INHERENT POWERS AND COMPETITION LAW

Giuditta Cordero-Moss*

I. Introduction

Competition law is an area in which the relationship between party autonomy, the courts’ power to exercise judicial control on the award and the powers of the arbitral tribunal is often strained. This has led to important developments in the law, and at the same time it exposes how arbitration requires a balancing exercise between its two masters: party autonomy and court control. It is not surprising that the tension between the two masters becomes particularly clear in the field of competition law. States or supranational organizations such as the EU have a strong interest in ensuring a functioning market and preventing conduct or arrangements that may restrict a fair competition; while, at the same time, commercial actors are interested in maximizing their efficiency and profit. These two interests do not necessarily always coincide, which leads states to issue mandatory and even overriding mandatory rules in order to restrict party autonomy. Regulatory norms of competition law are typically directed to private parties and are implemented in rules that forbid agreements or practices that would otherwise restrict competition in a certain market (forbidden agreements);¹ or forbid conduct that abuses a dominant position enjoyed by one party in a certain market (forbidden conduct).² These provisions are typically implemented by competition authorities, but also have civil law consequences between the private parties. For example, a forbidden agreement may be deemed void. Competition law also contains regulatory norms directed to states, particularly rules forbidding a state to affect competition in a certain market by giving aid to one party over another.³

In the context of arbitration, competition law has traditionally been considered in connection with the first mentioned category of rules: norms directed at private parties. For example, where a dispute occurs between contracting parties and one party requests a remedy following the other party’s breach of its contractual obligations, the defaulting party may allege that the contractual obligations are void because they violate competition law. Recently, the rules on state aid have also become relevant to arbitration. In

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¹ See e.g. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C115) 47 [hereinafter TFEU], art. 101.
² See e.g. TFEU, art. 102.
³ See e.g. TFEU, art. 107.

* Giuditta Cordero-Moss is a Dr. juris (Oslo), PhD (Moscow), and Professor at the University of Oslo.
particular, where a dispute occurs between a foreign investor and the host state under investment protection law such as bilateral investment treaties that were entered into before the host country became member of the EU. If the investor requests a remedy for the host state’s withdrawal of favourable investment conditions, the host country may allege that the obligation to maintain the preferential treatment is void because it violates competition law.

Arbitration enjoys a high level of autonomy and is therefore positioned to privilege party autonomy rather than being concerned with the formalities of the applicable law. However, courts retain the power to set aside awards or refuse their enforcement in areas where fundamental principles are at stake – such as the area of competition law. The tension between party autonomy and court control shows how arbitration is caught between its two competing essences of, on the one hand, instrument for the implementation of party autonomy and, on the other hand, judicial mechanism.

It is my submission that arbitrators will be in a position to better facilitate the intended functions of arbitration if they exercise some constraint and give consideration to particularly important regulatory norms such as competition law, even if this is made independently of the parties’ instructions. This approach may be criticized by some as an undesirable restriction to party autonomy, but in my opinion too lenient an approach by the arbitral tribunal may lead, in the long run, to a result that erodes confidence in the arbitral process. Rather than being enhanced, party autonomy runs the risk of being restricted if it is completely uninhibited in arbitration, because arbitration will lose the trust it needs in order to properly function as a dispute resolution mechanism capable of rendering enforceable awards. The first signs of erosion of trust and the consequent detrimental effects for arbitration and party autonomy are already visible as courts increasingly deny that certain disputes may be arbitrated, for example, in the field of commercial agency. The ‘pro-arbitration’ attitude of many legal systems runs the risk of being reversed, if too much emphasis is put on the primacy of party autonomy and on the autonomy of arbitration at the expense of the applicability of regulatory norms, or of overriding mandatory rules such as competition law.

II. Competition Law and Arbitration

The tense relationship between party autonomy and regulatory interests, and the effects that this tension may have on legal systems’ receptiveness towards arbitration, is particularly evident in the field of competition law, and has led to numerous decisions developing the law of arbitration. The *Mitsubishi* decision,* rendered by the US Supreme Court in the 1980s, reversed the traditional view according to which disputes concerning

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competition law matters could not be arbitrated. This is one of the decisions that have expanded the scope of arbitrability, and have introduced an era of ‘pro-arbitration’ attitude in domestic courts. The trust shown towards arbitration is based on the so-called ‘second look’ doctrine, according to which competition law-related disputes may be arbitrated, because courts retain the jurisdiction to review whether the award violates fundamental principles of the forum. By permitting to arbitrate these disputes, therefore, courts do not abdicate in favour of a private and autonomous dispute resolution mechanism. They retain the possibility to have the last word on fundamental matters.

The same balance can be found in the *Eco Swiss* decision,\(^5\) rendered by the EU Court of Justice in the 1990s. This decision established that competition law amounts to *ordre public* (public policy) in EU law, and that therefore an award that violates EU competition law may be refused enforcement under the New York Convention.\(^6\) In the following decades, two opposed doctrines were developed to define the degree of the judicial control as mandated by the *Eco Swiss* decision: the minimalist and the maximalist doctrines. The Paris Court of Appeal\(^7\) developed the so-called minimalist doctrine, according to which courts owe deference to the award’s evaluation when they control the award’s compliance with *ordre public*. The Dutch Court of Appeal\(^8\) developed the so-called maximalist doctrine, according to which courts may independently evaluate whether *ordre public* is infringed, and therefore whether the award has properly applied competition law. The minimalist doctrine permits the courts to set aside an award or refuse its enforcement only if the violation of *ordre public* is manifest, effective and concrete. In particular, a key question is whether issues of *ordre public* such as competition law were considered by the arbitral tribunal. If they were considered, and the arbitral tribunal concluded that competition law is not violated, under the minimalist doctrine the court is generally expected to accept the tribunal’s evaluation. In contrast, under the maximalist doctrine, the court is expected to make its own, independent evaluation. The minimalist doctrine seems to be losing its authority in its country of origin, France,\(^9\) but it still enjoys wide support in the arbitration

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\(^9\) See Cour d’appel [CA] [Regional Court of Appeal] Paris, 1e ch. Feb. 21, 2017 nr. 15/01650, at page 10, that refused enforcement of an UNCITRAL investment award rendered in the case Belokon v. Kyrgyz Republic, UNCITRAL (award rendered on 24 October 2014). The Cour d’appel referred to the same conditions set by the minimalist theory, *i.e.* that courts may refuse...
community because it accords with the traditional understanding that interference with party autonomy and the arbitral tribunal shall be kept to a minimum.10

