uncertainty, as discussed above,⁶¹² would even increase under the scenario that an arbitral award has been vacated based upon its violation of the seat's public policy but still be brought before an enforcing court for enforcement – since the enforcing court is not obliged to follow the seat court's decision on relevant public policy issue, the interrelationship between a seat court and an enforcing court when encountering a potential violation of public policy would to certain extent be subject to randomness.

Within all the potential situations concerning such interrelationships, the most intractable one arises where a seat court and an enforcing court of an international arbitration both recognise a specific public interest. As revealed in this Chapter, although a specific public interest may trigger the public policy defence of both a seat court and an enforcing court, the importance as attached to the public policy by these two courts may differ, which would then lead to the difference of their actual reviewing behaviour between the two courts and thus influence the interrelationship between them. Therefore, when both courts have the chance to examine an arbitral award concerning this specific public policy, a practical conundrum would emerge: which court should have a final say on the fate of the award?

The research in this Chapter hence intends to contribute to answer this question by exploring a plausible formula of shaping the interrelationship between a seat court and an enforcing court when examining public policy issues. Based upon the concept raised in Chapter V that the reviewing pattern of a national court examining relevant public policy issues depends essentially upon the specific obligation it bears under the specific public policy, the research in this Chapter carries on to propose that the interrelationship between a seat court and an enforcing court under a specific public policy would essentially depend upon whether the fulfilment of the seat court's obligation could automatically fulfil the obligation as borne by the enforcing court. This then leads to a three-step examination, which would start with specifying the obligation as borne by a seat court and an enforcing court under a specific public policy. For instance, in the example of reviewing arbitral awards concerning EU

⁶¹² See *supra* Section IV(A)(3)(c) of Chapter III, that an enforcing court under Article V(1)(e) of the NYC would not be impliedly expected to follow an seat court's annulment decision made based upon the violation of the seat's public policy.

competition law issues, the obligation as borne by an EU Member State's national court would be to ensure the compliance of the arbitral award with EU competition law, whilst the obligation as borne by a non-EU national court may be merely passively to ensure that relevant competition law issues have been duly and reasonably examined. After specifying the obligations, the examination would then take its second step to determine what the seat court and the enforcing court would do to fulfil their obligations. For example, an EU Member State's national court would proactively examine the reasoning of an arbitral award under EU competition law whilst a non-EU national court would examine the reasoning of an arbitral award under its own competition law. Also, as could be seen in the research of this Chapter, certain parameters, such as the specific reviewing patterns as applied by a seat court and an enforcing court, may also come into play.⁶¹³ Following the first two steps, the final step is then to make a comparison between the required actions of both the seat court and the enforcing court to shape the specific interrelationship between these two courts.

Although this three-step examination is a mere proposal and remains still to be examined and recognised in legal practice, it essentially conveys the idea that the interrelationship between a seat court and an enforcing court when encountering an arbitral award concerning a specific public interest should be further refined for the purpose of increasing the legal certainty of international arbitration. Indeed, such interrelationship would usually be an uneasy one since as revealed in the research of this Chapter that the establishment of a systematic interrelationship would almost inevitably require the involvement of multiple influence factors. But this does not mean it should remain untackled and unresolved, and a revisiting of it under the scenarios of reviewing arbitral awards concerning not only EU competition law but also other public interest is hence strongly encour

⁶¹³ This, notwithstanding, does not necessarily mean that when examining public policy concerning other public interest, the difference in reviewing patterns as applied by a seat court and an enforcing court should also be brought into consideration. The key lies in whether different reviewing patterns are likely to lead to different results of review.

Chapter VII – A potential rivalry between the protection of public interests and the respect of procedural autonomy

Following the analysis and discussion in the previous chapters, a comprehensive behavioural pattern concerning an enforcing court examining an arbitral award concerning strong public interest has thus been proposed. Notwithstanding, the research does not end here, as there is still a missing piece of jigsaw which should be taken into consideration, namely the procedural autonomy of the enforcing state.

