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Collective competition arbitration in the EU towards an arbitrated European class

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**King's College London
Dickson Poon School of Law**

**Collective competition arbitration in the EU — towards
an arbitrated European class**

Thesis presented for the degree of PhD:

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Collective competition arbitration in the EU — towards an arbitrated European class

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Chapter 1

Collective arbitration of EU competition claims — a solution looking for a problem or an efficient means of redress?

1. *What are the issues?*
 2. *Arbitration to solve the problems in competition redress*
 3. *What is collective redress?*
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1. What are the issues?

“The picture which emerges from the present study on damages actions for breach of competition law in the [...] EU is one of astonishing diversity and total underdevelopment.”¹

This 2004 introduction to the European Commission’s first significant study on redress for victims of competition law infringements is no longer fully accurate. Nearly 15 years later, the picture has changed significantly. Court claims by businesses requiring compensation for harm caused by competition law infringements established by the EU Commission and by national competition authorities have increased substantially, both in number and by size of recoveries.² The EU institutions have — for the most part — strongly encouraged compensation claims against competition law infringers, sometimes called ‘private enforcement’ of competition law.

In parallel with this trend, competition law enforcement by the European Commission and national competition authorities has increased sharply in intensity since 2000.³ Competition law infringements — particularly cartels — are increasingly international in scope and effect, and co-operation between competition authorities has increased to keep pace with this.

By comparison with the developed international co-ordination of public competition enforcement, the mechanisms available to private parties to manage international compensation claims in national civil courts remain relatively

¹ Denis Waelbroeck, Donald Slater, Gil Even-Sosha; ‘Study on the conditions of claims for damages in case of infringement of EC competition rules – a comparative report’ (2004) Ashurst at <ec.europa.eu/competition/antitrust/actionsdamages> retrieved 2 July 2018

² The European Commission’s statistics are currently (September 2018) incomplete — <ec.europa.eu/competition/elojade/antitrust/national_courts/>

³ European Commission, ‘Cartel Statistics’ (21 March 2018) <ec.europa.eu/competition/cartels/statistics.pdf> retrieved 2 July 2018

rudimentary. Within the EU — despite the EU legislative framework designed to ensure recognition and enforcement of civil judgments — defendants in competition cases still routinely face multiple claims in different courts. Claimants may also be disadvantaged by not being able to bring a single claim to deal effectively with the whole of their loss in the EU — especially if there is more than one defendant. Substantial differences in the civil procedure rules of EU Member States can have a dramatic impact on claimant redress. In particular, availability of evidence disclosure, limitation periods and the legality of advanced litigation funding solutions may well be determinative.

To respond to these difficulties, a package of EU ‘hard’ and ‘soft’ law measures was introduced in mid-2013, designed to provide a basis for EU wide ‘private enforcement’ of competition law. It is based on a Directive on actions for damages in competition infringement cases which, for the first time, provides EU minimum civil procedure standards for competition claims.⁴ This was accompanied by a Recommendation prompting Member States to ensure effective national procedures for ‘collective redress’ actions by groups of claimants against infringers of all directly effective EU law — among the most important being the EU competition rules.⁵ Collective redress is seen as necessary to ensure that widely dispersed harm can be effectively compensated even where the value of an individual loss might not warrant a separate claim.⁶

Despite this new legislation, there remain substantial gaps in the EU competition redress architecture. In particular:

- there is no single EU civil procedure for bringing one claim which will give full redress to a dispersed group of claimants, leading to a potential ‘redress deficit’;
- the lack of a single procedure means that defendant infringers may in many cases not be able to achieve finality of liability for their infringement within a reasonable time;
- available EU law based procedural mechanisms do not deal well with mass harm situations which also affect non-EU countries.

Although the EU legislative framework focuses on civil *litigation* procedures, the EU instruments recognize the central place of alternative dispute resolution — including arbitration — in providing effective compensation for all victims of EU competition law infringements.⁷ The flexibility of arbitration in resolving disputes and the broad enforceability of arbitration awards should make arbitrated solutions to competition redress issues particularly attractive.

This thesis therefore considers two closely related questions. First, can arbitration of EU competition claims proceed on a collective basis — to cover all damage arising from a single infringement — so that the procedure will be

⁴ Directive 2014/104, [2014] OJEU L349/1, Rules governing actions for damages under national law for infringements of competition law (‘damages Directive’)

⁵ Commission Recommendation, 14 June 2013, 2013/396/EU, [2013] OJEU L201/60, Common principles for injunctive and compensatory collective redress mechanisms (‘Recommendation’)

⁶ *ibid*, recital (9)

⁷ *ibid*, recital (16)

admissible and the resulting award recognised and enforced across the EU? Second — and assuming that the answer to the first question is ‘yes’ in whole or major part — how can collective competition arbitration in the EU best be managed so as to ensure both maximum redress for the claimant group and a high degree of finality (closure) for the defendants?

We conclude that the answer to the first question is — generally — indeed ‘yes’, although enforcement of some forms of collective competition award may face public policy difficulties in some EU Member States. The second question can best be answered by close attention by the parties, the arbitrator and (where relevant) arbitration institutions to the public policy backdrop to the collective competition arbitration. The choice of the place (seat) of arbitration is likely to determine the relevant set of public policy rules for admissibility and recognition of the collective arbitration procedure. If that seat is in the EU, common EU ‘general’ principles will condition how national public policy rules in the relevant (national) arbitration legislation should be applied to enforcement of competition awards.

2. Arbitration to solve the problems in competition redress

Fragmentation of civil procedures in the EU is the cause of — at least — the first two of the three redress gaps identified above. The response to this fragmentation issue — of clear benefit to both sets of parties — would be to gather all of the claims against a single competition infringement in a single collective procedure whose outcome is enforceable across the EU. This is, of course, already possible in the US using the ‘class action’ device.⁸ Other common law jurisdictions — Australia, some Canadian provinces — have similar litigation procedures. Some EU Member States have recently developed their own ‘collective redress’ court procedures — including the UK, which has chosen to model itself largely on Canadian precedent.

The EU legislation on recognition of civil *judgments* has yet to embrace this development of collective redress. ‘Class’ members who do not actively participate in civil litigation proceedings are unlikely to be able to enforce (or be bound by) a collective judgment outside the country where it was given. The collective effect of the judgment ends with the (national) jurisdiction of the court making it.

The jurisdiction of an arbitrator, in contrast, is only bounded by the consent of the parties to arbitrate. It is not limited to a particular territory. Consent may be given before a dispute arises or (in a ‘submission’ agreement) afterwards. The arbitrator is given the power by the parties to resolve a given civil dispute (or set of disputes) and the parties’ choice to arbitrate will be recognized in most advanced market economies.⁹ Courts should decline to hear disputes within the boundaries of a valid arbitration agreement.¹⁰

⁸ through the Rules of Procedure of the United States Judicial Panel on Multi-district Litigation (October 2016), made under 28 USC §1407, <jpm.l.uscourts.gov> retrieved 2 July 2018

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, UNTS I-4736 (‘Convention’), Art II

¹⁰ *ibid*, Article I

Arbitration should also provide a response to the third ‘gap’ issue noted above — international co-ordination. The territorial extent of the enforceability of the arbitrator’s award is — for all practical purposes — worldwide. Over 150 States are party to the 1958 New York Convention on the recognition of foreign arbitral awards.¹¹ They are required under the Convention to recognise and enforce arbitration awards made abroad: the limited exceptions to enforcement (which include public policy) are exhaustively set out in Article V. Broadly, provided that the foreign award is within the scope of the consent to arbitrate (that is, within the arbitrator’s jurisdiction) and does not offend against the most basic public policy norms: *ordre public* — in some States, measured using an *international* benchmark, it must be enforced.¹² Arbitration may therefore provide a platform for the development of international collective competition redress systems with a broad territorial scope not possible using court based dispute resolution.

If the appropriate incentives to agree are present, the development of arbitrated collective redress procedures will probably begin through (post-dispute) agreements to submit to arbitration. Defendants faced with actual or potential resource intensive collective court actions in a number of jurisdictions in the EU — or more widely — may find it more effective (and less costly) to agree to resolve all the class claims made against them in a single arbitrated international collective proceeding.

Collective arbitration using existing pre-dispute contractual arbitration clauses may also be possible. Most standard arbitration clauses recommended by the larger arbitration institutions give a wide procedural discretion to the arbitrator. The arbitration institutions themselves also sometimes have power to intervene to shape the arbitration procedure if the parties cannot agree.¹³ Collective arbitration under pre-dispute arbitration clauses has already taken place in an international investment context and we suggest that the lessons learned there can be transferred to competition arbitration.¹⁴ The essential questions are: how is consent to arbitrate (directly or indirectly) expressed and what is its scope? And are the procedural choices made by the parties (and the arbitrator) acceptable in public policy terms?

These two important questions are dealt with in Chapters 2 and 3 of this thesis. But use of language and terminology is unusually important in European collective redress — with ‘US-style’ class actions being seen as (at best) undesirable in most of Europe. The next two sections of this introduction therefore first offer a taxonomy for the relevant terminology — what is ‘collective redress’ — and then briefly introduce the policy controversy caused by the development of collective redress in the EU.

¹¹ signatories at <<https://treaties.un.org>>

¹² Convention (n 9), Arts I and II; in France, code de procédure civile (CPC), decret 2011-43, 13 January 2011, art 1520.

¹³ Arbitration Rules of the International Chamber of Commerce, Paris, 1 March 2017 (‘ICC Rules’), Art 10

¹⁴ *Abaclat and others v Argentine Republic*, ICSID, ARB/07/05, <icsid.worldbank.org/pages/cases>, retrieved July 2018

3 What is collective redress?

Descriptors (and thus taxonomy) appear unusually important in the field of collective redress in Europe. There is strong disapproval in Europe of US class actions — the most high-profile type of collective redress in the world.¹⁵ The perceived negative effects of such action — including ‘blackmail’ suits and excessive lawyers’ contingency fees based on a percentage of trebled damages — obscure the advantages of collective proceedings. This reaction means that anything which can plausibly be described as a ‘class action’ has — at least until very recently — been viewed as anathema by policy makers across the EU, and still is in many EU countries.¹⁶ Thus the appearance of ‘class’ can still be expected to lead to serious problems of recognition or enforcement of a collective *arbitration* award in many EU Member States.

In order to develop our argument, we nevertheless need to distinguish between the various forms of collective redress and the procedural mechanisms which underpin them. Not all collective redress is a ‘class action’.

‘Collective redress’ is a term adopted by EU legislators in the 2013 package to describe an action (either for damages or for an injunction) brought in two ways. The action can be brought (by two or more harmed claimants) collectively — effectively as part of a ‘bundled’ or group proceeding. Or the action can be brought by an ‘entity’ representing the group of (two or more) persons who have been harmed.¹⁷

The collective redress mechanism must allow individual claims to be brought collectively where they have resulted from the same ‘mass harm situation’. That is, they must claim that the harm caused to them resulted from the same unlawful activity committed by one or more persons.¹⁸

Here we use ‘representative action’ to mean an action where a person (possibly more than one in a large claim) or entity represents the interests of the group of claimants. There are, however a number of sub-categories of representative action.

A first distinction needs to be made according to the type of person who is allowed to be a representative. Some systems of collective redress allow (or in some cases require) the representative to be a claimant — that is, to have their own individual cause of action (a ‘claimant representative’). Other systems permit (or require) the representative to be a person or entity with no direct interest in the outcome

¹⁵ eg. European Parliament resolution, 2 February 2012, A7-0012/2012, para 2, <europa.eu/parl/committee/activities/2012/02/02/2012_0012_en.htm> retrieved July 2018

¹⁶ a minority of EU Member States permit ‘opt-out’ class claims. British Institute of International and Comparative Law, *State of Collective Redress in the EU in the context of the Implementation of the Commission Recommendation*, study for European Commission, November 2017, JUST/2016/JCOO/FW/CIVI/0099, 15-18

¹⁷ Recommendation (n 5) para 3(a)

¹⁸ *ibid*, para 3(b).

of the collective claim (an ‘ideological representative’).¹⁹ Sometimes ideological representatives must fulfill certain qualifying criteria — for example to be a non-profit organization — and they may also need to be authorized by national administrations.²⁰ Ideological representation appears currently to be the favoured form of representative action in Europe.

A second distinction depends on the way in which the group members adhere to the collective claim. Most countries allow some form of representative collective proceedings where the group members have individually agreed to belong to the group (‘opt-in’). A minority of countries allow representative collective claims where — after suitable notification (advertising) — all claimants within the group description (set by a court) will be bound to the collective claim unless they individually decide *not* to participate (‘opt-out’).²¹

The distinction between opt-in and opt-out representative actions may not be applicable in the same way to arbitrated collective redress actions as to litigated claims. The group members will always (directly or indirectly) have ‘opted-in’ to the arbitration by consenting to arbitrate the dispute.²² If that consent is found to include consent to arbitrate collectively, the arbitrator (subject to limited public policy supervision) will then have the competence to decide the best procedure for reaching a resolution of the collective claim. The procedure adopted may include some or all of the elements of an ‘opt-out’ representative action and so may appear to be one. But it can only ever bind those group members who consent to the arbitration — not those who never do so. There is no such thing as a properly ‘opt-out’ collective arbitration.

Here, we use the term ‘group action’ — in contrast to ‘representative action’ — where a number of individual claims are bundled together to form a single action without the use of an intermediary representative. All group actions are necessarily ‘opt-in’. There are a variety of ways of bundling together similar claims — the most well-known including the English group litigation order (GLO), which allows the court to manage a number of claims together where they have ‘common issues’.²³

Simple joinder of claims can also create a rudimentary form of collective redress. However, in the light of the Recommendation — which urges EU Member States to go further than simply allowing this basic process — EU policy clearly favours more advanced forms of collective procedure in order to ensure effective redress.²⁴

¹⁹ The Recommendation (n 5) promotes the use of an (‘ideological’) representative entity, (para 4); discussed in ch 2.3

²⁰ Recommendation (n 5), para 4(a)

²¹ BIICL study (n 16); Competition Act 1998, s 47B (11)

²² Convention (n 9), Art II(1); UNCITRAL *Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 2016 Edition, (UN, September 2016) (‘UNCITRAL Guide’), 43; Andrea Steingruber, *Consent in International Arbitration* (2012) OUP, 12-12

²³ CPR, 19.13

²⁴ Recommendation (n 5), recital 10

In any case, simple joinder — or consolidation — of *arbitrated* claims is not straightforward and does not conform to the pattern seen in litigation. A number of countries' arbitration laws do not permit the consolidation of several ongoing bi-lateral arbitrations unless all of the parties to each of them agree to this — either expressly or impliedly. For example, the UK Arbitration Act 1996 provides that an arbitrator has no power to consolidate proceedings or order concurrent hearings unless the parties agree otherwise.²⁵

Consent can, however, be given indirectly through choice of the rules of an arbitration institution permitting consolidation. Those institution rules which permit consolidation often have fairly detailed requirements. For example, the International Chamber of Commerce arbitration rules only permit the ICC Court to consolidate arbitrations (without unanimous consent) where the claims are all made under the same arbitration agreement or where the disputes arise in connection with the same legal relationship and the agreements to arbitrate are compatible.²⁶

We consider further in our recommendations at the end of this thesis how far arbitration institutions may wish to adapt their practice or even their rules to make group arbitration more available. Some (such as the rules of the Swiss Chambers) are already sufficiently permissive to allow fairly advanced forms of group action to be used in competition arbitrations.²⁷ The 2013 EU competition and collective redress package may also prompt other institutions to consider adopting similarly broad provisions.

We choose the term 'group action' in preference to the alternative term 'mass action' often used in this context.²⁸ We suggest that the term 'mass action' could be confused with the concept of 'mass harm' used in the 2013 Recommendation. 'Mass harm' can be compensated by collective redress procedures of either the representative or group (mass) types. However, in adopting this different terminology, we are not suggesting that there is any difference in the broad scope of bundled collective redress methods described — particularly given the variety of bundling techniques used in EU Member States and beyond.

Finally, and peculiarly to Europe, there are some hybrid collective redress systems which adopt collective redress procedures which cross the opt-in and opt-out divide. Either these are 'tailored' systems for particular situations — the main example being the collective redress system for shareholders in Germany (KapMuG)²⁹ — or they are mechanisms for the out of court settlement of group claims, which permit (after endorsement by a competent court) the settlement to

²⁵ s 35(2)

²⁶ (n 13), rr 10(b) and (c)

²⁷ Swiss Rules of International Arbitration, 2012, art 4, < https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf retrieved 18 July 2018

²⁸ S I Strong, *Class, Mass and Collective Arbitration in National and international Law* (2013) OUP, 74-84

²⁹ Kapitalanlegermusterverfahrensgesetz, 19 October 2012, BGBl I S2182 (KapMuG); 5.2.2 below

extend to non-active group members.³⁰ These hybrid procedures may be particularly relevant where an arbitration has concluded and the parties wish to widen the extent of redress and degree of finality of the award. The competent national courts may be able to ‘approve’ the arbitrated outcome so as to give it a degree (at least) of ‘opt-out’ effect within the court’s territorial jurisdiction, thus binding other group members even where they may not have consented to arbitration. We discuss this possibility further in Chapter 6.

4 Collective arbitration and EU competition claims

We have already noted that collective redress — seen through the lens of US class actions — was not initially welcomed in the EU. The European Parliament, in a 2009 resolution on an early draft of the damages Directive, opined:³¹

[...] no matter how a dispute is resolved, it is essential that procedures and safeguards are put in place to ensure that all parties receive fair treatment and that, at the same time, there is no abuse of that system, such as has occurred in other legal systems and, in particular, in the United States;

The Commission White Paper to which this resolution relates included a proposal for EU legislation to mandate competition collective redress in all Member States — a proposal which was subsequently withdrawn and replaced by the current Commission collective redress Recommendation.³²

Even in the USA class actions remain controversial.³³ The arbitration of class claims, which evolved from the early 2000s — notably in the *Green Tree* case³⁴ — although permitted by the US Supreme Court, has been closely examined by that court on a number of later occasions. We consider the US Supreme Court jurisprudence in Chapter 2, but it has been characterized by a high degree of caution and a strong emphasis on the need for the parties to the arbitration to have consented to ‘class’ proceedings.

US practice is not directly transferrable to the EU context. The simple lifting of the US class litigation process into an arbitration — which appears to have occurred in several US arbitration cases — is unlikely to be replicable in most competition arbitrations having their seat in the EU. This is particularly true where (as is usual) the competition claim is non-contractual in nature and EU legislation imposes a law governing important elements of a collective procedure.³⁵

However, the high degree of deference shown by the US Supreme Court to the findings of the arbitrator on procedural matters — in effect insisting only that he

³⁰ for example the Dutch mass settlement legislation: *Wet collectieve afwikkeling massaschade*, last amended 26 June 2013, StB 2013, 255

³¹ European Parliament Motion and Report, 9 March 2009, A6-0123/2009 recital I

³² White Paper on *damages actions for breach of the EC anti-trust rules*, COM (2008) 165 final, staff working paper SEC (2008) 404, para. 322 first bullet

³³ eg. Christopher Hodges *The Reform of Class and Representative Actions in European Legal Systems* (2008) Hart, 131-145; Deborah Hensler *Class Action Dilemmas: Pursuing Public Policy Goals for Private Gain* (2000) Rand, 49-62

³⁴ *Green Tree Financial Corp v Bazzle*, 539 US 444 (2003).

³⁵ 4.2.1 below

has properly directed himself as to whether the parties have indeed consented to class arbitration — is also a feature of most main European arbitration laws and practice. The manner in which the US courts have approached this key issue of consent to class arbitration therefore holds important lessons for EU collective arbitration. Despite the reservations of EU policymakers, the existing practice in class arbitration in the US should form a tool for the parallel analysis of collective competition arbitrations in the EU.

US experience will also — of course — be highly relevant where the arbitration covers claims for mass harm which has occurred in both the EU and the USA. One of the principal attractions of collective competition arbitration is likely to be its acceptability across the two continents so as to allow a single action to encompass trans-Atlantic anti-trust claims.

5 Methodology adopted

This thesis is based on a study of the case law, legislation — including relevant international treaty law — and legal academic literature relevant to the two focus questions: is collective competition arbitration possible in the EU and how best can it be managed?

Most of the literature on collective arbitration from European authors has focused on questions arising during multi-party arbitration proceedings — that is, those which are prompted by an arbitration with several parties whose claims or defences may need to be dealt with together. As ‘collective redress’ builds on — although steps significantly beyond — this simple joinder scenario, discussion of ‘complex’ multiparty arbitration is clearly very relevant to our focus questions.

Some European commentators have recently begun to consider the possibility of representative (or ‘class’) arbitration for EU disputes.³⁶ But their starting point has tended to be a comparison of potential class arbitrations with the litigation techniques available in the EU to group claims together — which, as they note, are still rudimentary (although developing rapidly).

We suggest that this may not necessarily be the best starting point for an examination of the feasibility of collective competition arbitration in the EU. Rather, we believe that a consideration of the twin ideas of arbitrability and consent to arbitration, taken in the context of overriding EU law principles, should give a clearer answer to the principal thesis question — can collective arbitration be successful on a broad scale in Europe? We suggest that this new analytical approach will give a more soundly based answer to our thesis question than the comparative approaches adopted to now.

³⁶ Philippe Billiet (ed), *Class Arbitration in the European Union* (2013) Maklu, 21-29; Strong (n 28), 308-312

The European literature has historically (broadly) focused on three issues of complexity — primarily relating to consent (jurisdiction) — in multiparty commercial arbitration:³⁷

- arbitrations involving a corporate group where it is unclear whether all of the legal persons forming part of the group have expressly consented to arbitrate the particular dispute in question (the ‘piercing the veil’ issue);
- arbitrations involving parties who may not all be in a direct contractual relationship with each other — for example where an arbitration clause is inserted in a series of contracts made by a head contractor with a number of unrelated sub-contractors or by a supplier down a chain of distribution. How far can disputes between the head contractor (supplier) and each sub-contractor (distributor) be treated in a single arbitration (the ‘related contracts issue’)?
- arbitrations involving a party who claims to be acting on behalf of other parties (the ‘agency’ issue).

Although we suggest that thinking in relation to ‘piercing the veil’ in complex commercial arbitration is of peripheral relevance to the collective arbitration of competition disputes, both the related contracts issue and the agency issue will arise in many forms of arbitrated collective redress.

In addition to considering commercial arbitration, there are also lessons to be learned from some forms of international public law arbitration — particularly investment treaty arbitration. We will, in particular, consider in Chapter 2 the admissibility award of the international ICSID arbitrators in the *Abaclat* dispute — between Argentina and a large number of Italian holders of Argentine government bonds — which permitted a representative form of collective arbitration.³⁸

We believe that our suggested approach is particularly suitable for examining the collective arbitration of EU *competition* claims. The literature on the specific issues raised by competition arbitrations has focused on the question of whether competition claims can be arbitrated (bi-laterally) at all— a question which now appears settled in favour of arbitration.³⁹ To date, the way in which the EU encouragement of *litigated* collective redress techniques in competition disputes might affect (or provide a basis for) *arbitrated* collective redress has been scantily considered in the academic literature.

As EU competition law is fully directly applicable in relations between private parties — and its observance is a matter of EU public policy — EU law principles and practice will apply with particular force in arbitrating EU competition claims.⁴⁰ The EU right to an effective method for obtaining compensation applies

³⁷ Bernard Hanotiau, ‘Complex Arbitrations: Multi-party, multi-contract multi-issue and class actions’ (2005) Kluwer Law International, 88-96, 101-108; Steingruber (n 22), 151-164

³⁸ ICSID ARB/07/05 (n 14)

³⁹ Renato Nazzini, ‘Competition Enforcement and Procedure’, 2 ed (2016) OUP, 416-418; Alexis Mourre, ‘Arbitrability of Anti-trust Law from the European and US Perspective’ in G Blanke and P Landolt (eds) ‘EU and US Anti-trust Arbitration’ (2011) Wouters Kluwer; 2.2.2 below

⁴⁰ C-126/97 *EcoSwiss China Time v Benetton International NV* [1999] ECR-I 3055

just as much to (private) arbitration proceedings as to litigation in a public forum. A main aim of this thesis is to demonstrate that EU law strongly promotes — even if it cannot mandate — the collective arbitration of EU competition law disputes.

This is not, of course, to say that national practice is irrelevant to the two focus questions. First, national arbitration legislation — largely made independently of EU law influence — may differ as to the extent to which it allows court intervention in arbitration. Second, national litigation procedures for collective redress in the EU — whether in the competition field or otherwise — may provide a suitable and acceptable template for an arbitrator to craft his own collective procedure. Finally, and importantly for the expansion of collective arbitration proposed here, the increasing availability of ‘collective settlement’ regimes in EU Member States may allow a novel ‘hybrid’ solution to resolving a collective dispute. This could combine collective arbitration and national (court based) collective settlement mechanisms to offer an effective and final resolution of the claim covering all members of the class in the ‘settling’ countries and extending across a number of EU Member States. Consideration of the legislative background to collective settlement in selected EU countries has — where accessible — therefore also been part of the method adopted in this thesis.

Finally, we have also considered — in overview — the US case law and practice on class arbitration of anti-trust claims. As noted above, there are some clear lessons to be learned — in particular from the decisions of the US Supreme Court in this area, which we address in the next chapter. However, there is already abundant literature from US-based commentators on US class arbitration to which we do not feel we could greatly add, and which is only tangentially relevant to EU practice. We have not, therefore, considered this resource in detail.⁴¹

We suggest that the audience for our analysis is — at least potentially — a broad one. The most important readers are the (potential) parties to a dispute arising from a competition infringement. We will consider at the end of this thesis how the conclusions we have drawn can incentivise claimants and — particularly — defendants to use collective arbitration in an EU competition context.

Arbitrators are also a principal audience. They would be tasked with deciding on the best form of collective procedure to use if they are asked to decide a competition claim presented as a collective action.

Finally, arbitration institutions and government policy makers should also be interested in the conclusions reached here. Arbitration institutions have already taken an interest in collective redress in Europe. The German arbitration institution (DIS) has drafted supplementary ‘model’ (collective) arbitration proceedings rules following a decision of the German supreme civil court that such proceedings are lawful. However, at its 35th Annual Meeting devoted to this topic, the ICC arbitration forum reached a view that drafting ICC rules to deal specifically

⁴¹ eg. Hon. Guido Calabrese ‘Class actions in the US experience: the legal perspective’ in Jurgen Backhaus, Alberto Cassara and Giovanni Ramello, *Law and Economics of Class Actions in Europe: Lessons from America* (2012) Edward Elgar

with collective arbitration would be premature.⁴² It is hoped that this thesis shows that that view may need to be revisited soon — at least for competition claims, and probably more widely.

6 Plan of thesis

This thesis will be presented in five further Chapters followed by a chapter of recommendations and conclusions.

Firstly, in chapter 2, we consider the twin jurisdictional requirements for any arbitration. Is the dispute capable of ‘settlement’ by arbitration (the question of ‘arbitrability’)? And, if so, how have the parties consented to the arbitration of their dispute?

This chapter also addresses the issue of how far an arbitrator can imply consent to collective arbitration against the backdrop of the encouragement to collective redress offered by EU law (examined in chapter 3), as well as by reference to the practice in other jurisdictions — primarily the United States.

In chapter 3 we will consider the development of EU policy and law, both in relation to collective redress and to arbitrating competition claims. We note in this chapter that the EU legislative and policy background strongly favours collective redress of EU competition claims. The CJEU, through its adoption of the ‘second look’ doctrine, has ensured that EU competition law issues must be considered when enforcing a competition award.

Chapter 4 considers how best to manage public policy risks to crafting and using a collective competition arbitration. Looking first at risks during the arbitration (in the court supervising the proceedings in the arbitration seat), we consider the factors which affect the ability of an arbitrator to admit a collective procedure — in particular for representative actions.

As to the potential for challenge to the award once made — which may in practice be the main danger to an effective collective competition arbitration — we consider both the depth of permissible scrutiny of the award by a court as well as the possibility of challenge by an inactive class member.

The degree of procedural flexibility allowed to an arbitrator turns crucially on the choice of the most appropriate seat for the arbitration. So, in chapter 5, we consider in overview the factors to be addressed when seating an arbitration (using England and Germany as examples) and how the choice of seat may affect recognition and enforcement of the collective competition award elsewhere in the EU.

In chapter 6 we turn to the collective redress phenomenon in Europe commonly called ‘collective settlement’. We consider the main national legislative

⁴² Paris 30 November 2015. Papers arising from this conference are presented in Bernard Hanotiau and Eric Schwartz (eds) *Class and Group Actions in Arbitration* (2016) ICC

settlement regimes (in the UK and Netherlands) which allow the settlement of collective claims without the need for litigation. We examine if court settlement orders can affect group members who may be outside the (jurisdictional) limits of the competition arbitration proceedings — those who cannot be said to have consented to arbitration. An increase in finality through this kind of ‘hybrid’ procedure is likely to be particularly attractive for defendants to the competition claim.

Finally (in chapter 7), we conclude that competition claims can indeed be collectively arbitrated with wide enforceability within the EU, provided that some care is taken in the crafting of the appropriate collective arbitration procedure. Choice of seat, of type of collective procedure and inspiration from national collective settlement mechanisms should all be combined to achieve an optimum collective outcome to the dispute.

The law is stated as at 1 October 2018.

Chapter 2 Can collective competition claims be arbitrated in the EU?

Arbitrability and the limits of consent in national and international law

- 1 *Parties' freedom to arbitrate*
- 2 *'...subject matter capable of settlement by arbitration'*
 - 2.1 *arbitrability and the New York Convention*
 - 2.2 *arbitrability of competition disputes*
 - 2.3 *ability to arbitrate collective claims*
 - 2.4 *'...agreement is null and void, inoperative or incapable of being performed' – 'in-arbitrability' or agreement failure?*
 - 2.4.1 *determining the validity of the arbitration agreement*
 - 2.4.2 *how does the public policy of the agreement affect collective competition arbitration?*
 - 2.4.3 *applying the correct law correctly*
- 3 *Scope of consent to arbitrate*
 - 3.1 *Arbitrator's competence – with consent*
 - 3.2 *Consent in international practice: the 'Abaclat' case*
 - 3.2.1 *the tribunal's jurisdiction and admissibility award*
 - 3.2.2 *is this analysis transferable to other contexts?*
 - 3.3 *Claimant challenges to arbitrator's competence*
 - 3.3.1 *'group' or 'representative' claims*
 - 3.3.2 *discovering consent: direct, indirect, express or implied*
 - 3.3.3 *implied authority of 'ideological' representative*
 - 3.4 *Effect of group member jurisdiction challenges: which dispute is affected?*
- 4 *Arbitrability in class action jurisdictions: what lessons are there from the US?*
 - 4.1 *Arbitrability of anti-trust claims*
 - 4.2 *Class arbitration permitted – within limits*
 - 4.2.1 *arbitrator's freedom to 'certify a class'*
 - 4.2.2 *arbitrator's power must be based on consent*
 - 4.3 *Summary on US case law*
- 5 *Conclusions on arbitrability and consent in collective competition arbitration in Europe*

1 **Parties' freedom to arbitrate**

This chapter considers the national and international law principles addressing the question whether collective competition claims can be arbitrated in Europe. The answer depends — in the first instance — on the answer to two further basic questions. Are collective competition disputes of a kind which private parties may arbitrate as a matter of *ordre public* ('arbitrability') and, second, have they in fact agreed to do so ('consent')?

And these questions will need to be addressed at different times in the process of making and enforcing a collective competition arbitration award:

- at the outset of the arbitration, if a jurisdiction challenge is made to the arbitrator or to a supervising court requesting a stay of the arbitration;
- (exceptionally) during the arbitration proceedings — on a challenge to the conduct of the arbitration or the (collective) procedure adopted;
- on enforcement of the award by or against one or more of the parties. A party may apply to have the award set aside or challenge enforcement of it outside the seat

The way in which these questions should be addressed will also vary according to the type of finding against which the challenge is made. In particular, is the challenge against the scope of the arbitrator's jurisdiction to resolve the competition dispute or against the admissibility of the (collective) procedure he has determined should apply to the arbitration? This interplay between the timing of the challenge and the nature of the decision being questioned will in turn condition:

- the set of legal rules under which both the criteria for assessing 'arbitrability' and the methods of interpretation of the arbitration agreement (for deciding the scope of consent to arbitration) will be applied;
- the forum in which the challenge should be made;
- the effect of a successful challenge on the parties to the application and on other parties concerned by the arbitration.

The analysis in this chapter demonstrates that collective competition disputes are indeed 'arbitrable' in principle in EU states. It will in many cases be possible to show that parties have consented to arbitration of their competition dispute through a collective procedure. Courts in the EU should therefore recognize and enforce the resulting arbitration award.

The next section in this chapter considers the question of the arbitrability of collective competition disputes and the extent to which international treaty law — specifically the New York Convention on the recognition and enforcement of arbitration awards — applies to this issue.¹ The following section considers the issue of consent to arbitrate — both as to the substantive jurisdiction of the arbitrator and as to the admissibility of collective procedures. And, before we conclude this chapter, we consider if any lessons for Europe can be learned from the — currently rather different — US practice in this field.

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, UNTS I-4736 ("Convention"). We use the term *ordre public* for the international public policy referred to the New York Convention (especially Art. V). EU public policy refers to the applicable general principles of EU law — somewhat broader than *ordre public*. Public policy is used to refer to national policy rules which (also additionally to *ordre public*) may affect the interpretation of an arbitration agreement or the setting aside of an award.

2. ‘...subject matter capable of settlement by arbitration’

There is no international law definition of the term ‘arbitration’ or ‘arbitral award’.² This malleability of terminology has necessarily spilled over to the use of the term ‘arbitrability’, which has traditionally been seen as addressing the issue of whether the *type* of dispute presented for arbitration is of a nature to be arbitrated.³ For example, many legal systems exclude family or inheritance disputes from arbitration on the public policy grounds of their ‘non-commercial’ nature.⁴ Perhaps less obviously, EU countries also prevent contracts with consumers from including pre-dispute arbitration clauses.⁵

However, most developed legal systems accept that all kinds of economic dispute — sometimes described as about ‘rights which the parties can freely dispose of’ — can be referred to arbitration (that is, are ‘arbitrable’).⁶ In contrast, where the resolution of a dispute necessarily involves the intervention of a public authority exercising its public law powers, that dispute will not be arbitrable. An arbitrator cannot condemn a party under criminal law, although he could, for example, decide whether an agreement is vitiated by fraud when resolving the related civil dispute.⁷

The term ‘arbitrable’ is also used — particularly in the US — in a wider sense to indicate whether or not a *particular dispute* should be referred to arbitration under its arbitration agreement.⁸ In addition to the narrow ‘policy’ question of whether the type of dispute is appropriate for arbitration, this wider ‘arbitrability’ definition also requires an examination of both the formal validity and the extent of the agreement to arbitrate (that is, an interpretation of the parties’ consent is required as well as consideration of its ‘subject matter’). The discussion in this chapter will treat ‘arbitrability’ in the narrower sense: the wider issue is, we believe, better treated (as we also do here) as a question of determining the boundaries of the parties’ consent to arbitration.