The Advocate General of the EU Court of Justice (CJEU) has issued two opinions in connection with two CJEU decisions, arguing for a restriction of the possibility to arbitrate disputes relating to competition law,11 as well as for an extensive power to be held by the courts to review arbitral awards relating to competition law matters.12 The CJEU chose not to decide these aspects, thus leaving open the question of whether the minimalist doctrine is compatible with EU law, or whether the maximalist doctrine shall be preferred. A recent request for preliminary ruling by the German Supreme Court13 (BGH) is likely to force the CJEU to clarify this matter. That case relates to an application for the annulment of an investment award which the host country argues must be set aside because, among other grounds, the subject matter cannot be arbitrated. The rationale behind this allegation is that, as arbitral tribunals are not bound by the EU-duty to apply EU law in a uniform way, the effective application of EU law would be endangered if the dispute were arbitrable.14 This line of thought resembles the situation prior to the Mitsubishi decision, when US courts excluded arbitrability whenever the issues in dispute assumed the accurate application of norms reflecting important policies, such as competition law. The BGH petitioned the CJEU to confirm that there is no basis to restrict the scope of arbitrability, as long as the courts retain the possibility to review the award’s compatibility with fundamental principles of the forum. Thus, the BGH embraces the ‘second look’ doctrine introduced by the Mitsubishi decision and endorses the

14 A further, highly controversial case where the enforceability of an investment award is questioned because it would violate EU competition law is the Micula case, see Viorel Micula et al. v. Romania, ICSID Case No. ARB/05/20 (Dec. 11, 2013) and Commission Decision (EU) 2015/1470 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013 (Mar. 30, 2015).
maximalist theory. Advocate General Wathelet, who delivered the opinion the case now pending before the CJEU,\(^\text{15}\)concurs with this line of thought. As a result, this approach requires arbitral tribunals to exercise some constraint and to give consideration to regulatory norms that may have an impact on \textit{ordre public}, such as in the field of competition law – lest their award be set aside or refused enforcement. This may be considered blasphemy by those who believe in arbitration as an unlimited playing field for party autonomy. However, such self-constraint is necessary to ensure validity and enforceability of awards. In addition to ensuring the effectiveness of the particular award, this self-constraint contributes to maintaining the generally arbitration-friendly regime that prevails today. As mentioned in connection with the \textit{Mitsubishi} decision, the pro-arbitration attitude is solidly linked to the ‘second look’ doctrine and thus the maximalist doctrine. There is no doubt that party autonomy is central in arbitration; but, as mentioned above, the long term consequence of unrestrained party autonomy in arbitration is that arbitration itself becomes restricted.

### III. The Sources of the Arbitral Tribunals’ Powers

The above showed that arbitration has to balance between the possibly conflicting primacy of party autonomy and the effects of court control. This has an impact also on the topic of inherent powers. Assume that the parties have entered into a market sharing agreement with the purpose of restricting competition on the EU market, and that they have decided that the contract will be subject to a non-EU law - possibly precisely to avoid the prohibition of such agreements under EU competition law. The arbitral tribunal will have to determine whether it shall simply follow the parties’ instructions and disregard EU competition law, or whether it shall consider EU competition law notwithstanding the different instructions received from the parties.

There are two opposing conceptions of arbitration that must be considered. Under one conception, arbitration is understood to be an instrument for the implementation of party autonomy, whose only task is to follow the parties’ instructions and to meet the parties’ expectations. Under this conception, any powers that do not directly derive from the parties’ instructions are deemed to be disturbing factors which require special justification. Alternatively, arbitration may be understood to be a mechanism with a judicial function, deriving its powers from the parties’ instructions but also from the applicable

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\(^{15}\)Case C-281/16, \textit{Slowakische Republik v Achmea BV}, ECLI: EU: C:2017:699, 19 September 2017, Advocate General’s Opinion, para 251-260. The principal argument in the Opinion is that investment arbitral tribunals meet the criteria contained in article 267 TFEU. Therefore, they are permitted to request the CJEU to give a preliminary ruling and are required to apply EU law.
law and conventions. Under this conception, these sources provide a basis for powers that go beyond, or even restrict, the parties’ instructions.

The proper approach seems to be, as it often happens, a combination of these two opposed views. Arbitration is undeniably based on law and conventions, otherwise courts would not be obliged to recognize arbitration agreements, nor to enforce arbitral awards. These legal mechanisms would not exist if it were not for articles II and III of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), or, in respect of validity of the awards, for the relevant provisions in national arbitration law. These legal mechanisms are not without conditions, and among the requirements that need to be complied with are that the subject matter of the dispute is arbitrable, and that the award does not violate ordre public. It should be pointed out that the content of arbitrability and ordre public is determined under the national law of the competent court even in the context of enforcement, notwithstanding that enforcement is uniformly regulated by the New York Convention.

The picture so far is that of arbitration as a dispute resolution mechanism that derives its legal effects from laws and conventions, and that therefore must respect the conditions contained in laws and conventions. The tension with the opposed view, that sees arbitration as the realm of party autonomy, arises from the circumstance that laws and conventions give party autonomy a central role in arbitration. Arbitration is regulated by three layers of sources that, to a large extent, create a circular hierarchy. The first layer is the arbitration agreement. The arbitration agreement can be extended by the parties’ reference to arbitration rules, which create the second layer – institutional rules or ad hoc rules, depending on which form of arbitration the parties have chosen. Arbitration rules may be considered an extension of the arbitration agreement because the parties’ reference to these rules has the effect of incorporating the arbitration rules into the arbitration agreement. Arbitration rules have, therefore, the same status as a contract and may not derogate from the mandatory rules of the applicable arbitration law. Arbitration law is the third layer of regulation, and consists of state arbitration acts or other state sources, as well as international conventions. Arbitration law is quite heterogeneous since it ranges from the uniform regulation contained in international conventions, to the harmonising, but not binding 1985 UNCITRAL Model Law on International Commercial Arbitration (revised in 2006), and to the arbitration law prevailing in each country. The

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17 At the time of writing, the UNCITRAL Model Law has been adopted in 75 states, see UNCITRAL Model Law on International Commercial Arbitration (1985),
INHERENT POWERS AND COMPETITION LAW

Circularity among these three layers of sources results from the fact that the formally highest layer, arbitration law, establishes that the parties’ agreement and, by extension, the arbitration rules, have primacy. Thus the arbitration law effectively places at the top of the hierarchy the source that is formally at the bottom.