It is not uncommon that in legal practice an enforcing court would require to follow certain procedural rules, usually contained in its national arbitration rules, civil procedural laws or case law to prevent a relevant public interest issue⁶¹⁴ as reflected in an arbitral award from being re-raised before it. One of the most representative examples would be that certain courts have endorsed the proposition that a substantive complaint will not be entertained as a public policy complaint at the enforcing stage if it existed at the time of the tribunal proceedings and it could have been raised before the arbitral tribunal.⁶¹⁵ Such procedural rules, although intends to maintain the ‘justice, reliance and practicality’⁶¹⁶ of international arbitration, may lead to certain inapplicability of the behavioural patterns as proposed above. For instance, in a hypothetical case that the losing party failed to raise relevant public policy concern before the tribunal and the annulment court but raise it only at the enforcement stage, based upon the consideration of procedural autonomy, an enforcing court which forbids a public policy complaint being raised if it could have been raised in earlier stages would dismiss the losing party’s argument. However, this may potentially lead to the violation of relevant public policy if such public policy concern is indeed plausible and following the rationale of the concern the involved behaviour as reflected in the arbitral award would actually effectively violate the public policy of the enforcing state. Therefore, in such a potential rival between the protection of public interests and the respect of procedural autonomy, a question is raised: which should prevail, the former or the latter?

⁶¹⁴ Which concerns both the arbitrability and public policy issues.

⁶¹⁵ See, for example, *Soinco SACI & Anor v. Novokuznetsk Aluminium Plant & Ors* [1998] C.L.C 730 (CA).

⁶¹⁶ *Epis S.A. v. Roche Diagnostics GmbH*, District Court of Jerusalem, Israel, 23 November 2004, in Albert Jan van den berg (ed), *Yearbook Commercial Arbitration 2006 - Volume XXXI*, Kluwer Law International, at p. 786.

This issue was examined by the ECJ in *Van Schijndel & Van Veen*⁶¹⁷ which concerned the application of EC competition law, although not in the context of international commercial arbitration. In this case, both applicants were physiotherapists and challenged the requirement of compulsory membership of the Physiotherapists' Pension Fund in the Netherlands. One succeeded and one failed before the *Kantonrechter* at Breda and Tilburg respectively, but on appeal to the Breda *Rechtbank*, both applications were dismissed and the Fund succeeded. Both applicants then brought their pleas before the *Hoge Raad*, arguing for the first time that the appeal court should have considered, if necessarily of its own motion, the question of the compatibility of compulsory fund membership with Community competition law. However, in Dutch law a plea in cassation of this kind involving a new argument could be made only if it required no examination of facts, and the pleas of both applicants did raise new issues of facts. Hence, the *Hoge Raad* made a preliminary reference to the ECJ, asking whether under such circumstances it was required to apply EC competition law even where its own national procedural law is clearly against such application.

The ECJ stated in its preliminary ruling that, first, in the absence of Community rules governing such issue, it was for the Member States' legal systems to lay down the detailed procedural rules governing actions for safeguarding the direct effect of Community law.⁶¹⁸ Secondly, and more importantly, such detailed procedural rules must not be 'less favourable than those governing similar domestic actions nor render *virtually impossible or excessively difficult* the exercise of rights conferred by Community law'⁶¹⁹.

⁶¹⁷ Case C-430-431/93 *Van Schijndel & Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, [1995] ECR I-4728.

⁶¹⁸ *Ibid.*, at para. 17.

⁶¹⁹ *Ibid.* Emphasis added. It should be noted that the approach as taken by the ECJ in examining whether a national procedural rule actually renders virtually impossible or excessively difficult the exercise of rights conferred by Community law has been heavily criticised. For example, it was argued that it is difficult to reconcile *Van Schijndel* and *Peterbroek*. See Diederik de Groot (2011), *op. cit.*, *supra* note 504, at para. 16-072. See also G. De Búrca, National Procedural Rules and Remedies: The Changing Approach of the Court of Justice and F. G. Jacobs, Enforcing Community Rights and obligations in National Courts: Striking the Balance, both in Julian Lonbay & Andrea Biondi, *Remedies for Breach of EC Law*, John Wiley & Sons, 1997, at pp. 43-45 and pp. 31-32; Michael Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*, Hart Publishing, 2004, at p. 48. Notwithstanding, such criticisms would make no difference to the conclusion that the balance between the effectiveness of EU law and the autonomy of Member States needs to be struck, at least at current stage.