How far is ‘arbitrability’ — narrowly defined — affected by treaty law? We will conclude in the next chapter that the general principles of EU law may in many cases have a substantial — perhaps determinative — influence on the application

² UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958, (2016) United Nations, New York, (‘UNCITRAL Guide’) p 11, para 18

³ Andrea Steingruber, ‘Consent in International Arbitration’, (2012) OUP, 43-44

⁴ eg. French Civil Code, loi 72-626 (5 July 1972), Art 2060; German Code of Civil Procedure, sections 1030(1) and (2)

⁵ Directive 2013/11, alternative dispute resolution for consumer disputes [2013] OJEU L165/63, art 10(1)-(2); C-168/05 *Mostaza Claro v Centro Movil Milenium* [2006] ECR I-10421

⁶ eg. French Civil Code, (n4), 2059. For a fuller discussion see Assimakis Komninos ‘Arbitration and damages claims based on competition law violations’ in Edward, MacLennan and Komninos eds, ‘*A Scot Without Borders, Liber Amicorum Ian S Forrester QC*’, Concurrences, September 2015

⁷ eg. *Premium Nafta Products Ltd and others v Fili Shipping Company Ltd. and others* [2007] UKHL 40, [2007] 4 AllER 951 (‘Fiona Trust’)

⁸ this wider usage appears to be particularly common in the USA. See Julian Lew, Loukas Mistelis and Stefan Kröll, ‘*Comparative International Commercial Arbitration*, Kluwer Law International (2003) at 188, and the discussion in Stacey Strong, *Class Mass and Collective Arbitration in National and International Law*, OUP 2013 at 247-255

of the international *ordre public* arbitrability exception to arbitration of EU competition disputes. But it is the New York Convention⁹ which provides the international legal framework —including arbitrability — for recognition and enforcement of commercial arbitration awards made abroad.

2.1 Arbitrability and the New York Convention

The two main provisions of the New York Convention which refer to ‘public policy’ (so, *ordre public*) — directly or indirectly — are Article II (obligation on courts of Contracting States to refer disputes to arbitration) and Article V (recognition and enforcement of foreign arbitration awards). They do so in slightly different terms.

Article II indicates that court intervention in arbitration at or near the outset of the proceedings (for example on a challenge to the arbitrator’s jurisdiction) is limited to addressing the following questions:

- is there in fact an arbitration agreement between the parties?
- does the dispute concern a subject matter capable of settlement by arbitration (arbitrability)? and
- is the agreement to arbitrate void, inoperative or incapable of being performed?¹⁰

Article V of the Convention — which applies at the time of enforcement of an award already made — allows an enforcing court to refuse recognition either where it is shown that the award (or the way in which it is made) is outside the scope of the consent to arbitrate given by the parties, or where recognition would be contrary to the *enforcing* court’s rules on *ordre public*.¹¹

The New York Convention does not apply to purely domestic arbitrations, nor to the supervision by a national court of an (international) arbitration taking place within its (territorial) jurisdiction.¹² However, the use by many important trading countries of domestic arbitration laws following the principles of the UNCITRAL Model Law on arbitration — which reflects the requirements of the Convention — has tended in practice to lead to a substantial convergence of the arbitration framework across the world.¹³

⁹ n1

¹⁰ The UNCITRAL Guide (n2) indicates that there is no consistent international practice on which law should be applied to determine these questions. Courts have applied either their own laws, the law chosen by the parties to govern the arbitration agreement or an autonomous international standard (in the USA and England) which requires a fundamental lack of consensus (at 70, paras 103-104). Pre-award, court intervention may occur either where (very exceptionally) a party disputes the jurisdiction of the arbitrator by applying for an injunction restraining all or part of the arbitration or where (more commonly) he commences litigation proceedings and another party applies for a stay of those proceedings relying on the arbitration agreement.

¹¹ Convention (n 1) Article V(2)(b)

¹² Gary Born, *International Arbitration: Law and Practice*, 2 ed, (2016) Kluwer Law International, 5. However, the court of the seat will invariably have the power to set aside a defective award.

¹³ UNCITRAL Model Law on International Commercial Arbitration (1985), last revised in 2006. For a commentary on the UNCITRAL Model Law, see Gary Born, *International Commercial Arbitration* (2 ed), (2014) Wolters Kluwer, 134-141

There are two kinds of potential arbitrability objection to collective competition arbitration. The first stems from the private law nature of the arbitration process — given the impact of competition infringements on the ‘public good’ of a properly functioning market, can an arbitrator have competence to decide a dispute in the manner envisaged by the parties?¹⁴ The second stems from the potential for collision between the parties’ agreement to arbitrate collectively and *ordre public* — sometimes framed in this context as a consequence of fundamental rules on party autonomy?¹⁵ It is helpful to consider the competition and collective elements of our proposed arbitration separately.

2.2 Arbitrability of competition disputes

Competition law sits in the ‘grey area’ where a dispute over economic rights has a strong public interest element short of necessarily requiring the intervention of a government body. Also, one party to the dispute is often in a category of weaker economic actors (consumers, for example) who are normally allowed substantial ‘public policy’ protection from oppressive agreements.¹⁶ For example, as we shall see in the next section, this means that consumers are not deemed able — as a matter of EU public policy — to give pre-dispute consent to any arbitration.¹⁷ Here, our question is “Are competition law disputes between private parties within the *type* of claims which can be arbitrated at all” — i.e. are they arbitrable — given the strong *public* interest in competition law enforcement to maintain an efficient market economy?

In general, the answer to this question in accepted international arbitration practice is ‘yes’. Ever since the United States Supreme Court held, in *Mitsubishi v Soler*¹⁸ in 1985, that an anti-trust dispute could be referred to arbitration despite the public interest in anti-trust enforcement, courts in other States have also confirmed the arbitrability of competition disputes.¹⁹ It now appears uncontroversial as a matter of international arbitration practice that competition disputes are of a type which are arbitrable.²⁰

¹⁴ In relation to collective arbitration, see Luca Radicati di Brozolo ‘Class Arbitrations in Europe’ in Nuyts, Hatzimihail eds, *Cross-Border Class Actions – the European Way* Sellier, 2014; on competition disputes see Renato Nazzini ‘Concurrent Proceedings in Competition Law’ 2 ed., OUP 2016, ch 9.

¹⁵ Steingruber (n 3), 12

¹⁶ Radicati di Brozolo (n14), 212-213

¹⁷ n 5

¹⁸ *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614 (1985), discussed at section 4 below.

¹⁹ France – Cour d’Appel de Paris, *Mors/Labinal*, 19 May 1993, [1993] Rev. Arb. 645; Switzerland – Tribunal Fédéral, decision of 28 April 1992, [1992] ASA Bull. 368

²⁰ Lew et al (n 8) note that this position now appears settled in international arbitration (at 199, fn 83), as does Luca Radicati di Brozolo, ‘*Arbitration and Competition Law: the Position of Courts and of Arbitrators*’, 27 Arbitration International (2011), 1. For an overview of the development of the arbitrability of EU competition law disputes, see Gordon Blanke ‘*Entrusting anti-trust issues to arbitration: some personal thoughts and considerations*’ (2015), 37 Arbitration International, 1-11

There is, however, no express confirmation of this in EU jurisprudence. In the leading *EcoSwiss* case the CJEU only confirmed that EU competition law enforcement is a matter of EU public policy.²¹ Member State courts are entitled to (and sometimes must) review arbitration awards presented to them *for enforcement* — whether under Article V of the New York Convention or in the seat — to ensure that recognizing or enforcing the award will not breach EU public policy if the award failed properly to address EU competition law issues. However, the CJEU also confirmed that the oversight by the national court for compliance with EU competition law should only use the same standard of review as permitted in national arbitration legislation for *ordre public* challenges (‘principle of equivalence’).²²

Implicitly, therefore, arbitrators must be free — and (at least in practice) are probably obliged — to apply EU competition law in disputes where a restriction on trade between Member States may be relevant to the decision they are requested to make.²³ That is, (by implication) EU law recognizes that national arbitration law may treat competition disputes as arbitrable. But — by only requiring a ‘second look’ *after* an award has been made — the CJEU has (perhaps inadvertently) permitted each national court to apply its *own* arbitration framework for *ordre public* to the enforcement of competition awards.²⁴

Clearly, the *ordre public* procedural tests for refusal to recognize or enforce an award may differ somewhat between Member States, even within the EU.²⁵ But fundamental EU principles will need to be applied alongside domestic policy by civil courts in the EU when either supervising or enforcing arbitrations of EU competition disputes.²⁶ National courts in the EU will need to consider the general principles of EU law — in particular, those set out in the EU Charter of Fundamental Rights and by the CJEU in its decisional practice.²⁷ In case of inevitable conflict between EU general principles and national arbitration legislation, EU law and ‘public policy’ should prevail where EU rights are at issue.²⁸ Within the EU, the increasing influence of EU legislation and CJEU case law can

²¹ C-126/97 *EcoSwiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, para 39, discussed by Luca Radicati di Brozolo ‘Court Review of Competition Law Awards in Setting Aside and Enforcement Proceedings’ in Gordon Blanke and Phillip Landolt (eds) *EU and US Anti-trust Arbitration* (2011) Wolters Kluwer

²² *ibid*, para 37, discussed in chapter 3.3

²³ Luca Radicati di Brozolo (‘Position of Courts and Arbitrators’, n 20) points out that arbitrators may be required to consider competition law issues even in the absence of party consent where not to do so would result in an unenforceable award (17-19). Marc Blessing reaches the same conclusion, even where the arbitrators are not sitting in the EEA, see ‘*EG/US Kartellrecht in internationalen Schiedsverfahren: Aktuelle Fragen*’ (2002) Helbing & Licherhahn, 35-36, citing the decision of the Swiss Federal Court in *G. SA v SPA* (1992) BGE 118 II 193. However, Lew et al (n 5) note that, although an arbitrator is under a duty to render an award which is valid ‘in its country of origin’, he is under no general duty to ensure that his award is enforceable elsewhere (280).

²⁴ as permitted under Art V (2)(b) New York Convention (n 1)

²⁵ *Eco Swiss* (n 21), para 37

²⁶ *ibid*, para 32

²⁷ ch 3.1

²⁸ eg. Opinion of AG Wathelet in C-567/14, *Genentech* ECLI:EU:C:2016:177

also be expected over time to have a ‘soft harmonization’ effect on the way in which public policy is applied to competition arbitration.

Many of the challenges to the arbitrability of a dispute are likely to occur early on in the arbitration proceedings in a (national) supervising court — not least as this is required by the majority of national arbitration laws.²⁹ The main review of collective competition arbitration procedures on *ordre public* grounds is thus likely to be by the court of the seat and purely under its national arbitration rules (the New York Convention does not apply to supervision of arbitrations or to the setting aside of awards in the seat).³⁰

The way in which the competition claims are presented to arbitration may also affect the ability of the arbitrator to resolve them collectively. Although the judgments of the CJEU have been careful not to trespass too far onto the territory of national commercial arbitration, it has handed down decisions which suggest that arbitration clauses — regarded as ‘exceptional’ methods of dispute resolution (outside the normal court system) — must be restrictively interpreted.³¹ This is not, however, strictly an issue of ‘arbitrability’ — on the narrow view — since it does not go to the *type* of dispute being brought to arbitration: rather it goes to the permissible scope of the parties’ consent to arbitrate. We therefore deal with it in section 2.4 below as well as in our discussion of EU law principles in chapter 3.

2.3 Ability to arbitrate collective claims

The other main issue for our purposes is therefore whether — and if so to what extent — redress claims can be arbitrated *collectively*. It is not (yet) possible to say that there is a firm consensus at international level on this issue — a fluid situation not assisted by the taxonomical difficulties surrounding collective redress procedures.³²

Starting with the wording of Article II of the New York Convention, the application of *ordre public* to refuse to refer disputes to arbitration appears to be limited to situations where the ‘*subject matter*’ of the dispute is not ‘capable of settlement by arbitration’.³³ This indicates that procedural matters are not within the scope of the exceptions, set out in Article II, which can be applied by contracting State courts to refuse to refer a dispute (within a valid arbitration agreement) to arbitration elsewhere.³⁴ Thus the question of whether an arbitration can proceed on a collective basis is not strictly one of ‘arbitrability’.

This reading of the Convention is reinforced by the principle that the arbitrator is free to set his procedure within the scope of the agreement of the parties (which

²⁹ Eg. Arbitration Act 1996, s 73

³⁰ UNCITRAL Guide (n 2), 20-27

³¹ C-352/13 *Cartel Damages Claims Hydrogen Peroxide SA v Akzo Nobel NV and others*, (21 May 2015) ECLI:EU:C:2015:335

³² discussed at ch 1.4

³³ Lew et al (n 8) refer to this as ‘objective arbitrability’ (at 188-189)

³⁴ UNCITRAL Guide, 49-50

may of course include reference to the rules of an arbitration institution).³⁵ He is not required to comply with the detailed rules of civil litigation procedure in the proper law of the arbitration agreement or of the place of arbitration (*lex arbitri*) — or indeed anywhere else — when resolving the dispute.³⁶

The *ordre public* applied in the *lex arbitri* must however be respected — the procedure chosen should not be contrary to fundamental public policy in the seat.³⁷ The supervising court of the seat of arbitration may, under its national law, refuse to refer a dispute to the (collective) arbitration where the claimants present themselves as the representatives of a larger group (a class), and collective action of the type envisaged would be contrary to *ordre public*. Nevertheless, these rules must still be applied consistently with EU public policy if the seat is in the EU.³⁸ Choice of the ‘correct’ EU seat (and thus *lex arbitri*) is therefore of significant importance for the success of a collective competition arbitration, as we discuss in chapter 5.

The law which applies to the agreement to arbitrate may also be relevant: it will include its own public policy requirements limiting collective proceedings. It will, however, be rare for the parties to have chosen expressly the law to apply to a (pre-dispute) arbitration agreement, viewed separately.³⁹ An express choice of law in the substantive contract including the arbitration agreement is normally — by implication — treated as the proper law of the agreement to arbitrate. If there is no express choice, the law of the seat chosen by the parties — directly or by an arbitration institution chosen by them — will normally be implicitly treated as the law of the agreement to arbitrate.⁴⁰

There is, then, a risk of a public policy ‘double hurdle’ during a collective arbitration (but not at enforcement of the award).⁴¹ The ability to arbitrate the competition claims collectively may need to be assessed both according to *ordre public* as applied in the seat and to the public policy requirements of the law of the arbitration agreement. However — again as discussed further in chapter 5 — this risk can be substantially reduced (and in most cases eliminated) by careful choice of the seat of arbitration. In non-contractual claims (the large majority of competition claims), the implication of choice of law of the agreement to arbitrate from a substantive contract may be difficult. The law of the seat may therefore be implied in such cases.

³⁵ Gary B Born ‘*International Commercial Arbitration*’ (2 ed), (2014) Wolters Kluwer, 1047-1051 and 2144-2154; Nigel Blackaby and Constantine Partasides QC, *Redfern and Hunter on International Arbitration*, 6 ed (2015) OUP, 354-355

³⁶ Born, *ibid*, 159-160

³⁷ Blackaby and Partasides, (n 35), 357; Lew et al (n 8), 337-8

³⁸ *EcoSwiss* (n 21), para 32

³⁹ Gary Born, *International Arbitration: Law and Practice* (2 ed) (2016) Kluwer Law International, 59-60; UNCITRAL Guide (n 2), 142; Blackaby and Partasides (n 35), 158

⁴⁰ *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2013] 1 WLR 148 ; ch 4.2.1

⁴¹ Convention (n 1) art V(2)(b): this permits the court to apply its own public policy on enforcement

If the agreement to arbitrate is made after the competition dispute has arisen, the parties may choose the seat of arbitration and its law as the proper law of that agreement — although that choice of law may not apply to all aspects of the arbitration procedure in non-contractual competition law claims.⁴² Nevertheless, for such post-dispute submission agreements (for example, between a representative claimant and the defendant), the parties to the arbitration agreement can — and should — expressly agree to both the seat of arbitration and its law as governing the arbitration.⁴³ Difficulty will only persist if the parties — acting in good faith — cannot agree to choose a seat of arbitration which does not regard collective actions of the kind proposed as contrary to *ordre public*.⁴⁴ There are a number of EU Member States having relatively advanced collective redress litigation mechanisms, where an arbitration could take place without any possible objection being validly taken to a wide interpretation of the arbitrator's jurisdiction.⁴⁵

The distinction between a challenge that the collective action is outside the arbitrator's substantive jurisdiction (because there is a failure of consent), and a challenge that the collective procedure is inadmissible, is important here. The hurdle for *ordre public* interventions in choice of procedure, generally applied in international arbitration practice, is a very high one.⁴⁶ Under the UK Arbitration Act, the arbitrator is empowered to decide all procedural and evidential matters not previously agreed by the parties and an award (including an admissibility award) can only be set aside if it amounts to a serious irregularity causing 'substantial injustice' to the applicant.⁴⁷ The standard for intervention on jurisdiction grounds is, in general, rather lower.⁴⁸

In EU supervising or enforcing courts (including in the UK), the impact of EU law on the application of *ordre public* to EU competition arbitration *procedures* must also be taken into account. The Commission collective redress Recommendation — although preferring an 'opt-in' principle for collective redress — specifically provides that other forms of collective procedure may be permissible if required in the interests of justice.⁴⁹ Against this background, we do not believe that a court in the EU could refuse recognition of a collective competition award under its national arbitration legislation — in the UK, on a set aside application for 'serious irregularity' — *solely* on the basis that the arbitrator has admitted a collective procedure.⁵⁰ Additional grounds must be shown.

⁴² ch 4.2.1.3

⁴³ ch 5.2.1

⁴⁴ As to the requirement to co-operate in good faith in performing the arbitration agreement, see Born (n 35), 1257-1263

⁴⁵ ch 5.2

⁴⁶ Opinion of AG Wathelet in C-586/13 *Gazprom* (4 December 2014) ECLI:EU:C:2014:2414 at para 167; UNICITRAL Guide (n2) p 240, para. 4 -5, citing *S. Parsons & Wittemore Overseas v Société Générale du Papier* (1974) 508 F 2nd 969

⁴⁷ s. 34(1) and s. 68(1)

⁴⁸ *ibid*, s.32

⁴⁹ Recommendation, 14 June 2013, 2013/396/EU, [2013] OJEU L201/60, para 21

⁵⁰ Arbitration Act 1996, s 68.

Procedural objections to the collective element of the arbitration are most likely against arbitrations which look ‘opt-out’. But even where the procedure appears ‘opt-out’ in nature, the requirement for each party to have consented to arbitration means that (at some point) everyone to be bound by the final award will have ‘opted-in’ (consented) to the arbitration. There can properly be no such thing as a fully ‘opt-out’ collective arbitration.⁵¹

Difficulties may nevertheless arise in practice where an award is to be enforced in a number of EU Member States. The New York Convention allows each enforcing court (outside the seat) to apply its own *ordre public* rules and not necessarily those of the seat or the arbitration agreement.⁵² These rules are — evidently — not fully harmonised across the EU nor more widely, although again EU law general principles will need to be considered by courts in the EU when enforcing collective awards. We will discuss the ‘direction of travel’ of EU policy on collective redress in a competition context in the next chapter. It is, however, once again clear that an enforcing court in the EU cannot refuse to enforce an award resolving an EU competition dispute solely on the ground that it results from a ‘collective’ procedure. Although national enforcing courts are still permitted to review collective awards against the *ordre public* principles applicable in their domestic legal system, as well as the EU general principles — notably to ensure that the award was made within the jurisdiction conferred on the arbitrator and that it meets the basic standards of due process — EU law will require them to overlook any reflex against ‘US-style class actions’.⁵³

2.4 ‘...agreement is null and void, inoperative or incapable of being performed’ – ‘inarbitrability’ or agreement failure?

As well as the requirement that the subject matter of the dispute is of a type ‘capable of settlement by arbitration’ (arbitrability), the New York Convention also allows — in Article II (3) — a court to refuse a reference to arbitrate where:

[...] it finds that the [arbitration] agreement is null and void, inoperative or incapable of being performed.

Similarly, Article V(1)(a) permits a court to refuse to enforce an award which is made under an invalid agreement to arbitrate.

The question of whether the *agreement* to arbitrate is valid — as distinct from the policy question of whether the substantive dispute is of a nature to be arbitrated — requires a consideration both of whether mutual consent to arbitrate the dispute exists, but also whether the agreement satisfies the other requirements for validity to the standard required in the court seised.⁵⁴

⁵¹ Recommendation (n 49), para 21, requires consent to be given expressly to the formation of the group, not to the arbitration. The arbitrator’s admissibility award will therefore need to address consent to both arbitration and to representation. Also, Jose Miguel Judice ‘Collective Arbitration in Europe’ in Hanotiau and Schwatz (eds) *Class and Group Actions in Arbitration* (2016) ICC, 48-49.

⁵² eg. Swiss Federal Supreme Court, SCD 132 III 389; Sandra di Vito Bieri ‘The application of EU law by arbitral tribunals seated in Switzerland’, ASA Bulletin, vol 35, issue 1 (2017)

⁵³ Convention (n 1), Art V(2)(b). As an example of good practice see Bundesgerichtshof ‘Arbitrability II’, II ZR 255/08 (6 April 2009)

2.4.1 Determining the validity of the arbitration agreement

How should a court determine if it can refuse a reference to arbitration or recognition or enforcement of the award on the grounds set out in Article II(3) or V(1)(a)? First, it is important to bear in mind that the agreement referred to in the Convention is the agreement to arbitrate, which is to be treated as a separate contract from the substantive agreement between the parties.⁵⁵

Second, as we have noted above, there are three — potentially different — laws applying to any arbitration: the law of the substantive obligation at the basis of the dispute, the proper law of the agreement to arbitrate and the law of the seat of arbitration (*lex arbitri*).⁵⁶ The application of the Article II(3) or V(1)(a) reasons for not recognizing or enforcing an arbitration will normally need to be assessed under the second of these applicable laws — the proper law of the arbitration agreement.⁵⁷ This law may be different from the law applying to supervision of the arbitration *procedure* itself after the reference to arbitration is made (this will normally be the *lex arbitri*).⁵⁸

Refusing to recognize an arbitration agreement on the Article II(3) grounds — or their national law equivalents if the matter is raised in the court of the seat — will, in most cases, require the court seised to find the agreement is defective or illegal. This may well imply a public policy choice by the court hearing the application — particularly if the applicant claims that the arbitration agreement is void for illegality.

If there is *express* agreement to collective arbitration, but the proper law of the arbitration agreement prohibits collective claims (of the kind agreed) on public policy grounds, the arbitration agreement is likely to be (at least partly) void. If there is *no* express agreement to collective arbitration, a wide interpretation of the arbitration agreement by the arbitrator — to imply consent to the collective proceedings on the basis presented to him — could be a nullity if the public policy of the law of the arbitration agreement prohibits collective redress of the kind envisaged.

⁵⁴ UNCITRAL Guide (n 2), noting that US and UK courts apply an international standard; Born 'Law and Practice' (n 39), 81-82; Blackaby and Partasides (n 35), 159-163; section 3 below

⁵⁵ for example, in the UK Arbitration Act 1996, s. 7

⁵⁶ *Channel Tunnel Group v Balfour Beatty Construction Ltd* HL [1993] AC 334, Lord Mustill at 357-8.

⁵⁷ For example, by the Swiss Federal Court, 21 March 1995, Bundesgericht /5C.215/1994. However, the UNCITRAL Guide (n 2) notes — at 62 — that courts have applied their own laws to this question and the English courts (along with the courts in the US) apply an autonomous standard — see *Albon v. Naza Motor Trading Sdn Bhd*, [2007] EWHC 665 (Ch)

⁵⁸ also *Compania Nacional de Seguros SA* ('Sulamerica') (n 40), discussed further in chapter 4.2. Martin Platte notes that, once the jurisdiction of the tribunal is established, only the *lex arbitri* and the requirements of the New York Convention apply to condition the arbitrator's duty to make an award which is enforceable ('*An Arbitrator's Duty to Render Enforceable Awards*' (2003) 20 *Journal of International Arbitration*, 307 at 311). For a discussion of the potential differences between the 'procedural' law (*lex arbitri*) and the mandatory law of the seat of arbitration, see Born, (n 35), 1602-3.

In either case — and in addition to the consideration of *ordre public* under the arbitrability exception — the (usually broader) public policy stance taken under the law applied to the agreement to arbitrate will affect the scope of the arbitrator’s jurisdiction to resolve a competition dispute collectively.

2.4.2 How does the public policy of the agreement affect collective competition arbitration?

There are a variety of broader national public policy reasons why an agreement to arbitrate may be void or inoperative — for example, rules protecting consumers or employees may mean that they cannot consent to arbitration under the proper law of the arbitration agreement.⁵⁹ However, recent decisions of the CJEU — particularly in the *CDC* case⁶⁰ — have raised significant doubt as to whether EU public policy rules might prevent general arbitration clauses from extending by implication to apply to competition disputes arising from ‘hidden’ cartels or to most non-contractual claims for breach of EU competition law. We consider the current state of this case law in more detail in chapter 3 — it is still evolving, against a changing background of increased EU legislative focus on, and support for, competition ADR.

Our first issue here is whether an arbitration clause can apply to ‘hidden’ infringements of competition law which could not have been within the contemplation of the claimants at the time the clause was entered into.⁶¹ As a first observation, the CJEU’s reasoning in *CDC* can only apply to pre-dispute arbitration agreements. If the parties are agreeing to arbitrate a compensation claim already arisen from an infringement, it necessarily follows that the infringement is known to all of them. Any ambiguity in the wording of the submission to arbitration should therefore be decided in the light of the general ‘pro-arbitration’ stance in most advanced arbitration fora and under the New York Convention.⁶² There should be no objection to agreements to submit to post-dispute collective competition arbitration.

Secondly, not all competition infringements are ‘hidden’. It is likely that a breach of Article 102 TFEU (abuse of market dominance) will become evident to the claimants from the implemented commercial practices of the abuser. Even in other cases, the fact that the claimant may not know of the (potential) cause of his loss at the time the agreement to arbitrate was made cannot sensibly be used as a reason for preventing the arbitration clause from requiring him to arbitrate. Causes of action which are arbitrated often arise after the arbitration agreement is entered into: it would deprive arbitration generally of its efficiency (and be contrary to the purpose of the New York Convention) to say that an arbitration agreement cannot apply in such situations.

⁵⁹ EU law will invalidate pre-dispute arbitration clauses with consumers governed by the laws of EU Member States, C-168/05 *Mostaza Claro* (n 5)

⁶⁰ n 31

⁶¹ *ibid*, para 70

⁶² ‘*Fiona Trust*’ (n 7); UNCITRAL Guide (n 2), 2; Born ‘*Law and Practice*’ (n 39), 52,92

In any event, the CJEU expressly refused in *CDC* to apply its jurisdiction reasoning to arbitration, leaving its position unclear.⁶³ This has already had some unpredictable consequences.

The Dortmund court making the *CDC* reference was indeed presented by defendants with a plea, in a different later case (concerning a rail construction cartel), that it lacked jurisdiction on the basis that the (non-contractual) competition disputes should be referred to arbitration under an ‘all disputes’ arbitration clause. The claimants contested this, relying on the CJEU’s *CDC* decision. The Dortmund court ruled that it did indeed lack jurisdiction, by upholding the arbitration clause, and referred the cartel damages dispute to arbitration.⁶⁴ It expressly rejected the argument that the clause could not extend to competition claims due to the CJEU’s *CDC* judgment. In contrast, the Amsterdam appeal court, asked to rule on a parallel Dutch claim by *CDC* in the same (hydrogen peroxide) cartel, ruled that it could see no good reason not to apply the CJEU’s reasoning on jurisdiction in *CDC* also to arbitration clauses (despite the CJEU’s express reservation), and refused to refer that dispute to arbitration.⁶⁵

Closely related to our first issue (the ‘hidden’ infringement point), can ‘all disputes’ pre-dispute clauses apply to non-contractual competition claims? That is, even if national supervising courts are in principle permitted to refer contractual disputes involving competition questions to an arbitrator, can this apply to non-contractual disputes?

In England and Wales, the House of Lords’ *Fiona Trust* judgment noted that ‘all disputes’ clauses should be interpreted, as a businessman would, to cover *all* disputes relating to the subject matter of the contractual relationship between the parties.⁶⁶ Recent — post *CDC* — case practice from the English courts therefore indicates that, provided that there is a sufficient, connected arguable *contractual* competition claim, a ‘parallel’ non-contractual claim will also fall within the scope of the arbitration clause.⁶⁷ However, if there is no possible contractual claim as between the parties — inevitable where the claimants are indirect purchasers from the infringing defendants — it appears that no tort claim can be arbitrated under that clause.⁶⁸ The Dortmund court took a similar — although possibly more ‘arbitration friendly’ — view in the rail construction claims noted above: in Germany it appears simply necessary that there is some factual relationship between a contract and the tortious claims advanced.⁶⁹

To summarise on clause interpretation, there must be an existing substantive contractual relationship between the parties to the (pre-dispute) arbitration

⁶³ (n 31) para 58

⁶⁴ Landesgericht Dortmund, 13 September 2017, 8 O 30/16 (Kart)

⁶⁵ Gerechtshof Amsterdam (21 July 2015), 2015: 3006

⁶⁶ *Fiona Trust* (n 7), para 13

⁶⁷ *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch)

⁶⁸ *Ryanair v Esso Italiana* [2013] EWCA Civ 1450

⁶⁹ (n 64) para. 25

clause — to which any tortious claims made must be related — before the clause will cover those tortious competition claims. It should follow that the law (and public policy) applicable to that existing substantive contractual relationship will also (normally) apply to the arbitration agreement in the (likely) absence of express choice of the law of the arbitration clause.⁷⁰ The *CDC* jurisprudence of the CJEU does not change this outcome: it made clear that it was for the referring court (in *CDC*, the Dortmund court) to assess whether the clauses should extend to cover the claims made. The views of the Dortmund court — given in the light of the *CDC* judgment — under German law, are clear from the subsequent rail construction cartel decision and, we submit, are to be preferred over those of the Amsterdam court.

Where there is no existing contractual nexus between the claimants and the defendant(s) — all cases outside the area of direct purchaser claims — the necessary post-dispute agreement to submit to arbitration can, of course, be crafted so as to deal expressly with these issues. As we shall show in chapters 4 and 5, most of the issues raised by the CJEU's case law can be avoided by careful choice as to (in particular) the seat of arbitration.

2.4.3 Applying the correct law correctly

If a judge in the (collective redress 'friendly') seat of arbitration is called on to refuse to recognize the 'foreign' arbitration agreement on the ground that the arbitrator's assumption of (collective) jurisdiction over the group is contrary to public policy rules under the law of that agreement, should he apply those rules in preference to his own favourable public policy on collective redress? This issue is not conclusively dealt with either by the New York Convention or by EU law: national arbitration rules apply.

In general, the courts in England will wait for the arbitrator to hand down an award, including a decision on the question of his jurisdiction (and so whether the arbitration agreement is interpreted to include consent to collective proceedings), before they intervene.⁷¹ Since the agreement to arbitrate is separate from any substantive contract, it is only where a challenge which specifically affects the arbitration clause is raised that the court will even consider intervening beforehand.⁷² Similarly, some legal systems take the view that, provided that the agreement to arbitrate meets the validity criteria of the seat, there is no need to enquire beyond this *prima facie* validity to ascertain the public policy position of the law of the arbitration agreement.⁷³

⁷⁰ Blackaby and Partasides (n 35), 158-159; Born '*Law and Practice*' (n 39), 59-60. But this presumption can be displaced: see *Sulamerica* (n 40)

⁷¹ Arbitration Act 1996, s.31 requires the consent of *all* of the parties or of the arbitrator to a jurisdiction reference to the English supervisory court at the (early) stage of referral to arbitration. See also *Fiona Trust* (n 7), paras 32-37

⁷² *ibid*, at para 42

⁷³ Bundesgerichtshof, 13 January 2005, III ZR 265/03; *Allen v Royal Caribbean Cruises Ltd* (29 September 2008) (US) 08-22014; UNCITRAL Guide (n 2), 70-71

Both the New York Convention and EU law principles could nevertheless indirectly apply to condition the court's reasoning. The New York Convention does not, however, stipulate the type of review required for this purpose.⁷⁴ The application of EU public policy to the question of whether the law of the arbitration agreement can permissibly (impliedly) extend the scope of the agreement to EU competition claims is uncertain at present — as the differing approaches of the German and Dutch courts show.⁷⁵ But it is at least clear that there is no EU principle voiding an agreement (governed by the law of an EU Member State) under which collective competition disputes must be referred to arbitration.

Where a foreign court is later called on to *enforce* an international arbitration award, the enforcing court is also permitted to examine the validity of the agreement to arbitrate. The New York Convention allows the enforcing court to consider both the validity of the agreement as a whole, but also its scope — whether the award is partly outside the terms of the agreement to arbitrate even if it is valid.⁷⁶ In contrast to the review of the agreement pre-award, the Convention expressly stipulates that the applicable law for determining validity at enforcement of the award is the law expressly chosen by the parties to govern the agreement or, if none, the law 'of the place where the award was made' — generally accepted as being the *lex arbitri*.⁷⁷ There is clearly a very close relationship between the analysis needed to determine if the arbitration agreement validly requires a reference to arbitration and whether an award is made under that (valid) arbitration agreement. Our discussion above will thus largely apply also to invalidity challenges against collective competition awards.