Scholars and practitioners in the field of arbitration have mainly emphasised the central role of party autonomy, developing doctrines that are meant to restrict, to the extent possible, any points of interference by national courts that are provided for in arbitration law and conventions. Thus, the negative theory of *kompetenz-kompetenzi* is meant to restrict the courts’ jurisdiction on arbitrability, and the minimalist theory mentioned above is meant to restrict the courts’ jurisdiction on *ordre public*. Similarly, the applicability of conflict rules to arbitration has been questioned and excluded in some arbitration laws and arbitration rules. All of these developments are efforts to enhance arbitration by promoting it as a forum in which party autonomy does not meet any constraints. The rhetoric of party autonomy’s centrality, however, should not lead arbitrators to lose sight of the sources upon which arbitration’s legal effects are based. This will be analyzed in the following sections.


19 See Committee on International Commercial Arbitration Rio de Janeiro Conference 2008 Report Ascertaining The Contents Of The Applicable Law In International Commercial Arbitration, pp. 4, 12, International Law Association (2008). The idea that arbitrators are not bound to apply the principles of private international law that are applicable to courts is considered to be an uncontested point by Fouchard, Gaillard and Goldman on International Commercial Arbitration, 849 (E. Gaillard and J. Savage eds., Kluwer Law International 2004). At the same time, arbitrators are said to be under no duty to enforce state laws: see International Commercial Arbitration Committee, p. 20. See also Radicati, supra at note 10, 16f. The role of private international law in arbitration has undergone an evolution, from being the classical framework for choice of law to being criticized by some for being a rigid and undesirable mechanism. See Giuditta Cordero-Moss, Arbitration and Private International Law, 11 Int’l Arb. L. Rev. 153, 153 (2008), not approving of this development.

20 The criticism against private international law in arbitration, however, is not unanimously shared. See Cordero-Moss, supra note 19; See also G. Cordero-Moss, International Commercial Contracts 203 (Cambridge University Press, 2014).

IV. The Legal Basis for Arbitration

The legal framework of arbitration is the starting point of the analysis. Arbitration enjoys relative autonomy from national laws. Arbitration agreements shall be recognised and arbitral awards shall be enforced in the over 150 countries that have ratified the New York Convention.22 The New York Convention contains in article V an exhaustive and restrictive list of exceptions to the enforceability of arbitral awards. In addition to enforceability, it is important to ensure that an award is valid and, thus, not set aside by the courts in its country of origin. Although the validity of arbitral awards is not unified by a convention and is thus subject to national law, national law on the validity of arbitral awards is largely harmonised, among others on the basis of the UNCITRAL Model Law. The grounds for invalidity under national law largely correspond to the grounds contemplated in article V of the New York Convention as the only grounds upon which to refuse enforcement.23

According to these sources, an arbitral award runs the risk of being unenforceable or invalid if: it is based on an arbitration agreement that was invalid or did not bind one of the parties; the principle of due process was violated during the proceedings; the arbitral tribunal exceeded its power; the composition of the arbitral tribunal or the procedure followed was irregular; the subject of the dispute was not arbitrable; or, if the award violates fundamental principles (ordre public) in the legal system of the court.

As this short overview shows, court control is not meant to be an appeal on the merits or on the application of law: court control is meant to ensure that fundamental principles, both procedural and substantial, are respected, as well as to avoid arbitration occurring without the consent of all the parties. In other words, within the area where the grounds for setting aside or refusing enforcement of an award are not applicable, arbitration enjoys full autonomy. This means that the wrongful application of rules or the application of the wrong rules will not affect the effectiveness of the award. The legal framework described above is the basis for the arbitral tribunal’s powers, together with party autonomy. If there is tension, it must be resolved on the basis of the applicable sources. In particular, this requires verification as to whether the award will be valid and enforceable if it gives preference to party autonomy over the legal framework, or vice versa. These sources contain the answer to the question of whether arbitrators have an independent power to apply competition law, or whether they are

23 See UNCITRAL Model Law, supra note 17, art.34; see also Gary Born, supra note 18, 3186. Id. at 3340; Cordero-Moss, supra note 20, 224.
bound by the will of the parties as expressed in the disputed contract, in the arbitration agreement, or in the pleadings. In other words, these sources contain the answer to the following question: if the parties have chosen a given law to govern their relationship, and have not pleaded competition rules belonging to a different law, does the arbitral tribunal have the power, or even the duty to apply competition law in spite of the parties’ different choice of law?

As the short overview showed, four grounds for setting aside or refusing enforcement of an award may be relevant in this context. Under circumstances, an award that disregards competition law may be deemed invalid or refused enforcement as a consequence of the violation of two rules: the *ordre public* and the arbitrability rule. On the other hand, an award that considers different rules from the rules that were chosen by the parties may be deemed invalid or refused enforcement as a consequence of the violation of two other rules: the rule on excess power and the rule on fair hearing. These grounds will be examined in the following sections.

V. Competition Law and *Ordre Public*

According to the so-called *ordre public* defence, an award may be set aside as invalid or refused enforcement if it violates fundamental principles in the socio-economic system of the annulling- or, respectively, enforcing court. It seems generally recognised that this defence is to be applied only in exceptional situations. The scope of *ordre public* is very narrow; narrower than the body of mandatory rules that a state applies irrespective of which law governs a particular relationship, and that goes under the names of overriding mandatory rules or *lois de police*.

Public policy is relevant not only in the context of annulment or enforcement of arbitral awards: it is also a limitation to the application of a foreign governing law, and to the enforcement of foreign court decisions. In EU law, the former is regulated, *i.e.*, in the Rome I and Rome II Regulations, respectively in articles 21 and 26, and the latter in the Brussels I Regulation.

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26 See Born *supra* note 18, at 3312; *Id* at 3647.

27 More extensively on terminology see Cordero-Moss, *supra* note 20 at 243.

28 More extensively see Cordero-Moss, *supra* note 24.

article 45. Under all these instruments, as well as under the New York Convention, the Model Law on arbitration, and most national arbitration laws, *ordre public* may be seen as an expression of the basic socio-economic principles of the society, and does not necessarily correspond to the positive content of specific provisions. It is the underlying principles that may constitute *ordre public*, not the technicalities of the provisions. Therefore, even though a certain provision may be deemed to protect fundamental principles of a given system, *ordre public* will not necessarily be deemed violated every time the specific, technical content of that provision has not been accurately followed – as long as the underlying principles have been safeguarded.30 *Ordre public*, in other words, is not meant to ensure an accurate application of the details of a provision (quite irrespective of whether the provision is based on fundamental principles), but to make sure that the interests protected by that rule are safeguarded. As a corollary, a violation of *ordre public* may not be determined in the abstract, by simply observing that a certain rule was not applied accurately. It will be necessary to evaluate, on a case-by-case basis, whether the violation of a certain provision entailed violation of *ordre public* or not.31 In the above-mentioned EU instruments of private international law, Rome I, Rome II and Brussels I, the narrow scope of the *ordre public* defence is expressed among others with the formulation that the defence is applicable when fundamental principles are *manifestly* violated. The word “manifest” is not present in the arbitration instruments such as the New York Convention or the UNCITRAL Model Law, but the narrow scope and exceptional application are equivalent in both contexts.