This preliminary ruling importantly conveys an implication that ‘the need for effectiveness and proper judicial protection can normally be satisfied by national remedies enforced through the national courts in accordance with national procedural rules’⁶²⁰ as long as the procedural autonomy exercised by the national courts would not render virtually impossible or excessively difficult the protection of relevant public interests. Notably, one of the most important features of a reasonable procedural rule which does not incur such virtual impossibility or excessive difficulty is that it is based upon the legitimate expectation that relevant violation of public interests could have been reviewed before proceeding to final enforcement stage, and hence treat the enforcing court as the last hurdle of an international arbitration. Therefore, as long as the expectation still stands reasonable, which should be the case in legal practice, from the perspective of an enforcing court, it would be less legitimate and necessary for it to reconsider relevant public interests issues, and the probability that the respect of a reasonable procedural rule would prevent the potential derogation of relevant public interests from being discovered is low. A plausible conclusion could thus be drawn that the respect of procedural autonomy would prevail as long as it stays necessarily reasonable.

Nevertheless, one might argue that this conclusion which is based essentially upon the examination of probability can still not provide a fully convincing answer to the hypothetical case raised above, under which although the procedural rule would not render virtually impossible or excessively difficult the protection of relevant public policy, the final result would be that the relevant public interest is still violated. This then leads to the next question concerning necessity and proportionality, namely that under the consideration of the low probability that the respect of procedural autonomy would lead to the potential violation of public policy being undiscovered as well as the solid effect of reasonable procedural rules which maintains the legal certainty and fairness of international arbitration, how necessary and proportionate it would be for an enforcing court to dismiss its procedural rule for protecting relevant public interests.

⁶²⁰ Ton Heukels, Case note on Joined Cases C-430/93 and C-431/93, *Van Schijndel & Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*; and Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, *Common Market Law Review*, Vol. 33, 1996, at 352.

The answer to this question lies essentially in the nature of the applicable public policy. For example, in the above-mentioned *Van Schijndel & Van Veen*, EC competition law was understood as not a full sense of Member States' legal concept.⁶²¹ As pointed out:

‘[T]he assumption made by the authors of the EC Treaty was that national legal systems based on the rule of law could be relied upon to provide an adequate level of judicial protection; it was therefore sufficient to allow Community law to be enforced by national remedies through national courts in accordance with national procedural rules. The reality is that the authors of the Treaty *had little choice but to rely on national legal systems short of undertaking immediate and extensive harmonisation of rules governing the organisation of courts, remedies, procedures and time-limits.*’⁶²²

Therefore, since ‘large sections of the judiciaries throughout the European Union are not yet fully equipped’⁶²³ to embrace the primacy of EC law over national procedural rules,⁶²⁴ a compromise would thus be made to allow a violation of EC competition law potentially to ‘escape’ below the radar in rather rare occasions,⁶²⁵ and the protection of EC competition law may thus not be able to trump the respect of national procedural autonomy.

On the other hand, certain public policy may be deemed as a full sense of legal concepts of which the protection would be prioritised both substantively and procedurally. For instance, in a *Bayerisches Oberstes Landesgericht* case⁶²⁶, the parties concluded a supply contract providing for the arbitration of disputes.

⁶²¹ If EU competition law were deemed as provisions of public policy in the full sense, it would always override not only national substantive but also procedural rules.

⁶²² F. G. Jacobs (1997), *op. cit.*, *supra* note 619, at pp. 25-26.

⁶²³ Diederik de Groot (2011), *op. cit.*, *supra* note 504, at para. 16-073.

⁶²⁴ It could be found in cases such as Case C-31/90 *Johnson v. Chief Adjudication Officer* [1994] ECR I-5483 and Case C-213/93 *Peterbroek, Van Campenhout & Cie SCS v. Belgian State* [1996] ECR I-4615 that the ECJ steered somewhere between the strong principle of supremacy and effectiveness of EU law and the ready deference to national procedural rules. See also G. De Búrca (1997), *op. cit.*, *supra* note 619, at p. 45.

⁶²⁵ It should still be noted that procedural autonomy may not prohibit a national court to raise relevant public interest issues *ex proprio motu*, which would further lower the risk that relevant public interests would actually be violated by conceding to the procedural autonomy of the enforcing state.

⁶²⁶ Germany No. 71, *Seller v. Buyer, Bayerisches Oberstes Landesgericht*, 4 Z Sch 17/03, 20 November 2003, in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2004 - Volume XXIX*, Kluwer Law International, at pp. 771-775.