In contrast, where the challenge to the award is that the arbitrator included issues beyond his competence, the Convention again provides no choice of law rules.⁷⁸ It would, however, be strange if Convention rules as to the choice of law differed according to whether the enforcement challenge is that the agreement to arbitrate is wholly or partly invalid or whether it is that the award exceeds the scope of the same agreement. The law chosen in the arbitration agreement (or, if none, the *lex arbitri*) should therefore import its public policy rules to decide if — for example — the agreement to arbitrate can be impliedly extended to include collective proceedings.⁷⁹

In addition to examining the validity and scope of the agreement to arbitrate, an enforcing court is also entitled to consider separately whether enforcing the award would be contrary to *ordre public*.⁸⁰ It was this provision which the CJEU relied on to support its conclusion in the *EcoSwiss* case that a national court is

⁷⁴ UNCITRAL Guide(n 2), 42 para 10

⁷⁵ nn 64 and 65

⁷⁶ (n 1) Article V(1)(a) and V (1)(c) respectively

⁷⁷ *ibid*, Article V (1)(a); UNCITRAL Guide (n 2), 143, para 34

⁷⁸ Convention (n 1) Art V(1)(c)

⁷⁹ Convention (n 1) Article V (2)(b); Olivier Caprasse and Bernard Hanotiau 'Arbitrability, Due Process and Public Policy under Article V of the New York Convention' (2008) 25 Journal of International Arbitration, at 726

⁸⁰ Convention (n 1), art V (2)(b)

entitled not to enforce awards contrary to *ordre public* including, according to the CJEU, EU competition law.⁸¹ Since the *ordre public* applied in the enforcement forum may well be different from the public policy of the law of the agreement to arbitrate — especially as regards its receptiveness to collective redress — there may in many cases be an overall public policy ‘quadruple hurdle’ on enforcement of a collective competition award. The public policy of the law of the agreement, of the *lex arbitri* (for procedural issues) and the *ordre public* of the enforcement forum will all need to be respected. The outcome will, in addition, need to comply with EU public policy to the extent indicated by the CJEU, if enforcement is requested in the EU.

We consider the implications of these conclusions for designing collective arbitration proceedings more fully in chapter 4 — particularly for non-contractual competition claims using a post-dispute submission agreement. We believe that express choice of an applicable law, embracing a developed ‘collective redress’ procedural mechanism, to govern the arbitration agreement should be capable of supporting (possibly in connection with other factors) implied consent to collective arbitration.⁸²

The next section considers by whom — and how — the agreement to arbitrate is to be interpreted to decide if consent to collective competition arbitration exists.

3. Scope of consent to arbitrate

3.1 Arbitrator’s competence – within consent

Assuming a valid agreement to arbitrate, by whom should its scope be defined?

The generally accepted ‘pro-arbitration’ stance and respect for the jurisdiction of the arbitrator must mean that a court should hesitate before interfering.⁸³ As a first step, instead of applying to a court, a party should rather request the arbitrator to determine his own jurisdiction. The arbitrator should interpret the arbitration agreement and, if appropriate, make an interim award on whether the reference to arbitration requested is within the scope of the authority given to him by the parties’ agreement (the *Kompetenz-Kompetenz* principle).⁸⁴ We believe that this should enable an arbitrator to give an appropriately extended interpretation of the parties’ consent to arbitrate, so as to discern implied consent to arbitrate a competition claim collectively in the majority of cases presented as collective disputes.⁸⁵

⁸¹ ch 3.1.2

⁸² The US Supreme Court found such consent in *Oxford Health Plan LLC v Sutter* 569 US _ (2013), even without express consent to class arbitration.

⁸³ Practice may, however, vary: UNCITRAL Guide (n 2), 60-61 and 67-68

⁸⁴ See UNCITRAL Arbitration Rules (2010), r 23(1); ICC Arbitration Rules (2017), r 6(3); LCIA Rules (2014), r 23(1).

⁸⁵ On the broad scope to be given to the parties’ expression of consent, see Steingruber (n 15), 120-121; Blackaby and Partasides (n 35), 94-95

This *Kompetenz-Kompetenz* principle is a generally accepted principle in international arbitration, perhaps most clearly set out in the UNCITRAL arbitration rules.⁸⁶ UK arbitration legislation expressly recognizes the power of an arbitrator to rule on his own jurisdiction.⁸⁷ The wording in the UK Arbitration Act provides overlapping powers of the court and of the arbitrator to rule on the validity and interpretation of the agreement to arbitrate.⁸⁸

We again distinguish the determination of the arbitrator's 'substantive jurisdiction' — that is, the scope of the matters referred to arbitration — and that of the admissibility of a *procedure* which one or more of the parties to the arbitration has proposed.⁸⁹ When accepting or crafting any procedure, the arbitrator must, of course, always act within the express or implied consent of the parties to the arbitration agreement (that is, within his jurisdiction). However, within the scope of the consent to arbitrate, an arbitrator has a wide discretion to adopt whatever procedure he thinks is most appropriate to resolve the dispute in the circumstances presented to him.⁹⁰

A leading example of the use by an international arbitral tribunal of the differentiated concepts of (substantive) jurisdiction and (procedural) admissibility, to allow a 'representative' collective redress claim against Argentina — the *Abaclat* case under the ICSID rules — is considered in the next section.⁹¹

Although the method of consenting to arbitration within the framework of the ICSID investor-State dispute resolution architecture is different from that usually found in commercial arbitration between private parties, the basic requirement of mutual agreement (consent) to submit a dispute to a neutral — non-judicial — third party for decision remains constant.⁹² ICSID arbitration remains consensual in nature.⁹³ The application of the concept of consent, both to jurisdiction and to admissibility questions, by the *Abaclat* arbitration tribunal is strongly indicative of international arbitration practice.⁹⁴

⁸⁶ r 23 in particular

⁸⁷ Arbitration Act 1996, s. 30

⁸⁸ *ibid*, ss 13 and 30

⁸⁹ *ibid*, s 68, which provides for challenges to the award on the ground of serious irregularity affecting the tribunal, proceedings or award. This right is separate to a jurisdiction challenge under s 67, which does not require serious irregularity to be shown

⁹⁰ see Lew et al (n 7), 524-5, Blackaby and Partasides (n 35), 308

⁹¹ Argentina announced on 4 February 2016 that it had reached a preliminary settlement with the claimant bondholder group; <http://www.economia.gob.ar/preacuerdo-con-bonistas-italianos/> (retrieved 25 May 2016)

⁹² See Steingruber (n 3), 60-68 for a discussion of the convergent theories of the basis of consent in commercial and in investment treaty arbitration.

⁹³ However, in C-284/16 *Slovak Republic v Achmea BV* (6 March 2018) ECLI:EU:C:2018:158, the CJEU (Grand Chamber) found that the arbitration clause in the relevant investor protection treaty differed in nature from the usual consensual arbitration agreement (para 55). It is not clear from the judgment whether the CJEU considers that the arbitration clause was not consensual in nature or whether it was merely referring to the fact that the investor treaty was an agreement between States and not a private law agreement. The CJEU did, however, expressly preserve its previous case law on arbitration in relation to commercial arbitration clauses (para 54).

⁹⁴ UNCITRAL Guide (n 2), 200-201; Steingruber (n 12), ch 10, 290; Blackaby and Partasides (n 35), 354

In *Abaclat*, the tribunal addressed, in an interim award, a situation where the defendant (Argentina) objected to the arbitration tribunal's use of a purposive interpretation of the arbitration agreement to imply all parties' consent to collective proceedings.⁹⁵ Where a represented *claimant* seeks to object to the use of a collective procedure in arbitration, the issues surrounding consent may present themselves somewhat differently: we consider these in section 3.3.

3.2 Procedural consent in international practice: the '*Abaclat*' case

3.2.1 The tribunal's jurisdiction and admissibility award

The *Abaclat* case was a set of claims against the Republic of Argentina by a large number of Italian buyers of Argentine government bonds in respect of losses they suffered as a result of Argentina's debt default in 2001. And one of the reasons it has a high profile is that Argentina specifically raised the issue of the power of the ICSID arbitration tribunal to decide on a collective dispute resolution procedure at the request of the representative (agent) of multiple claimants, the large majority of whom were not participating directly in the arbitration.⁹⁶

The arbitration was conducted under an arbitration clause in a bi-lateral investment treaty (BIT) between Argentina and Italy. The BIT provided that, in the event of dispute between Argentina (the issuer of the securities which were the subject of the subsequent dispute) and any Italian securities holder, the issues would be resolved by arbitration by three arbitrators appointed by ICSID and following the ICSID arbitration rules.⁹⁷ There was no choice of national substantive law in the ICSID rules (or the BIT) — international legal principles applied instead.

The Italian claimants (mostly, but not entirely, individuals) were represented by an *ad hoc* association (TFA), expressly empowered by them to arbitrate. At the time of the tribunal's admissibility decision, the TFA acted on behalf of around 60,000 investors. The tribunal (which could not decide unanimously), found that the proposed form of collective arbitration procedure — where the TFA

⁹⁵ *Abaclat and others v Argentine Republic*, ICSID case ARB/07/05. See also Strong (n 8) at 75-80.

⁹⁶ the ICSID Arbitral Tribunal's Decision on Jurisdiction and Admissibility, handed down on 4 August 2011, deals with these arguments ('Admissibility Decision'). For further commentary, see S I Strong, "Mass Proceedings as a Form of 'Regulatory Arbitration' – *Abaclat v Argentine Republic and the International Investment Regime*" 38 *Journal of Corporation Law*, vol 2 (2013), 259-324; -- "Mass Procedures in *Abaclat v Argentine Republic*: Are they Consistent with the International Investment Regime?", 3 *Year Book of International Arbitration* (2012), 261; Hans van Houtte and Bridie McAsey "Abaclat and others v Argentine Republic: ICSID, the BIT and Mass Claims" 27 *ICSID Review* (2012), 231; Samuel Wordsworth "Abaclat and others v Argentine Republic: Jurisdiction, Admissibility and Pre-conditions to Arbitration" 27 *ICSID Review* (2012), 225; Andreas Steingruber, "Abaclat and others v Argentine Republic: Consent to Large Scale Arbitration Proceedings" 27 *ICSID Review* (2012) 237.

⁹⁷ Article 8(5) of the Italy-Argentina Bi-lateral Investment Treaty, <http://investmentpolicyhub.unctad.org/>, also allowed the claimants to choose ad hoc arbitration under the UNCITRAL rules.

represented the investors at their express request — should proceed under the arbitration clause in the BIT, despite Argentina’s objections.⁹⁸

In essence, Argentina objected to the claims proceeding under the representation of the TFA because it (Argentina) had not *expressly* and *separately* consented to such a procedure in the arbitration clause in the BIT. The ICSID statutes and UNCITRAL rules were silent on the issue of collective arbitration: that silence could not (argued Argentina) be read as empowering the tribunal to admit what Argentina viewed as a ‘class action’ procedure.

The tribunal distinguished the concepts of its jurisdiction and the admissibility of a (collective) claims procedure within that jurisdiction.⁹⁹ A lack of jurisdiction in the tribunal would mean that the claim in question could not be brought before it at all, whereas a lack of (procedural) admissibility meant instead that the claim as presented was either not fit or ‘mature’ enough for (quasi) judicial treatment. And while a finding of lack of jurisdiction (which might be subject to court review) would prevent the claims in question from being re-submitted to arbitration, lack of admissibility could be cured in appropriate cases by reworking the collective procedure proposed.

On the question of whether it had jurisdiction, the tribunal first considered the issue on the basis of whether it would have jurisdiction if only one of the represented claimants had been before it.¹⁰⁰ The answer to this was in the affirmative — there was a written arbitration clause in the BIT in which Argentina consented to any ‘disputes relating to investments’ and ‘in relation to the issues governed by this Agreement’ (ie. the BIT) being referred to ICSID arbitration.¹⁰¹

The tribunal then considered whether Argentina’s consent to arbitrate extended to ‘mass proceedings’. Argentina contended it did not and that additional express consent would be required on this specific procedural issue. Noting that there was no generally accepted classification of ‘mass proceedings’, the tribunal used a dual classification of its own as a tool to address the issue.¹⁰² It first described ‘representative’ proceedings as those allowing a high number of claims to be dealt with as a single action by the representative. The second category used by the tribunal was called ‘aggregate proceedings’, such as under the English group litigation order, where there is judicial aggregation of claims which are managed together.¹⁰³

The tribunal majority said:¹⁰⁴

⁹⁸ The Egyptian arbitrator nominated by Argentina (Professor Georges Abi-Saab) dissented from the Admissibility Decision (Opinion 28 October 2011)

⁹⁹ Admissibility Decision (n 96), para 247

¹⁰⁰ *ibid*, para 249

¹⁰¹ *ibid*, para 270, reciting Art 8(1) of Italy-Argentina BIT. At para 405, the tribunal noted that it “...has jurisdiction *rationae personae* over any person who is entitled to claim protection under this BIT...” by (para 407) being an Italian national having purchased the relevant securities.

¹⁰² *ibid*, para 483

¹⁰³ This category is the equivalent of the category of ‘group proceedings’ we have described in Chapter I.

¹⁰⁴ Admissibility Decision, (n 96) para 485

In the context of arbitration [...] representative proceedings raise issues relating to consent, especially for those who subscribe to a view of arbitration that requires the parties' explicit consent not only to arbitration of the dispute but also to the procedure to be used in the arbitration. In contrast aggregate proceedings raise issues of a more technical nature, in particular the question whether ordering the parties to proceed collectively is within the scope of the Tribunal's discretion and authority.

These *Abaclat* proceedings were, said the tribunal, commenced as 'aggregate' proceedings "*in which each individual Claimant was aware of and consented to the ICSID arbitration*". This was not the equivalent of a US class action commenced by the representative of an undetermined number of unidentified claimants.¹⁰⁵ Addressing Argentina's criticism of the simplistic nature of this characterization, the tribunal noted:

[...] the present proceedings seem to be a sort of hybrid kind of collective proceedings, in the sense that it starts as aggregate proceedings but then continues with features similar to representative proceedings due to the high number of Claimants involved.¹⁰⁶

The tribunal concluded that specific consent to collective arbitration was not required for these 'hybrid' claims to be within its jurisdiction. It gave two ('policy' based) reasons for this. Assuming the tribunal had jurisdiction over each of the claims of several represented individual claimants,

[...] it is difficult to conceive why and how the Tribunal could loose [sic] that jurisdiction where the number of claimants exceeds a certain threshold. [...] what is the relevant threshold? And [...], can the Tribunal really 'loose' [sic] a jurisdiction it has when looking at claimants individually?¹⁰⁷

The second reason for rejecting Argentina's argument followed from the nature of the investments underlying the dispute. These were uniform Argentine public bonds which had been marketed widely to both individual and corporate foreign buyers. The tribunal found:

Thus, [...] where such investments require a collective relief in order to provide *effective protection* to such investment, it would be contrary to the purpose of the [BIT] and the spirit of ICSID to require, in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration. In such cases, consent to ICSID arbitration must be considered to cover the form of arbitration necessary to give efficient protection and remedy to the investors and their investments, including arbitration in the form of collective proceedings.¹⁰⁸

¹⁰⁵ *ibid*, para 486; Bernard Hanotiau *Complex Arbitrations: Multi-party, multi-contract, multi-issue and class actions*, (2005) Kluwer Law International, 257-259

¹⁰⁶ *ibid*, para 487-488

¹⁰⁷ *ibid*, para 490

¹⁰⁸ *ibid*, emphasis added

There is a clear parallel between this second reason advanced by the ICSID tribunal to imply Argentina's consent to mass proceedings and the CJEU's use of the EU general principle of 'effectiveness'.¹⁰⁹

Finding that it had jurisdiction over the claims, the *Abaclat* tribunal turned to examine the admissibility of the TFA proposed collective procedure. The tribunal noted that the admissibility question is not whether Argentina had expressly consented to a 'mass proceeding' but whether that proceeding was compatible with the spirit and framework for ICSID dispute resolution.¹¹⁰ Although the tribunal could not amend the ICSID framework, it needed to consider how far it was competent, and would need, to 'fill the gaps' in a particular case to create an admissible collective procedure.

First, was the silence of the ICSID procedural rules on the question of the admissibility of 'mass proceedings' a 'qualified silence' (as contended by Argentina) which required the additional consent of Argentina to the type of *procedure* adopted? The tribunal found that it was not: collective proceedings were 'quasi-inexistent' at the time the ICSID Convention was concluded, so that their omission ought not to be interpreted as a deliberate choice. And given the wide range of investment disputes covered by the ICSID framework and the BIT, the 'useful effect' doctrine applied as equally to the admissibility question as to the jurisdiction question to ensure that an effective procedure should be available.¹¹¹

Second, who should decide what procedure should be used? The tribunal relied on Art 44 of the ICSID Convention giving it a wide discretion on procedure in the absence of express wording in the agreement to arbitrate (or subsequent agreement between the parties).¹¹² The limit on that discretion was that the tribunal might only fill the gaps in the ICSID procedure to the extent necessary to resolve the specific proceedings at hand. It could not 'complete or improve' the ICSID framework in general.¹¹³ However, although abstract theorising was to be avoided,¹¹⁴

[...] the Tribunal shall, in accordance with the principles of interpretation of treaties, not only ask itself whether, from a technical perspective, if it can make such adaptation but also whether, *based on the object and purpose* of the ICSID Convention, it should do so.¹¹⁵

This conclusion was strongly criticised by the dissenting member of the tribunal on the grounds that it was not open to an arbitrator — in contrast to a court forming part of a national legal order — to rework the rules under which it operated by the parties' consent.¹¹⁶ It could not extend that consent to a particular form of procedure in the face of silence in the arbitration clause and the

¹⁰⁹ the EU general principle of effectiveness is considered at ch 3.1.1

¹¹⁰ Admissibility Decision (n 96), para 506

¹¹¹ *ibid*, para 519

¹¹² *ibid*, para 521

¹¹³ *ibid*, para 523

¹¹⁴ *ibid*, para 527

¹¹⁵ *ibid*, para 528, emphasis added. See also Articles 31-32 of the Vienna Convention on the Law of Treaties, 1969, UNTS-1155

¹¹⁶ Dissent (n 97), para 194

ICSID rules. Arbitrators do not — he contended — enjoy an implied ‘original’ jurisdiction under international law to fill gaps — whether substantive or of fundamental procedure — in the way that courts do in the national legal order.¹¹⁷

His analysis echoes that of the US Supreme Court in the *Stolt-Nielsen* case — absolute silence implies absolutely nothing.¹¹⁸ But the purposive approach to ‘filling the gaps’ in legislation — or (as here) a treaty — is commonly relied on in an international law context, not least by the CJEU (itself a creature of treaty). In contrast to US law,¹¹⁹ EU law is to be interpreted having regard to its purpose and to ensure its effectiveness. This is a reflection of the international principle of treaty interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties — a source of the implied jurisdiction for the *Abaclat* tribunal which the dissent denied exists.¹²⁰ The purpose of the arbitration agreement in the BIT was — said the majority — to ensure the effective resolution of mass disputes arising in connection with payments to be made by Argentina under the bonds.¹²¹

Despite the dissent, and acknowledging Argentina’s procedural rights of defence, the Tribunal majority considered that, in looking for the correct balance between the defendant’s and the claimants’ rights, it had to examine (first) the circumstances in which it was appropriate to change its procedure from individual to group treatment so as to ensure an effective process. Second, it had to consider the extent to which such a change would affect Argentina’s rights of defence as compared with 60,000 separate arbitration proceedings, and (third) the extent to which it was permissible to deprive the individual claimants of rights they would have had as separate parties.¹²²

On appropriateness of group treatment, were all the claims sufficiently homogenous to be treated together? The Tribunal noted that the dispute between all of the claimants and Argentina related to Argentina’s similar behaviour towards all of its investors. And the question whether the individual claimants had additional, separate and differentiated, breach of contract claims (for example against the intermediary retail banks who sold them the securities) was outside the scope of the agreement to arbitrate in the BIT, as between Italy and Argentina.¹²³

Further, the restriction of Argentina’s rights of defence was in practice limited. Its lawyers would not be able to delve into the specific facts of 60,000 separate cases in detail in any event. Finally, the restrictions on the individual claimants’ procedural rights had been expressly accepted by them when they adhered to the TFA.¹²⁴ The procedure proposed by TFA was therefore admissible under the ICSID rules.

¹¹⁷ *ibid*, para 258

¹¹⁸ *ibid*, para 177. US case law is discussed at section 4.

¹¹⁹ *eg.* United States Supreme Court in *Morrison v First National Bank of Australia* 561 US (2010) at 6-7

¹²⁰ n 115

¹²¹ Admissibility decision, n 96, paras 490 and 518

¹²² *ibid*, para 539

¹²³ *ibid*, paras 540-543

¹²⁴ *ibid*, paras 545-546

3.2.2 Is this analysis transferrable to other contexts?

The tribunal itself addressed this ‘precedential’ question in the admissibility award.¹²⁵ In common with other types of arbitration awards, ICSID tribunal awards do not create ‘legally binding precedents’.¹²⁶ In particular the tribunal found that the admissibility of the claim was dependent on the specific circumstances of the case — it was not open to the tribunal to amend the overall ICSID framework.¹²⁷

However, in reaching its conclusions, the tribunal expressly sought guidance from international public law principles — in particular the interpretation provisions of the Vienna Convention.¹²⁸ The Vienna Convention — which aims at codifying the application of existing international treaty law — provides general rules of interpretation for Treaties concluded between States, so including both the New York Convention and the Italy/Argentina BIT. Treaties shall be interpreted in the light of the object and purpose of the Treaty in question.¹²⁹

The *Abaclat* tribunal therefore took the view that

[...] subject to the specific provisions of a treaty in question and of the circumstances of the actual case, [the Tribunal] should pay due consideration to earlier decisions of international tribunals where it believes that such consideration is appropriate in the light of the specific factual and legal context of the case and the persuasiveness of the legal reasoning of these earlier decisions.¹³⁰

The tribunal’s findings on the scope of its own *jurisdiction* under the BIT and the ICSID framework are, we suggest, significantly less fact specific than its decision on admissibility. The use by the tribunal of the purposive approach to treaty interpretation to support its finding that separate express consent to a collective form of arbitration is *not* required appears to conform fully to the international norms of treaty interpretation as set out in the Vienna Convention.¹³¹

The conclusions on the *admissibility* aspects of the award were well rooted in the facts of the particular claim (and the need to allow a process giving effective redress to the 60,000 claimants). But, again, the use of the general principle of effectiveness, and the balancing of the conflicting interests of the parties in the light of the facts of the case, also follow accepted international and EU law practice.¹³²

¹²⁵ *ibid*, paras 291-293. Stavros Brekoulakis, ‘Third Parties in International Commercial Arbitration’ OUP (2010) discusses the ‘precedential’ effect of arbitration awards (258-260) and argues for a limited effect, in relation only to findings of fact by an arbitrator; Blackaby and Partasides (n 35), 562-563

¹²⁶ Admissibility Decision, n 96, para 292 and ICSID Tribunal Order 3, 27 January 2010.

¹²⁷ Admissibility Decision, n 96, para 523

¹²⁸ *ibid*, para 290; Vienna Convention (n 115), Arts 31 and 32.

¹²⁹ *ibid*,

¹³⁰ Admissibility Decision (n 96), para 293

¹³¹ *Radicati di Brozolo* (n 14), 216-217

¹³² eg. Article 19(1) Treaty on the Functioning of the EU; CJEU, 199/82 *San Giorgio*, [1983] ECR 3595: national procedural rules should not make the exercise of (international) EU law rights “excessively difficult”.

Consequently, we believe that an international arbitration tribunal is entitled, when considering the scope of the parties' consent to arbitrate, to distinguish between consent to its substantive jurisdiction and the (often implied) consent to admit collective proceedings if justified in the circumstances of the particular case.¹³³ On admissibility, an arbitrator in the EU, called on to resolve a dispute under treaty law (including the EU treaties), should have regard to the purpose of the agreement to arbitrate the dispute — the effective resolution of all differences within its substantive scope — when considering the extent of his implied authority to admit a collective procedure to resolve the (EU) competition dispute being heard.¹³⁴ Separate express consent to collective arbitration is not required.

3.3 Claimant challenges to arbitrator's competence

The conclusions above are based on a challenge to collective competition arbitration by the defendants in the proceedings (Argentina). How (and how far) do they apply where a member of the claimant group wishes to challenge the procedure adopted?

A claimant group member may seek to challenge the collective arbitration proceedings at the outset (in the supervising court of the seat). However, we suggest that in practice, the important question is how far can members of the claimant group bring further arbitrated claims (or litigate), either individually or using a different collective redress mechanism? That is, will the defendant be able to preclude a group claimant from later making the same claim individually? The issues of consent to be addressed — whether by a supervising court or an enforcing court — are likely to be very similar and our consideration of them here is intended to cover both possibilities.

The answer needs to be considered in the light of the type of collective proceedings ('group' or 'representative') and of whether the claimant's consent to arbitrate is said to be express, implied, direct or indirect.

3.3.1 'Group' or 'representative' claims

Collective arbitrations in the form of a 'group' claim — the bundling together of a number of single disputes in the same arbitration proceedings — are still (in form) a collection of bi-lateral arbitrations being treated together (a 'multi-party' claim). So claimant challenges — either to the collective jurisdiction of the arbitrator or to the admissibility of the collective redress process — are likely to arise mainly due to a lack of sufficient commonality between the disputes which are being bundled together.¹³⁵

¹³³ UNCITRAL Guide (n 2), 200-201

¹³⁴ *Fiona Trust* (n 7). Lord Hoffman noted that the 'construction of an arbitration clause should rather start from the assumption that parties, as rational businessmen, are likely to have intended *any* dispute arising out of the relationship [...] to be decided by the same tribunal' (para 13, emphasis added)

¹³⁵ see Bernard Hanotiau (n 105), paras 247-254; Strong (n 8), 350-355, 356-357

A 'group' claimant would be entitled to challenge the jurisdiction of the arbitrator over his claim on the grounds that there is not a sufficient link between the dispute he has with the defendant(s) and the 'defined legal relationship' which forms the core of the mass claim. Moreover, the claims in (group) arbitration should be made under substantially the same arbitration agreement — at least governed by the same proper law and have compatible procedures concerning the composition of the arbitration tribunal and the seat of the arbitration.¹³⁶ In practice, this is likely to mean that the 'bundled' agreements to arbitrate will need to incorporate the procedural rules of the same arbitration institution.

But if there is a sufficient connection, and a common arbitrator can find consent to resolve the claimants' disputes using the same legal principles as the other claims in the group, we conclude — as the tribunal did by majority in *Abaclat* — that the arbitrator hearing the group claim would have jurisdiction to deal with the claimant's claim, as being within his jurisdiction.

Is it nevertheless open to a single claimant to refuse to participate in the collective claim — that is, may he refuse to have his claim included in the group so as to continue his own action?

The UNCITRAL 'Model Law' — and so national arbitration legislation based on it — is silent on the issue of 'compulsory' consolidation of separate but similar arbitration proceedings.¹³⁷ English law allows consolidation (or concurrent hearing) only if all of the parties have agreed to this.¹³⁸ However, the rules of some arbitration institutions — commonly incorporated into arbitration agreements by reference — may nevertheless have provisions which 'facilitate' appropriate consolidation. In particular, the ICC Rules permit the ICC Court, at any party's request, to consolidate two or more pending ICC arbitrations if they have sufficient common elements.¹³⁹ Although 'by agreement' (because the ICC Rules are incorporated into the agreement to arbitrate) such a consolidation may well be against the immediate wishes of the objecting claimant.¹⁴⁰

Where the collective claim is in the form of a representative action, the question of when a 'class' member can challenge the competence of an arbitrator is more complex. A closer examination of how his consent is said to have been given and of its scope will be required.

3.3.2 Discovering consent: direct, indirect, express or implied

In contrast to 'grouped' forms of collective competition arbitration — which marshal (through consolidation, assignment or otherwise) existing arbitrations into a manageable single proceeding — representative proceedings may

¹³⁶ Rule 10 of the ICC Rules (n 84) provides an example of the requirements needed for arbitrations to be consolidated; also ch 4.2.1

¹³⁷ Hanotiau (n 105), 179-190; Brekoulakis (n 125), 98-103.

¹³⁸ Arbitration Act 1996 s 35(2)

¹³⁹ r 10

¹⁴⁰ further discussed in ch 5.3

encompass claims not yet commenced in arbitration by the affected claimants themselves. The consent of the represented class members to the jurisdiction of the arbitrator must in these cases necessarily be indirect. And if the arbitration agreement does not expressly contemplate collective proceedings, consent to them will need to be implied¹⁴¹.

Express consent to arbitrate may be given indirectly, by a class member empowering an agent to arbitrate on his behalf — as TFA was empowered by the Italian bondholders in the *Abaclat* case — or through a general assignment of his cause of action against the competition infringer, as in the *CDC* case (which was, however, a litigated collective competition claim).¹⁴² Indirect consent may, though, also be given impliedly, as where a person belongs to an organization — such as a trade body — whose statutes give the body the power to represent members generally or to resolve disputes on their behalf.¹⁴³ In all of these cases there will be a written agreement to arbitrate (between the representative and the defendant) as required by the New York Convention.¹⁴⁴ But who is bound by it and with what effect?

Where individual express consent to arbitrate has been given — even indirectly by assignment or through an agency or similar agreement — then the claimant must be bound to arbitrate in the collective proceedings unless the representative has exceeded his authority to act. As the question of the scope of the representative's authority to act goes to the scope of the consent of each claimant in the class, this must be a question of (substantive) jurisdiction of the arbitration tribunal.¹⁴⁵ Therefore, it is capable of decision by the arbitrator and supervision by a competent court on the grounds provided in relevant national legislation and Articles II (3) and V of the New York Convention.

An arbitrator or supervising court, when considering the scope of consent to arbitrate, will need to examine both the agreement to arbitrate (between the representative and the defendant) and the agreements under which the representative claims to act on behalf of the group members. The proper law of the representation agreements may, of course, be different from the proper law of the agreement to arbitrate.¹⁴⁶

¹⁴¹ For discussions of consent in 'class wide' arbitration, Hanotiau (n 105) chapter IX, and Steingruber, (n 3), chapter 10.

¹⁴² C-352/13 (n 3)

¹⁴³ discussed in Strong, (n 8) at 185-195 and Radicati di Brozolo, (n 14), 216. Steingruber (n 87) notes that, where parties applying to join an arbitration are parties to an arbitration agreement which binds the other parties, consent to joinder of the new parties should be implied (para 10.21, p 170). However, many civil law systems do not permit an implication that a representative can agree to arbitrate a dispute on behalf of another simply from a power given to resolve a dispute: express consent to arbitrate appears to be required: French Civil Code Art 1989, Austrian civil code Art 1008.

¹⁴⁴ (n1), Article II(1)

¹⁴⁵ Strong (n 7), 185-188, commenting on US practice

¹⁴⁶ This may mean that those represented under agency agreements governed by a civil law system may be less likely to be said to have impliedly consented to arbitration (see n 143) than those in common law countries, where a wider degree of implication appears to be permitted, eg. *InterGen v Grina* (2003) 344 F 3d 134 (US 1 Circuit Court of Appeals)

If a class member alleged to be party to the arbitration agreement has taken no steps in the arbitration himself, English law permits him to apply to the court for any appropriate relief (usually a declaration or injunction) to determine whether there is an arbitration agreement, if so what matters are within its scope and whether the arbitral tribunal is properly formed.¹⁴⁷ It appears this right can be exercised at any point in the arbitration proceedings, although undue delay may lead the court to decline to grant the discretionary (equitable) remedies sought.¹⁴⁸ And if the alleged class member has already participated in the arbitration, he will have wider rights to challenge the arbitrator's powers as a 'party' to the arbitration, but these rights must be exercised no later than at the time when he takes the first step in the arbitration proceedings.¹⁴⁹ Without an application — made in good time — to the supervising court, each class member will be bound by his (indirect) consent to arbitrate collectively. A defendant can rely on that consent to support the later enforcement of the award resulting from the arbitration against those claimant class members.

Even in the — presumably rare — event that the representative has exceeded his actual (express or implied) authority, a defendant (without notice of this) will in many cases be able to rely on the apparent authority of the representative to be able to bind the class members to the outcome of the arbitration proceedings. The apparent authority of the representative must (in English law) derive from a representation — express or implied by conduct — by each class member.¹⁵⁰ For example the secretary of an association may be said to act on behalf of the members (who have expressly adhered to the association) to recover compensation on their behalf. But it is not sufficient that the class member has been *wholly* passive.¹⁵¹

We discuss the question of 'who may be a representative' in more detail in chapter 4, but the two kinds of representative noted there — the 'class member' and the 'ideological' representative — may need to be treated differently for the purposes of examining their authority to act for the group. In particular it is very unlikely that a 'class member' representative will have any apparent (implied) authority to act on behalf of the other class members. His authority to arbitrate for them will therefore need to be derived from (direct or indirect) authority *actually* given by each of them.

3.3.3 Implied authority of 'ideological' representative

Where the representative is not a class member — a consumer body for example — its officers may well have implied (apparent) authority to resolve disputes for

¹⁴⁷ Arbitration Act 1996, s 72

¹⁴⁸ *ibid*, s 31(1); Blackaby and Partasides (n 35) 344-345

¹⁴⁹ *ibid*,

¹⁵⁰ whether an implied agency relationship has arisen is to be decided objectively: silence cannot be used to imply such a relationship in English law; *Marine Blast Ltd. v Targe Towing Ltd.* [2006] EWCA Civ 346 at paras 20-22. For discussion of implied or apparent authority to arbitrate, see Brekoulakis (n 125), paras 2.76-2.111; Hanotiau (n 105) 10-14; Steingruber (n 3), 146.

¹⁵¹ *Marine Blast*, *ibid*. See also *Armagas Ltd. v Mundogas ("The Ocean First")* [1986] 1 AC 717, per Lord Keith at 778. Nor can a statement by the agent alone create apparent authority (*Freeman & Lockyer v Buckhurst Park Properties Ltd.*, [1964] 2 QB 480 at 504-5).

the association and its members and a defendant would be entitled to rely on this as against each member.¹⁵²

However, legislation in a number of EU Member States permits designated consumer associations or similar bodies to act not only on behalf of their members but also on behalf of all consumers — even if only in a particular region. Can such consumers — not members of the association but within the *legislated* group — be bound by an arbitration agreement entered into by the officers of the association where the association is the ‘ideological’ claimant?

Unless the national legislation expressly provides that the designated association may arbitrate on behalf of all consumers, we do not believe it can do so. The authority of the association to represent its members in an arbitration depends on their willing adherence to the association.¹⁵³ That is, there must be a chain of consent from each person represented — even if the first link in the chain is no more than a ‘click’ on a membership application.