In the aforementioned *Eco Swiss* decision, the Court of Justice of the European Union affirmed that European competition law must be considered as European public policy.32 The CJEU justified this qualification affirming that competition rules “are necessary for the achievement of the internal market.” Given the narrow understanding of the defence of *ordre

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30 See Cordero-Moss, *supra* note 20 at 246.
31 See Cordero-Moss, *supra* note 20 at 247.
public, a narrow understanding that is shared by the mentioned EU instruments of private international law such as the Rome I, Rome II and Brussels I Regulations, it is to be expected that the Court of Justice has a restrictive understanding of this formulation. As most EU rules have the purpose of achieving the internal market, emphasis should be placed on the adjective “necessary”. Otherwise, a situation may arise where the majority of EU regulation is deemed to be public policy; a situation that would run counter the assumption that the public policy defence shall be used only in exceptional cases. This formulation was used by the CJEU in the Ingmar decision. In that case, the CJEU decided that EU law on agency, and in particular articles 17 and 18 of Council Directive 86/653/EEC on determining that the principal has to pay compensation to the agent upon termination of an agency contract, override any choice of law clause contained in the contract and must be applied even if the parties chose a different law. As will be seen in section VI below, commercial agency is deemed to be necessary for the achievement of the internal market for two reasons: uniform conditions for agents are deemed to ensure fair competition; and, they protect the agent who is deemed to be the weaker party. As will be seen below, this seems to have created a basis for restricting arbitrability of disputes relating to contracts of agency – an undesirable development. That the CJEU in the Ingmar decision used the same formulation as in Eco Swiss and defined rules on agency as “necessary for the achievement of the internal market”, could be interpreted to mean that these rules must be considered as European public policy. This, however, is too expansive an understanding of ordre public.

Even CJEU case law confirms that the defense of public policy may not be triggered whenever a rule necessary for the achievement of the internal market is breached.

Not all violations of competition law are automatically to be considered to be an infringement of public policy. Ordre public becomes relevant when there is a manifest violation of the underlying principles. This has been established by the CJEU in respect of the Brussels Convention (the predecessor of the mentioned Brussels I Regulation); in the Renault decision, the Court explained that “[r]ecourse to the clause on public policy […] can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any

review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.”

Applied to the case at hand, this narrow approach led to the conclusion that intellectual property rights that restricted the possibility for third parties to sell spare parts for automobiles were restrictive of competition, but did not reach the threshold for the Court to find a violation of public policy. The Court explained that “[t]he court of the State in which enforcement is sought cannot, without undermining the aim of the Convention, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or Community law was misapplied in that decision.”

Also in more recent case law the CJEU confirmed that a violation of a EU rule, even of a rule that has an impact on the internal market, shall not automatically be deemed to be a violation of public policy.

The above described decisions are rendered in respect of enforcement under the Brussels I Regulation and its predecessor, the Brussels Convention, of judgments rendered by courts in other EU member states. However, the reasoning may be applied also to recognition and enforcement of arbitral awards under the New York Convention, as well as to challenge to the validity of awards under national arbitration law – at least under the arbitration laws that have adopted the UNCITRAL Model Law or are compatible with it. While the Brussels I Regulation is based on the principle of mutual trust, the New York Convention and the Model Law are based on the principle of effectiveness of arbitral awards. This is a strong principle, which justifies an equally narrow scope for the *ordre public* defence as the principle of mutual trust.

This makes it necessary to assess which violations of competition law may be deemed to be so serious that the threshold for infringement of public policy is reached. As mentioned above, the evaluation of this issue is necessarily based on the circumstances of the case, and it is difficult to suggest abstract criteria that can automatically support the finding that a certain violation of competition law is or is not an infringement of public policy. Generally, however, it seems possible to point out that certain types of agreements seem to be considered as serious violations of competition law, and thus more likely can be deemed to be a manifest infringement of the fundamental principles underlying competition law. For example, the above

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36 Ibid. ¶ 33.
37 Case C-681/13, Diageo Brands BV v Simiramida, 2016 ECLI:EU:C:2015:471, ¶ 51.
INHERENT POWERS AND COMPETITION LAW

mentioned article 101 of the TFEU forbids, in the chapeaux of the first paragraph, “all agreements [...] which have as their object or effect the prevention, restriction or distortion of competition within the internal market.” These are two distinct categories of infringements: infringements by object; and, infringements by effect. Both types of agreements are forbidden, but the agreements whose object is to restrict competition, are deemed to be more harmful to fair competition.38 Which agreements are considered to be infringing by object is explained in the Commission’s guidelines on the application of the TFEU, article 101: “Non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices. Restrictions that are blacklisted [sic] in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers. As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales.”39

While infringements by object may more readily be identified and deemed to violate fundamental principles, it is more demanding to identify infringements by effect. For these agreements, an infringement of fundamental principles may be found only after extensive and complex evaluations, among others considering possible economic benefits, indispensability and other aspects of the economic context.40 Examples of these agreements are agreements on research and development, production agreements, purchasing agreements, and commercialisation agreements.

In the context of the validity or enforceability of arbitral awards, the necessity to carry out complex evaluations to ascertain whether an agreement violates competition law seems to be at odds with the requirement that the violation must be manifest – which, as seen above, applies to the applicability of the *ordre public* defence. However, this does not necessarily mean that the minimalist doctrine mentioned above should be endorsed. According to the minimalist view, the court may not revise the application

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of law and the assessments made by the arbitral tribunal, but must limit itself to verifying whether the arbitral tribunal has considered, with the due attention and competence, the rules that are deemed to be relevant to public policy. In a recent CJEU case, the Advocate General Wathelet pleaded for more extensive court control and criticised the minimalist approach, according to which court control may be exercised only in the case of manifest infringement of public policy, and only if the issue had not been examined in the arbitration proceeding. The requirement that only manifest infringements may trigger court control was criticised for making court control illusionary – because many restrictions of competition that are forbidden in EU law by article 101 TFEU would escape review. As seen above, the assessment may require complex evaluations, inter alia, of the economic context. The requirement that the court owes deference to the decision made by the arbitral tribunal was criticised for being at odds with the system of review of compatibility with EU law: as arbitral tribunals have no competence to refer to the CJEU questions for preliminary rulings, in the view of the AG, the responsibility for reviewing compliance with EU law must be placed with the courts and not with arbitral tribunals. On this basis, according to the AG opinion, the principle that a court may not independently review the substance of an award does not prevent the court from considering the issue of compliance with competition law, even though the issue has already been considered by the arbitral tribunal - given that article 101 of the TFEU is a provision of fundamental importance in the EU legal order. The AG seemed to assume that any and all violations of article 101 of the TFEU would amount to a violation of EU public policy. As was seen above, this is not a correct assumption as the CJEU has repeatedly stated that only serious violations lead to infringement of public policy. In its final judgement, the CJEU ignored the matter and did not take a position on the scale from the AG’s maximalist approach with automatic effects to the minimalistic approach and the impossibility to