Subsequently, a dispute arose and the claimant thus commenced arbitration. The parties then entered into settlement negotiations at the tribunal's suggestion and agreed that the claimant would withdraw arbitral proceedings if the defendant paid the amounts in dispute. The defendant then duly paid the amounts, but the claimant did not terminate the arbitral proceedings by concealing the parties' settlement and obtained a favourable award. The claimant then sought enforcement in Germany. The enforcing court, the *Oberstes Landesgericht*, denied enforcement pursuant to Article V(2)(b) of the NYC, holding that the concealment of a settlement agreement constitutes a gross violation of the basic principles of German law, and the procedural rule that a party be estopped from raising objections against an arbitral award that should be timely raised would be inapplicable in this case. As clearly shown here, contractual good faith would hence be understood as a full sense of legal concept in German legal system the derogation of which would not be tolerated in any case, even under the consideration that such violation would be rather rare under the procedural rules.

It hence follows the discussion and analysis above that the question of whether the protection of public interests or the respect of procedural autonomy should prevail is not a question of 'black-or-white'. In other words, the interrelationship between these two potentially competing values should not be one simply preceding over another but one may be prioritised under certain scenarios. A two-step examination is hence proposed when examining the interrelationship between a specific procedural rule and a specific public policy, which starts from checking the reasonability of the procedural rule. As inspiringly held by the ECJ, a plausible test standard would be to see whether the procedural rule would render virtually impossible or excessively difficult for the protection of relevant public interests, or more specifically, whether the procedural rule would unreasonably prevent or restrict the possibility of a potential violation of relevant public interests from being reviewed.

Following the first step, the nature of public policy should then be examined. If a compromise to sacrifice the public interest to a reasonable extent could be accepted by the enforcing state, the procedural autonomy should then prevail. If such potential derogation, no matter how unlikely, could not be accepted by the enforcing state, the protection of the public policy would then be prioritised. It should be noted that the

judgment of the nature of public policy may change through time. For example, although the ECJ held in *Van Schijndel & Van Veen* that EC competition law was not a full sense of Member States' legal concept and would hence not take precedence over national procedural autonomy, the situation might gradually change through the process of political integration, especially bearing in mind Advocate General Wathelet's observation in *Genentech v. Hoechst* that Articles 101 and 102 TFEU are fundamental provisions which are essential for the functioning of the internal market, without which the European Union could not function and the breach of which, whether or not flagrant or obvious, would be *unacceptable* from the standpoint of the EU legal order.⁶²⁷ Therefore, it is suggested that enforcing courts in international arbitration should not apply a fixed priority between the protection of a specific public interest and the respect of procedural autonomy, and stay alert for any development in the understanding of the public interest.

⁶²⁷ The Opinion of Advocate General Wathelet on Case C-567/14 *Genentech v. Hoechst*, EU:C:2016:177, at footnote 46.

Chapter VIII – Conclusion

International commercial arbitration is understood to be an effective dispute resolution mechanism for resolving private dispute between parties of which the result, i.e. the arbitral award, would normally trigger little concern for public interests, and the existing mechanism of enforcing foreign arbitral award founded upon the pro-enforcement bias of the NYC has remained generally effective and efficient. However the situation may change when international arbitration begins to venture into areas attended by important public interests. A potential conflict between the pro-enforcement bias and important public policy concerns may then emerge to question the applicability of the existing reviewing mechanism.

This thesis argues that the existing reviewing mechanism of enforcing foreign arbitral awards cannot provide clear and ideal guidance on how an enforcing court should act when reviewing an arbitral award concerning important public interests, and proposes a new comprehensive behavioural pattern of enforcing courts reviewing relevant foreign arbitral awards.

EU competition law, and more specifically Articles 101 and 102 TFEU, one of the most representative examples of a subject matter dealing with an important public interest, was therefore chosen as the focus of research. Chapter II of the thesis then considered the possibility of international commercial arbitration as a private means of enforcing EU competition law to connect EU competition law with international arbitration. Through the research, it was found that both Articles 101 and 102 are directly effective and applicable before international arbitral tribunals, which led therefore to the conclusion that, from a theoretical perspective, disputes concerning EU competition law issues could be resolved by arbitration, and thus crucially paved the way for the research which followed. Furthermore, that Chapter also revealed two major modalities of raising competition law issues in international arbitration, namely that competition law issues could be raised either defensively or proactively.