Where there is a chain of consent, if a claimant brings individual proceedings against the defendant after the time to challenge the arbitrator’s jurisdiction in the collective arbitration has passed, the defendant will be able to compel him to continue in the arbitration (if it is still ongoing) or to abide by its outcome. But if the consent ‘chain’ is incomplete, the claimant cannot be said to have agreed (consented) to participate in the collective arbitration, and the collective award cannot be used as a bar to him bringing his own separate claim.¹⁵⁴

Questions of the scope of the representative’s authority (or indeed the existence of consent to arbitrate at all) are likely to be more acute where the representative’s power to act is both indirect and implied from the terms of an agreement entered into by the class member for another purpose — for example the articles of association of a club or company. Although we believe that the analytical steps set out above should still be used, the increased risk of defects in the chain of consent should mean that a prudent defendant ought to request the arbitrator to make an interim award confirming that the representative ideological claimant does indeed properly represent the whole class presented to collective arbitration.¹⁵⁵ If adequate notice of this interim award is given to all class members — and they then have a reasonable but definite time to raise any

¹⁵² Brekoulakis (n 125) notes that, in addition to an express or implied representation of authority by the principal, the other party to the agreement must have relied on it (53). For an overview of the application of arbitration clauses to non-signatories through agency (against the background of Swiss law) see Tobias Zuberbühler ‘*Non-signatories and the consensus to Arbitrate*’ (2008), 26 ASA Bulletin, 18-34

¹⁵³ John Townsend, ‘Extending an arbitration clause to a non-signatory claimant or a non-signatory defendant. Does it make a difference?’ in Bernard Hanotiau and Eric Schwartz eds, *Multiparty Arbitration* (2010) ICC, 114-117, notes the difference between ‘willing’ and ‘unwilling’ non-signatories to the arbitration agreement exists in US practice.

¹⁵⁴ However, Brekoulakis (n 125) notes that the absence of a non-participating claimant’s consent to arbitrate ought not to preclude the representative from claiming damages on his behalf if empowered to do so under the applicable law (212-215). It must be doubtful, however, that such an award would create a formal legal bar to separate proceedings by such a claimant.

¹⁵⁵ Brekoulakis, *ibid*, at 53.

objections — all members found by the arbitrator to have impliedly consented will be bound by the final arbitration award.

In conclusion here, provided that each class member has given either direct consent or a complete chain of indirect consent to the arbitration agreement — itself formed through the written terms agreed between the representative and the defendant(s) — whether that consent is express or implied from other documents or conduct, those class members will be bound to the arbitration. Only a class member who makes a successful jurisdiction challenge promptly to the arbitrator (or a court) on taking his first step in the arbitration,¹⁵⁶ or on being given adequate notice of it, should be able to maintain a separate individual action on the dispute — otherwise he is bound by his consent to arbitrate.¹⁵⁷

3.4 Effect of group member jurisdiction challenges: which dispute is affected?

What is the effect of a successful claimant challenge to the arbitrator's jurisdiction? Clearly, a claimant class member (who is not a representative claimant) making a jurisdiction challenge either to the arbitrator or to a court will only be acting on his own behalf. So, the decision on the challenge will only affect the 'defined legal relationship' between him and the defendant(s). But what is the impact of this on the collective arbitration proceedings?

Assuming that the collective dispute falls within the scope of the consent given in the arbitration agreement, and that the agreement is formally valid, it will not be open to the court seised by the claimant to restrain the collective arbitration proceedings *entirely*.¹⁵⁸ And it is (usually) the policy (*ordre public*) standard applied in the *lex arbitri* which is the relevant yardstick for assessing the collective procedure as a whole, not that of the claimant's chosen litigation forum.¹⁵⁹ The admissibility of a collective redress procedure in the overall arbitration should not be assessed by a court on the basis of the public policy of the place of residence or nationality of the applicant. Nor, even on enforcement of the collective award against the applicant claimant(s), should the court seised (if outside the seat) use its own public policy criteria to assess the admissibility of the collective procedure through which the award was made, unless the alleged breaches are so fundamental as to go to the very foundations of its legal order and so contrary to *ordre public*.¹⁶⁰

¹⁵⁶ see for example UK Arbitration Act 1996, ss. 68(1), 70(2) and (3)

¹⁵⁷ Case C-352/13 *CDC Hydrogen Peroxide SA* (n 31) upheld a party's right expressly to choose (pre-dispute) to litigate where he wishes, although the CJEU decision does not apply to arbitration (see ch 3.3). For an example of the expansive view of consent, '*Fiona Trust*' (n 7), (Lord Hoffman) at para 13-14, citing Bundesgerichtshof of 27 February 1970, reprinted in (1990) 6 *Arbitration International*, 79. The narrower view is exemplified by *Kemira Chemicals Oy v CDC Project 13 SA*, Gerechtshof Amsterdam, 21 July 2015, NTHR 2015, af. 5, p 273 discussed at ch 2.3.2 above.

¹⁵⁸ see ch 4.3.2. Hanotiau (n 105) notes that US courts have allowed parties to a class arbitration to raise the objection that the procedure "does not adequately protect the due process interests of absent class members." (at 276)

¹⁵⁹ UNCITRAL Guide (n 2), 39, 60-61, 193-194; Blackaby and Partasides (n 35), 170

¹⁶⁰ UNCITRAL Guide, 244-245

Thus, the question confronting the court seised becomes *not* whether the competition dispute should be arbitrated collectively, but rather whether the individual claim of the class member before the court should be dismissed because it is within the scope of the arbitration agreement. As the CJEU has confirmed in *West Tankers*¹⁶¹ an EU court seised of a dispute must always be able to consider the extent of its own jurisdiction *over that dispute*. The answer to this jurisdiction question is — we believe — that the individual claimant is in the majority of cases bound to the collective arbitration and its outcome *unless* he has successfully challenged the proceeding in good time, in which case his individual action should continue. There are two alternative sets of reasoning for this conclusion.

The first is that any arbitration — whether individual or collective — depends for its validity on the express or implied consent of those to be bound by the arbitration award. Where consent to collective arbitration is implied — so, there is no chain of express consent to the collective element of the procedure between the claimant and the arbitrator — the court must be able to consider if the implication is justified. The court seised by the applicant should therefore be able to continue to hear his individual claim, unless it is clear — as it was in the *Abaclat* case — that he has in fact already irrevocably consented to his claim being included in the collective arbitration. He remains bound to the collective arbitration if the time for him to validly challenge the jurisdiction of the arbitrator has passed, but otherwise is free to proceed individually if he wishes.

Second, even if the applicant class member might be said to have impliedly consented to his claim being included at the beginning of the collective competition arbitration procedure, if he later brings a separate court application he might be said to ‘opt-out’ of that procedure. It may be perfectly consistent with the law of the arbitration agreement or the *lex arbitri* — even one allowing ‘opt-out’ collective claims — for a court seised of an individual application by a class member to treat that single applicant as wishing to ‘opt out’ of the *collective* arbitration proceedings. This assumes that the period for opting out (if any) set by the arbitrator has not yet expired. We submit that the correct course in this case is for the court seised to stay its proceedings and to require the applicant to notify the arbitrator of his wish to opt-out, so that the arbitrator can take proper account of this in the subsequent collective arbitration proceedings.¹⁶² Once the ‘opt-out’ from the collective arbitration is effective, the stayed litigation claim can be recommenced.

Only if no opportunity to opt-out is given by the arbitrator in reasonable time for the individual applicant to be able to exercise his rights elsewhere, should the court allow an application to ‘extract’ the individual from the collective arbitration. And, if the application is made so late in the proceedings that the applicant has had notice and been given an opportunity to ‘opt-out’ by the

¹⁶¹ Case-185/07 *Allianz SpA and Generali Assicurazione SpA v West Tankers Inc.*, [2007] ECR I-663, considered in ch 3.3.2

¹⁶² Arbitration Act 1996 s. 68(3)

arbitrator, but has not done so, a court should in any case hold him to his agreement to arbitrate as part of the collective action.¹⁶³

4 Arbitrability in class action jurisdictions: what lessons are there from the US?

Given the lack of collective competition arbitrations in the EU to date, the question of court intervention against a collective arbitration procedure has only come for decision in non-EU courts. In this section we therefore offer an analysis of the solutions adopted in the US to the issue of arbitrability of competition class claims.¹⁶⁴

As we have noted, the term ‘arbitrability’ as used in US practice has a wider meaning — including not only the public policy aspects of referral to arbitration but also interpretation of the scope of the agreement to arbitrate. There are, then, limits to which principles derived from US judicial decision making can be transferred to a European context. Moreover, the United States’ federal judicial decisions fully bind the courts of US States in a wholly different way to effect of the relationship between the CJEU and the courts of the Member States. The effect of international public law (the New York Convention) in the federal legal order of the US is also different from its status in EU law.¹⁶⁵ Nevertheless, US case law does offer useful pointers — in particular for arbitrators — on consent to and admissibility of collective anti-trust (competition) arbitration procedures.

4.1 Arbitrability of anti-trust claims

The US Federal Supreme Court recognized over thirty years ago in the *Mitsubishi* case that disputes giving rise to anti-trust issues are arbitrable — there is in principle no US public policy reason to require anti-trust arbitrations to be stayed and remitted to a court.¹⁶⁶ This was true despite the clear public policy purpose pursued by the US federal anti-trust legislation (the Sherman Act and the Clayton Act) in ensuring effective competition.¹⁶⁷ It follows from the *Mitsubishi* decision that there should be no public policy reason for a US court to refuse recognition of an arbitration award which addresses anti-trust issues.¹⁶⁸

¹⁶³ see ch 3.1.1 for a discussion of the impact of the principle of party autonomy in EU law.

¹⁶⁴ For an overview, Strong (n 8), 6-14; James Carter ‘Class Arbitration in the United States: Life after Death?’ in Hanotiau and Schwartz (eds.) *Class and Group Actions* (n 51)

¹⁶⁵ for the interplay between EU law and international law in this context, see ch 3.1.2 and authorities noted there at nn 74-75. The status of treaties in US law is debated — eg. Michael Garcia ‘*International Law and Agreements: their Effect upon US Law*’, Congressional Research Service, 7-5700 (18 February 2015), www.fas.org/sgp/crs/misc/RL32528.pdf (retrieved 16-07-2018).

¹⁶⁶ *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth* 473 US 614 (1985)

¹⁶⁷ Sherman Anti-trust Act (1890), 15 USC §§ 1-7; Clayton Anti-trust Act (1915), 15 USC §§12-27, 29 USC § 52

¹⁶⁸ for a more detailed discussion, see Nazzini (n 14), 416-428

4.2. Class arbitration – permitted within limits

The decisional practice of the US Supreme Court on the availability of *class* arbitration in US federal law is more recent and the court's approval of this procedure has been far more guarded. The US Federal Arbitration Act ('FAA'),¹⁶⁹ whose provisions the Supreme Court is interpreting when deciding on the availability of class arbitrations, was enacted in the first half of the last century to ensure that arbitration agreements were upheld, at a time when judges in US State courts had adopted a generally hostile attitude to arbitration — seeing it as a possible means of oppressing weaker parties.¹⁷⁰

4.2.1 Arbitrator's freedom to certify a class

In 2003 the US Supreme Court decided in *Green Tree v Bazzle* that the FAA did not prevent an arbitrator from making a class award.¹⁷¹ The facts of the case are worth setting out briefly as they have a considerable bearing on the way in which the Supreme Court approached the issue.

The Bazzles, along with a large number of other borrowers from commercial lender Green Tree, had entered into loan agreements which provided that all disputes related to the loan contract '*shall be resolved by binding arbitration by one arbitrator*'. Despite this, the Bazzles applied to their local State court to have a class certified on behalf of themselves and the other plaintiffs. Green Tree applied for a stay and an order compelling arbitration on the basis of the arbitration clause. The State court allowed *both* applications: it compelled arbitration but also itself certified a class under the State class action rules.

A number of the class members submitted their disputes to the same arbitrator, who confirmed a 'class in arbitration' despite the silence of the arbitration clause on the issue of class arbitration. On appeal against the class certification award, the State Court of Appeal found that the arbitration clause was indeed silent on the issue of whether its scope covered class actions — despite the conflicting views of the parties on this point — and that they were therefore impliedly *permitted* (since '*all*' disputes were to be submitted to arbitration).

The US Supreme Court therefore had to decide two related questions: did the silence of the arbitration clause on the question of class proceedings mean that they were within the scope of the clause (given its wide drafting) and, second, if they were, did that conclusion conflict with public policy as embodied (in particular) in the FAA?

The Court decided that it was for the arbitrator to interpret the contract(s) — as the parties had wished him to do — and that the question of whether the arbitration clause permitted class proceedings and if so whether a class should be

¹⁶⁹ Federal Arbitration Act (1925), 43 Stat. 883, codified at 9 USC §1

¹⁷⁰ This view also appears to continue to influence EU policy makers and legislators – as for example in the rules on binding ADR in Directive 2013/11 OJ (2013) L165/63.

¹⁷¹ *Green Tree Financial Corp v Bazzle et al.* 539 US 444, (23 June 2003); Strong (n 8), 10-12, 180-182.

formed was one for the arbitrator.¹⁷² As to whether the ‘policy’ of the FAA (as previously interpreted by the Supreme Court itself) prevented this conclusion, the Court held that it did not.¹⁷³ The previous practice of the Court was that it would allow court interference in the parties’ freedom to choose to arbitrate only where there was a question as to the validity of the arbitration clause or where the type of dispute which had arisen did not fall within the scope of what had been agreed.¹⁷⁴ Beyond this it is for the arbitrator to decide on his own competence.

In a strong minority dissent — led by the Chief Justice — the majority finding that silence on the face of the arbitration clause permitted the arbitrator to choose a class procedure was criticized as being inconsistent with the other provisions of the arbitration clause. In particular, since the (separate) agreement of the parties was said to be required to the choice of arbitrator, an arbitrator chosen by the first claimants could not — by using a class procedure — effectively impose on subsequent claimants the choice of himself as their arbitrator.¹⁷⁵ In effect, the minority opined that an arbitration clause could never be properly ‘silent’ on the issue of the availability of class proceedings: either they were permitted expressly or they were not available. And, said the minority, since the issue of whether the arbitration clause is silent on the issue of class proceedings is a matter of contractual construction of the arbitration agreement, it is (in the US) reserved to the courts.¹⁷⁶

It is worth drawing a parallel here between the reasoning of the minority and the criticism of opt-out collective redress in Europe on the basis of the principle of party autonomy. German legislation on collective redress addresses the issue of party participation in the establishment of the arbitration tribunal by requiring ‘late coming’ claimants to adhere to collective proceedings as they stand at the moment of joining.¹⁷⁷ The same approach appears to have been contemplated by the ICSID arbitrators in *Abaclat*.¹⁷⁸ We suggest that these international and European examples make the reasoning of the minority in *Bazzle* less relevant — but still of some importance — in the European context.

4.2.2 Arbitrator’s powers must be based on consent

In later decisions, the Supreme Court has considered a number of different issues arising from the possibility of class arbitration. It is fair to observe that these later decisions (all taken by majority) demonstrate a judicial policy which requires close reading of the relevant agreement to arbitrate to discern exactly what the parties have agreed to. This hostility to broadening of use of class arbitration

¹⁷² *Bazzle*, *ibid*, at 7

¹⁷³ *ibid*, at 5

¹⁷⁴ *ibid*, 6

¹⁷⁵ *ibid*, Rehnquist CJ dissent at 5

¹⁷⁶ *ibid*, at 1

¹⁷⁷ Kapitalanleger-Musterverfahrensgesetz (KapMuG), 19 October 2012 (BGBl.I.S 2029, 2040), §14

¹⁷⁸ Jurisdiction and admissibility award (n 96), para 490, where the Tribunal appeared to consider that it followed that, if it had jurisdiction over a bundle of separate bi-lateral claims, it automatically had jurisdiction over a mass proceeding comprising those claims. But see Hanotiau, n 105, 101-114

procedures has, nevertheless, not prevented class arbitrations becoming a well-used dispute resolution tool in the USA.¹⁷⁹

The Supreme Court has repeatedly emphasized that, although arbitrators are empowered (and indeed required) to interpret themselves the scope of the arbitration clause on which their appointment is based — the internationally well recognized principle of *Kompetenz-Kompetenz* — the FAA does not permit the arbitrator to change that interpretation simply because he disagrees with it. There must be some contractual basis for the jurisdiction findings reached by the arbitrator. In particular the US Supreme Court held in *Stolt-Nielsen* that it is not open to an arbitrator simply to assume that the clause does give him competence to arbitrate on a class basis.¹⁸⁰

The question of law referred to the Supreme Court in the *Stolt Nielsen* case was whether, in the absence of any express wording in the arbitration agreement and of any implied consent either for or against class arbitration — all agreed as facts by both parties — an arbitration clause could authorize the arbitrator (sitting in the United States) to use a class action procedure.

The plaintiffs had chartered a ‘parcel tanker’ — a ship containing separate compartments for shipping bulk liquids — under a charterparty containing a well-used arbitration clause (Vegoilvoy), which provided for arbitration in New York but with no clear choice of law. On learning that the US Department of Justice had found that *Stolt-Nielsen* had been a member of a cartel in the charter of parcel tankers, Animal Feeds and other plaintiffs commenced litigation in the US Federal courts claiming damages. The US Federal Appeal Court found that the Vegoilvoy arbitration agreement covered the claims for anti-trust damages against members of the parcel tankers cartel, so that the plaintiffs’ claims had to be arbitrated. Animal Feeds therefore served *Stolt-Nielsen* with a demand for *class* arbitration in New York under the arbitration agreement.

During the course of the arbitration proceedings, both parties agreed that the Vegoilvoy arbitration clause was wholly silent as to whether class arbitration was permitted — and both accepted that the clause had never previously been used as the basis for a class arbitration. As the Supreme Court noted when considering the remanded question of whether a proper construction of the Vegoilvoy clause authorized class arbitration:

¹⁷⁹ The American Arbitration Association received 461 class arbitration requests from 2003-2015: Christopher R Drahozal, ‘Class Arbitration in the United States’ in Hanotiau and Schwartz (eds) *Class and Group Actions in Arbitration* (2016) ICC.

¹⁸⁰ *Stolt-Nielsen SA v Animal Feeds International Corp*, 559 US 1 (2010), section 2.5 above and Strong (n 5) at 106 – 110. For a commentary by the arbitrator in this case see Gerald Aksen ‘Class Actions in Arbitration and Enforcement Issues: an Arbitrator’s Point of View’ in ‘Multiparty Arbitration’ (n 154), 215. See also the decision of the French Cour de Cassation in *Siemens AG and BKMI GmbH v Dutco Construction Company Inc*, 7 January 1992 ([1992] 1 Bull Civ; excerpts translated in XVII YBCA 140 (1993)), where the Cour declined to enforce a multi-party arbitration award on the ground that the composition of the ICC arbitral tribunal without a member nominated with the consent of each of the parties was contrary to (French) public policy. Also Born (n 35) at 2608-2610. The immediate issue has been resolved by amendment to Rule 10 of the ICC Arbitration Rules (2012)

[...] Animal Feeds explained to the arbitration panel that the term ‘silent’ did not simply mean that the clause made no express reference to class arbitration. Rather, [it] said, ‘all the parties agree that when a contract is silent on an issue, there’s been no agreement that has been reached on that issue’.¹⁸¹

Nevertheless, the arbitrators had concluded that the Vegoilvoy clause *did* allow class arbitration. This award was vacated by the Federal District Court but reinstated by the Federal Appeal Court: the question of the scope of the clause was therefore remanded to the US Supreme Court.

The Supreme Court found on the evidence that the arbitrators had reached their finding on the scope of the Vegoilvoy clause for two reasons. First, there was nothing in the Vegoilvoy clause prohibiting class arbitration; second the arbitrators simply accepted Animal Feeds’ submission that ‘...the clause should be construed to permit class arbitration as a matter of public policy.’

The Supreme Court concluded that
perceiving a post-*Bazzle* consensus among arbitrators that class arbitration is beneficial “in a wide variety of settings,” the panel considered *only* whether there was no good reason not to follow that consensus.¹⁸²

It noted that the arbitrator could not simply impose its own policy view on the agreement of the parties to arbitrate:

...a party may not be compelled [...] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached “no agreement” on that issue.¹⁸³

The Court went on to note:

In certain contexts it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties’ agreement. Thus, we have said that “procedural” questions [...] are presumptively not for the judge but for an arbitrator to decide.¹⁸⁴

However, specifically in relation to class arbitration — based (of course) on the procedure in the US rule FRCP 23 — the Court found:

An implicit agreement to authorize *class action* arbitration however is not a term that the arbitrator may infer *solely* from the fact of the parties’ agreement to arbitrate. This is so because class action arbitration changes the nature of the arbitration to such a degree that it cannot be presumed that the parties consented to it simply by agreeing to submit their disputes to an arbitrator.¹⁸⁵

There had to be consent to *class* arbitration — express or implied.

¹⁸¹ *Stolt-Nielsen*, *ibid*, at 4

¹⁸² *ibid*, 9, emphasis added

¹⁸³ *ibid*, 20, emphasis in the original

¹⁸⁴ *ibid*, 20-21

¹⁸⁵ *ibid*, 21 emphasis added. See also, Hanotiau (n 125) at 271-274. For a European perspective see Radicati di Brozolo, (n 21), 216-217 and, for comment on the ‘changed’ nature of arbitration, see Strong, (n 8), 145-150.

Although this finding appears to conflict with that of the *Abaclat* tribunal on the same issue, we suggest that this conflict may be more apparent than real. In *Abaclat* the parties disagreed on whether the ICSID rules under which the arbitration was being conducted impliedly allowed representative actions. The Tribunal, exercising its *Kompetenz-Kompetenz*, decided they did. In contrast, in the *Stolt Nielsen* case, all parties accepted that the agreement to arbitrate neither expressly nor impliedly authorised class arbitration.¹⁸⁶ The plaintiffs relied on an inherent jurisdiction in the arbitrator allowing him to apply such a procedure. The US Supreme Court disagreed: it found that arbitrators must derive their authority solely from the consent of the parties to the arbitration agreement and not from any inherent quasi-judicial power.

The Supreme Court has considered the practical difficulties which class arbitration is said to give rise to in later cases. In *Concepcion*¹⁸⁷ it noted in particular:

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. [...] arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, *to the extent it is manufactured by [California law]* rather than consensual, is inconsistent with the FAA.¹⁸⁸

And, although it did not decide on the point in this judgment, the Court noted:

[...] it is at the very least odd to think that an *arbitrator* would be entrusted with ensuring that third parties' due process rights are satisfied.¹⁸⁹

The Supreme Court confirmed the *Concepcion* decision in 2013 in *Italian Colors*, even where it was accepted as a fact by all parties that unless a class arbitration were permitted, the plaintiffs' costs of individually arbitrating their federal statutory claim exceeded the potential recovery.¹⁹⁰ The doctrine of 'effective vindication' of their statutory rights (created under previous Supreme Court practice) did not apply to contractual provisions which simply made the arbitration more difficult for the plaintiffs.¹⁹¹ That 'effective vindication' doctrine still

[...] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would *perhaps* cover filing and

¹⁸⁶ This difference was expressly dealt with by the Supreme Court in *Oxford Health Plans v Sutter* (569 US 1(2013))

¹⁸⁷ *AT&T Mobility Inc. v Concepcion* 563 US 1 (2011)

¹⁸⁸ *ibid*, 13, emphasis added

¹⁸⁹ *ibid*, 15, emphasis added. The decision of the Court may well have been influenced by the availability in this contract of 'fast track' cost free individual consumer arbitration, although this hardly seems a sufficient reason to impose a blanket rule ousting the application of unconscionability laws in the interpretation of arbitration clauses. For a comment on the (ineffectiveness) of consumer ADR, see Gerhard Wagner 'Private Law Enforcement through ADR: Wonder Drug or Snake Oil' (2014) 51 CMLRev, at 191-192.

¹⁹⁰ *American Express Co v Italian Colors Restaurant*, 570 US 1 (2013)

¹⁹¹ *Mitsubishi Motors v Soler Chrysler Plymouth* 473 US (1985)

administrative fees attached to the arbitration that are so high as to make access to the forum impracticable.

But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy. [...] The class action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' rights to pursue their statutory remedy than did federal law before its adoption of the class action rule in 1938 [...] ¹⁹²

Despite these evident reservations about the workability of class arbitration, the jurisprudence of the Supreme Court continues to allow it where the supervising US court can find that the arbitrator has grounds for his decision that the agreement to arbitrate includes agreement to arbitrate *as a class*.

So, in *Oxford Health Plans*,¹⁹³ also decided in 2013, the US Supreme Court found that, where the parties had agreed that the arbitrator should decide whether the arbitration clause included consent to class arbitration (as there was a dispute on this point), and he had decided — after the *Stolt-Nielsen* judgment — that it did, his award should stand. A party seeking to overturn an arbitrator's decision bears a heavy burden.

"If parties could take 'full-bore' legal and evidentiary appeals, arbitration would become 'merely a prelude to a more cumbersome and time consuming judicial review process.'" ¹⁹⁴

Kagan J (for the court) dealt with the applicants' argument to the contrary — based on *Stolt-Nielsen* — by finding that it

"... misreads *Stolt-Nielsen*. We overturned the arbitral decision there because it lacked any contractual basis for ordering class procedures..." ¹⁹⁵

and

"At bottom, *Oxford* maintains that this is a garden variety arbitration clause lacking any of the terms or features that would indicate an agreement to use class procedures.

We reject this argument because, and only because, it is not properly addressed to a court." ¹⁹⁶

Determining the scope of consent — if in dispute — was for the arbitrator and here he had performed that task.

4.3 Summary on US case law

The Supreme Court's decision that 'silence' could not imply consent to class arbitration is unsurprising in view of the unusual agreed facts of the *Stolt-Nielsen* case. 'Silence' in the *Vegoilvoy* arbitration clause was agreed by all parties to mean that there had been 'no agreement' on the question of class arbitration. It is, we suggest, uncontroversial that in those circumstances the Supreme Court struck

¹⁹² *Italian Colors* (n 191) at 6-7, emphasis added

¹⁹³ *Oxford Health Plans LLC v Sutter* 569 US _ (2013)

¹⁹⁴ *ibid*, at 4, citing *Hall Street Associates LLC v Mattel Inc* 552 US 576 (2008)

¹⁹⁵ *ibid*, at 6

¹⁹⁶ *ibid*, at 8

down an award based *solely* on a ‘policy’ position adopted by the arbitrators without any grounding in the express or implied consent of the parties.¹⁹⁷ The facts in *Oxford Health Plan* — more likely to arise in practice — and the decision of the Supreme Court in that case, affirming the arbitrator’s *Kompetenz-Kompetenz*, is squarely in line with international arbitration practice.

Finally, the procedure considered by the Supreme Court in *Stolt-Nielsen* and later cases is based closely on the relatively complex US federal class action rules. Those rules are designed to create a ‘class’ of persons falling within a given description, which may extend well beyond a relatively well defined group which has adhered to an arbitration agreement (even one which contemplates class action). The difficulties of managing what may be very large groups of claimants in an arbitration context have clearly motivated the Supreme Court to restrict the availability of class arbitration strictly to those having consented to it (both claimants and defendants) — as the *Concepcion* and *Italian Colors* judgments make clear.

Use of simpler forms of representation — for example through a trade association — or of group arbitration techniques would not appear to be so squarely within the ambit of the Supreme Court’s concern that ‘class’ action fundamentally changes the nature of arbitration so that consent to it cannot easily be implied. And the Supreme Court has not excluded arbitrators from using even a complex ‘class action’ procedure — basing themselves on its *Bazzle* case law — if the arbitration tribunal can properly find that that is what the parties agreed.¹⁹⁸

5 Conclusions on arbitrability and consent to collective competition arbitration

Arbitration in bi-lateral competition (anti-trust) disputes appears uncontroversial in principle, whether at an international, EU or national level. Although the ‘public interest’ element of competition claims has been recognized, this does not prevent such disputes from being arbitrated.¹⁹⁹ There is no general international principle which makes an agreement to arbitrate competition disputes in Europe ‘incapable of settlement by arbitration’ or ‘void, inoperative or incapable of being performed’.²⁰⁰

The availability of arbitration of *collective* claims is less well established in international, EU or national laws — and is more controversial. It is still not certain whether and when a national civil court in the EU may make an order preventing a collective competition arbitration procedure from continuing, nor how far recognition or enforcement of collective competition awards is required. Nevertheless — and also in the light of the EU policy background discussed in chapter 3 — we believe that a number of propositions can safely be advanced.

¹⁹⁷ In *Oxford Health Plans* (n 194) decided after *Stolt-Nielsen*, the Supreme Court refused to interfere with an arbitrator’s reasoned finding that a ‘silent’ but disputed arbitration agreement *did* permit class arbitration.

¹⁹⁸ *Oxford Health Plans* (n 194), 6-7

¹⁹⁹ see eg. Directive 2014/104 [2014], OJ L34/1, recital 1

²⁰⁰ New York Convention (n 1), Art II(3)

1. Given the wide variety of forms of collective redress — and of the labels attached to them — as well as differing legislation across EU Member States, there can be no formalistic general rule that collective competition claims cannot be arbitrated in Europe.
2. Questions of arbitrability and consent raised at the beginning of the arbitration proceedings in arbitrations seated in the EU should be addressed according to national standards, applied in the light of the New York Convention and international arbitration *ordre public*. The outcomes should also be compatible with the general principles of EU law (EU public policy).
3. Where recognition or enforcement of the resulting collective award is sought outside the seat, the (similar) tests for assessing the scope of the consent and exceptions to enforcement based on *ordre public* are solely those provided in the New York Convention (Article V).
4. Court intervention to deny the referral of a dispute to arbitration should be limited to an examination of the arbitrator's substantive jurisdiction. Is the dispute of a type capable of settlement by arbitration? If so, does it fall within the scope of the consent to arbitrate? Questions as to whether there is a valid arbitration agreement, whether the arbitration tribunal has been properly constituted and the scope of the matters submitted to arbitration are all also of 'substantive jurisdiction.'²⁰¹
5. In contrast, questions as to the admissibility of collective redress *procedures* are properly a (preliminary) question for the arbitrator. Setting aside an arbitrator's interim procedural award should be wholly exceptional and (in EU law terms) limited to cases where a party's fundamental EU rights will be violated (a 'serious irregularity' in the UK).²⁰²
6. The primary national legal framework — including public policy — applicable to decide preliminary questions of consent is the law of the arbitration agreement. Unless expressly chosen, this will either be the law chosen to govern the substantive agreement in which the arbitration agreement is contained, or — if there is an implication that the parties must have intended that the substantive law should not apply to govern the arbitration proceedings — the law of the seat.²⁰³
7. If the arbitration procedure decided on by the arbitrator seriously contravenes *ordre public* as applied under the *lex arbitri*, the supervising court may — exceptionally — be able to restrain the collective arbitration from continuing. In contrast, where recognition or enforcement of an award made elsewhere is applied for, the applicable standard is always

²⁰¹ Arbitration Act 1996, s 30

²⁰² *ibid*, s 68 (1)-(2)

²⁰³ *Sulamerica* (n 40) and section 2.1.2 above

that of the enforcing court. Refusal to enforce should again be the exception.

8. Consent to arbitrate may be direct or indirect, express or implied. Where consent is indirect, there must be an unbroken chain manifesting consent, linking each group member to the arbitrator by whom the collective competition arbitration is being conducted. Where consent is implied, there must be adequate grounds for that implication, which are properly assessed by the arbitrator in his award.
9. An implication of a representative's authority to arbitrate on behalf of each group member can only arise where the representative has (at least) apparent authority to represent group members in the arbitration. Consent to representation cannot be implied merely through passively belonging to a group of persons described in the representative's application to the arbitrator for collective proceedings (in contrast to a 'class' action in a court).
10. The fact that the competition dispute — for which a claimant group is requesting a referral to arbitration — is presented in the form of a collective claim does not alter the right of a defendant to invoke his lack of consent to the substantive jurisdiction of the arbitrator. However it is not open to a defendant to a dispute to refuse to submit to arbitration *solely* on the grounds that he did not expressly and separately consent to a collective arbitration *procedure*.
11. A member of the claimant group who wishes to question the jurisdiction of the arbitrator should normally do so to the arbitrator himself in the first instance. Such a challenge should be made at the time the group member takes his first procedural step (directly or through his properly authorized representative) in the arbitration. Any review application to the supervising court must be made promptly or the right to challenge will be lost.
12. The arbitrator (or court) may — and probably must — determine a jurisdiction application as a preliminary issue. However, that determination can only be made in relation to the (bi-lateral) dispute before the court or the arbitrator relating to the individual group member (or defendant) making the application. It is not open to a challenging group member to require the abandonment of the entire collective competition arbitration.
13. A group member will be bound by the outcome of a collective competition arbitration — and a defendant may use the award as a bar to prevent further claims from him — where the arbitrator has determined that he has consented to the collective arbitration and he did not challenge that determination in good time.

14. If the group member's challenge is made in good time after he has been (actually or constructively) notified of the collective arbitration affecting his interests, the arbitrator or the court should allow his jurisdiction challenge unless it can be shown that he has expressly *already* consented to participate in the collective arbitration.
15. Where the arbitrator has already admitted a procedure which allows group members expressly to leave the group, a court should stay the application of any group member — bringing a challenge before this 'opt-out' period has expired — so that he continues with the collective arbitration until he can opt-out of it later, if still desired, in accordance with the procedure set by the arbitrator.

On the basis of these propositions, we believe that it will be wholly exceptional for a court to be able entirely to prohibit the continuation of a collective arbitration of an EU competition dispute at a defendant's or a group member's application. The arbitrator should be allowed to proceed using his chosen collective redress procedure consistent with the fundamental policy principles of the proper law of the arbitration agreement and of the *lex arbitri*. In Europe, these must be applied consistently with EU law fundamental rights and general principles.

Where application is made for the recognition of the resulting collective competition award, refusal to recognize or enforce it should be rare and take full account of the EU principle of effectiveness. A successful challenge to recognition or enforcement will only affect the legal position of the individual applicant and defendant(s) to that application. Other parties to the collective competition award remain bound by it in accordance with their original agreement to arbitrate and are entitled to rely on it as against the other parties — including when making further applications for recognition or enforcement to courts in the EU.