41 Case C-567/14, Genetech Inc v Hoechst GmbH, 2016 OJ (C 335) 8.
43 Id. ¶ 59-62. It is interesting to notice that the AG refers here to commercial arbitration. The same AG Wathelet expressed the opinion that in investment arbitration the arbitral tribunal has to be deemed to be a permanent court within the meaning of article 267 TFEU. This entails that investment tribunals are entitled to request preliminary rulings and are included in the system of mutual trust: see Case C-281/16 (Achmea), supra note 15, Opinion of Advocate General Wathelet, ¶ 84-135.
44 Case C-567/14 (Genetech), supra note 41, Opinion, supra note 42, ¶ 70-72.
45 In the specific case, the Advocate General concluded that art. 101 TFEU was not violated.
46 See Case C-38/98 (Renault), supra note 34, and Case C-681/13 (Diageo), supra note 37.
evaluate the infringement’s result under the specific circumstances. Therefore, there has not been any clarification on this point.47

In my opinion, it is not viable to support the minimalist doctrine, if it implies that courts shall limit themselves to verifying whether the tribunal has taken cognisance of matters of public policy, without considering how the tribunal has evaluated the matter. This results in courts delegating the safeguard of their fundamental principles to arbitral tribunals, and it goes so far in affirming the autonomy of arbitration, that it risks backfiring and eventually restricting the scope of arbitration (see section VI below). A court’s ability to independently verify the ordre public is not manifestly infringed, is a fully acceptable precondition to a legal system’s recognition and enforcement of the arbitral mechanism for dispute resolution. The narrow scope of the ordre public defence ensures that courts do not abuse this power. The defence of ordre public shall not be used to re-judge the dispute: court control of arbitral awards is not meant as a tool to permit a review of the merits, neither in respect of the application of the law or of the assessment of the facts. Therefore, an error of law or a divergent opinion by the court is not sufficient to deem public policy violated.48 It has been suggested that it should be possible to exercise court control by examining, in some detail, the reasoning of the award. Only in exceptional cases, such as when the award has no reasons, or the award did not consider the applicability of public policy rules, should the court be allowed to go further and examine the parties’ pleadings or the evidence produced in the arbitral proceedings or, in extreme cases, to launch a full-fledged investigation.49

VI. Competition Law and Arbitrability

The New York Convention and the Model Law contain another defence that may become relevant in respect of competition law: the defence that the subject matter of the dispute was not capable of being subject to arbitration. The purpose of this defence is to ensure that the courts are the only venue for resolving disputes in areas where the legal system considers it essential that an accurate application of the law is ensured.

As was seen in section II above, arbitrability is a defence that has undergone an interesting evolution: as legal systems became more arbitration-friendly during the second half of the 20th century, the scope of the defence has been

47 A clarification is expected when the CJEU decides the Achmea case, supra note 15, following the BGH request for preliminary ruling mention supra in note 13.
48 See Cordero-Moss, supra note 20, at 246.
49 Radicati supra note 21, at 63f.
restricted accordingly.\textsuperscript{50} However, as will be seen below, there are signs that the scope of the arbitrability defence may be starting to expand again.

Representative of the evolution towards a narrower application of the defence is the US Supreme Court decision in the above mentioned Mitsubishi case.\textsuperscript{51} In that case, the court deviated from the traditional approach that considered in-arbitrable disputes relating to anti-trust issues. The court relied on the possibility to review the accurate application of competition law at the stage of enforcement (the so-called “second look” doctrine), and permitted the arbitration of the anti-trust issues.

More recent case law, particularly of EU state courts, seems to reverse this trend and denies the arbitrability (or the recognition of a contractual choice of forum in favour of a court not located within the EU) in disputes regarding contracts of commercial agency.\textsuperscript{52} Commercial agency is an area in which EU law contains overriding mandatory rules with the multiple purposes of protecting the agent, who is considered to be the weaker party in the relationship; ensuring free movement within the internal market; and, ensuring that all commercial activity carried out on the European territory is carried out under comparable circumstances. Permitting a principal to employ commercial agents at conditions more favourable to the principal than the conditions imposed by EU rules is deemed to have an impact on competition and on the internal market. For this reason, some courts have affirmed that disputes concerning commercial agency should be decided by courts who belong to the EU because the choice of a court outside the EU, or the choice of arbitration, may endanger the effective enforcement of EU law. This approach seems to go further than necessary or advisable.

There are parallels between the approach of EU state courts and the reasoning behind Advocate General Wathelet’s G’s opinion in Case C-567/14 (Genentech), mentioned in section V above. It should, however, be remembered that the AG opinion in Genentech was completely disregarded by the CJEU in this respect: the Court did not discuss the matter. The opinion in Genentech regarded restrictions upon judicial review of arbitral awards – in particular, whether an annulment court should be limited to examining whether the arbitral tribunal considered flagrant infringements of

\textsuperscript{50} See Cordero-Moss \textit{supra} note 20, at 122.

\textsuperscript{51} Mitsubishi Motors Corp., \textit{supra} note 4.

public policy, or whether the court has the power to independently evaluate the compatibility of the award with EU competition law. The AG argued that restrictions upon the court’s review are contrary to the principle of effectiveness of EU law because they deprive the court of the possibility to ensure, by referring a question for preliminary ruling to the CJEU, compliance with EU law. Moreover, the AG observed that, since arbitral tribunals fall outside of the scope of application of the Brussels I Regulation, they also are excluded from the principle of mutual trust among the courts of Member States, as established by the Brussels I Regulation.