The link between EU competition law and international arbitration having been established, the research then progressed to Chapter III, in which the current prevailing understanding of the mechanism of reviewing foreign arbitral award at enforcement stage under the NYC was critically examined and the uncertainties

regarding the enforcement of arbitral awards concerning important public interests raised. The spotlight was placed upon three grounds provided in the NYC, namely Article V(2)(a) according to which the enforcement of an arbitral award may be refused if the subject matter of the dispute is not arbitrable; Article V(2)(b) which focuses on the potential refusal of enforcement caused by the violation of relevant public policy; and Article V(1)(e) which provides the possibility that the enforcement of an arbitral award may be refused if the award has already been vacated by a competent seat court.

As for Article V(2)(b), the research of this section set out by providing a plausible definition of public policy, i.e. the fundamental and basic principles or values of a state, followed by examining its applicable law at the enforcement stage. By comparing and analysing the *lex fori*, the ‘truly international’ public value and the law of foreign states, the research concluded that the *lex fori* should generally be applied when examining public policy issues at enforcement stage, unless a jurisdiction regards respecting other jurisdictions’ public policy as an international comity and essentially incorporates this comity in its own public policy. After the examination of the first two issues, the focus then switched to the permissive wording and its application under this Article, which further revealed three key principles of the application of the public policy defence, i.e. public policy touches only upon the most fundamental principles or values of a jurisdiction; only clear and effective violation of public policy could activate the public policy defence under Article V(2)(b); and the review of public policy issues at enforcement stage could not delve into the merits of disputes but merely conduct a *prima facie* review.

This third point regarding the reviewing pattern of public policy issue then triggers the first key query of this research, namely the applicability of the *prima facie* reviewing standard. More specifically, first, when relevant competition law issues have been examined by the tribunal, whether the enforcing court should fully trust the tribunal’s decision without reviewing the reasoning and merits of dispute; and secondly, when relevant competition law issues were not examined by the tribunal, whether the enforcing court should dig into the merits of dispute to determine the existence of serious violations of competition law or merely decide the fate of the award based upon the information reflected in the award.

Moreover, as for Article V(2)(a), the most fundamental question which concerns the rationale of inarbitrability was first examined. There are two major reasons which cause certain subject matters which concern important public interests to be inarbitrable. The first is the inappropriateness which lies inherently in the mechanism of international arbitration, i.e. international arbitration is a dispute resolution mechanism of contractual origins, which would be inappropriate to solve disputes concerning important public interests since the result of arbitration inevitably influences third non-contractual parties. The second lies in other extrinsic reasons concerning, for example, the distrust of arbitrators' qualifications and the view that international arbitration is, or at least in the past was, equipped with less fact-finding powers and less rigorous evidential proceedings. This basic rationale of inarbitrability, although seemingly persuasive, is not free of uncertainty in legal practice. As for the inherent inappropriateness, uncertainties may arise when considering what the nature of influence as exerted on the contractual parties and the third parties are. Are these influences the same or should they be distinguished? If different, would such difference degrade the legitimacy of the argument? Furthermore, as for the extrinsic reasons, a question mark hangs over those extrinsic reasons as they seem to be more empirically assumptive than uniformly observed. Therefore, a query was raised, whether these reasons would lead always to a subject matter concerning public interest being inarbitrable. Followed this examination, the applicable law of arbitrability at enforcement stage was then examined. Through the research, contrary to the prevailing viewpoint that the *lex fori* should govern arbitrability issue at enforcement stage, an understanding that arbitrability should be interpreted as a jurisdictional rule was raised, and it was hence proposed in this research that in an international arbitration, if the dispute falls outwith the jurisdiction of the enforcing court, the enforcing court's own law on arbitrability should not be applied; if the dispute is indeed within the jurisdiction of the enforcing court, the *lex fori* would then be applied.

Having gained a basic understanding of the operation mechanism of the arbitrability ground under the NYC, the second key query of this research was then raised, focusing on the rationale of a subject matter concerning important public interest being inarbitrable. It was queried that whether the rationale as introduced in this

section, namely both the inherent and extrinsic reasons for denying the arbitrability of subject matter concerning important public interests, remains still true in legal practice.

Last but not least, as for Article V(1)(e), a key issue lies in the practical application of the permissive wording of this Article – since as it provides that the enforcing court may refuse to enforce an arbitral award which has already been vacated by the seat court, how should this discretion of the enforcing court be applied? By examining two potential interrelationships between a seat court and an enforcing court, the research in this Section reached the conclusion that the annulment judgment made by the seat court should be generally followed by the enforcing court, subject to three exceptions, namely the procedural injustice of the annulment judgment, the outdated or exorbitant annulment standard as applied when making the annulment judgment, and, most pertinent to this research, the annulment judgment being made based upon the inarbitrability of the dispute at hand or the violation of relevant public policy.