We have noted at various points in this chapter that national courts and arbitrators are required to apply national arbitration legislation consistently with EU general principles where the dispute relates to (directly effective) EU competition law. Chapter 3 considers what those principles are in commercial arbitration and how their application may affect the conduct of a collective competition arbitration.

Chapter 3 Collective competition arbitration in the EU : EU ‘public policy’ engaged

- 1 *EU general principles and the international legal order*
 - 1.1 *General principles and collective competition redress*
 - 1.1.1 *principle of effectiveness: right to an effective remedy*
 - 1.1.2 *principle of ‘party autonomy’*
 - 1.1.3 *principle of equivalence*
 - 1.2 *EU law enforcement and the New York Convention: separate regimes*
 - 1.2.1 *supremacy of EU law?*
 - 1.2.2 *the principle of ‘sincere co-operation’: when does it apply*
 - 2 *Impact of EU legislation and guidance*
 - 2.1 *Encouraging access to a remedy through collective redress: Commission Recommendation*
 - 2.2 *Arbitration in EU competition damages legislation*
 - 3 *Arbitration in the decisional practice of the CJEU*
 - 3.1 *Arbitrators outside the EU ‘mutual trust’ court-based system*
 - 3.2 *Jurisdiction over the dispute: EU control of arbitrator’s competence*
 - 3.3 *The scope of the agreement to arbitrate – EU or national control?*
 - 4 *Conclusions: strong EU policy encouragement but behind a ‘cordon sanitaire’*
-

EU public policy towards arbitration is still developing and has yet to address directly many of the issues raised by collective competition arbitration. However, this chapter shows that EU policy more broadly can and should be used to encourage arbitration of collective competition claims in the EU Member States. A pro-arbitration stance is particularly apparent in recent legislative and competition policy initiatives from the European Commission.

We focus here on the public policy position at EU level: this forms the backdrop to any application of *ordre public* in an EU competition law arbitration. Relevant distinct (national) policy concerns are dealt with in chapter 4, where we discuss how parties and arbitrators can best manage overall policy risk the commencement, recognition and enforcement in the EU of collective competition arbitration.

1 EU general principles and the international legal order

1.1 General principles and collective competition redress

General principles of law — derived from a comparative view of generally accepted practice in national legal systems — have been examined and relied

upon by arbitrators (and academic commentators) for well over half a century.¹ EU law — through the decisional practice of the CJEU — also relies on a comprehensive set of general principles of law, derived both from the common practices of national legal systems in the EU and from international law, to support the application and interpretation of EU legislation in individual cases.²

Most of the general principles developed by the CJEU have subsequently been incorporated into the EU Treaties — either the Treaty on European Union (TEU) or the EU Charter of Fundamental Rights (Charter).³ In practice these general principles of EU law together form a body of rules which can be characterised as ‘public policy’ of the EU legal order.⁴ Unsurprisingly, the impact of these general principles of EU law is most evident in those areas of EU competence where EU law is directly effective and where the EU’s institutions have direct enforcement powers: EU competition law enforcement is the leading example.

The ‘general principles’ of EU law are often articulated using methods of interpretation developed by the CJEU so that, where the text of EU law is inadequate or permits the exercise of a discretion, the application of the law (or the discretion) is used to further the overall purpose of the legal provision applied in its EU context.⁵ This ‘purposive’ interpretation of EU law is itself a main principle of EU law — and contrasts with the more literal legislative interpretation generally used by the English courts when applying purely domestic legislation.⁶

The discussion in this section — primarily for reason of space — is limited to those general principles which have a direct bearing on the question of the arbitration of collective EU competition disputes. This is not to imply that other general principles (for example the principle of proportionality) are irrelevant to a consideration of availability of collective competition arbitration, but they are — we believe — of lesser practical impact.

We therefore deal here with the principle of effectiveness (and in particular of access to an effective remedy for breaches of directly effective EU law rights) and

¹ Bin Cheng ‘General Principles of Law as applied by International Courts and Tribunals’ (1953) CUP; Kotuby, C.T. and Sobota, L.A. ‘General Principles of Law and International Due Process’ (2017) OUP.

² see for example C-144/04 *Werner Mangold v Rudiger Helm* [2005] ECR I-9881 (Grand Chamber) at paras 74 -75. This technique of developing of a set of general principles based on fundamental and national constitutional rights in Europe is now restated in the Treaty on European Union, [2012] OJEU C 326/1, Art. 6(3):

“3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.*

³ *ibid*; European Charter of Fundamental Rights [2016] OJEU C-202/389

⁴ However, as Christoph Liebscher points out in ‘European Public Policy – a Black Box’, (2000) 17 *Journal of International Arbitration*, 73-88, the criteria used by the CJEU to identify EU ‘public policy’ are far from clear – a point confirmed by AG Wathelet in his opinion in C-536/13 *Gazprom*, 4 December 2014, ECLI:EU:2014:2414 at para 75

⁵ for example, the CJEU gave itself jurisdiction to review the legality of the acts of the European Parliament, despite the absence of express wording to that effect in Article 173 of the Treaty of Rome: case 294/83 *Les Verts v European Parliament* [1986] ECR 1339. The Treaty was subsequently amended to reflect the CJEU’s position by the Treaty of Maastricht.

⁶ eg. *Customs & Excise Commissioners v Samex ApS* [1983] 3 CMLR 194, Bingham J at 211

the principle of equivalence (the same procedures must be available for the vindication of EU law rights as are available for the assertion of purely domestic law). We also deal with the impact of ‘party autonomy’. This is less widely recognized as a ‘general principle’ of EU law, but is nevertheless a common feature of the constitutional and judicial frameworks of the large majority of Member States.

1.1.1 Principle of effectiveness: right to an effective remedy

The right to an effective remedy — a sub-set of the general EU principle of effectiveness — finds its EU law roots in the early case law of the CJEU. The first use of the principle in the seminal *Van Gend en Loos* case in 1962 ensured that private law persons benefitting from rights under the (now) EU Treaties could assert them in national courts.⁷ This line of case law has developed to include, in particular, ensuring that victims of infringements of EU competition law have a right to damages.⁸

This principle of ‘effective remedy’ has been expressed by the CJEU as follows:

‘[...] the conditions [...] for reparation of loss or damage [for breach of EU law] laid down by national law [...] must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness)’⁹

The Treaties themselves now give the right to an effective remedy. Article 19 TEU requires Member States to provide remedies sufficient to ensure effective legal protection in all fields covered by EU law. The EU Charter goes a little further. Article 47 adds to the TEU ‘effective remedy’ rule in two respects. Firstly the rule in the Charter is expressed (implicitly at least) to be independent of (and superior to) the national legal orders of the Member States. Member State courts hearing an application for recognition of an arbitration award in an EU competition case will therefore need to verify compliance by the arbitrator with Article 47 as a matter of EU (and not only domestic) public policy.

Second, the EU right to an effective remedy must be exercisable ‘before a tribunal’. The Charter does not define what might be a ‘tribunal’ for these purposes, but it is unlikely that a commercial arbitral tribunal could fully satisfy the detailed requirements of Article 47. In particular the Article requires that access to a tribunal should include a *public* hearing by a tribunal *previously* established by law. These requirements would exclude *ad hoc* commercial arbitration tribunals, hearing argument, deliberating and giving their awards in private.

However, the Charter also provides that its articles must be interpreted in conformity with equivalent articles in the European Convention of Human Rights (ECHR).¹⁰ Article 6 of the ECHR corresponds to the requirements of Article 47 of

⁷ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

⁸ C-453/99 *Crehan v Courage Ltd.* [2001] ECR I-6297; Vivien Rose, David Bailey (eds.), *Bellamy & Child, European Union Law of Competition*, 7 ed, (2013) OUP, 1208-1209; Renato Nazzini, *Competition Enforcement and Procedure*, 2 ed, (2016) OUP, ch 9

⁹ C-261/95 *Palmisani v INPS* [1997] ECR I- 4025, para 27

¹⁰ Charter (n 3), Article 52(3); Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, UNTS 2899

the EU Charter. The European Court of Human Rights (ECtHR) has confirmed that arbitrators may be ‘tribunals’ within the scope of Article 6(1) of the ECHR.¹¹ Arbitrators are ‘established’ under relevant national arbitration legislation, their conclusions are amenable to review by an ‘appellate’ jurisdiction and their awards may be enforced as a court judgment.¹² This wide-ranging conclusion was reached even though the award under consideration by the ECtHR could only be set aside by a court (under national legislation) on the grounds described in Article V of the New York Convention.¹³

The procedure which the arbitrator uses to comply with the requirements of the ECHR (and, therefore, the EU Charter) is a matter for agreement between the parties and the exercise of the arbitrator’s procedural discretion — not the application of rules of court. By choosing to arbitrate, the parties have waived the full set of their procedural rights.¹⁴ But it does not follow from this that arbitrators must necessarily be incapable of impartially protecting parties’ fundamental rights. The ECtHR clearly decided that they can, provided an appropriate procedure is adopted.¹⁵ It follows that an arbitrator must also be capable of being a ‘tribunal’ for the purposes of Article 47 EU Charter and that an arbitration can satisfy the Article 47 requirements.

How, then, should the EU legal order ensure the adequate supervision of arbitrators’ application of fundamental EU rights — if at all? The ‘second look’ principle first used in the *EcoSwiss* case for competition law compliance by arbitrators will equally well apply to the question of whether other fundamental EU public policy principles have been complied with by an arbitrator.¹⁶ And among them is the right to an effective remedy including — in competition cases at least (and probably more widely) — a right to be able effectively to claim damages.¹⁷

The CJEU was expressly asked in the *CDC* case whether this fundamental right to an effective remedy for EU competition law harm could override the requirement in national legislation for a court to give effect to arbitration clauses in accordance with the New York Convention.¹⁸ That is, were the clauses ineffective to refer the competition dispute to arbitration?

¹¹ *Lithgow and others v UK*, [1986] 8 EHRR 329, paras 201-202

¹² *Regent Company v Ukraine*, App 773/03, (ECTHR, 3 April 2008), para 54

¹³ *ibid*, para 50

¹⁴ *Stretford v Football Association* [2007] EWCA Civ 238, para 47, citing ECtHR in *Deweert v Belgium* [1980] 2 EHRR 439 at para 49 “..... in civil matters, notably in the shape of arbitration clauses in contracts ... the waiver, which has undoubted advantages to the individual concerned as well as for the administration of justice, does not in principle offend against the Convention.”

¹⁵ *Lithgow v UK* (n 11) — in that case protecting the applicants’ fundamental right to property, under Protocol 1, Art 1 of the ECHR.

¹⁶ C-126/97 *EcoSwiss China Time v Benetton international NV* [1999] ECR I-3055, discussed at 3.3.2 below

¹⁷ *Crehan*, (n 5); C-295-8/04 *Manfredi and ors. v Lloyd Adriatico Assicurazione SpA and ors.*, [2006] ECR I-6619; Directive 2014/104, [2014] OJ L349/1, Art. 3.

¹⁸ C-352/13, *CDC Hydrogen Peroxide SA v Akzo Nobel NV and ors.* [2015] ECLI: EU:C:2015:35. We consider the *CDC* judgment in more detail at 3.3

The CJEU found it had insufficient information from the referring court to give a useful answer as regards the impact of the principle of effectiveness on *arbitration* clauses — noting in any event that the question was outside the scope of interpretation of the relevant EU Regulation.¹⁹ However, the findings of the CJEU in relation to jurisdiction clauses — that such a clause can only apply to prevent competition disputes being litigated in an EU court where there is express wording to that effect — *may* nevertheless give an indication of its views if it is called on to decide the question in relation to arbitration agreements.²⁰

The clear importance of the EU principle of effectiveness should nevertheless be emphasized, despite the possible uncertainty in national application resulting from the *CDC* judgment.²¹ In particular, where an arbitrator has jurisdiction, the effectiveness principle will provide grounds to counter any national public policy arguments to prevent him from adopting a (collective) procedure which he considers necessary to ensure an effective remedy for breach of EU competition law.²² National courts should not be permitted to interfere with that determination solely on the basis of purely *national* public policy. Although the CJEU has not to date had to consider the compatibility of arbitrated *collective* redress procedures with the fundamental principles of EU law, EU legislation and guidance strongly support both collective redress and the alternative resolution of EU law disputes (eg. through arbitration), as we shall see below.²³

The *type* of collective proceeding adopted by the arbitrator may nevertheless have an impact on the likelihood of successful challenge to the arbitrability of the dispute. The types of collective redress are varied and there is no clear taxonomical line between them. But, given European ambivalence to ‘US style class actions’, a procedure adopted by an arbitrator which could successfully be described as ‘opt-out’ or a ‘class action’ is likely to be more susceptible to public policy challenge in national courts.²⁴

A ‘class action’ challenge — inadmissibility of *procedure* admitted in an award due to serious irregularity — should not succeed in having the arbitration set aside in full.²⁵ We discuss the principle of party autonomy, on which such a challenge would normally need to rely (is it an EU law principle and can it apply to collective competition claims?) in the next section. In short, the principle of party autonomy

¹⁹ now Regulation 1215/2012, [2012] OJ L351/1 – at the time of the *CDC* judgment, Regulation 44/2001, [2001] OJ L12/1. The Advocate General’s Opinion took a relatively unfavourable stance towards arbitration, [2014] ECLI:EU:C:2014:2443

²⁰ judgment (n 18), paras 68-70. See also Assimakis Komninos, ‘Arbitration and damages claims based on competition law violations’ in Edward, MacLennan and Komninos eds., *‘A Scot Without Borders, Liber Amicorum Ian S Forrester QC’*, Concurrences, September 2015 at 10-14.

²¹ discussed at ch 2.2.4.2 above

²² in C-536/13 *Gazprom v Lithuania* [2015] ECLI:EU:C:2015:316, the CJEU upheld the right of a national court to apply national arbitration legislation to prevent the Lithuanian state from continuing with part of a court claim in Lithuania in order to comply with an interim award from a Stockholm arbitrator in related proceedings to which Lithuania was party.

²³ At section 3.2

²⁴ Commission Recommendation, 11 June 2013, [2013] OJ L201/60, paras 21-22

²⁵ Ch 2.4 above

does not appear to prevent ‘opt-out’ procedures, but it may condition how they must be administered by an arbitrator sitting in the EU.

1.1.2 Principle of ‘party autonomy’

The ‘principle of party autonomy’ is undeveloped as a general principle of EU law. In a national context it is often confused with the wider principle of ‘access to justice’. In the narrower sense (which we use here), ‘party autonomy’ describes the right of a party (individual or corporation) to decide independently whether or not to litigate (arbitrate) or to join a case already pending. ‘Access to justice’ in contrast is often used in a broader and more practical sense — is a claimant able in fact (and not just as a matter of legal principle) to obtain a remedy for a wrong he has suffered.

The principle of party autonomy is echoed in the constitutions (or constitutional principles) of many EU Member States.²⁶ Perhaps the clearest expression of the principle is found in the Italian constitution.²⁷ Importantly, the German Basic Law also contains a similar requirement (although expressed somewhat differently).²⁸ Equivalent provisions exist in the Dutch constitution,²⁹ the Belgian constitution,³⁰ the Spanish constitution,³¹ and the Swedish constitution.³² The UK and France are exceptions to this general trend for an express constitutional right of access to the courts, although they both clearly recognise the principle.³³ However, the principle is normally expressed in these constitutional documents in terms of ‘access to justice’ rather than the stricter idea of ‘party autonomy’ — ie. the right to decide whether to bring a civil claim in one’s own name.

The scope of this ‘general principle’ is not, however, well defined. In particular, the constitutional and international texts express the principle in terms of the autonomous right to access to justice (or, more precisely to a ‘tribunal established

²⁶ One of the most important sources used by the CJEU in developing general principles of EU law are the common constitutional traditions of the EU Member States see eg. *Mangold* (n 1) paras 74-75

²⁷ Art. 24

“Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law.

Defense [sic] is an inviolable right at every stage and instance of legal proceedings. [...]”

Senato della Repubblica ‘*Constitution of the Italian Republic*’; [...], official translation.

²⁸ Article 101

“(1) Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.

[...]

Article 103

(1) In the courts every person shall be entitled to a hearing in accordance with law. [...]”

Deutscher Bundestag ‘*Basic Law of the Federal Republic of Germany*’ as at December 2010, official translation.

²⁹ Netherlands Ministry of the Interior and of Kingdom Relations, ‘*The Constitution of the Kingdom of the Netherlands 2008*’, Art 17.

³⁰ Belgian Constitution, as at October 2007, Art 13.

³¹ Constitution of the Kingdom of Spain, 27 December 1978, Art 24

³² Regeringsformen, SFS: 1974:152, Ch 11 Art 3.

³³ eg. Code de procedure civile francaise, Art. 31; *Bremer Vulkan Schiffbau v South India Shipping Corp Ltd* [1981] 1 ALLER 289, HL, Lord Diplock at 295

by law’).³⁴ As some commentators have noted, any form of collective redress (mass, group, representative or class) necessarily requires a degree of restriction of the freedom (autonomy) of individual claimants forming part of the claimant group.³⁵ It follows that an extensive interpretation of the principle of party autonomy to prohibit *any* restriction on the freedom of a claimant to participate in a collective claim would mean that all forms of collective proceedings are contrary to EU law. This is clearly not the case, as the EU legislation in this area shows.

In particular, does the principle of party autonomy necessarily extend to a right *not* to participate in civil legal proceedings?³⁶ That is, when can a party refuse to participate in civil proceedings — including collective and competition claims — implicating him?

A first, and rather obvious, point is that any right *not* to participate can only apply to potential *claimants*. The effectiveness of redress systems would be irretrievably impaired if defendants properly sued could not be compelled to participate in civil proceedings — so, defendants cannot enjoy full ‘party autonomy’ in the wider sense.³⁷ But even a claimant may be compelled to participate in civil proceedings in a number of ways — for example if it is a company whose shareholders have commenced a derivative claim,³⁸ or if he is a member of an unincorporated association or partnership which is a claimant.³⁹

The principle of ‘party autonomy’ therefore cannot be absolute and must be adapted to the extent necessary to ensure *effective* administration of justice.⁴⁰ Or, put another way, any EU general principle of party autonomy (extended to mean the right *not* to participate) appears to be of lesser force than the EU principle of effectiveness — including the right to an effective remedy.

Further support for the view that the ‘party autonomy’ principle cannot be absolute can be found in national constitutions. Most of the constitutional texts noted above permit derogations from the principle of access to the general courts where that derogation is expressly provided by law.⁴¹ It is this, coupled with their countries’ international obligations under the New York Convention, which permits courts in the EU to recognise and enforce awards made by private law arbitrators. The constitutional right of access to a court does not prevent the recognition of (otherwise valid) arbitral awards in those countries under national arbitration legislation.

³⁴ ECHR (n 10), Art 6

³⁵ Adrian Zuckerman, *Zuckerman on Civil Procedure*, 3 ed. (2013) Sweet & Maxwell 692; Rachel Mulheron *The Class Action in Common Law Legal Systems* (2004) Hart Publishing, 61-65

³⁶ clearly any the right not to participate cannot extend to criminal legal proceedings since otherwise the effectiveness of criminal law enforcement would be compromised

³⁷ Cf. Zuckerman (n 35), 530-531

³⁸ under CPR 19.9

³⁹ CPR 19.6

⁴⁰ Zuckerman (n 35), paras 13.107-13.108

⁴¹ nn 27-32

Arbitration appears well adapted to ensure compliance with the principle of party autonomy read in this restrained way. In contrast to some forms of collective litigation, a collective arbitration procedure can only include group members who have initially consented in some way to arbitration.⁴² They have thus been free to choose (autonomously) whether or not to participate. But, once this initial consent has been given, the ‘party autonomy’ principle should not be available to restrict the use by the arbitrator of the collective procedure he properly considers most appropriate. A balance between effectiveness and ‘party autonomy’ needs to be found for appropriately managing each case.

In addition to the principle of effectiveness and the lesser requirement to respect party autonomy, an arbitrator may also need to consider what collective *litigation* procedures are available under relevant national laws, in order to show compliance with the EU general principle of equivalence, discussed in the next section.

1.1.3 Principle of equivalence

The principle of equivalence, that is that:

‘[...] the conditions [...] for reparation of loss or damage [for breach of EU law] laid down by national law must not be less favourable than those relating to *similar* domestic claims (principle of equivalence) [...]’⁴³

is a well-recognised general principle of EU law.

Although the principle of equivalence may seem to be a part of the overall principle of effectiveness, it does add an important additional element. Even where there is effective national recourse against a breach of a directly effective EU law norm, if other national (domestic) procedures are available which provide a better or more efficient remedy for similar national law breaches, the *most* effective equivalent procedure must also be available for EU law redress claims.⁴⁴ And the substantive basis of the claim is not the appropriate comparison. Rather, it is equivalence with similar domestic *procedures* which is required.

Determining whether a domestic procedure is ‘similar’ for the purposes of applying the EU principle of equivalence requires the court or arbitrator to consider the purpose of the allegedly equivalent procedure, the cause of action and the ‘essential characteristics’ of the two procedures.⁴⁵ For collective competition claims, we suggest that this means that — provided that they are consistent with the consent to arbitrate given by the parties — competition specific collective procedures (for example under the Competition Act 1998 in the

⁴² ch 2.3 above; Bernard Hanotiau *Complex Arbitrations* (2005) Kluwer Law International

⁴³ *Palmisani* (n 9), emphasis added

⁴⁴ eg. C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635; a procedural requirement to exhaust all internal remedies before claiming against the Spanish state for mis-implementation of EU law not lawful since a similar claim for breach of the Spanish constitution did not require exhaustion of other remedies. Even though there was a national remedy for the EU law breach it was not equivalent to the domestic law remedy.

⁴⁵ C-78/98 *Preston and others v Wolverhampton Healthcare NHS Trust and others* [2000] ECR-I 3240 at para 57

UK) must clearly also be available to arbitrators.⁴⁶ If they are not, parties bound by an arbitration clause could be said to be denied the best available procedure — contrary to their expectations when they chose (for example) England as the seat (or law) of their arbitration. Their representative may, for example, be able to rely on the principle of equivalence in a court challenge by a group member against the collective nature of the arbitration. Similarly, where *general* national collective redress procedures are available for use in domestic competition litigation (for example, the group litigation order in England), they should also be available to an arbitrator.⁴⁷

How far can a national collective redress procedure specific to another area of substantive law — for example, financial services — be applied in competition cases using the EU principle of equivalence? The three criteria to be applied — similar purpose, similar cause of action and similar ‘essential characteristics’ — do not *prima facie* exclude the use of comparator procedures from outside the competition enforcement arena.⁴⁸

The CJEU has, however, confined the scope of the available comparators in two ways. First it has made clear that it is for the national decision maker to ensure that (in particular) the purpose of the two procedures are similar — which may therefore lead to a degree of judicial conservatism.⁴⁹ Second

... that principle [of equivalence] is not to be interpreted as requiring Member States to extend their most favourable rules to *all* actions brought in a certain field of law.⁵⁰

A high degree of similarity between the proposed arbitration procedure and the proposed ‘non-competition’ collective procedure, based on the legal and factual circumstances of the collective competition claim, therefore seems to be required.

Arbitrators are not, of course, *bound* by the civil procedure rules of the law of the arbitration agreement or of the *lex arbitri*.⁵¹ Nevertheless, it is possible that failure to apply a procedure equivalent to the ‘most favourable’ and ‘similar’ litigation procedure available under relevant national rules *may* be grounds for challenging the arbitrator’s exercise of his procedural discretion in a court in the EU. At least, the arbitrator will need to consider other — allegedly more favourable — procedures in his decision on the admissibility of a collective procedure.⁵² If an arbitrator decides not to adopt the ‘more favourable’ procedure available under the law of the arbitration agreement or under the *lex arbitri* — for example, because its complexity makes it unsuitable for the particular collective

⁴⁶ Competition Act 1998 s 47B

⁴⁷ CPR 19.10 -19.15 and PD 19B.

⁴⁸ see *Transportes Urbanos* (n 44) at 35, *Preston* (n 45) at 57.

⁴⁹ C-326/96 *Levez* [1998] ECR-I 7835, para 43; *Preston* (n 45) para 56.

⁵⁰ *Levez* (n 49) para 42 (emphasis added); *Transportes Urbanos* (n 44) para 34.

⁵¹ Gary Born *International Arbitration: Law and Practice*, 2 ed, (2014) Wolters Kluwer, 160; Nigel Blackaby and Constantinos Partasides QC, *Redfern and Hunter on International Arbitration*, 6 ed, (2015) OUP, 167-170

⁵² Arbitration Act 1996, s. 68 (2)(a) and cf. decision of the US Supreme Court in *Stolt Nielsen SA v Animal Feeds International Corp.* 559 US 1 (2010), discussed at ch 2.4

dispute he has to resolve — he should give reasons for doing so if the risk of challenge (eg. by an application to set aside the award) is to be minimised.⁵³

Compliance with this principle may also arise on recognition or enforcement of a collective competition award on a ‘second look’ to ensure compliance with EU public policy.⁵⁴ In practice (as noted above) we suggest that the principle of equivalence is the complement in a wider ‘effectiveness’ principle — now given Treaty force.⁵⁵ It therefore has a value which can be equated to the fundamental rights of the Union.⁵⁶

We suggest application of the equivalence principle has three main consequences for collective competition arbitration proceedings in Europe.

First, a supervising court (of the seat) should not, solely on *national* public policy grounds, be able to set aside an award made using a procedure adopted (or even lightly adapted) from a civil procedure device for collective redress in the national litigation rules of the (European) law of the arbitration agreement. Additional grounds of irregularity will need to be shown on the facts of the particular case. The supervising court must balance such additional arguments against the need for the arbitrator to provide an effective collective remedy for the victims of EU competition law infringements.

Second, the *Kompetenz-Kompetenz* principle — by which the arbitrator is free to set his own procedure within the scope of his jurisdiction — should mean that a court will not exercise its supervisory powers until the arbitrator has decided on the matter himself.⁵⁷ Where the New York Convention applies, the procedural admissibility challenge must relate to a ‘final’ award — that is one which definitively resolves an issue between the parties in a binding manner.⁵⁸ Practice is inconclusive on whether interim awards on jurisdiction should be recognized under the Convention although it appears that if the arbitration proceedings are ongoing, courts are in practice reluctant to intervene.⁵⁹ We suggest that they certainly should not do so where the arbitrator has adopted an equivalent collective procedure to one available under the civil procedure rules of an EU Member State.

⁵³ either to a court, for example under s. 68 (2) Arbitration Act 1996, or to any appeal body provided for in the applicable arbitration institution rules.

⁵⁴ C-126/97 *EcoSwiss China Time v Benetton International NV* [1999] ECR I-3055; Luca Radicati di Brozolo ‘Court Review of Competition Law Awards’ in Blanke and Landolt (eds) *EU and US Antitrust Arbitration* (2011) Wolters Kluwer

⁵⁵ Article 19 TEU

⁵⁶ Article 6(3) TEU; *Eco-Swiss* (n 33) at 3079. Also AG Wathelet in C-536/13 *Gazprom* (n 22) paras 166-175; Jakob Soerensen and Kristian Torp ‘The Second Look in European Union Competition Law: a Scandinavian Perspective’ (2017) 34 *Journal of International Arbitration* 35-54

⁵⁷ for a discussion of this principle see Gary Born *International Commercial Arbitration* (2 ed), (2014) Wolters Kluwer, 1046-1066; Lew, Kröll and Mistelis, ‘*Comparative International Commercial Arbitration*’, Kluwer (2003), 280; Andrea Steingruber, *Consent in International Arbitration* (2012) OUP, 89-91

⁵⁸ ‘UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’, (2016) United Nations, New York (‘UNCITRAL Guide’), 12, para 21

⁵⁹ *ibid*, 15, paras 28-32

Third, it should not be open to an EU court outside the seat to refuse to recognize or enforce the resulting final collective competition award *solely* on the ground that the arbitration procedure is contrary to its domestic public policy. Again, any refusal at the time of the enforcement ‘second look’ to recognise the collective award in an EU competition matter will also need to measure procedural non-compliance against both the fundamental principles forming part of the European Union’s public policy and also *ordre public* as applied to international arbitration.⁶⁰

There must, at least, be a strong presumption that an EU arbitrator’s use of a collective redress court procedure, available under the *lex arbitri* (when sitting in an EU Member State) for arbitrating an EU competition claim, is also compliant with public policy in all Member States.⁶¹ The principle of equivalence will permit him to adopt it and the principle of effectiveness should (as a matter of EU law) restrain EU courts from refusing to recognize it.

The additional ‘levelling-up’ element of availability of the *most* favourable equivalent national procedure is particularly relevant to potential challenges to the admissibility of collective procedures on three grounds:

- challenges to the **standing** of a collective representative. How far does the principle of equivalence affect whether an arbitrator is bound by procedural limitations not to recognize as a representative a person who does not meet the relevant criteria of the *lex arbitri*?
- challenges on the basis of the **type** or subject matter of the dispute covered by the collective arbitration. A number of Member States now have fairly developed collective redress mechanisms for certain types of domestic law breaches — for example many consumer claims in France⁶² or shareholder claims in Germany.⁶³ Does the principle of equivalence require these advanced procedures also to be available to arbitrators dealing with other categories of dispute?
- challenges on the basis of the **forum** of the collective claim. Some Member States require collective claims to be brought in a specific domestic court. Do these ‘forum’ requirements make collective disputes over directly effective EU law rights inarbitrable on policy grounds?

On **standing** of the representative, there appear to be two issues. The first arises where the proposed representative claimant fulfills the criteria to be a representative in the seat, but either has not obtained a mandatory authorisation from the responsible State authority or wishes to represent claimants, some of

⁶⁰ Christoph Liebscher ‘EU Member State Court Application of Eco Swiss’ in Blanke and Landolt (eds) *EU and US Anti-trust Arbitration* (n 54)

⁶¹ A contrary view would imply that the court procedure is also incompatible with EU general principles. Civil procedure in competition claims is now within the scope of EU competence: Directive 2014/104 on competition damages actions, [2014] OJEU L349/1, recitals 4-5.

⁶² ‘loi Hamon’, n° 2014-344 du 17 mars 2014 relative à la consommation

⁶³ Bundesgerichtshof’s ‘Arbitration II’ decision, 6 April 2009, II ZR 255/08 and Kapitalanleger Musterverfahrensgesetz, (Capital Markets Model Proceedings Act), 19 October 2012, Federal Law Gazette I, 2182

whom are not within its legislated representative authority — for example, because they reside outside the region in which it operates. Given the general principle of international law that arbitrators have *Kompetenz-Kompetenz*⁶⁴ and the similarly generally accepted requirement that national courts should only intervene in arbitrations on public policy grounds in exceptional circumstances, we believe that challenges to the arbitration procedure in these circumstances should fail. The arbitrator's decision on the suitability of the representative should be allowed to stand in the absence of 'serious irregularity' in the award regardless of the detail of national law restrictions on standing.⁶⁵

The second situation is where the intended representative in the arbitration cannot, on any objective basis, meet the criteria set out in an applicable law.⁶⁶ An example is where the national law requires the representative to be an association of those (to be) represented, but the proposed representative is an individual claimant. Here, the purpose of the national procedural requirement will need to be assessed against EU law — for example is it necessary to ensure 'fairness' to claimants for the purposes of Article 47 EU Charter?

Again intervention by the national court should be exceptional. However, to take the example above, it may be that the interests of the proposed individual representative are so substantially in conflict with some (or even all) of the other members of the group to be represented that the arbitration cannot proceed fairly.⁶⁷ In this kind of exceptional circumstance, we suggest that the court could be justified in intervening so as to refuse to refer conflicted individual disputes to the (proposed) representative collective arbitration.⁶⁸

As to restrictions in national laws on the *type* of disputes which can benefit from collective redress mechanisms, we have already noted that the CJEU takes the view that, where any directly effective EU law right (eg. to compensation for breach of the EU competition rules) is engaged, the principle of equivalence applies if there are more favourable rules applying to domestic actions having a *similar* purpose.⁶⁹ So, the arbitrator's exercise of his competence should only be interfered with where he applies a collective procedure designed for litigating disputes wholly removed from the bounds of the 'defined legal relationship' which is the subject of the arbitration. It is in any case highly unlikely that the parties can properly have (impliedly) consented to the use of a procedure so far removed from the scope and purpose of the relationship in relation to which the dispute

⁶⁴ discussed in ch 2.3.1. Also UNCITRAL Model Law on International Commercial Arbitration (2010), art. 16; Born (n 57), 2163-2166

⁶⁵ Arbitration Act 1996, s 68(2)

⁶⁶ the 'applicable law' in this circumstance could be either the law of the agreement to arbitrate (so that the admission of the representative is outside the scope of the arbitrator's jurisdiction), the *lex arbitri* or the law of the agreement under which the representative purports to exercise his powers

⁶⁷ *Emerald Supplies Ltd. And anor. v British Airways plc* [2009] EWHC 741 (Ch); [2009] 3 WLR 1200 para 36

⁶⁸ the interim 'admissibility award would be open to challenge on the ground of 'serious irregularity' (under s 68(2) Arbitration Act 1996) or by class members who do not wish to be represented by the chosen representative (under s. 72(2)(b))

⁶⁹ eg. *Transportes Urbanos* (n 44), paras 33-37

arose. In effect, the arbitrator will be free to choose any appropriate equivalent procedure in a relevant European law, consistent with the parties' consent to arbitrate.

In the same way, reliance on a domestic procedural bar on bringing collective claims elsewhere than in the designated court (*forum*) should not override the EU law principle of equivalence. The purpose of requiring some collective claims to be heard in designated courts is (we assume) to ensure that the court is properly equipped to deal with the claim fairly — that is, it has appropriate expertise etc. There is no reason to suppose that a properly constituted arbitration tribunal could not also be suitably qualified or experienced to deal fairly with a collective claim.⁷⁰

So, the EU principle of equivalence can be used in an arbitration to 'level up' to the best equivalent collective procedure available in the EU where the arbitrator considers it is necessary properly to resolve the dispute before him in accordance with the agreement of the parties to arbitrate. There appears to be no reason to apply different review grounds or standards on recognition of a *collective* competition award by the court of the seat to those already available in national arbitration legislation arbitration.⁷¹ And similar observations apply when a court outside the seat is asked to enforce, under the New York Convention, an award resulting from a collective arbitration of an EU competition claim.