This reasoning was at the basis of Advocate General Jääskinen’s opinion in another case involving EU competition law. Here, the AG argued that the principle of mutual trust prevents courts from disregarding choice of forum agreements on the ground that the chosen court would not give effective enforcement of EU competition law, as long as the chosen court is within the EU. Regarding arbitration agreements, however, the AG invoked the principle of effective enforcement of EU competition law. The AG recalled the above-mentioned CJEU decision on *Eco Swiss*, affirming that EU competition law may be regarded as a matter of public policy and that questions about the compatibility of an arbitral award with EU competition law should be open to examination by national courts. The *Eco Swiss* reasoning was made in the context of the court’s review of an arbitral award. The AG extended this reasoning by analogy to the issue of arbitrability. On one hand, the AG recognised that an arbitration agreement does not necessarily deprive the victims of an alleged violation of EU competition law of the possibility of obtaining full compensation in arbitration. On the other hand, the AG described this as a theoretical possibility, and its implementation into practice as a “matter of some delicacy.” With respect to horizontal restriction of competition, as in the case at hand, the AG argued that an arbitration agreement would be compatible with the principle of effective enforcement if the victims had expressly accepted arbitration and the arbitral tribunal was required to apply EU competition law as rules of public policy.

The CJEU decided only in respect to agreements choosing a court within a EU member state. The CJEU declined to answer in relation to arbitration

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53 Opinion of Advocate General Wathelet, supra note 41 ¶ 58.
54 Id. ¶ 59.
55 Id. ¶ 69.
57 Id. ¶ 116.
58 Id. ¶ 123.
59 Id. ¶ 124-26.
60 Id. ¶ 126.
agreements and forum agreements nominating a court outside the EU, affirming that it did not have sufficient information.\textsuperscript{61} It is, therefore, left open whether the AG’s arguments would be capable of restricting the arbitrability of a dispute concerning EU public policy. On the one hand, with respect to forum agreements nominating an EU court, the CJEU affirmed that the validity of a jurisdiction clause is not affected by which rules are applicable to the merits of the dispute: even if competition law is applicable, the jurisdiction clause remains valid.\textsuperscript{62} The restriction premised on effective enforcement of EU law, therefore, is not relevant when the parties chose that the forum would be in another EU member state. On the other hand, the CJEU emphasized that this is based on the principle of mutual trust established by the Brussels I Regulation.\textsuperscript{63} As arbitration agreements fall outside the scope of the Brussels I Regulation, they are not part of the system of mutual trust. Therefore, the CJEU reasoning that the requirement for effective enforcement may not restrict choice of forum agreements, may not be used to confirm the arbitrability of disputes relating to competition law.

As mentioned above, a clarification is expected in connection with the preliminary ruling requested by the BGH in the \textit{Achmea} case:\textsuperscript{64} the BGH requested confirmation that the circumstance that arbitration is not part of the mutual trust based on EU instruments is not sufficient to exclude arbitrability. It is still possible for courts to ensure a uniform application of EU law, because courts have the possibility to review the compatibility of an award with competition law, when they are called upon to decide on the validity of the award or to enforce it. Embracing the maximalist view on court control is, in the eyes of the BGH, a sufficient counterweight to permit arbitrability of matters relating to competition law. This view is shared by the Advocate General Wathelet in the same case.\textsuperscript{65} Based on this understanding of the ‘second look’ doctrine, AG Wathelet disapproved of AG Jääskinen’s opinion on the lack of arbitrability of disputes that require an interpretation of EU law.\textsuperscript{66}

The ‘second look’ doctrine, as reflected in the BGH request for preliminary ruling and in AG Wathelet’s opinion in \textit{Achmea}, seems to be more compatible

\textsuperscript{61} Case C-352/13 (CDC), supra note 56 ¶ 58.
\textsuperscript{62} Id. (referring to Case C-159/97 \textit{Castelletti v. Trumpy} ¶ 51, 1999 E.C.R. I-01597). The AG supported the same view.
\textsuperscript{63} Id. ¶ 63.
\textsuperscript{64} See supra notes 13 and 15.
\textsuperscript{65} See supra note 43, ¶226-250. In the \textit{Achmea} case, the AG was of the opinion that this reasoning is redundant. The arbitral award was rendered in the frame of investment arbitration, and investment arbitration is, in the opinion of the AG, included in the system of mutual trust, see ¶226-250.
\textsuperscript{66} Id. ¶ 243.
with the arbitration-friendly regime based on the New York Convention (reflecting strong support for the effectiveness of arbitral awards) rather than AG Jääskinen’s approach in CDC. Rather than excluding arbitration automatically and a priori, simply on the basis that the dispute regards an area regulated by laws that require accurate application, it is better to permit arbitration and verify at the stage of challenge or enforcement whether the award is compatible with fundamental principles.

Admittedly, the ‘second look’ doctrine is not without flaws, as situations may still arise in which courts do not get the possibility to give a second look because the award is not brought to court. In the opinion rendered by AG Wathelet in Achmea, this circumstance does not seem to create an obstacle to confirming arbitrability.

If arbitration becomes a means to evade competition law, it can be expected that the scope of arbitrability will be negatively affected. The aforementioned developments in jurisprudence demonstrate that insisting on the primacy of party autonomy and on the autonomy of arbitration may achieve the opposite effect to that which is intended: rather than enhancing the independent of arbitration, there is a risk of eroding the trust in arbitration that is necessary for a pro-arbitration regime.

VII. Competition Law and the Arbitral Tribunal’s Power

Having established that courts may scrutinize awards, and that disregard for competition law may lead to courts setting aside an award or refusing its enforcement, the next question is what arbitral tribunals can do to render an award that passes scrutiny. Scenarios where parties plead competition law and the arbitral tribunal applies it are not of interest here. The tribunal may get competition law right or it may get it wrong – the consequences for the effectiveness of the award are the same as usual: the courts may not review the application of the law, but may react if error in law leads to a manifest infringement of fundamental principles. In the field of competition law, there is a higher probability that an error in law would violate fundamental principles, particularly given that competition law has been declared to relate to ordre public in the aforementioned Eco-Swiss decision. However, it should be remembered that not all breaches of competition law or EU rules on the

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67 See Radicati supra note 20, at 58 (Casting doubt on the assumption that arbitration is not capable of an accurate application of the law).
69 See supra note 43, ¶ 251-260.
70 See Cordero-Moss, supra note 24, at 336f.
internal market necessarily qualify as violation of _ordre public_, as the above mentioned _Renault_ and _Diageo_ decisions affirmed.

What is more interesting to the issue of inherent powers is the scenario where the parties do not plead competition law at all; or, where one of the parties pleads it, but the other objects to its applicability because the contract contains a different choice of applicable law. An arbitral tribunal that desires to pass court scrutiny may wish to apply competition law on its own motion. Assuming that the tribunal gave the parties the opportunity to make submissions on competition law, and that therefore the principle of due process is not infringed (on which see section VIII below), a court must verify whether the tribunal exceeded its power by applying competition law that was not pleaded or chosen by the parties.