With respect to the third exception, the author further proposed a comprehensive behavioural pattern of an enforcing court encountering an annulment judgment based upon these two grounds. With regard to an annulment judgment made based upon inarbitrability, if the enforcing state is itself a substantively interested state to which the dispute would fall within the jurisdiction of the state if the arbitration agreement were absent, it would apply its own arbitrability rule no matter how the seat court has ruled on the arbitrability issue. If the enforcing state is not a substantively interested state, two possible scenarios may arise: if the seat court refused to set aside the award based upon its own arbitrability rule but the involved dispute did not fall within the jurisdiction of the seat court if the arbitration agreement were absent, this annulment judgment should not be able to influence the enforcing court's decision on enforcement; if the seat court refused to set aside the award based upon its own arbitrability rule and the involved dispute does fall within the jurisdiction of the seat court, the enforcing court should then conduct a two-step examination starting from considering whether it would, under its own public policy, respect and protect other states' rule of exclusive jurisdiction. If the answer is in the affirmative, it would then run a balancing test between its unwritten obligation of enforcing an arbitral award

under the NYC and the urgency of upholding a foreign state's arbitrability rule; if the seat court refused to set aside the award based upon the arbitrability rule of a foreign substantively interested state, the enforcing court should also follow the suggested behavioural pattern in the second scenario as discussed above.

In regard to an annulment judgment made based upon a violation of relevant public policy, if the seat's public policy is not understood by the enforcing court as covering either the enforcing state's fundamental domestic public interest or a general public value which is recognised by the enforcing state, such annulment decision would generally not influence the enforcing court's decision on whether to enforce the arbitral award. Although the enforcing court may, if permitted by its own law, consider to respect and protect the public policy of the seat, the application of such discretion would be restricted under the pro-enforcement bias of the NYC; if the seat's public policy is understood by the enforcing court as covering either the enforcing court's fundamental domestic public interest or a generally recognised public value, the enforcing court would then apply its own standard of reviewing the seat court's annulment judgment and determine whether to enforce the arbitral award; if the seat court annulled the award based not upon its own public policy but the public policy of a foreign jurisdiction, unless it could be convincingly proved that the enforcement of the award would manifestly derogate from the public policy of the foreign jurisdiction and the law of enforcing state permits the enforcing court to respect the public policy of a foreign jurisdiction under certain prerequisites, the enforcing court is not obliged to follow the seat court's annulment decision.

The third key query of this research is then raised by re-considering the proposal on an enforcing court's behavioural patterns of reviewing arbitral awards on public policy ground, namely that if the seat's public policy is understood by the enforcing court as covering either the enforcing court's fundamental domestic public interest or a generally recognised public value, the enforcing court would then apply its own standard of reviewing the seat court's annulment judgment and determine whether to enforce the arbitral award. An uncertainty hence emerges: which specific standard should the enforcing court apply? Should the enforcing court re-examine what the seat court has examined to ensure that the seat court has performed in the way which it would have performed if the public policy issue is directly raised before it after the

award was rendered? Or should the enforcing court fully trust the seat court and simply follow the seat court's decision?

With these three key queries raised in examining the three grounds as provided by the NYC, the following Chapters IV to VI then set out to provide answers to them respectively by concretising the scenario to the enforcement of foreign arbitral awards concerning EU competition law disputes.

To begin, Chapter IV addressed the first key query and drew the following key points. First, expanding arbitrability on subject matters concerning public interest tallies with the tendency of the development of international commerce. Under this prerequisite, secondly, as for the inherent inappropriateness of arbitrating disputes concerning important public interests, there exists an inevitability of imposing impact on non-contractual parties, which merely dictate inevitable effects which neither confers rights nor imposes obligation. Such impact should not trigger the concern that arbitrating disputes concerning public interests would undermine the nature of international arbitration as a private dispute resolution mechanism. Moreover, although international arbitration itself may not provide sufficient redress to violations of public interests since it would focus merely on the contracting parties and not on other affected third parties, such focus and the privacy of international arbitration would not constitute a bar to derogation from the sufficiency of protecting public interests, especially under the consideration of the non-absoluteness of confidentiality of arbitration proceedings and arbitral awards. Thirdly, as for the relevant extrinsic reasons, with the development of international arbitration and an improvement in the quality of arbitrators, when public policy issues are raised, it could legitimately be expected that the arbitrators are fully competent to examine and rule on them. Therefore, following these points of view, the author takes the view that international arbitration, from both theoretical and practical perspectives, has the potential to become a reliable dispute resolution mechanism for resolving disputes concerning important public interests.