1.2 EU law enforcement and the New York Convention: separate regimes

How then do the general principles of EU law — discussed above — mesh with the application of international law in an international arbitration? Within the scope of the EU's competence, EU law overrides contrary national laws.⁷² This section therefore briefly considers the relationship between EU law (and particularly the principles discussed in the previous section) and those national laws of Member States which articulate the *international* obligations of the Member State. Specifically, how far do EU law general principles affect the way in which the New York Convention is applied through Member State arbitration laws?

1.2.1 Supremacy of EU law?

The New York Convention pre-dates adherence to the European Communities for all Member States except for the original six, and also considerably predates the expansion of EU law to address international private law issues. The EU Treaties themselves provide that pre-accession treaties with non-EU Member States (including, therefore, the New York Convention) are not affected by EU law.⁷³

⁷⁰ for discussion of the alleged complexity of collective arbitration and on the composition of the tribunal, Hanotiau (n 42), 275-276; S I Strong *Class, Mass and Collective Arbitration in National and International Law* (2013) OUP, ch 3

⁷¹ confirmed by the CJEU in *EcoSwiss* (n 54), para 37

⁷² 6/64 *Costa v ENEL* [1964] ECR 585

⁷³ TEU, Art 351

Moreover, the CJEU has confirmed that the powers of the EU must be exercised so as to observe the customary rules of international law.⁷⁴

Member States thus remain bound by their ongoing international treaty obligations separately from their engagement in the EU. The CJEU has held that, where those treaty obligations have been entered into by all Member States, the national courts are bound to apply both domestic and EU law in the field ‘*as far as possible in the light of the wording and purpose of*’ the relevant international treaty provision.⁷⁵

However where the international law provision appears to offend against fundamental principles of international law (*jus cogens*), EU law may exceptionally override even international law within the EU. In *Kadi* the CJEU Grand Chamber annulled a General Court judgment upholding the validity of an EU regulation implementing a UN Security Council resolution.⁷⁶ The resolution imposed sanctions on individuals linked to Al Qaeda without the possibility of review by an independent tribunal. The CJEU held that, where even international law violated such fundamental principles as access to an impartial tribunal, it was not open to the EU legislator to simply re-enact the defective international norm (even a UN one). This judgment has been criticized by commentators, and its correctness doubted by the General Court itself, but remains EU law.⁷⁷

It is doubtful whether any policy objection to collective competition redress proceedings — even (opt-out) class actions — is so fundamental as to engage the *Kadi* principle. A number of Member States have opt-out representative claims mechanisms and they are also an established feature of developed litigation systems elsewhere in the world.⁷⁸ Clearly, they cannot be said to be contrary to international *jus cogens* or *ordre public*, however contested they may be. Consequently, we believe that the proper application of the New York Convention to commercial arbitration within the EU cannot be impeded by the application of the EU Treaties.⁷⁹

This position is reflected in the recitals to the current EU Regulation on the recognition and enforcement of civil court judgments.⁸⁰ These confirm that

- any court seised may always examine if an arbitration agreement is null and void;
- a judgment that the arbitration agreement is null and void will not be recognized and enforceable under the EU Regulation;

⁷⁴ eg C-286/90 *Poulsen* [1992] ECR I-6019 at paras 9-10; C-405/92 *Mondiet* [1993] ECR I-6133 paras 13-15; C-162/96 *Racke* [1998] ECR I-3655 paras 45-46

⁷⁵ C-300 & 392/98 *Parfums Christian Dior v Tuk* [2000] ECR I-11307 para 47

⁷⁶ C-584/10P *Commission and ors. v Kadi* (18 July 2013) ECLI:EU:C:2013:518

⁷⁷ Case T-85/09 *Kadi v Commission* [2010] ECR II-5177, in particular at para 115

⁷⁸ Rachel Mulheron *The Class Action in Common Law Legal Systems* (n 35)

⁷⁹ C-536/13 *Gazprom OAO*, Opinion AG Wathelet (4 December 2014), ECLI:EU:C:2014:2414, paras 182-185

⁸⁰ Regulation 1215/2012, [2012] OJEU L 351/1, recital 12

- if a court has found that the arbitration agreement is void and has given substantive judgment in the dispute itself, the court's substantive judgment 'shall be recognized' under the EU Regulation;
- if the arbitrator has proceeded in any case, other national courts in the EU are not prevented from recognizing and enforcing the resulting award in accordance with the New York Convention; and
- the Regulation does not apply to applications to the court of the seat of arbitration relating to (among other things) the power of the arbitrator to conduct any arbitration procedure 'or any other aspect of such a procedure'.

In short, this EU legislation regards the New York Convention system as distinct from the EU cross-border civil procedure architecture. It will only apply to recognize a *court* judgment given in an 'arbitration case' where the absence of a valid and applicable arbitration agreement has already been expressly found by a competent court in the EU.

But this does not mean that arbitration is entirely outside the system of EU law: it forms part of the national laws of Member States and, under the 'second look' doctrine adopted by the CJEU, arbitration awards may be assessed by a national court of enforcement to ensure compliance with the public policy of the EU.⁸¹

How far, then, does EU law permit or even require arbitrators and courts to work together?

1.2.2 The principle of 'sincere co-operation': when does it apply

The internationally recognised principle of comity has developed into the EU law principle of 'sincere co-operation' between Member States (and therefore between their courts).⁸² This duty of 'sincere co-operation' also extends to relations between the EU institutions and Member States. So, the CJEU is not hierarchically 'superior' to the courts of Member States under the EU Treaties, but rather works through them in developing the EU legal order.⁸³ This implies the principle of 'mutual trust' and respect for the decisions of each court within the scope of their respective jurisdictions. There is an obligation on the Member State courts not to act in a manner inconsistent with the case law of the CJEU when applying EU law.⁸⁴

The question of how far the principle of 'sincere co-operation' applies as between two or more arbitral tribunals applying EU law depends on the scope of the parties' agreement to arbitrate and the requirements of the law(s) applicable to the arbitration procedure. In general, arbitrators — as masters of their own competence — are not required to take account of arbitration proceedings being

⁸¹ *EcoSwiss* (n 54)

⁸² TEU, art 4(3)

⁸³ in particular C-283/81, *Srl CILFIT and others and Lanificio di Gavardo SpA v Ministero della sanità* [1982] ECR 3415, para 7

⁸⁴ *ibid*, para 14

conducted elsewhere.⁸⁵ This would in any case be difficult to apply in practice to arbitrations, which are normally confidential.⁸⁶ If the parallel proceedings are so closely connected that they could be consolidated into a single arbitration, the parties may agree this but, in the absence of agreement, it is unusual for an arbitrator or a court to be able to consolidate different arbitration proceedings — even if there is a clear risk of inconsistent outcomes.⁸⁷

The CJEU has held that, if arbitrators have failed apply EU competition law properly when reaching their decisions, their awards should be set aside by courts of Member States on enforcement — as a matter of *EU* public policy — in circumstances where national law would permit the award to be set aside for breach of *national* public policy.⁸⁸ But it has also held that — since they are not courts — arbitrators are not normally entitled to refer questions of interpretation of EU law to the CJEU under Article 267 TFEU.⁸⁹ The CJEU considers arbitrators to be outside the scope of the EU ‘mutual trust’ system, based on ‘sincere co-operation’ between courts, which underpins the EU civil law jurisdictional and enforcement system.⁹⁰ It follows that the principle of ‘mutual trust’ also cannot apply between arbitral tribunals and the CJEU itself.⁹¹ But it does not follow that the principle of sincere co-operation does not apply at all in relation to arbitral tribunals deciding EU competition law points.

First it does not appear to be open to national courts to refuse to refer a dispute (within a valid arbitration clause) to commercial arbitration on the ground that the EU competition question would not be arbitrable.⁹² In the *CDC* case, despite the adverse comments of its Advocate General and its own finding that arbitration clauses should be carefully interpreted, the CJEU refused to approve the view that arbitration and resolution of EU competition claims are incompatible.⁹³

Second, arbitrators may need to consider as a practical matter how far they need to ensure an adequate degree of co-ordination between the proceedings they are

⁸⁵ for a discussion of how far parallel arbitrations can be co-ordinated, see Bernard Hanotiau ‘Complex Arbitrations. Multiparty, Multicontract, Multi-issue and Class Actions’ (2005) Kluwer Law, paras 478 – 489. He concludes (488) that ‘any co-operation’ between differently composed arbitration tribunals is ‘theoretically impossible’.

⁸⁶ *Hassneh Insurance Co of Israel v Mew* [1993] Lloyd’s Rep. 243 (QB), *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184; Blackaby and Partasides (n 44), 124-130. However, there is significant variation internationally in the scope of confidentiality in arbitration: Filip De Ly, Mark Friedman and Luca Radicati di Brozolo, ‘ILA International Commercial Arbitration Committee’s Report and Recommendations on ‘Confidentiality in International Commercial Arbitration’’, (2012) *Arbitration International*, vol 28, no. 3, 355; Gary Born *International Commercial Arbitration* 2 ed., (2014) Wolters Kluwer, 2779-2780

⁸⁷ for example, s. 35(2) Arbitration Act 1996 prevents a court from consolidating arbitrations against the will of one or more parties — further discussed at ch 5.3

⁸⁸ *Eco-Swiss* (n 54)

⁸⁹ C-102/81, *Nordsee v Reederei Mond* [1982] ECR 1095.

⁹⁰ *ibid*; C-284/16 *Slovak Republic v Achmea BV* (Grand Chamber) (6 March 2018) ECLI:EU:C:2018:158 para 49

⁹¹ *Achmea* *ibid*, paras 45-49

⁹² *EcoSwiss* (n 54), paras 35-36. However, the position may be different if the parties are claiming under an arbitration provision in an inter-State treaty — *Achmea* (n 90)

⁹³ C-352/13 *Cartel Damages Claims (CDC) v Akzo Nobel NV and ors.* [2015] ECLI:EU:C:2015:335 para 58 — section 3.3 below

conducting and any court proceedings for recognition of another arbitration of the same or similar competition claims in the EU. Both the arbitration proceedings and any such court proceedings stand outside the legislative and jurisprudential EU law framework for recognizing ‘judgments’.⁹⁴ But an enforcing court is nevertheless required to consider EU competition law issues as a public policy question on a ‘second look’.⁹⁵ There is, therefore, a clear possibility of diverging court enforcement decisions in relation to multiple arbitrations concerning the same competition dispute — and even some possibility of them in relation to a single arbitration proceeding.

Article 4(3) TEU requires Member States — and their courts — to respect the principle of ‘sincere co-operation’ whenever they are applying EU law. EU *competition* law disputes fall squarely within EU competence: the principle of ‘sincere co-operation’ should apply in all Member State courts. The wide scope of Article 4(3) must mean that courts should ensure (as far as possible) the uniform application of EU competition law across the EU, whatever the type of application before them — even, we submit, if that application is for the recognition or enforcement of an arbitration award on a *competition* dispute, despite arbitration proceedings being outside the competence attributed to the EU.⁹⁶

We therefore believe that, when enforcing competition arbitration awards, national courts in the EU are required to have due regard to recognition and enforcement decisions for related arbitrations (at least in relation to the same dispute) by other EU *courts*.⁹⁷ Arbitrators too should avoid making awards which are inconsistent with other known arbitration outcomes in relation to the same competition dispute. Failure to do so would put a recognizing or enforcing court in the unfortunate position of having to choose between two incompatible competition law awards — both of which must be reviewed for uniform compliance with EU competition law.

Third, CJEU case law, based as it is on the application of Art 267 TFEU (preliminary questions by national courts to the CJEU) does not apply to relations between arbitrators and EU institutions other than the CJEU. In particular, the European Commission has the overriding duty — independently of any private law dispute — to act as ‘guardian of the Treaties’.⁹⁸ This gives the Commission the power — although not the duty — to work with arbitral tribunals in appropriate cases to ensure the proper and uniform application of directly effective EU law (including, of course, EU competition law).

So, the EU civil judgment enforcement system — based as it is on ‘mutual trust’ between the national civil courts and the CJEU — is discrete from, but intertwined with, the New York Convention system of resolving international disputes through

⁹⁴ Regulation 1215/12 (n 80), recital 12

⁹⁵ *EcoSwiss* (n 54); sections 3.1 and 3.2 below

⁹⁶ eg. 229/83 *Leclerc v Au blé vert* [1985] ECR I para 14; Aidan O’Neill QC *EU Law for UK Lawyers* (2 ed) (2011) Hart, 57-62

⁹⁷ although such judgments will not be binding outside the forum — Regulation 1215/2012, (n 80) Article 1 and recital 12

⁹⁸ Article 17 TEU

arbitration. This has posed some difficult issues for the CJEU. But EU legislation and guidance encourages collective ADR (including arbitration) especially to provide redress in competition claims, as we shall see next.

2. Impact of EU legislation and guidance

2.1 Encouraging access to a remedy through collective redress: Commission Recommendation

The European Commission has been actively promoting collective redress for EU competition claims for a number of years. Commission initiatives (which began as far back as 2005) aimed to improve the ability of those harmed by infringements of EU competition law to claim compensation.⁹⁹ This prompted the European Parliament in 2009 to request the Commission to extend the scope of its competition redress policy to all breaches of directly effective EU law.¹⁰⁰ The result is the Commission collective redress Recommendation of June 2013.¹⁰¹

The purpose of the Recommendation is stated to be to ‘facilitate access to justice’ and so to ‘enable injured parties to obtain compensation in mass harm situations’.¹⁰² It therefore recommends that Member States should have (or create) procedures for allowing collective claims by groups of claimants harmed by the *same* unlawful activity of the defendants.¹⁰³ It sets out a number of basic principles:

These principles should be common across the Union, while respecting the different legal traditions of the Member States.¹⁰⁴

The Commission is therefore clearly setting out in the Recommendation what it believes to be the EU public policy substructure, upon which Member States should develop their own collective redress procedures.

As its title indicates, the Recommendation does not form a binding part of either EU law nor, therefore, of any Member State law.¹⁰⁵ Unlike the competition damages Directive, it is therefore not capable of defining (directly or indirectly) the rights and obligations of parties to a competition dispute. But this does not, of course, mean that a Recommendation is a mere policy statement.

⁹⁹ Green Paper *Damages actions for breach of the EC anti-trust rules* COM (2005) 672, 19 December 2005; Directive 2014/104, *Actions for damages for infringements of competition law*, [2014] OJ L349/1

¹⁰⁰ European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC anti-trust rules (20092154), A123/2009, esp. at para 6.

¹⁰¹ Commission Recommendation of 11 June 2013 *on common principles for [...] collective redress mechanisms* [2013] OJ L 201/60. At the time of writing (mid 2018) the Commission has reviewed the effectiveness of the Recommendation and published proposals for legislation for consumer collective redress (including representative redress actions for compensation), COM (2018) 184 (11 April 2018)

¹⁰² Recommendation, *ibid*, para 1

¹⁰³ *ibid*, para 3(b)

¹⁰⁴ *ibid*, para 2

¹⁰⁵ TFEU, Article 288

The CJEU has held:

“...it must be stressed that [recommendations] cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular [...] where they are designed to supplement binding Community provisions.”¹⁰⁶

The collective redress Recommendation is clearly designed to prompt Member States to introduce effective collective court procedures in relation all directly effective EU law rights. But the effect of the Recommendation will be magnified in those areas of EU law where there is complementary EU legislation on redress: this is particularly true of damages claims against infringers of EU competition law. The competition damages Directive contains significant harmonization of civil procedure rules for claims under (directly effective) EU competition law in national courts — including in relation to ADR.¹⁰⁷ The Recommendation also addresses the need for collective ADR.¹⁰⁸ How far does it affect the exercise by an arbitrator of his procedural discretion — given that he is not bound by any national litigation procedure rules — when resolving the collective competition dispute? We suggest that the Recommendation forms part of the body of law which an arbitrator — sitting in the EU — must consider, in two main respects.

First, as we have noted, arbitrators in the EU are required to have regard to the fundamental principles of EU law — in particular the right to an effective remedy in Article 19 TEU and Article 47 EU Charter — when exercising their procedural discretion. The Commission Recommendation is a more detailed articulation — in cases of claims over ‘mass harm’ resulting from directly effective EU law rights — of that fundamental principle. Consequently, it serves as guidance not only for courts, but also for arbitrators in the EU called on to apply collective procedures in competition claims.

Second, the Recommendation now forms part of the *acquis communautaire*, the legal backdrop against which arbitration agreements governed by national laws in the EU should be interpreted and enforced. An arbitrator in the EU should now consider the question of whether the arbitration agreement includes consent to collective arbitration in the light of the Commission’s statement in the Recommendation that all Member States (and therefore their civil procedure rules) should have effective *collective* redress procedures — including collective ADR.¹⁰⁹ If the arbitrator is applying one or more national EU civil procedure mechanisms (by analogy) when conducting the collective competition arbitration, the Recommendation will also be very relevant to interpreting national legislation on collective competition redress.

¹⁰⁶ C-322/88 *Grimani* [1989] ECR 4416, para 18

¹⁰⁷ (n 99) arts 18-19; 3.2.2 below

¹⁰⁸ Recommendation (n 101), paras. 25-26

¹⁰⁹ *ibid*, para 19

What, then, does the Recommendation say about collective ADR? The recommendations on ADR are brief, but potentially far-reaching:

Member States should ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution [...]¹¹⁰

Does this mean that the Commission recommends that collective ADR should only be available as a complement to, and in conjunction with, *litigated* collective redress solutions? We think this would be a misreading of the Commission's position, particularly given the overall purpose of the Recommendation to promote redress through collective claims.¹¹¹ Some 'softer' forms of ADR — mediation being a good example — are normally used in conjunction (or at least closely coordinated) with litigation. But ADR methods envisaged in other EU legislation — particularly the competition damages Directive and the consumer ADR Directive — clearly include binding forms of ADR, principally arbitration, which are commonly used on a 'stand-alone' basis.¹¹² Given the close connection between the Recommendation and (in particular) the damages Directive in the course of preparation and legislation, it is inconceivable that the Commission intended the scope of the Recommendation for ADR to be substantially different from that of the Directive.

The Recommendation also asks Member States to ensure that parties to a collective claim are 'encouraged' to settle the dispute out of court.¹¹³ When read in conjunction with the definitions in the damages Directive, the use of the term 'settle' appears to be deliberately wide in scope and should include arbitration — even where the proceedings do not 'settle' in a narrower sense but proceed to a final award.¹¹⁴ We consider the wider implications of this in Chapter 6.

The Recommendation gives no detail on how these collective settlements are to be 'encouraged'. However, we believe that — at the least — this encouragement should mean that both arbitrators and national courts should interpret arbitration clauses so as to include as much of any competition dispute as possible within the jurisdiction of the arbitrator, consistent with the consent of the parties.¹¹⁵ And *collective* arbitration proceedings are also 'encouraged'. This reinforces the view that the arbitrator's freedom to craft an appropriate collective dispute resolution procedure should only exceptionally be questioned on EU law grounds by a court — where there are good grounds for believing EU fundamental rights or principles may be breached.

There are, however, two issues arising from the Recommendation which need careful consideration by any representative claimant (or, if necessary, the arbitrator) in a collective competition arbitration. First the Recommendation

¹¹⁰ *ibid*, para 26

¹¹¹ *ibid*, recitals 10 and 13 and paras 1-2

¹¹² Damages Directive (n 61), Arts 18-19; Directive 2013/11, on alternative dispute resolution for consumer disputes [2013] OJEU L165/63, Art 2

¹¹³ Recommendation (n 101), para 25

¹¹⁴ discussed in ch 6.2.2

¹¹⁵ however, the jurisprudence of the CJEU may suggest otherwise, C-352/12 *CDC* (n 93) discussed in section 3.3 below

defines ‘mass harm’ as resulting from the *same* ‘illegal activity’ of the defendants.¹¹⁶ Where the representative is suing (in particular) a cartel, care will be needed to show that the ‘same’ infringement underlies the action, for example where an apparently ‘global’ cartel is in fact a series of regional infringements.

Second, and more importantly, the Recommendation notes that the claimant group should be formed on an ‘opt-in’ basis:

The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (‘opt-in’ principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.¹¹⁷

Arbitration may offer an advantage over a litigated collective dispute resolution here. Where the representative brings a collective competition claim to arbitration, it can necessarily only be with the consent to arbitrate of the group that he claims to represent. There must be some expression of consent to be bound by the outcome of the arbitration proceedings — absolute silence is not sufficient.¹¹⁸ The (jurisdiction) question of whether that (direct or indirect) expression of consent to arbitrate extends to consent to *collective* arbitration — and if so what collective procedure within that jurisdiction is most appropriate — falls within the arbitrator’s competence, subject only to light touch control by a supervising court.¹¹⁹ This means, we believe, that all forms of collective competition arbitration should be characterized as ‘opt-in’ for the purposes of the Recommendation: the award can only bind those who have consented to the proceedings.¹²⁰

There is also the exception to the ‘opt-in’ principle in the Recommendation: alternatives are justifiable on the grounds of the ‘sound administration of justice’. Where an arbitrator applies a procedure which might be characterised as not ‘opt-in’, against the immediate wishes of a defendant — as, for example, in the *Abaclat* arbitration — he should be careful to give full reasons for his decision. Provided that any award justifies the use of the collective procedure on ‘administration of justice’ (including effective remedy and equivalence) grounds, a national court to which an application to set aside is made should nevertheless uphold the award in the absence of clear and specific breach of EU fundamental principles.

The strong ‘encouragement’ for collective ADR in the Recommendation, read (for collective *competition* disputes) in conjunction with the ADR provisions in the competition damages Directive, provides a substantial EU impetus for arbitrators to develop new and effective collective procedures for resolving competition disputes.

¹¹⁶ Recommendation (n 101), para 3(b)

¹¹⁷ *ibid*, para 21

¹¹⁸ *Stolt-Nielsen SA v Animal Feeds International Corp.* 559 USC 1 (2010), discussed ch 2.4

¹¹⁹ ch 2.3 and ch 4.2

¹²⁰ It may, though, form the basis of an application under national opt-out collective settlement legislation (ch 6)

2.2 Arbitration in EU competition damages legislation

The competition damages Directive¹²¹ is the result of the Commission's final proposal for a Directive, published and presented to the European Parliament on 11 June 2013 — on the same day that the Commission made the collective redress Recommendation. For EU competition claims the intention is clearly that the two instruments should be read together.

The purpose of the Directive is given most clearly in Article 1(1): it

‘... sets out certain rules *necessary* to ensure that anyone who has suffered harm caused by an infringement of competition law [...] can effectively exercise the right to claim full compensation...’

The damages Directive includes provisions requiring Member States to make ADR available in claims for compensation under EU competition law.¹²² The Directive uses the term ‘consensual dispute resolution’, defined to mean

... ‘any mechanism enabling parties to reach the out of court resolution of a dispute concerning a claim for damages.’¹²³

It follows from the breadth of this definition first, that arbitration is included in the scope and purpose of the Directive and second (and also in the light of the Recommendation) that it covers *collective* dispute resolution.¹²⁴

Interestingly, the damages Directive does not justify including (relatively favourable) provisions promoting ADR on the grounds of ‘access to justice’, but rather on the desirability of achieving a complete settlement for defendants (ie. finality). Recital 48 sets out the rationale:

Achieving a ‘once-and-for-all’ settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, [they] should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where the judge can declare a settlement binding), arbitration, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.

Two principles emerge clearly from this statement of purpose. First, ADR (including arbitration) is seen as a vehicle to achieve as wide a resolution of competition damages claims as possible — this strongly supports a favourable EU law view of *collective* competition arbitration. Second, the scheme of the damages Directive also supports ‘hybrid’ collective mechanisms, where a judge lends the support of his court’s jurisdiction to facilitate ADR.

¹²¹ n 99

¹²² *ibid*, Arts 18-19

¹²³ *ibid*, Art 2(21), emphasis added

¹²⁴ The term ‘out of court resolution’ therefore has the same scope as the term ‘ADR’ in the consumer ADR Directive (n 112), Art 4(1)(g) and recitals 5 and 15

The operative provisions of the damages Directive dealing with ADR are relatively brief. Article 18 provides that any applicable national limitation period should be suspended for the duration of the ADR process. If necessary, courts should stay any pending cases for up to two years to allow ADR to go forward. This requirement to stay is expressed to be ‘without prejudice’ to national arbitration rules.¹²⁵ The exception appears to be needed to allow national courts to refer a dispute to arbitration by dismissing, rather than simply staying, any litigation brought by a party to an arbitration clause — but it also confirms that arbitration is within the scope of ‘consensual dispute resolution’.

Article 19 requires ‘consensual settlements’ of one of several claims to be automatically carved out of the continuing proceedings — requiring change in the laws of several Member States, including England.¹²⁶ ‘Consensual settlement’ in this Article ‘means an agreement reached through consensual dispute resolution’.¹²⁷

A textual reading of this definition may appear to exclude a final arbitration award but we suggest that the effectiveness and purpose of the Directive would be compromised by an overly narrow reading of the definitions. A defendant who has agreed to ‘consensual dispute resolution’ (through an arbitration) and who has an award made against him ought to be automatically protected from cross claims by ‘non-settling’ claimants (that is, those who do not consent to arbitration) as indicated in Article 19. He should not find himself in the same position as a losing defendant in *litigation* who has not “settled” through ADR. A strict reading of the definition against defendants in arbitration is unlikely to encourage the use of ADR (including arbitration) in EU competition claims — contrary to the stated aims of both the damages Directive and the Recommendation.

The damages Directive — including the principles identified above — is now part of the *acquis communautaire* which should guide national courts when applying EU law to questions arising from collective competition arbitrations. The twin aims of the Directive, to increase access to compensation for victims of competition law infringements and to encourage as wide and final a resolution of such disputes as possible, clearly indicate strong support for the use of collective proceedings in competition claims. Coupled with the pro-ADR policy set out in the damages Directive, the consumer ADR Directive and the Recommendation, the legislative policy impetus for collective competition arbitration in the EU is clear.

National courts should interpret national arbitration legislation — giving them the power to intervene in support of arbitration proceedings at the request of a party or the arbitrator — as far as possible so as to give effect to EU policy encouraging collective competition arbitration.¹²⁸ In particular, a national court should be slow to intervene against a form of collective proceeding crafted by an arbitrator

¹²⁵ *ibid*, Article 18(2)

¹²⁶ Civil Liability (Contribution) Act 1978, s. 2(1), as varied by SI 2017/385, The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, sch. 1, para. 38

¹²⁷ Damages Directive (n 61), Art 2(22)

¹²⁸ C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion* [1990] ECR I-4153

in a competition dispute if its own national law is silent or ambiguous as to the acceptability of the procedure for resolving the dispute adopted by the arbitrator. In particular, the damages Directive expressly reiterates the two principles of equivalence and effectiveness and provides that they apply to all actions for competition redress — including therefore those which are arbitrated.¹²⁹

In contrast to this EU legislative encouragement of collective arbitrated redress, the jurisprudence of the CJEU has taken a nuanced approach — it appears because supervision of arbitrators is largely outside the scope of EU competence.

3 Arbitration in the decisional practice of the CJEU

The contrast between the favourable view of collective competition redress through ADR in the most recent EU legislation and guidance and the more cautious attitude of the CJEU is most noticeable in CJEU case law on the interaction between arbitrators and national civil courts — and in the (lack of) relationship between arbitrators and the CJEU itself.¹³⁰ However, the CJEU has trod a careful neutral path to date, making sure that international commercial arbitration retains its effectiveness and also its discrete characteristics compared to litigation.

3.1 Arbitrators outside the EU ‘mutual trust’ court-based system

EU law is judicially applied in Member States by national courts. In order to ensure uniform application of EU rules, the CJEU has developed (on the basis of Art 267 TFEU) a concept of a ‘mutual trust’ system between itself and the national courts. The CJEU first defined the limits of the ‘mutual trust’ system, as regards arbitrators, in a pair of cases in the early 1980s. It decided that in most cases arbitration tribunals fall outside the ‘mutual trust’ system, but with some exceptions.¹³¹

In *Nordsee* the CJEU decided that a private law arbitrator could not make an admissible reference to the Court under Art 177 EEC (now Art 267 TFEU).¹³² Its reasons for reaching this conclusion were twofold. First, it noted that the parties to the arbitration in question had chosen (by including an arbitration clause in their agreement) to take themselves outside the jurisdiction of the ordinary courts.¹³³ Second, on the facts of that case, there was no involvement of the public authorities of the Member State of the seat of the arbitration (Germany) in the composition of the arbitral tribunal nor in the proceedings before the arbitrator. Germany could not be assumed to have left its obligation to ensure the uniform interpretation of EU law in its territory to wholly private parties. This conclusion was despite the arbitrator in question being required under German legislation to decide the dispute according to law (and not a simple fairness or equity test) and

¹²⁹ n 99, Art. 4

¹³⁰ 102/81 *Nordsee* (n 89); C-352/13 *CDC* (n 93)

¹³¹ This position has been criticized, given the increase in importance of commercial and investment arbitration in recent years, by Jurgen Basedow; ‘EU law in International Arbitration: Referrals to the European Court of Justice’, (2015) 32 *Journal of International Arbitration*, 367.

¹³² 102/81 *Nordsee* (n 89)

¹³³ as decided by the ECtHR in *Deweert v Belgium* [1980] 2 EHRR 239

German legislation permitting the execution of his award without further hearing.¹³⁴

In contrast, in *Broekmeulen*, the CJEU found that an Appeals Committee of a private law association (the Dutch General Medical Council), which sat as an arbitrator for disputes involving its members, was able to make a request for a preliminary ruling.¹³⁵ Although membership of the association was technically voluntary, in practice most Dutch general practitioners had to belong to it since the Dutch health insurance system only reimbursed treatment provided by registered members. Further, and importantly, the Dutch state intervened in the composition of the Appeals Committee and had given the Council the task of policing the application of substantive provisions of EU law on free movement of medical practitioners, which were in issue in the case. Given this degree of state intervention — in what remained a private law arbitration body — the CJEU held that the Appeals Committee could make an admissible preliminary ruling request. That is, it was within the ‘mutual trust’ system of national courts and tribunals applying and enforcing EU law.¹³⁶

The large majority of commercial arbitrators deciding EU competition law cases will fall into the *Nordsee* category, even if a number of arbitrators called on to consider competition law claims may nevertheless fall within the *Broekmeulen* category.¹³⁷

The exclusion of most commercial arbitrators from the judicial ‘mutual trust’ co-operation system has nevertheless led to two incursions into arbitration procedures, originating from Luxembourg decisional practice, regulating the boundaries of an arbitrator’s competence. First, the CJEU has held that national civil courts must be able to review awards for compliance with EU public policy — but only at enforcement — in cases where EU competition rules need to be applied by the arbitrator.¹³⁸ Second, there have been indications from the CJEU that EU law should require national courts to interpret arbitration agreements strictly, so as to avoid (as far as possible) the arbitration of EU public policy rules such as competition law without express consent.¹³⁹

¹³⁴ It is also of note that the arbitrator making the – ultimately abortive – reference was in fact a judge (President of the Oberlandesgericht Bremen), although not sitting as such.

¹³⁵ 246/80, *Broekmeulen v Huisarts Registratie Commissie*. [1981] ECR 2312

¹³⁶ This position was confirmed by the CJEU (Grand Chamber) in C-536/13 *Gazprom v Lithuania* ECLI:EU:C:2015:316

¹³⁷ The consumer ADR Directive (n 112), Art 5(3), requires Member States to designate consumer ADR bodies, and to provide a back-up body if none exists already: these may well be ‘Broekmeulen’ arbitrators

¹³⁸ by requesting the competent judge to refer in support of the arbitration *Nordsee*, n 89, para14. Basedow (n 131) notes that it has not been greatly used in practice (374-376).

¹³⁹ C-352/13 *CDC* (n 93)

3.2 Jurisdiction over the dispute: EU control of arbitrator's competence

In its *Eco Swiss*¹⁴⁰ judgment, the CJEU confirmed — at least implicitly — that EU law does not prevent the arbitration of claims raising issues of EU competition law. Where a national court is called on to enforce an award but believes that the arbitrator may not have properly addressed relevant EU competition law issues, it must either use the Article 267 procedure to refer a question of interpretation to the CJEU or refuse recognition and enforcement on EU public policy grounds as it would if a challenge had been made on other *ordre public* grounds.¹⁴¹ EU competition law forms part of EU public policy.¹⁴² Any attempt to exclude entirely an EU public policy review by a national court at the time of enforcement of an award resolving a dispute over directly effective EU law is likely to be incompatible with the EU Treaties.¹⁴³

The well-established 'second look' at the competition law content of an arbitration award *after* it has been made is mirrored in the possibility — upheld by the CJEU — for a party to an arbitration clause to rely on EU law grounds to seise a competent court *before* an arbitration if he considers that the dispute cannot be arbitrated (it is beyond the arbitrator's jurisdiction). In the *West Tankers* decision, the CJEU confirmed that the 'mutual trust' principle *between national courts* under EU civil judgment recognition legislation (now Regulation 1215/12) means that each national court always has to be able to take the preliminary step of examining its own jurisdiction under the Regulation, even in the face of an apparently binding arbitration agreement.¹⁴⁴

West Tankers sought to rely on an arbitration clause in the (standard form) charter party, which provided for binding arbitration of all disputes in London under English law, despite the defendant having seised the court in the place of the tortious act (Syracuse in Sicily). In order to prevent the defendant from continuing its court action in Syracuse (and instead arbitrate in London) *West Tankers* applied to the London court for an injunction requiring the insurers to discontinue their court claims in Italy. The application was appealed to the House of Lords (UK Supreme Court), which referred to the CJEU the question of whether it was consistent with EU law to restrain the defendant from bringing their claim in the Syracuse court.

The CJEU, held, in essence, that the system of 'mutual trust' between national courts in the EU — which permitted the 'free movement' of civil judgments — meant that it was never open to a court in one Member State to seek to prevent a

¹⁴⁰ C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*. [1999] ECR I-3055

¹⁴¹ *EcoSwiss* (n 140) paras 37; New York Convention Article. V(2)(b)

¹⁴² *EcoSwiss* (n 140), para 39; cf C-567/14 *Genentech v Hoechst* (7 July 2016) ECLI:EU:C:2016:526 where the CJEU held that it could not review the *substantive* findings of the arbitrator; Christoph Liebscher 'EU Member State Court Application of *EcoSwiss*' in Blanke and Landolt (eds) *EU and US Anti-trust Arbitration* (2011) Wolters Kluwer, noting that not all errors of application would merit refusal to enforce the award

¹⁴³ C-284/16 *Slovak Republic v Achmea BV* (6 March 2018) ECLI:EU:C:2018:158, paras 50-51

¹⁴⁴ C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663; Regulation 1215/12 (n 80)

court in another Member State from at least a preliminary examination of its own jurisdiction, even when faced with a claim that the action should be referred to arbitration.¹⁴⁵ This right applied unless the *subject matter* of the dispute clearly fell outside the scope of the Regulation — for example, the issue was one of administrative or criminal law rather than civil law. Implicitly therefore, it did not matter that the *procedure* invoked (arbitration) was expressly outside the scope of the Regulation.