As mentioned in section IV above, one of the grounds for setting aside an award or refusing its enforcement is excess of power. The main purpose of this ground is to ensure that the award is rendered within the borders set by the arbitration agreement and by the parties’ pleadings. An award that goes beyond those borders is an award not based on the parties’ consent to arbitrate, and is therefore invalid and unenforceable. Generally, this ground is considered to apply when the arbitral tribunal decides on matters that were not raised by the parties, or when it otherwise goes beyond the scope of power that was conferred on the arbitral tribunal. For example, an award that orders one party to set off its contractual claims against claims that the other party has under a separate contract that is not subject to the arbitration agreement under which the arbitral tribunal was appointed, is beyond power.

Often, the defence of excess of power is considered to be irrelevant to the question of the applicable law.71 However, the applicable law is certainly relevant to the scope of the dispute: the scope of the dispute is in part determined by the disputed contract, and the contract does not have legal effect simply because of its own existence – it receives its legal effect from the governing law. The same contract wording may have dramatically different effects depending on which law governs it.72 It may be argued, therefore, that the scope of the dispute is (in part) determined by the contract as construed under its applicable law. An arbitral tribunal that applies a different law, may be equivalent to a tribunal that applies a contractual terms articulated differently from those contained in the disputed contract. Hence, the tribunal may be deemed to have gone beyond the powers that were conferred to it under the contract.73 Although it is not often recognised that application of a

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71 See Cordero-Moss _supra_ note 24, at 305ff and _id. supra_ note 20, at 282f.
72 See Cordero-Moss _supra_ note 20, at 90.
73 _Id._ at 282.
law different from the applicable law may constitute an excess of power, there is no conceptual obstacle to invoking this defence in such a situation.

Consequently, it is necessary for a court to verify whether the tribunal has the power to apply competition law when this does not belong to the applicable law, or whether the tribunal by so doing would go beyond the powers that the parties conferred on it. According to the traditional approach,\(^7\) the parties’ or the arbitral tribunal’s choice of law is regulated by that branch of the law that goes under the name of private international law (also known as conflict of laws, or choice of law rules). Private international law contains rules that give instructions as to how to select the applicable law. Today, European Regulations or international conventions\(^7\) harmonise part of the private international law, but national law still regulates some areas of the private international law.\(^6\)

In the field of international arbitration, some specific private international law rules are codified in international conventions,\(^7\) whereas others are regulated in national arbitration law. Of particular interest in the transnational context may be the 2015 Principles of Choice of Law in International Contracts,\(^7\) published by the Hague Conference as a restatement of generally recognised principles of private international law. When it comes to the question of which law is applicable to the merits of the dispute, the UNCITRAL Model Law harmonises national arbitration law and contains a choice of law rule giving the parties’ the possibility to choose the applicable law.\(^7\) In case the parties have not made use of their party autonomy, the UNCITRAL Model Law directs the arbitral tribunal to apply the conflict rules that the tribunal “considers applicable”.\(^8\) The Model Law thus follows the traditional approach and applies the private international law mechanism. However, in the revision of 2006, the Model Law incorporated a more flexible version of the choice of law rule and emancipated parties from the automatic application of the private international law of the state where the


\(^8\) Some conventions drafted by the Hague Conference have the purpose of harmonising choice of law rules. See https://www.hcch.net/en/instruments/conventions.

\(^6\) For example, company law and property law.

\(^7\) For example, the New York Convention contains choice of law rules regarding the law governing the capacity of the parties, the validity of the arbitration agreement, the arbitral procedure, arbitrability and public policy.


\(^8\) Art. 28(1).

\(^8\) Art. 28(2).
tribunal has its venue. This was intended to cater to the situations where the venue of arbitration has no connection with the dispute, and where it may be appropriate to apply the conflict rules of states with a closer connection to the parties or dispute. In practice, arbitral tribunals may still consider the venue of the arbitration as a significant connecting factor and thus apply its conflict rules to determine the law applicable to the merits of the dispute. According to the UNCITRAL Model Law, the venue is the proper connecting factor for a series of important aspects, such as the validity of the arbitration agreement, the arbitral procedure, the tribunal’s power to issue interim measures, the validity of the award and the applicable public policy. Accordingly, it does not seem unreasonable to consider it as a proper connecting factor also for the conflict rules. Some jurisdictions have formalised these considerations and have codified the rule that, failing a choice by the parties, tribunals shall apply the private international law of the venue to determine the law applicable to the merits of the dispute.81 However, not all jurisdictions have adopted the Model Law’s reference for applying the private international law (of the venue or otherwise). Some jurisdictions provide a specific conflict rule for arbitration,82 some contain no guidelines at all,83 and some regulate the so-called voie direct,84 that does not rely on private international law and gives no criteria for the selection of the applicable law. It cannot be excluded that arbitral tribunals will make use of private international law even when the arbitration is subject to an arbitration law that does not regulate the selection of law or provides for the voie direct. Although not required to apply conflict rules, arbitral tribunals may find that the well-known mechanism of private international law permits the selection of the applicable law more objectively and predictably than the mere discretion without guidelines. Even though conflict rules may be complicated and sometimes they may leave room for discretion, the abundant literature and case law on the area contributes to rendering its application quite predictable.

With the exception of the latter voie directe approach, this short overview demonstrates that the private international law has still quite an important role in arbitration.85 Even those who deem it undesirable to apply a national

81 See Norwegian Arbitration Act 2004 § 31(2). This is practiced also when there is no specific codified provision: see, for example, the German and the Russian reports in Iura Novit Curia, G. Cordero-Moss and F. Ferrari (eds.), forthcoming.
82 See the Federal Act on Private International Law, January 1 2017 (Swiss), art, 187.
83 See e.g. Swedish and Italian law.
84 See e.g. the Code De Procedure Civile [C.P.C] [Civil Procedure Code] article 1511 (French).
85 See Cordero-Moss, supra note 18 (On the role of private international law in arbitration); See also CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (Franco Ferrari & Stephan Kröll eds., 2010).
system of private international law, can find the mechanisms underlying private international law in generally acknowledged principles such as the Hague Principles on Choice of Law. It is, therefore, justifiable to look at the private international law as the framework for determining the scope of the choice of law made by the parties and selected by the arbitral tribunal. As the choice of law is the exercise of a power based on private international law, any restrictions or exceptions that rely on principles or rules of private international law do not violate the primacy of party autonomy; they simply implement the parties’ choice of law pursuant to its scope as determined in the legal sources upon which party autonomy is based.