Following the discussion on the application of Article V(2)(a) of NYC, Chapter V then turned to address the second key query concerning the reviewing pattern of an enforcing court examining public policy issues as reflected in an arbitral award.

Through this research, it found that the applicability of the *prima facie* reviewing standard essentially depends upon the obligation of an enforcing state under its public policy concern as well as the ability of the *prima facie* reviewing standard in revealing potential serious violation. Under the scenario that the prevailing *prima facie* reviewing standard may not reliably reveal potential clear and effective violations of relevant public policy, a further step of deeper examination of the merits of dispute should be allowed. Based upon this viewpoint, this Section carried on to propose a comprehensive behavioural pattern of an enforcing court reviewing arbitral awards concerning EU competition law by examining two key parameters, i.e. the manifestation of the violation of relevant public policy, and the specific obligation as borne by an enforcing court under such public policy, with the expectation of shedding light on the behavioural pattern of an enforcing court reviewing arbitral awards concerning other public interests.

The last key query concerning the interrelationship between seat courts and enforcing courts was then examined in Chapter VI. Following the concept that the reviewing pattern of a national court examining relevant public policy issues depends essentially upon the specific obligation it bears under the specific public policy, the author carried on to propose that the interrelationship between a seat court and an enforcing court under a specific public policy would depend essentially upon whether the fulfilment of the seat court's obligation could automatically fulfil the obligation as borne by the enforcing court, which then calls for a three-step examination. First, the specific obligation as borne by a seat court and an enforcing court under a specific public policy should be specified; secondly, what the seat court and the enforcing court would do to fulfil their obligations; and thirdly, a comparison between the required actions of both the seat court and the enforcing court should then be made to shape the specific interrelationship between the two.

Last but not least, Chapter VII wound up the research by examining the potential rivalry between the protection of public interests and the respect of procedural autonomy which may potentially influence the applicability of the behavioural patterns raised above, proposing that the interrelationship between these two potentially competing values should not be one simply taking precedence over another. Following the bottom line that the procedural autonomy of an enforcing

state should not inflict unnecessary and excessive difficulty on its national courts reviewing public policy issues as reflected in arbitral awards and based upon the legitimate expectation that relevant public policy issues, if conditions permit, could have been raised before the enforcement stage, the specific interrelationship between the protection of a specific public interest and the respect of relevant procedural autonomy would also rest with the nature of the public interest, i.e. whether such public policy is a full sense of legal concept of which the protection would be unconditional whatsoever, or a compromise to sacrifice the public interest to a limited, reasonable extent could be acceptable.

Based upon the research results as concluded above, the contribution of this thesis thus lies in three major aspects. The first is that, by revisiting the existing reviewing mechanism of foreign arbitral award under Article V(2)(a), V(2)(b) and V(1)(e) of the NYC, some new understanding of their application in legal practice, e.g. the applicable law of public policy and arbitrability issues and the interrelationship between a seat court and an enforcing court, is proposed by the author with the expectation of increasing the legal certainty of international arbitration. Secondly, by narrowing the research scope to the enforcement of foreign arbitral awards concerning EU competition law issues, a specific behavioural pattern of an enforcing court under this scenario is proposed, which was expected to promote the development and increase legal certainty of the private enforcement of EU competition law. Thirdly, based upon the examination of enforcing awards concerning EU competition law issues, the general principles and specific ideas are extracted and generalised to shed light upon the behavioural pattern of an enforcing court examining foreign arbitral awards concerning other public interests.

Notwithstanding, it should be noted that since the New York Convention essentially leaves certain room for an enforcing court to exercise its own discretion under the grounds as examined in this research, the research results are reached based largely upon the examination of relevant theoretical foundations and should hence still be subject to the test of legal practice. However, from the viewpoint of the author, it remains true that the existing mechanism of enforcing foreign arbitral awards is not flawless and without uncertainty, especially when considering the collision between international commercial arbitration and disputes concerning an important public

interest. Considering that international commercial arbitration is applied increasingly in dispute resolution, the discussion and research on the connection between international commercial arbitration and the enforcement of public laws are thus encouraged, and a comprehensive enforcement standard of arbitral awards concerning important public interests required.

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