However, this rule does not apply to (interim) arbitration awards seeking, in a similar way, to prevent foreign litigation which overlaps with the pending arbitration.¹⁴⁶ The CJEU addressed this question in rather unusual circumstances in its *Gazprom* decision.¹⁴⁷ Gazprom and the Lithuanian state were engaged in arbitration in Stockholm over a dispute arising from a shareholders' agreement. In parallel the Lithuanian state commenced proceedings in the Lithuanian courts in respect of matters which overlapped with the dispute being arbitrated in Stockholm. Gazprom obtained an interim award requiring Lithuania to refrain from litigating in the Lithuanian courts to the extent that the two proceedings overlapped.

The Lithuanian court referred a question to the CJEU asking, in effect, whether the '*West Tankers*' case law applied to prevent it applying the Stockholm interim award. The CJEU (Grand Chamber) held that it did not. Although the jurisdiction of EU Member State courts is regulated by EU law, it is clear that recognition and enforcement of an arbitration award is outside the scope of EU law.¹⁴⁸ Instead, the CJEU noted, the recognition of international arbitration awards is governed solely by international law and the national rules giving effect to it. This put arbitrators wholly outside the scope of the 'mutual trust' system for civil enforcement of EU law. So, a court would not breach that 'mutual trust' by using its own laws — in turn applying international norms — to recognize (or not) an 'injunctive' arbitration award.¹⁴⁹

These two cases — at first sight difficult to reconcile — can, we suggest, best be explained by noting that the CJEU appears to propose a two stage analysis. First, is the subject matter of the dispute within the scope of the EU judgments Regulation? Second, if it is, is that jurisdiction displaced by an arbitration clause which applies — as an exception to the general rules in the Regulation — to the 'defined legal relationship' from which the dispute arose?¹⁵⁰ Every court must, as

¹⁴⁵ the CJEU relied on its decision in C-159/02, *Turner*, [2004] I-ECR 3565, which held that it was incompatible with the Regulation for an English court to make an anti-suit injunction restraining the parties from proceeding in a court in another EU Member State where there was a dispute (not involving an arbitration clause) as to the jurisdiction of that court.

¹⁴⁶ Interim or jurisdiction awards may also be outside the scope of the New York Convention, UNCITRAL Guide (n 58), 15-16

¹⁴⁷ C-536/13 (n 136)

¹⁴⁸ *ibid*, paras 28 and 36. The Regulation being interpreted is Regulation 44/2001 [2001] OJ L12/1. This is now replaced in similar terms by Regulation 1215/2012 (n 80) whose recital 12 effectively embodies the principles set out by the CJEU in this and related cases.

¹⁴⁹ *ibid*, paras 36-37

¹⁵⁰ C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others*. 21 May 2015 ECLI:EU:C:2015:335 at paras 59 and 61 ('derogation')

a matter of EU law, be free to determine both of these questions. But if an arbitration agreement does apply to the dispute, the consequences of this choice are then governed by *national* arbitration legislation, articulating the New York Convention rules, and not by EU law.

3.3 The scope of the arbitration agreement: EU or national control?

To what extent, then, does EU law apply to the second ‘boundary’ question noted above — whether a dispute does or does not fall within an arbitration agreement? The position of the CJEU — protecting the preliminary jurisdiction of any EU civil court seised against impermissible incursion by another EU *court* relying on an agreement to arbitrate — was also tested in the *CDC* case.¹⁵¹ Questions of the validity and scope of an arbitration agreement arose as a defence during court claims for damages against members of a cartel.¹⁵²

Faced with a collective action by the assignee of a number of hydrogen peroxide direct purchasers’ cartel claims, the defendants — previously found by the European Commission to have participated in an infringing hydrogen peroxide cartel — pleaded that a large number of the contracts under which the chemical had been purchased from them contained either arbitration clauses or jurisdiction clauses granting jurisdiction to non-EU civil courts. They argued that these clauses meant that the German court initially seised did not have jurisdiction to hear the cartel damages claims. The German court asked the CJEU whether it nevertheless had jurisdiction on the basis that the EU principle of effectiveness meant that it had to disregard the contractual forum (arbitration) clauses.

In his Opinion, Advocate General Jääskinen took a hard line against the defendant cartelists’ argument and urged the CJEU to permit the German court to overrule the clauses.¹⁵³ He noted, however, that arbitration clauses are excluded from the scope of the Brussels Regulation — which means that their interpretation is governed by the rules indicated in the national legal systems of the Member States.¹⁵⁴

The Advocate General concluded that the application of national rules (including those implementing a Member State’s international law obligations) should not allow an arbitration clause to prejudice the full effectiveness of the EU law right to compensation for cartel harm.¹⁵⁵ He said:

‘[...] I find it hard to accept that jurisdiction [...] could be excluded when the application of the law of a Member State allows [...] [an] arbitration clause to govern *all disputes* arising out of the relationship between a party and the other

¹⁵¹ Case C-352/13 *CDC Hydrogen Peroxide* (n 150). Commentaries: Wolfgang Wurmnest ‘International jurisdiction in competition damages claims under the Brussels I Regulation: CDC Hydrogen Peroxide’ (2016) CMLRev 1, 225-247; Rupert Bellingham and Julia Grothaus ‘The CJEU’s decision in *CDC v Akzo Nobel*: a Blessing or a Curse for Arbitrating Cartel Damages Claims?’, 31 July 2015, Kluwer Arbitration blog

¹⁵² *CDC* (ibid.), para 12. This analysis has now been applied in the Netherlands, *Kemira Chemicals Oy v CDC Project 13 SA*, Gerechtshof Amsterdam, 21 July 2015, NTHR 2015, af. 5, 273

¹⁵³ Opinion of AG Jääskinen, 11 December 2014, ECLI:EU:C:2014:2443 para 132

¹⁵⁴ Regulation 1215/2012 (n 80), recital 12 and Article 1 (2)(d)

¹⁵⁵ Opinion (n 153), paras 119 and 124

party to the contract and stemming from relationships *other than that in connection with which* the clause at issue was agreed. The requirement of a close connection between the clause invoked and a particular legal relationship [...] seems to me to be necessary here in order to guarantee the predictability of jurisdiction'.¹⁵⁶

This conclusion is open to criticism on a number of grounds. The first is that predictability of jurisdiction is likely to be undermined by permitting national courts in the EU to override the meaning of arbitration clauses previously agreed between the parties.¹⁵⁷

Second, the conclusion appears to be outside the scope of the CJEU's own jurisdiction. As the Advocate General recognized, issues of arbitration procedure fall outside the scope of the EU Regulation.¹⁵⁸ So, although a Member State court cannot be prevented from examining its own jurisdiction simply because of the presence of an arbitration clause,¹⁵⁹ the question whether that arbitration clause applies to the dispute in question as a matter of contract interpretation is not — in the light of the current state of EU legislation — a question of EU law.¹⁶⁰

Third, the enforcement of foreign arbitration awards is comprehensively governed by the New York Convention. EU law should be applied as far as possible to allow Member States to comply with their international obligations under the Convention. Indeed, for most Member States, the requirements of the New York Convention pre-date those arising from their accession to the EU Treaties — which are 'without prejudice' to such pre-existing international obligations.¹⁶¹

Finally, the fact that the application and interpretation of the New York Convention is not entrusted to the CJEU itself does not imply that the international arbitration system is inadequate to ensure the protection of parties' EU law rights — as the Advocate General himself somewhat reluctantly recognized.¹⁶²

The CJEU did not follow the Advocate General's Opinion in *CDC* — either in relation to jurisdiction clauses or to arbitration clauses. Its decision on arbitration clauses was (apparently) simply that it did not have enough information to give a useful answer to the referring court.¹⁶³ Despite the Advocate General's conclusion that the principle of effectiveness should in some circumstances be permitted to override arbitration and jurisdiction clauses, the CJEU held that Member State courts were allowed to apply national laws upholding jurisdiction clauses even

¹⁵⁶ *ibid*, para 129, emphasis in original

¹⁵⁷ ch 2.3.2; also, Assimakis Komninos 'Arbitration and damages claims' (n 20); Luca Radicati di Brozolo 'Class Arbitrations in Europe' in Nuyts, Hatzimihail (eds.), *Cross-Border Class Actions – the European Way* (2014) Sellier.

¹⁵⁸ Opinion (n 153), para 127

¹⁵⁹ C-185/07 *West Tankers* (n 144)

¹⁶⁰ Eg. national legislation may still require a court to give effect to an arbitration award requiring parties before the court to stay their claims if they are being arbitrated elsewhere (*Gazprom*, n 136).

¹⁶¹ TEU, Art 351

¹⁶² Opinion (n 153), para 125

¹⁶³ *CDC* judgment (n 151), para 58

where they nominated courts outside the EU.¹⁶⁴ It reached no express conclusion on the arbitration clauses.

Nevertheless, the CJEU did note that the national court had to be clear that the (jurisdiction) clause did indeed cover the dispute in question. It thus appeared to require the German referring court to take a restrictive view of the scope of clauses conferring jurisdiction “to avoid a party being taken by surprise” by the effect of the clause.¹⁶⁵ Although the CJEU was careful not to extend this reasoning to arbitration clauses — and that analysis would contradict the current position in the UK on this issue¹⁶⁶ — it is relatively easy to make such a step. The Amsterdam Court of Appeal has already done so.¹⁶⁷ In a parallel claim in the hydrogen peroxide cartel, CDC claimed in the Dutch courts against various cartel members, who raised the same defence as they had in the German proceedings. Expressly referring to the CJEU’s *CDC* judgment, the Amsterdam court found that there was not a sufficient connection between the arbitration clauses and the competition claims brought by CDC to require it to refer the claims to arbitration. There were ‘no good grounds’ for not applying the CJEU’s analysis in *CDC* (given in relation to jurisdiction clauses) also to the arbitration clauses in question.¹⁶⁸ However, in contrast, both the English and German courts have declined in different cartel cases to follow the lead set by the Advocate General in *CDC*.¹⁶⁹

The CJEU’s understandable reluctance to rule on arbitration questions, and its apparent desire to maintain the ‘bright line’ separating commercial arbitration and EU enforcement of civil judgments is to be welcomed.¹⁷⁰ However, the perceived need to maintain the ability of national *courts* in the EU to ensure the uniform application of the EU competition rules across the Union — and the implication that arbitrators may not be well placed to do this — could in future give rise to significant EU public policy incursions on the freedom of arbitrators to interpret the scope of their own jurisdiction, or even to decide on the admissibility of collective procedures to resolve group competition disputes.¹⁷¹

And if national courts are not permitted to exercise EU public policy control over an arbitration proceeding (or at least the resulting award) the agreement to arbitrate may be void. In *Slovakia v Achmea BV*, the CJEU (Grand Chamber) held that an arbitration clause in a bi-lateral investment treaty (BIT) concluded between Slovakia (before it became an EU Member State) and the Netherlands

¹⁶⁴ *ibid*, paras 61 and 62. Such ‘non-EU’ jurisdiction clauses are governed by the private international laws of each Member State: they are not addressed expressly Regulation 1215/2012, although neither are they specifically excluded from its scope (in contrast to arbitration clauses).

¹⁶⁵ *ibid*, para 68

¹⁶⁶ *Premium Nafta Products Ltd v Fili Shipping Company Ltd and others (‘Fiona Trust’)* [2007] UKHL 40

¹⁶⁷ *Kemira Chemicals Oy* (n 152)

¹⁶⁸ *ibid*, para 2.16

¹⁶⁹ *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch); Landesgericht Dortmund, (13 September 2017) 80 35/16 (Kart); also ch 2.2.4.2 above

¹⁷⁰ this is now recognized in legislation: Regulation 1215/2012 (n 80), recital 12

¹⁷¹ Aren Goldsmith ‘*Arbitration and EU Anti-trust Follow-on Damages Actions*’, (2016) 34 ASA Bulletin, 1-40,

was contrary to EU law.¹⁷² The investment issues covered by the BIT could give rise to disputes involving directly effective EU law which the Dutch investors would then be entitled to put to an arbitration panel (under UNCITRAL rules). Achmea BV — a Dutch investor in the Slovak healthcare system — requested an arbitration under the BIT to take place in Frankfurt am Main. The German supervising court — seised of a jurisdiction challenge by Slovakia — referred questions to the CJEU on the compatibility of the inter-State arbitration mechanism with EU law.

Since the arbitration clause in the BIT compelled both the Netherlands and Slovakia to submit disputes to *final* binding arbitration, the CJEU found that this necessarily meant that recourse to either parties' national courts was excluded.¹⁷³ There was therefore no scope for the required EU public policy review *by a court*, since both states were required not to allow their courts to review the award. Thus the clause as agreed was contrary to both countries' obligations to ensure uniform *judicial* interpretation of EU law in their territories.¹⁷⁴ But the CJEU's reasoning (expressly) did not apply to commercial arbitration, since there the (private) parties to similar arbitration clauses are not able to prevent a national enforcing court from conducting an EU public policy review compatible with Article V of the New York Convention.¹⁷⁵

An indication of the degree of the intervention which might occur in future is given in the Opinion of Advocate General Wathelet in *Genentech*.¹⁷⁶ The Court of Appeal, Paris referred questions on recognition of an arbitration award enforcing an agreement against Genentech, which Genentech had argued (unsuccessfully) before the arbitrator infringed EU competition rules. French law (the *lex arbitri* — the arbitration was being conducted in Paris under the ICC Rules) only permits a French court to refuse to recognise an international arbitration award where there is a flagrant ('*manifeste*') breach of *international* public policy by the arbitrator.¹⁷⁷

The Opinion considered two 'scrutiny' questions raised by the Paris court. Did the bar in French arbitration law, preventing the court from examining the merits of an international arbitration award, apply to possible breaches of EU competition law? If it did not, was the requirement in French law, that any enquiry into an arbitration award be limited to considering 'flagrant' breaches of law, contrary to the general principles of EU law?

¹⁷² C-284/16 *Slovakia v Achmea* (n 143), para 60

¹⁷³ *ibid*, paras 50-51. The Court declined to follow the Opinion of AG Wathelet who advised that the BIT arbitration agreement should be held compatible with EU law on the basis that the two Member states had in fact delegated part of their imperium to the BIT tribunal (which could, on this basis, refer a question to the CJEU under Art 267 TFEU); Opinion in case C-284/16 (19 September 2017) ECLI:EU:C:2017:699

¹⁷⁴ *ibid*, para 56, emphasis added

¹⁷⁵ *ibid*, para 54

¹⁷⁶ C-567/14 *Genentech Inc v Hoechst GmbH, Sanofi Aventis Deutschland GmbH*, opinion of 17 March 2016, ECLI:EU:C:2016:177

¹⁷⁷ code de procedure civile, art 1514 (decret 2011-48, 13-01-2011, art 2)

On the substance of the two ‘scrutiny’ questions, AG Wathelet opined that both the French law requirement that any breach be ‘flagrant’ and that the court may not look behind the substantive findings of an international arbitration award were contrary to the EU general principle of effectiveness.¹⁷⁸ Because arbitrators are not ‘courts of Member States’ (following the *Nordsee* decision), they are not part of the system of ‘mutual trust’ within which EU law must be interpreted.¹⁷⁹ Thus,

“.... the responsibility for reviewing compliance with European public policy rules lies with the courts of the Member States and not with arbitrators, whether in the context of an action for annulment or proceedings for recognition or enforcement.”¹⁸⁰

The Advocate General said that he was here following the line set out in the *EcoSwiss* decision. But the CJEU’s decision on depth of scrutiny in *EcoSwiss* was relatively *laissez-faire*: although there must be a review¹⁸¹

“.... the ordinary courts may have to examine [EU law] questions, in particular during review of the arbitration award, which may be more or less extensive depending on the circumstances...”¹⁸²

The flagrant breach requirement would also mean, according to AG Wathelet, that infringements of competition law by effect only — which he opined cannot be flagrant breaches of EU public policy due to the complexity of the analysis needed — would be excluded from review. In his view, it should not be open to parties to escape *court* control of these important matters by deciding to arbitrate:

“No system can accept infringements of its most fundamental rights making up its public policy, irrespective of whether or not those infringements are flagrant or obvious.”¹⁸³

Courts should be free to intervene even where the arbitrator’s breach is not flagrant.¹⁸⁴

But again, the CJEU declined to follow the Advocate General’s advice.¹⁸⁵ It noted — relying on a single sentence in the Opinion¹⁸⁶ — that it was not for the CJEU to review the findings of an arbitrator in the context of a preliminary reference made by a court. Implicitly, the CJEU therefore upheld the ability of the Paris Court of Appeal to continue to apply existing French arbitration legislation — limited to ‘flagrant’ breaches of law — when exercising its supervisory jurisdiction over an international arbitrator sitting in France. Arbitration remains outside the scope of the CJEU’s interpretative jurisdiction.

¹⁷⁸ Opinion (ibid,) para 58

¹⁷⁹ *ibid*, para 59

¹⁸⁰ *ibid*, para 61

¹⁸¹ *EcoSwiss* (n 140) para 40

¹⁸² *ibid*, para 32

¹⁸³ Opinion (n 176) para 67

¹⁸⁴ For the contrary argument Luca Radicati di Brozolo ‘*Arbitration and Competition Law: the Position of Courts and Arbitrators*’ (2011) 27 *Arbitration International*, issue 3, 8-12; Christoph Liebscher ‘*European Public Policy – A Black Box?*’ (2000) 17 *Journal of International Arbitration*, 75-77 and 89.

¹⁸⁵ C-567/14 *Genentech* (n 142), 7 July 2016, judgment reported at ECLI:EU:C:2016:526

¹⁸⁶ *ibid*, para 38 relying on para 75 in the Opinion (n 176)

It is also very difficult to reconcile the relatively intrusive stance proposed by AG Wathelet — effectively invalidating French international arbitration laws, based on the New York Convention, for a significant number of competition arbitrations — with the ‘bright line’ separating commercial arbitration and EU civil enforcement legislation through national courts drawn by the CJEU in its *Nordsee*, *Gazprom* and *Achmea* decisions.¹⁸⁷

Despite the continuing careful stance of the CJEU — fearing to tread where Advocates General would rush in — we suggest that, at the least, careful crafting and interpretation of the arbitration agreement and arbitration procedure in competition disputes is now clearly needed to navigate the current state of the CJEU’s decisional practice. We discuss this further in chapter 4: there is, nevertheless, still room to manage these risks so as to create a broad-ranging arbitrated collective action in Europe.

4 Conclusions: strong EU policy encouragement — but behind a ‘*cordon sanitaire*’

Arbitration in bi-lateral competition disputes appears uncontroversial, whether at an international, EU or national level. Although the ‘public interest’ element of competition claims has clearly been recognized — not least by the European Commission — this does not prevent such disputes from being arbitrated, and they commonly are.¹⁸⁸

However, as a result of CJEU jurisprudence, the recognition of arbitration agreements by EU civil courts and the enforcement of awards including EU competition law claims, is subject to an overriding EU law and policy review by a court. And EU law — shaped by this developing jurisprudence of the CJEU — may become more interventionist in this area.

We nevertheless believe that general EU law principles — in particular the principles of effectiveness and equivalence — as well as recent, focused, EU legislation and guidance on competition and collective redress, substantially reinforce the impetus for recognition and enforcement of collective competition arbitration across the Union. In particular, the ‘damages Directive’ requires Member States to provide ADR mechanisms (including arbitration) for resolving competition law disputes.¹⁸⁹

The way in which national and EU law and public policy interact in this area can, we believe, be summarized as follows:

¹⁸⁷ In *EcoSwiss* (n 34), the CJEU noted, pragmatically, that the enforcing court’s review should be ‘more or less extensive, depending on the circumstances’ (para 32), discussed in Gordon Blanke ‘The Supranational Dimension of Arbitrating Competition Law Issues’ in Blanke and Landolt, eds, *EU and US Anti-trust Arbitration* (2011) Wolters Kluwer, 306-307.

¹⁸⁸ eg. Damages Directive (n 80), at recitals 3 and 6 in particular.

¹⁸⁹ *ibid*, Articles 18-19 and recitals 48-51

1. International arbitration and the system for uniform enforcement of (directly effective) EU competition law form two discrete — although intertwined — procedural systems to be applied in parallel by national courts in the EU. The Union has not exercised full competence to legislate in the field of international arbitration and probably does not have the power to do so.
2. Since recognition of the continuing international obligations of Member States is both permitted and — as far as possible — required in EU law, the international commercial arbitration system, established under the New York Convention, continues to apply in full in the EU. Only wholly exceptionally, where an international rule violates (international) *jus cogens*, should a national court in the EU decline to enforce the international rule when protecting EU rights: this exception is not in practice applicable to international collective competition arbitration.
3. Nevertheless, the way in which national courts in the EU apply *national* laws — designed to give effect to the international arbitration architecture — when they are enforcing directly effective EU law rights, must be conditioned by application of the general principles of EU law (EU public policy) and any EU legislation which may incidentally touch on international arbitration.
4. EU public policy includes respect for the fundamental principles of EU law (now primarily set out in the EU Charter of Fundamental Rights), for ‘party autonomy’, for EU competition law and also for the general principles used by the CJEU itself when interpreting and applying EU law.
5. The strong impetus in recent EU legislation and guidance, in the areas both of collective redress and competition damages procedure, is in favour of collective ADR (including arbitration) for competition disputes, to promote both access to justice for claimants and finality of outcome for defendants.
6. EU policy prefers ‘opt-in’ group collective redress procedures rather than ‘opt-out’ actions. The need for (direct or indirect) consent to collective arbitration by each party to be bound by the arbitrated outcome necessarily implies ‘opting-in’ by them to an arbitrated (collective) competition procedure.
7. The EU’s national courts must be allowed a preliminary consideration of the extent of their own jurisdiction when presented with a request to refer a dispute to arbitration. The way in which they may do this will be set out in national legislation — which must be applied equivalently to EU law disputes — as shaped by the New York Convention.
8. Arbitrators do not (normally) form part of the ‘mutual trust’ system comprising EU civil courts and the CJEU, which ensures the effective and uniform application of directly effective EU law across the Union. National *courts* must therefore address EU public policy when requested to supervise an arbitration or enforce an award.

9. The degree of scrutiny of an arbitration proceeding or award by a national court on EU public policy grounds is not (as yet) well articulated in the decisional practice of the CJEU. It is likely to vary according to the EU principle which is said to be infringed and the national arbitration legislation of the supervising or enforcing court. However, the CJEU has been careful not to bring detailed questions of interpretation of agreements to arbitrate within the scope of its own interpretative jurisdiction.
10. The EU principles of effectiveness and equivalence will require a court outside the seat of arbitration, seised of an application to recognize or enforce an arbitration agreement or award, to disregard restrictions (in its own law) as to the identity of the party who may act as a representative, or as to the substantive matters to which a particular collective procedure may be applied. Subject to respect for other fundamental EU principles, an arbitrator must be free — in the exercise of his procedural autonomy — to select the procedure which is the most favourable to allowing an effective remedy for breaches of EU competition law, compatible with the agreement of the parties to arbitrate (ie. his jurisdiction) and the *ordre public* applied under the *lex arbitri*.
11. The CJEU may in future seek to require a restrictive interpretation of the necessary closeness of the relationship between the dispute to be arbitrated and the arbitration agreement. And there are already indications that national courts are taking a narrower view of the scope of arbitration clauses when considering their jurisdiction over EU competition law disputes. However — given that international commercial arbitration is a separate system to the EU ‘mutual trust’ civil judgment enforcement architecture — deciding whether the arbitration agreement gives the arbitrator jurisdiction over the dispute being referred to him or allows him to admit a collective procedure is, in principle, still a question for the arbitrator and national courts, not the CJEU.

We therefore suggest that:

- the recognition by the EU institutions and in EU legislation of the advantages of ADR (including arbitration) in achieving effective and final redress for EU competition law breaches;
- the wide discretion allowed to an arbitrator to craft a procedure best suited to resolving the (collective) dispute in hand; and, finally,
- the separateness of the international commercial arbitration system from the court-based ‘mutual trust’ system for applying EU law

all mean that a court in the EU should only wholly exceptionally refuse to refer a *collective* competition dispute to arbitration where there is agreement to arbitrate or to refuse to enforce the resulting award. Indeed most EU law principles and legal provisions support the use of arbitrated redress solutions for compensating mass competition law harm occurring in the EU.

In the next chapter we will discuss — using the principles and conclusions reached in this and the previous chapter — how best to craft an arbitrated collective competition claim in Europe to ensure maximum recognition and enforceability of the resulting collective award.

Chapter 4 Managing risk to recognition and enforcement in EU collective competition arbitration

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 2. *Risk management during the arbitration: ‘substantive jurisdiction’ and procedure challenges*
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1 Introduction: maximum certainty in finality and redress

Effective management of risks to a collective competition arbitration in the EU requires a clear view of the aim of the arbitration proceedings. As with all arbitrations, the primary aim must be to resolve the dispute between the parties.¹ Collective competition arbitrations, however, have additional objectives, in particular achieving maximum redress to the claimant group and finality for the defendant. As the Commission noted:

Achieving a ‘once-and-for-all’ settlement’ for defendants is desirable in order to reduce uncertainty for [both] infringers and injured parties. [...] Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive [...] are therefore meant to facilitate the use of such mechanisms *and increase their effectiveness*.²

Arbitration procedures available to manage the risks to recognition of the arbitration agreement and to the enforceability of a collective competition award

¹ Arbitration Act 1996, s 1(a)

² Directive 2014/104, [2014] OJEU L349/1, recital 48, emphasis added

can and should be selected to best achieve the optimal outcome across both the primary purpose of the arbitration (dispute resolution) and these additional objectives.³ Not only must the outcome of a collective competition arbitration resolve the dispute and aim to give fair redress to the whole claimant group, but it should also give maximum finality of decision to the defendant(s) both in terms of number of claimants covered and territorial reach of the award.⁴ For defendants, the balance between the relatively greater complexity of collective arbitration proceedings must be outweighed by the advantages of greater scope and degree of finality of the outcome.

In this chapter we first look at when and how ‘policy’ risks to achieving these aims through collective competition arbitration might arise. We then consider the appropriate law for the collective competition arbitration and its effects on the risks identified. Finally, before concluding, we briefly consider the enforceability in the EU of collective awards made outside the EU.

2 Risk management during the arbitration: ‘substantive jurisdiction’ and procedure challenges

Accepted international arbitration practice indicates that court intervention in international commercial arbitration should be exceptional.⁵ Arbitrators are the masters of their own procedure, within the parties’ consent, and the large majority of national arbitration legislation only permits a very light touch by the supervising court.

This limited degree of supervision is exemplified by the (UK) Arbitration Act 1996, which only permits courts to review arbitrators’ findings during an arbitration:

- on an application to determine a preliminary point of jurisdiction (s. 32), but only if either all of the parties agree to the application or with the permission of the arbitrator and where there is a good reason for a *court* to hear the application (where this would save time or cost);
- on an application to enforce an arbitrator’s ‘preremptory order’ (s. 42) — for example, in our context, replacing a representative — but only if all arbitral appeals have been exhausted; or
- on an application to set aside an interim award — for example, one which admits representative collective proceedings — for ‘serious irregularity’.⁶

³ eg. Arbitration Act 1996 s. 33(1)

⁴ supervising national courts should be slow to intervene at the commencement of a collective arbitration: Arbitration Act 1996 s. 1(c); Gary Born *International Commercial Arbitration*, 2 ed, (2014) Wolters Kluwer, 1924 (noting some diversity of approach); Nigel Blackaby and Constantine Partasides QC *Redfern and Hunter on International Commercial Arbitration*, 6 ed, (2016) OUP, 416-417

⁵ Arbitration Act 1996 s 34(1); Blackaby and Partasides (ibid,) 59, 420; ch 2.5 above

⁶ Arbitration Act 1996 s 67(1) and s 68(1). A court application may only be made against an *award* of the arbitrator – including partial awards (s 47(1)).

Similar grounds exist in other EU Member States.⁷ A setting aside application is likely to be the most used in practice as arbitrators should normally make a separate interim award on admissibility in a collective redress procedure.

We suggest that three bases of challenge will be particularly relevant to collective competition arbitration. First, a claim that the arbitrator has erred in the choice of law applicable to the proceedings, so that he has misdirected himself as to the availability of collective competition redress. Second, a claim that the arbitrator's finding on suitability of the dispute for collective treatment (or on the choice of procedure) should be set aside. Or third, that the arbitrator's approval of a representative (in representative collective claims) is impermissible.

Each of these bases reflects a 'due process' concern' with collective redress proceedings — but of course can only be successfully asserted against an arbitrator if they can be brought within a ground of challenge specified in the relevant national arbitration legislation. We consider each of these bases in turn below and suggest how the arbitrator might best act (within his competence) to reduce risk to admitting a collective procedure.

2.1. Finding the applicable law in multiparty competition cases

Arbitrators enjoy considerable procedural freedom within the scope of their jurisdiction.⁸ However, both the law of the agreement to arbitrate and the *lex arbitri* may be important in providing the legal (and thus public policy) framework within which the arbitrator must work. An arbitrator should, therefore, consider which law applies to the arbitration agreement when framing his collective procedure in a competition claim.⁹ This should avoid any erroneous conclusions that a particular form of collective redress is outside his jurisdiction or is not admissible as being contrary to public policy under a relevant law — either the law of the arbitration agreement or the *lex arbitri*.¹⁰

As we conclude in this section, the arbitrator's (and the parties') freedom to choose the law applicable to the arbitration may be limited, particularly in non-contractual collective competition actions.¹¹ In contrast, the choice of the seat of

⁷ France: code de procédure civile Art 1448 (decret 2011-48, 13 January 2011); Germany, code of civil procedure, (Zivilprozessordnung — ZPO), book 10, sections 1026 and 1062

⁸ n 5

⁹ Where this law is uncertain, or several different European laws may apply, we suggest that the arbitrator should adopt a procedure based on EU principles — ch 3.4

¹⁰ New York Convention on the recognition and enforcement of foreign arbitral awards, 1958 UNTS I-4739, Art V (1)(d); UNCITRAL *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016) UN, New York, 193-94. But Bernard Hanotiau nevertheless notes that arbitrators "do not often base their decision" about the scope of the arbitration clause on a prior determination of the applicable law, but rather on the common intent of the parties, taking account of international usage. *Complex Arbitrations: Multi-party, Multicontract, Multi-issue and Class Actions* (2005) Kluwer Law International, para 204; Gary Born *International Arbitration: Law and Practice* (2016) Kluwer Law International, 161.

¹¹ Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJEU L199/40, Art 6(3). The application of Rome II to arbitrators is not universally accepted: V V Veeder QC and Paul Stanley 'Arbitrating Competition Law Issues: the Arbitrator's Perspective' in

arbitration — and therefore (normally) the *lex arbitri* — remains unconstrained by EU choice of law legislation. Choice of seat is therefore the main variable under the parties' control in determining the legal system which provides the public policy backdrop to a collective competition arbitration. We consider the national law factors relevant in choosing the appropriate seat of a collective competition arbitration in more detail in chapter 5.¹²

The risk of diverging approaches to collective redress is reduced (for competition arbitrations taking place in the EU) due to the general principles of EU law underpinning all Member States' public policy in the enforcement of EU competition law. The EU competition 'damages Directive' will also begin to prompt the harmonisation of national competition litigation procedures.¹³ Differences in EU Member States' public policy in relation to procedures for recovering losses caused by competition infringements should therefore progressively diminish over time. Nevertheless, for the foreseeable future, the public policy treatment of advanced collective competition redress procedures will differ substantially across Member States. These differences alone are likely to give rise to a potential for challenge to the recognition and enforcement of a collective competition award.

Indeed, a first differentiation based on the concepts the proper law of the arbitration agreement and the *lex arbitri*, may be too simplistic in collective competition arbitrations. Each of the three legal systems which can apply to the defined legal relationship during the arbitration — the law of the substantive obligation, the law of the arbitration agreement and the *lex arbitri* — may have a significant impact on the framework within which the arbitrator must operate to resolve the dispute. This is particularly true where the dispute is presented as a claim for breach of a non-contractual obligation. The law of that substantive obligation imports — under EU legislation — certain 'quasi-procedural' rules into the dispute resolution procedure which may significantly affect the availability of arbitrated collective redress.¹⁴

In the rest of this section we consider the issue of how to assess the scope of the 'defined legal relationship' related to the dispute — which mainly (but not totally) defines the scope of the arbitrator's substantive jurisdiction ('Kompetenz') — and the specific issues on choice of law arising in non-contractual collective competition arbitrations.

2.1.1. The 'defined legal relationship' and its connection to the dispute in arbitration

International arbitration law and practice only require the recognition of arbitration agreements and awards to resolve disputes arising from a 'defined

Gordon Blanke and Philip Landolt (eds) *EU and US Anti-Trust Arbitration* (2011) Kluwer Law International, 100-101.

¹² Gary Born *Law and Practice* (n 10), 111-112; Blackaby and Partasides (n 4), 158-163.

¹³ Directive 2014/104, OJ [2014] L349/1

¹⁴ Rome II Regulation (n 10), art 15.

legal relationship'.¹⁵ The question of whether there is a sufficient connection between each dispute marshalled in a collective competition arbitration and the agreement to arbitrate is one of 'substantive jurisdiction' rather than one of procedure.¹⁶ This in turn implies a greater possibility for a court to intervene, even at an early stage in the arbitration process.¹⁷ There is a significant degree of divergence in the 'connection' test to be applied in different legal systems — with the UK Supreme Court, for example, taking a more expansive stance to the interpretation of arbitration agreements than appears to be apparent in much European jurisprudence.¹⁸

The law of the arbitration agreement is not only relevant in deciding whether the agreement covers the disputes presented to the arbitrator. It may also contain public policy rules which could affect the ability of the arbitrator to imply consent by the parties to certain types of collective procedure (assuming the absence of express agreement).¹⁹ Although, as discussed in chapter 2, many Member States now have civil litigation procedures permitting collective redress actions, a number still prohibit advanced forms of collective procedure — in particular 'opt-out' representative actions. It may not be open to an arbitrator, deriving his jurisdiction from an agreement governed by such a national law, to admit the most advanced collective techniques by implication — the risk of challenge on referral or on enforcement would be substantial.²⁰ Although many courts use an international public policy standard when considering enforcement challenges to an award — leaving a far greater discretion to the arbitrator — this position is not universal.²¹

a) England and Wales

The leading English authority on the reach of an agreement to arbitrate is the judgment in *Fiona Trust*.²² The House of Lords found that English law gives effect — as far as the language of the arbitration clause permits — to the commercial purpose of arbitration agreements.²³ In interpreting the arbitration clause, the assumption must be that the parties are likely to have intended *any* dispute arising

¹⁵ UNCITRAL Model Law on international Commercial Arbitration, 1985 (with 2006 amendments) (2006) UN, Vienna, art 7; UNCITRAL Guide (n 10), 49.