Party autonomy in private international law generally applies only within the scope of contract law (and to a certain extent also tort law). If a dispute has implications of company law or property law, or if it is on areas where states exercise their regulatory powers such as competition law, the court will apply the law chosen by the parties to the contractual aspects of the dispute only. To the other aspects of the relationship (company-, property- or competition law), the court will apply the law selected according to the appropriate conflict rules (so-called dépeçage). In private international law, therefore, the parties’ choice of law does not cover areas where there may be overriding mandatory rules such as competition law. If the tribunal applies competition law on its own motion, therefore, it does not violate the parties’ choice and it does not exceed its power.

It has been suggested that party autonomy in arbitration has a wider scope than party autonomy in private international law. As a matter of fact, many conflict rules contained in arbitration law permit the parties to select the law applicable not only to the contract, but more generally to the merits of the dispute. For example, the UNCITRAL Model Law gives the parties the possibility to choose the law applicable to the substance of the dispute. This is interpreted as giving party autonomy a wider scope than the autonomy conferred under private international law as described above: if the dispute has implications that go beyond the mere contract law, according to this opinion, party autonomy would also cover these aspects. According to this logic, therefore, the private international law would not be a sufficient basis to justify the arbitral tribunal’s power to override the parties’ choice of law: the parties’ choice of law would not be restricted to the mere contract matters, but would extend to any issues within the scope of the dispute.

86 Supra note 76.
87 Luca Radicati di Brozolo, Party Autonomy and the Rules Governing the Merits in LIMITS TO PARTY AUTONOMY IN INTERNATIONAL ARBITRATION, section IIIa, (Franco Ferrari ed., 2016).
However, although the wording of the arbitration conflict rule may seem wider than, for example, the wording of the Rome I Regulation – which applies not to the merits of the dispute, but only to contractual obligations – the question arises as to whether this can be taken as a basis for assuming that the parties in arbitration have the power to choose the law applicable to matters of company law, property law or regulatory matters such as competition law. This is because the choice of law possible in arbitration relates to the merits of the dispute. Therefore, it must be interpreted within the scope of the dispute that may be decided by the arbitral tribunal. Generally, arbitral tribunals may decide disputes between the parties on rights and obligations that the parties may dispose of, and decide the dispute with effects for the parties. An arbitral tribunal may not render an award with effects for third parties. Accordingly, an arbitral award will not be empowered to decide matters of company law (such as whether the resolution of a company body is invalid), or matters of property law (such as that a certain asset of the insolvent debtor is not available to the generality of the creditors). These aspects may arise as preliminary questions in the course of the decision of the civil law matters before the arbitral tribunal. The arbitral tribunal may assume that these aspects are regulated in a certain way and may base its own decision on those assumptions; but these aspects are not the direct object of the tribunal’s decision. These aspects are outside of the dispute; hence, the broad language of the conflict rule for arbitration does not cover them. The wording of the conflict rule contained in the Model Law, therefore, does not seem to extend the scope of party autonomy in a significant manner.

In summary, a systematic interpretation of the sources applicable to arbitration, including also the private international law, seems to give justification for the arbitral tribunal’s power to apply competition law in spite of a different choice of law made by the parties. If the parties chose the governing law, the arbitral tribunal does not violate its mandate because the choice made by the parties does not extend to competition law. If the arbitral tribunal selected the governing law on its own motion, and selected it applying private international law mechanisms, it is the private international law itself that gives the power to override the governing law. Under the private international law, competition law is applicable to agreements or conduct if these affect the territory’s competition.88

88 See, for example, Case C-381/98, Ingmar GB Ltd v Eaton Leonard Technologies Inc., supra note 33.
VIII. Competition Law and Fair Hearing

While the foregoing discussion has shown that arbitral tribunals may have the power to apply overriding competition law notwithstanding a different choice made by the parties, it must be kept in mind that this power may not be exercised in a way that deprives the parties from their right to be heard. The principle of fair hearing requires that each party be given the possibility to present its case. This also includes the possibility to comment on the applicability of overriding mandatory rules, such as competition law, that the arbitral tribunal may deem applicable on its own motion. Therefore, it is important that the tribunal informs the parties of its intention to consider overriding mandatory rules that were not pleaded by the parties, and invites them to comment. Some legal systems require that parties are invited to comment on facts that the arbitral tribunal independently will use as a basis for the decision, but not necessarily on the arbitral tribunal’s legal reasoning. However, it seems prudent to inform the parties also on legal aspects that the tribunal independently considers relevant, such the applicability of competition law. This is because one of the parties, or both, may be induced to present evidence that they did not consider relevant when they were not aware that competition law would be considered. The result of not informing the parties may be that the parties are deprived of the possibility to present their case in full, and this is a violation of the principle of fair hearing.

IX. Conclusion

The foregoing shows that arbitral tribunals have the power to consider competition law of their own motion, even though the parties may have chosen a different governing law. This power derives directly from the legal framework of arbitration, combined with an understanding of the parties’ choice of law as the exercise of their power to choose the governing law within the constructs of private international law, i.e. as the conflict rule of party autonomy.

Arbitral tribunals should be wary of an interventionist approach that gives effect to any mandatory rules, such as competition law, without taking into consideration the parties’ expectations. At the same time, they should not lend themselves to circumvention of competition law. Between these two extremes, arbitral tribunals may find guidance in the grounds for validity and enforceability of arbitral awards, as well as in private international law criteria.

89 More extensively, see Cordero-Moss supra note 25 at 299, 302, 324, 326, 329.
90 See Cordero-Moss supra note 25 at 321.
91 See the national reports of Brazil and Germany and, to a certain extent, of Austria, Hong Kong, Singapore and Switzerland, in Cordero-Moss and Ferrari, supra note 81.
Disregarding competition law may lead a tribunal to make an invalid or unenforceable award that violates the *ordre public* of a contracting state. However, there is no automatic correspondence between competition law and *ordre public*. Even though competition law pursues public interests and may therefore have affinities with situations where fundamental rights are at stake, not all aspects of competition law are necessarily of such importance that they may be relevant to public policy. The underlying principles may be safeguarded even if the technical content of the rule was not implemented accurately. Moreover, not all violations of such rules have necessarily so serious consequences that they shall be deemed to violate *ordre public*.

Considering the legal framework for arbitration as described above permits tribunals to strike a balance between party autonomy, the independence of arbitration and court control. If arbitral tribunals exercise some self-regulation and consider overriding mandatory rules such as competition law, they will give no ground to erode the trust in arbitration, and courts or the legislators will not have incentives to restrict the availability of arbitration. If courts exercise constraint and strike down awards only when these seriously violate fundamental principles, they will give no ground to develop doctrines intended to restrict court interference.