¹⁶ eg. Arbitration Act 1996, s 30(1)(c)

¹⁷ Arbitration Act 1996, s 32(1)

¹⁸ The UNCITRAL Guide (n 8) notes that this concept of 'defined legal relationship' is very broad and seldom gives rise to dispute (49). For a recent overview of practice in Europe in relation to competition arbitrations following the CJEU's CDC judgment, Olga Sendetska 'Arbitrating Anti-trust Damages Claims: Access to Arbitration' (2018) *Journal of International Arbitration*, vol 35 issue 3, 357.

¹⁹ Born, *Law and Practice* (n 10), 59-62, indicating that the principles in Article V(1)(d) of the New York Convention (n 10) may also apply by analogy to import the public policy of the seat to the interpretation of the arbitration agreement.

²⁰ UNCITRAL Guide (n 10), 63 at para 84. The general position appears to be that courts apply a light review of the validity and scope of the arbitration agreement.

²¹ *ibid*,

²² *Premium Nafta Products Ltd and others v Fili Shipping Company Limited and others (Fiona Trust)* [2007] UKHL 40.

²³ *ibid*, Lord Hoffman, para 8

out of the relationship they have entered into under the substantive contract to be decided by the same arbitrator.²⁴

The arbitration clause in the charter party in the *Fiona Trust* case extended to requiring that an allegation that the charter as a whole — including the arbitration clause — had been procured by fraud (bribery) should be decided by the arbitrator and not by the court.²⁵ Unless the bribery claim said to make the arbitration agreement void for illegality was specifically directed at the validity of the arbitration clause — and the House of Lords noted that almost all charters contained arbitration clauses, so it was unlikely that its inclusion was fraudulent — that (separate) arbitration clause (applying to *all* disputes) gave the arbitrator jurisdiction to decide this jurisdiction point. The arbitration agreement can be invalidated only on a ground which relates (specifically) to the arbitration agreement.²⁶ And the emphasis is on the commercial purpose of the arbitration agreement — giving the arbitrator scope to include a broad set of claims in the procedure.

This decisional practice has been followed in competition cases by the English courts even in the light of the CJEU case law which may throw doubt on it.²⁷ However, there has to be a contractual cause of action for the claimant to hang their non-contractual claims on:

‘...the contractual and tortious disputes [must be] so closely knitted together on the facts that an agreement to arbitrate one can properly be construed as covering the other.’²⁸

And the (substantive) contractual claims have to have a prospect of success. It is insufficient in English law simply to point to the commission of a competition infringement and claim that there is an implied term in a supply contract with the infringer that prices paid should not be affected by a cartel or similar anti-competitive behaviour — “such a term has never been found to exist”.²⁹

It appears that the courts in England therefore echo to some extent the concerns about foreseeability of scope of forum agreements expressed by the CJEU in its *CDC* judgment.³⁰ As the Court of Appeal noted — commenting on the *Fiona Trust* test in the context of interpreting a non-exclusive jurisdiction clause in a competition dispute:

“...rational businessmen would be surprised to be told that a [...] jurisdiction clause bound or entitled the parties [...] to litigate, in a contractually agreed forum, an entirely non-contractual claim for breach of statutory duty pursuant to Article

²⁴ *ibid*, para 13

²⁵ *ibid*, para 17

²⁶ *ibid*, para 19

²⁷ *Microsoft Mobile Oy v Sony Europe Ltd* [2017] EWHC 374 (Ch). For a discussion of the previous case law, Philip Landolt ‘Arbitration Clauses and Competition Law’ in Blanke and Landolt (eds) (n 11), 78-82

²⁸ *Angeliki Charis SA v Pagnan SpA — The Angelic Grace* [1995] Lloyd’s Rep 87 (CA), Leggatt LJ at 89

²⁹ *Ryanair v Esso Italiana* [2013] EWCA Civ 1450, Rix LJ at para 39.

³⁰ C-352/13 *CDC Hydrogen Peroxide SA v Akzo Nobel and others* (21 May 2015), ECLI:EU:C:2015:335, para 68

101, the essence of which depended on proof of unlawful arrangements between the seller and third parties with whom the buyer had no relationship whatsoever and the gravamen of which was a matter which probably affected many other potential claimants with whom such a buyer might very well wish to link itself.”³¹

Although this decision might appear to exclude all non-contractual claims for breach of competition law from the scope of pre-dispute arbitration agreements, in a subsequent English case the High Court has referred competition claims to arbitration in not dissimilar circumstances.³²

Microsoft (as successor to Nokia) claimed damages — both contractually and non-contractually — from various mobile phone battery manufacturers from whom it had bought under a standard supply agreement including an arbitration clause referring “any disputes relating” to the contract to arbitration under the ICC Rules.

The High Court stayed the claims brought by Microsoft (under s 9 Arbitration Act 1996) to allow arbitration to take place. This was because:

- the alleged breach of contract was that the prices — inflated by a cartel — charged to Microsoft were not negotiated in good faith. There was an *express* clause in the supply agreement requiring good faith price negotiation;
- the court appeared to accept that engaging in a cartel — even with non-parties to the contract in dispute — in relation to the products supplied under the contract was necessarily a breach of good faith;³³
- a rational businessman would have intended — at the time the agreement to arbitrate was made — that the arbitration clause covered both the (contractual) ‘bad faith’ claims and tortious (breach of duty) competition claims. It did not matter that the contractual claims had not (yet) been pleaded as long as they were ‘parallel’ to the tortious claims actually advanced;³⁴
- the strength of the contractual claims was, however, clearly relevant to the expectations of a rational businessman at the time the arbitration agreement was made. If they were too factually convoluted then they would not be sufficient to create a parallel link with claims for damages for breach of (non-contractual) duty not to infringe competition law;³⁵
- the ability to arbitrate the non-contractual claims under the arbitration clause was not affected by the CJEU’s *CDC* decision. The court was not bound by the Advocate General’s opinion (relied on by Microsoft to resist a stay for arbitration) and the CJEU’s judgment did not apply to arbitration;³⁶
- the fact that this might lead to ‘fragmentation’ of dispute resolution procedures in relation to the same cartel (since many claimants would not be party to an arbitration agreement) might permit the court to disregard

³¹ *Ryanair*, n29, para 46

³² *Microsoft Mobile Oy v Sony Europe Ltd* (n 27)

³³ *ibid*, para 70

³⁴ *ibid*, para 72

³⁵ *ibid*,

³⁶ *ibid*, para 80

the arbitration clause (based on the principle of effectiveness), but there was nothing which required this result and it was not appropriate in that case.³⁷

b) Other European legal systems

Similarly, in the recent German rail construction cartel case the Dortmund court also referred ‘related’ non-contractual and contractual claims to arbitration under German legislation.³⁸ Broad interpretations of the scope of the ‘defined legal relationship’ are also accepted elsewhere.³⁹ It is also — perhaps parenthetically — worth noting that most legal systems in Europe require good faith in the creation and performance of contractual obligations even in the absence of express terms.⁴⁰

The other main source of (mandatory) public policy rules which govern an arbitration procedure are those applied by the supervising court (of the seat) — that is, those required in the arbitration legislation of the *lex arbitri*.⁴¹ But — as arbitrators are not bound to follow civil litigation rules — it is not the case that *all* of the procedural prohibitions in the *lex arbitri* are imported: the wide discretion of arbitrators to set their own procedure in the absence of party agreement is almost universally recognised.⁴² For *procedural* matters, although the public policy of the law of the arbitration agreement will be very relevant, in the highly unlikely case of unavoidable conflict between the permitted scope of agreement to arbitrate — the public policy limits on the parties’ ability to consent to a collective procedure — and the public policy of the *lex arbitri*, the latter should normally prevail.⁴³ This may nevertheless mean that there is a public policy ‘double hurdle’ for a collective arbitration procedure to clear — both in the law of the agreement to arbitrate and in the *lex arbitri*.

The relatively expansive national approaches to the interpretation of arbitration agreements is in contrast to the more cautious position adopted by the CJEU. In particular, the CJEU’s view that “all dispute” clauses may not extend to non-contractual competition damages claims — as indicated in *CDC*⁴⁴ — is now influencing the application by some national courts in the EU of their domestic arbitration legislation.⁴⁵ The CJEU view in *CDC* (on its face limited to jurisdiction

³⁷ *ibid*, para 80-81

³⁸ Landesgericht Dortmund, 13 September 2017, 8 O 30/16 (Kart); ch 3.3.3

³⁹ UNCITRAL Guide (n 10), 49, (paras 28-29). The New York Convention (Art. II (1)) expressly extends its scope to non-contractual disputes.

⁴⁰ Bürgerliches Gesetzbuch §242 (Germany); Code Civil, art 1104 (France). *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) also appears to allow the implication of a good faith obligation into English law, although the position is not yet certain.

⁴¹ Born *Law and Practice* (n 10), 162. The UNCITRAL Model Law (n 15), art 19(1) makes equality of arms mandatory in arbitration laws adopting the Model Law: Arbitration Act 1996 s 33(1)

⁴² Born *Law and Practice* (n 10), 161; Arbitration Act 1996 s 38;

⁴³ Born, *ibid*, 156; Blackaby and Partasides (n 4), 176. The public policy objection must however be a fundamental one — AG Wathelet in *C-536/13 Gazprom*, Opinion of 4 December 2014, ECLI:EU:C2014:2414, 167 citing UNCITRAL Guide (n 10), 240 at para 4.

⁴⁴ n 30

clauses) may be incompatible with the view taken in *Fiona Trust* (in relation to arbitration clauses) and also generally accepted international arbitration practice.⁴⁶ We have, however, already noted, first that the English courts have also expressed similar concerns about foreseeability of expectations and, second, that the CJEU has so far refrained from extending its reasoning to arbitration agreements and, we suggest, it should continue to hesitate before doing so.

2.1.2 Collective contractual competition claims — the relevant law

Competition damages claims framed on a contractual basis are still the exception in competition litigation in Europe (and indeed more widely). However, where a significant number of claimants have purchased directly from the infringing defendant, and did so under related standard form contracts containing a sufficiently similar arbitration clause, it may be possible for these contractual claims — based on breach of a contractual duty of good faith or on misrepresentation — to be asserted in a single collective arbitration under the ‘related contracts’ doctrine.⁴⁷ The preliminary issue to be addressed — whether, as a matter of contractual interpretation, the arbitration clauses in the related contracts permit the single resolution of all of the disputes (‘are the clauses related enough?’) — is different from the main ‘admissibility’ question of whether there is sufficient similarity of the substantive claims for them to be arbitrated together (‘are the facts related enough?’).

The arguments for and against the ‘related contracts’ theory have been extensively rehearsed elsewhere.⁴⁸ The 2012 revisions to the ICC arbitration Rules introduced provisions allowing disputes in related contracts to be dealt with in a single arbitration.⁴⁹ However, the ICC Court — or an arbitrator already appointed under the ICC rules — may refuse to group all disputes together where the arbitration agreements in the various contracts are not compatible or where there is a *prima facie* question as to whether all of the parties to the related contracts have agreed that their claims should be determined together.⁵⁰

Assuming the arbitration agreements permit a single arbitration of the multiple contractual claims, which law will govern the collective arbitration and therefore provide the policy backdrop for the scope of the arbitrator’s jurisdiction?

Although EU legislation — the ‘Rome I’ Regulation⁵¹ — sets out clear rules for choosing the law applicable to a (commercial) contractual relationship, arbitration agreements (taken separately from any substantive contract in which they sit) are excluded from its scope.⁵² Nevertheless the main principle in the

⁴⁵ *Kemira Chemicals Oy v CDC Project 13 SA*, Gerechtshof Amsterdam, 21 July 2015, NTHR 2015, af. 5, 273

⁴⁶ Born *Law and Practice* (n 10), 92-93; Blackaby and Partasides (n 4), 94-95

⁴⁷ Andrea Steingruber *Consent in International Arbitration* (2012) OUP, 161-162; Bernard Hanotiau *Complex Arbitrations* (n 10), 111-114

⁴⁸ Bernard Hanotiau, *ibid*, 101-132, Andrea Steingruber, *ibid*, 161-163

⁴⁹ eg. ICC Arbitration Rules (2017), rule 9

⁵⁰ *ibid*, rule 6 (4)(ii)

⁵¹ Regulation 593/2008, Law applicable to contractual obligations (Rome I), OJEU [2008] L177/6

Regulation — that the parties to an agreement should be free to choose their law — is also widely recognized as being applicable to arbitration clauses.⁵³ If (as is usual) there is no separate express choice of law for the agreement to arbitrate, the arbitrator should be able to imply a choice of law using accepted principles of contract interpretation.⁵⁴

English courts normally imply the express choice of law (if there is one) in the substantive contract to which the arbitration clause relates — although this implication can be displaced by other factors.⁵⁵ But if there is no express choice of law even in the substantive contract — or the claim is made on a non-contractual basis — the *lex arbitri* will normally be used as the law of the agreement to arbitrate.⁵⁶ If the arbitration agreement is governed by English law, the wide ‘*Fiona Trust*’ principle of interpretation will mean that a standard arbitration clause should cover most non-contractual claims relating to the same competition infringement (event of mass harm) provided that there is a parallel arguable contractual claim.⁵⁷

However, the position may be different under applicable laws taking a less liberal approach to the permitted scope of arbitration agreements. And, as we discuss next, the parties may in that case have more restricted freedom to choose the law governing the arbitration agreement due to EU legislation on the applicable law for non-contractual obligations.⁵⁸

2.1.3. Applicable law in the arbitration of non-contractual competition claims

The majority of competition damages claims are made on a non-contractual basis and will therefore be arbitrated either under a widely drafted arbitration clause in an existing agreement or in a submission agreement. Different EU legislation — the ‘Rome II’ Regulation on choice of law in non-contractual obligations — will apply to the substantive obligation in dispute.⁵⁹ It is, however, worth noting the different scope of application of Rome II compared with Rome I:

- there is no express exclusion for arbitration;
- the choice of law indicated by it applies irrespective of the ‘court or tribunal seised’⁶⁰

⁵² *ibid*, Art 1(2)(e)

⁵³ *ibid*, Art 3(2); Blackaby and Partasides (n 4), 158-165

⁵⁴ *eg. Sulamerica Cia de Seguros SA v Enesa Engenharia SA* [2012] EWCA 638

⁵⁵ *ibid*, para 17

⁵⁶ *Habas Sinai AS v VSC Steel Company Ltd.* [2015] EWHC 4071 (Comm), paras 98-103

⁵⁷ *Microsoft Mobil Oy* (n 25); *The Angelic Grace* (n 22); discussed in section 2.1.1

⁵⁸ There is some doubt whether the choice of law rules of the seat (so including the Rome I and II Regulations for arbitrations in the EU) can bind an arbitrator — V V Veeder and Paul Stanley ‘The Arbitrator’s Perspective’ in Blanke and Landolt (eds) *EU and US Anti-trust Arbitration* (n11), 100-101; Blackaby and Partasides (n 4), 218-219.

⁵⁹ Regulation 864/2007, Law applicable to non-contractual obligations (Rome II), 11 July 2007, OJEU [2007] L199/40

⁶⁰ *ibid*, recital 8

- it is, however expressly ‘without prejudice’ to the international obligations of the EU Member States — although the New York Convention is not among those notified to the Commission for this purpose.⁶¹

Opinions are divided on whether either Regulation binds arbitrators.⁶² We briefly consider three main issues in relation to the Rome II Regulation in particular and then apply them in a collective arbitration context.

a) Arbitrators excluded from Rome II?

The exclusion of arbitration from the scope of both the Brussels Regulation and the Rome I Regulation is not repeated in the Rome II Regulation. Its omission in only one of the three closely related EU legislative instruments on international private law, this may therefore give rise to the inference that the Regulation does indeed cover non-contractual arbitrations and that the choice by the arbitrator of the law for the resolution of the substantive non-contractual dispute would then have to follow its requirements.⁶³

There are two reasons why this straightforward conclusion may be mistaken, even based on the drafting of the EU legislation. First, the recitals to the Rome II Regulation indicate that the scope and provisions of the Rome II Regulation are to be *consistent* with those of the Brussels I and Rome I Regulations.⁶⁴ This might indicate that the express exclusion of arbitration should carry over to the Rome II Regulation. But the requirement is only one of consistency, not uniformity: it does not necessarily follow that subjecting an arbitrator to the Rome II rules for non-contractual obligations is inconsistent with the exclusion of arbitration from other EU legislation relating to jurisdiction and choice of law.

The second reason is that the extension of a pre-dispute arbitration agreement to cover non-contractual claims requires a related, arguable, contractual claim.⁶⁵ But the substantive law of that contract claim, indicated by the Rome I Regulation, may not apply to determine the scope of the separate arbitration agreement — the arbitrator may therefore have a freer hand to assume jurisdiction than a court in the same factual circumstances.⁶⁶ In contrast, the substantive law applying to resolve a non-contractual dispute will be that designated by the Rome II Regulation, assuming no ‘arbitration exception’. As we discuss later in this section,

⁶¹ *ibid*, art 28; the notifications are published at [2010] OJEU C343/7

⁶² Pedro De Miguel Ascensio, ‘The Rome I and Rome II Regulations in International Commercial Arbitration’ in *The Impact of EU Law on International Commercial Arbitration* Ferraris, F (ed) (2017) *Juris*, 11 and 24; Veeder and Stanley (n 58)

⁶³ Yves Derains comments, however, that court review of an arbitrator’s choice of ‘norm’ to apply to the merits will only address ‘blatant disregard’ of the parties’ choice — ‘Applying EU Competition Law from a Continental Perspective’ in Blanke and Landolt (eds) (n11), 495

⁶⁴ Rome II Regulation, (n 59), recital 7

⁶⁵ *The Angelic Grace* (n 22)

⁶⁶ Rome I Regulation, (n 59), art 1 (2)(e). The English decisions in *Sulamerica*, (n 54) and *Habas Sinai* (n 56) suggest that the implication that the substantive contractual law is also the law of the arbitration agreement may be displaced by the *lex arbitri*. Indeed, it is open to question whether arbitrators are bound by the Rome I and Rome II Regulations at all: Paul Torremans (ed) *Cheshire North & Fawcett – Private international Law*, 15 ed (2017) OUP, 700

special rules apply under Rome II to designate the law applicable to substantive torts arising from breaches of competition law, and the parties to the dispute may not contract out of them — including, therefore, through the use of an arbitration agreement.⁶⁷ The risk of divergences in law applying to the (tortious) ‘substance’ — including the quasi-procedural issues — and the determination of the jurisdiction and admissibility questions under the (contractual) law of the arbitration agreement or the *lex arbitri* is, therefore, a real one.

b) ‘Irrespective of court or tribunal’

The Rome II Regulation applies to all courts or tribunals:⁶⁸ does this include arbitral tribunals? This proposition has been doubted on simple linguistic grounds.⁶⁹ The designation ‘arbitral tribunal’ is not universal in all EU languages and appears to be a matter of convention in English. Moreover, we have seen that arbitrators are not ‘courts or tribunals’ for the purposes of the TFEU — in particular Article 267 — as they are not able to make references for interpretation of EU law directly to the CJEU as EU courts may.⁷⁰ Since the CJEU has competence to give rulings on the interpretation of the Rome II Regulation,⁷¹ it would be inconsistent to include arbitrators in the definition of courts or tribunals able to apply the Regulation when they are outside the ‘mutual trust’ system which underpins its rules.

c) Compliance with international obligations

The Rome II Regulation is ‘without prejudice’ to the international obligations of Member States.⁷² For this express ‘carve out’ to apply, the international obligations in question have to be notified to the EU Commission.⁷³ The notifications do not, however, include the New York Convention,⁷⁴ so the express ‘without prejudice’ exception will not apply to allow international arbitration procedures to override the Rome II Regulation. Nevertheless, Article 351 TFEU provides for a general ‘override’ for pre-existing international Treaties to which both EU Member States and third states are party.⁷⁵ The effect of the Rome II Regulation (secondary legislation made under that Treaty) cannot alter the effect of Art 351 as regards the New York Convention.

However, and as a matter of practical — rather than strictly legal — practice, if the arbitrator is to render an award which is to be enforced in the EU, there is a high chance that enforcement will be challenged if the arbitrator does not apply the Rome II rules to resolving the substance of the non-contractual competition

⁶⁷ n 59, art 6(4)

⁶⁸ n 59

⁶⁹ De Miguel Ascensio, (n 62)

⁷⁰ ch 3.3.1 above; Treaty on Functioning of the EU (TFEU), [2016] OJEU C202/1, art 267

⁷¹ *ibid*,

⁷² Rome II Regulation (n 59), art 28

⁷³ *ibid*, art 29

⁷⁴ n 61

⁷⁵ ch 3.1.2. Cf. C-284/16 *Slovak Republic v Achmea BV* (6 March 2018) ECLI:EU:C:2018:158, where an arbitration agreement articulated in a (pre-accession) treaty between two EU Member States *only* was overridden by EU law as Art 351 TFE did not apply.

dispute. Although there must be significant doubt — as indicated by Advocate General Wathelet in *Gazprom*⁷⁶ — that EU conflict of law rules are sufficiently fundamental to constitute an *ordre public* exception for the purposes of Article V(2)(b) of the New York Convention, nevertheless there must be a risk that an enforcing court might take a different view.

We therefore assume for our further discussion here that Rome II applies to the resolution of the substantive non-contractual dispute by an arbitrator — although it will not necessarily designate the applicable law of the arbitration agreement itself.

d) Applicable law in the Rome II Regulation

The general rule in the Rome II Regulation is that the law applicable to a non-contractual dispute is that of the country in which the damage occurs, although this default principle can be displaced if there is another law which has a “manifestly” closer connection to the obligation.⁷⁷ This may occur, in particular, where the tort claim is in the context of a pre-existing contractual relationship having a different proper law.⁷⁸

The parties to a non-contractual dispute may (as an exception to the general rule) usually choose the substantive law to be applied to the obligation — either in an agreement made after the event of harm has occurred or (but only between businesses) in a pre-dispute forum clause.⁷⁹ However, this principle of freedom of choice is subject to important exceptions: for example, the choice of substantive law cannot avoid the ‘mandatory’ rules of the law of the court seised.⁸⁰

More importantly for our purposes, there are also special choice of law rules in Rome II for certain types of substantive non-contractual claim — and competition law claims are among those to have their own regime.⁸¹ Because of the strong possibility that a number of different laws would apply to non-contractual claims against cartels (in particular), Article 6(3)(b) of the Rome II Regulation provides:

[...] the person seeking compensation for damage who sues in the court of the domicile of the defendant, may [...] choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; [...]

Importantly, it is not open to the parties together to agree to apply a different law — the ‘freedom of choice’ rule in the Regulation is disapplied to non-contractual competition claims.⁸² A choice of law clause for the *substance* of a non-contractual competition dispute is therefore ineffective in the EU.

⁷⁶ Opinion (4 December 2014) in C-536/13 (n 43), paras 180-182

⁷⁷ Rome II Regulation (n 59), art 4; Torremans (n 66), 827-828

⁷⁸ *ibid*, art 4(3)

⁷⁹ *ibid*, art 14

⁸⁰ *ibid*, art 16

⁸¹ *ibid*, art 6(3)

⁸² *ibid*, art 6(4)

Why is the proper law of the substantive (non-contractual) competition obligation relevant to the *procedure* to be used in the collective arbitration? The Rome II Regulation, despite only applying to the substance, requires certain issues which have a significant procedural impact (our ‘quasi-procedural’ matters) to be decided according to the law applying to the substantive non-contractual obligation in dispute.⁸³

These issues can be especially important for collective proceedings. In particular, the ‘substantive’ law governs

- whether rights under non-contractual obligations may be transferred — which will affect the validity of any representative action by assignment;⁸⁴
- who is entitled to compensation for damage sustained — which may affect the scope of a representative’s procedural power to act for the group;⁸⁵
- liability for the acts of another person — which may affect joint and several liability of defendants and liability of any interested third parties.⁸⁶

How, then, should the mandatory ‘quasi-procedural’ rules in Article 6 of the ‘Rome II’ Regulation be applied in an arbitration context?

Article 6 only fully applies where the claim is made ‘in the court of the domicile’ of a defendant. But the concept of the seat of an arbitration cannot be fully assimilated with the seat of a court. In most cases the seat of arbitration will be chosen directly or indirectly by the parties.⁸⁷ The concept of an arbitration’s seat is not, therefore capable of designating a set of rules which cannot be derogated from by party agreement — contrary to the apparent purpose of Article 6(4) of the Regulation.

The reason for the disapplication of the Rome II ‘freedom of choice’ provisions to competition disputes through Article 6 is not explained in the Regulation.⁸⁸ And neither does the Rome II Regulation — nor the Brussels I Regulation⁸⁹ — affect the ability of parties to choose the *seat* of their arbitration, a freedom widely recognised in international law.⁹⁰ The choice of seat normally also indicates the choice of *lex arbitri* — the source of the main set of rules applied to *procedural* matters during the arbitration.⁹¹ By exercising this choice with care, the parties

⁸³ *ibid*, art 15

⁸⁴ *ibid*, art 15(e)

⁸⁵ *ibid*, art 15(f)

⁸⁶ *ibid*, art 15(g) but note requirements in damages Directive 2014/104 (n 13) harmonizing some of these rules for competition claims, (art 11)

⁸⁷ Blackaby and Partasides (n 4), 99, 168-170; Born *Law and Practice* (n 8), 245. The ICC Rules permit the ICC Court to designate the seat of an ICC arbitration (Art 18(1))

⁸⁸ It *appears* that it is indeed to prevent defendants from using fine arguments about applicable law to frustrate the rights of claimants to compensation for competition infringements - recitals 21-22. Also, eg. Ralf Michaels ‘European Class Actions and Applicable Law’ in Arnaud Nuyts and Nikitas Hatzimihail (eds) *Cross-Border Class Arbitrations: the European Way* (2014) Sellier 130-131; Astrid Stadler ‘Conflicts of Laws in Multinational Collective Actions – a Juridical Nightmare?’ in Duncan Fairgrieve and Eva Lein (eds), *Extraterritoriality and Collective Redress* (2012) OUP 191

⁸⁹ Regulation (EC) 1215/12 [2012] OJEU 351/1

⁹⁰ UNCITRAL Model Law (n 13), art 20(1); Arbitration Act 1996 s. 34(1) and 34 (2)(a).

⁹¹ Blackaby and Partasides (n 4) 171-173

will (despite Rome II) be able to give the arbitrator a broad procedural discretion — a freedom considered further in chapter 5.

Furthermore, although Article 6 severely limits the ability of the *parties* to the dispute to choose the law of the agreement to arbitrate, it does not similarly constrain the power of the *arbitrator* to decide on the appropriate law. Even on our hypothesis that the Rome II Regulation applies to the arbitrator, is he permitted to depart from the mandatory special competition rule — designed for a litigation context — when arbitrating competition claims? Can he, for example, apply a different law to the validity of assignments of non-contractual competition claims (one of the ‘quasi-procedural’ rules where the Regulation binds)?

The recitals to the Regulation appear to give some discretion, despite the apparently strict mandatory wording of Article 6:

The special rule in Article 6 is not an exception to the general rule [...] but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly.⁹²

It would, then, appear still to be open to an arbitrator to apply the Article 4 ‘general rule’ — designating the law of the place of harm or (importantly) the law to which the dispute has a manifestly closer connection — instead of full application of the Article 6 competition exception. This will be particularly important where inflexible application of the competition exception might mean that more than one substantive law is indicated. This would in turn import a plurality of ‘quasi-procedural’ laws — and their policy choices — making the collective arbitration procedure very difficult to manage effectively.

The Regulation’s ‘general rule’ — and in particular the ‘manifestly closer connection’ escape valve contained in it⁹³ — is likely to describe the method used by any sensible arbitrator to determine the law of the obligation, even in the absence of any special EU choice of rules indicating how this should be done.⁹⁴ In practice, therefore, situations where an arbitrator is compelled to use a different law for the substantive (non-contractual) obligation and ‘quasi-procedural’ matters, and for the interpretation of the arbitration agreement are likely to be exceptionally rare.

e) Application in a collective arbitration

However, the arbitrator (or supervising court) will need to conduct at least some inquiry into the facts of the infringement — to assess the place of harm — before determining the law of the arbitration agreement and therefore any relevant public policy limits on the arbitrator’s jurisdiction contained in it. We doubt whether an arbitrator could ever reasonably apply a law in a competition dispute (either substantive or quasi-procedural), which is the law of a place where there

⁹² Rome II Regulation (n 59), recital 21

⁹³ *ibid*, recital 18

⁹⁴ as an analogy, the Model Law (n 13, article 20) allows the arbitrator to take all circumstances into account when determining the *seat* of the arbitration

was *no* effect on competition from the event of mass harm giving rise to the obligation to compensate. We suggest that a law other than of one of the EU *loci damni* will not be the law with which the (collective) dispute arising from a breach of EU competition law has its closest connection.⁹⁵

Questions of fact as to the place of harm may themselves require significant evidence — particularly in cases which do not follow-on from a competition authority decision. A *prima facie* reasoning should be sufficient at this early stage of the arbitration procedure, but will need to be shown in the award to avoid the risk of the choice of law — and (potentially) findings on the scope of the arbitration agreement (jurisdiction) or admissibility of collective procedure — being rejected by an enforcing court.

From this we suggest that — despite the restrictions on party freedom of choice of (substantive) law in Article 6 of the Rome II Regulation — parties should nevertheless continue to choose a law to apply to their arbitration agreement in competition cases. This choice may not override ‘quasi-procedural’ requirements in the law applied by operation of the Rome II Regulation to the substantive obligation. However, the arbitrator should nevertheless be invited to take their choice into account when deciding on the law of the arbitration procedure — particularly if using the ‘closer connection’ test — provided that the law chosen is the law of a place where harm from the EU competition infringement was felt.

So, an agreement to arbitrate a competition claim, in which the parties choose a desired seat of arbitration *and its law* to govern their arbitration agreement, is likely to prompt an arbitrator to select the same law to govern the substantive obligation (and its quasi-procedural elements) if at all possible. The procedural public policy requirements applying to the collective arbitration under each of the three legal systems applying to it will then be identical — making the arbitrator’s procedural choices in what will be a complex case significantly easier to manage.

To summarise here, although the parties have a degree of freedom to choose the law applying to the procedure for arbitrating a non-contractual competition dispute, that freedom is limited. The ultimate determination of the applicable law(s) lies with the arbitrator who may — in this case — override the choice of the parties. He may not, however, override their choice of the seat of arbitration.⁹⁶ The *lex arbitri* can therefore in effect be chosen by the parties, provided that the selected *locus arbitri* is a place where the EU competition infringement caused harm to at least some of the claimant group.

It must be in all parties’ interests for a consistent legal framework to apply to all matters relating to procedure in the arbitration and they should therefore choose the seat of arbitration with this in mind. In claims for breach of EU competition law — where there must be at least a potential effect on competition in the EU for the infringement to have occurred — the seat of arbitration *may* need to be in an

⁹⁵ Recital 18 to the Rome II Regulation (n 59) makes it clear that the law of the place of harm is the general rule for the applicable law in tort claims. The ‘manifestly closer connection’ test is seen as an exceptional provision.

⁹⁶ n 69

EU (or EEA) state. But within this limit, it is possible for the parties to ensure that the arbitrator will have a significant degree of freedom to craft the most appropriate procedure. Party selection of the most appropriate European seat will be key to the later recognition of the collective award made using the procedure the arbitrator decides to admit.

2.2. Setting the procedure: when collective arbitration is appropriate

Within the boundaries set by relevant public policy (and consent), the arbitrator will then need to decide if the collective treatment of the claims before him is appropriate. The usual factors considered outside Europe for a *litigated* ‘class action’ or similar claims are (broadly) the number of class members (or ‘numerosity’), ‘commonality’ of the issues to be decided, ‘superiority’ of using the chosen method of collective redress over other procedures — and (usually) a catch all overall ‘reasonableness’ or suitability test (which we need not consider further here).⁹⁷ We suggest that these three litigation criteria represent a sensible starting point for assessing the admissibility of collective competition arbitration procedures in the EU.⁹⁸

2.2.1 Number of represented claimants

When considering numbers of claimants in a collective claim to be arbitrated, there appear to be two questions to be answered. First — as with litigation — the arbitrator will need to consider how many claimants have been affected by the competition infringement in dispute. Second, and additionally for an arbitration, the arbitrator will also need to consider the size of the sub-group of that ‘class’ which has or — importantly — could, expressly or impliedly consent to the arbitration by directly or indirectly adhering to the arbitration agreement.

The minimum threshold number of a group to be represented in collective court proceedings organised under national laws in the EU (and elsewhere) is usually relatively low. For example, in the UK and Ontario statutes, the threshold is just two or more claimants.⁹⁹ However, in many class action jurisdictions, even if numbers are above the minimum required, civil procedure rules normally include a discretion to decide whether there are sufficient group members to justify the use of a formal collective procedure rather than simply relying on existing joinder or consolidation rules.¹⁰⁰ In this sense the ‘numerosity’ criterion is a branch of the ‘superiority’ criterion discussed below.¹⁰¹

Collective competition arbitration proceedings could arise in a wide number of ways.¹⁰² This can mean that a person who does not expressly consent to arbitrate

⁹⁷ Rachel Mulheron, *The Class Action in Common Law Legal Systems* (2004) Hart, 115, 165-166, 219; US Federal Rules of Civil Procedure (FRCP), title 28 US Code, §2072, r 23. The ‘reasonableness’ criterion is in general so specific to the facts of each case that we doubt an analytical consideration of it is either necessary or, indeed, possible.

⁹⁸ as does Bernard Hanotiau *Complex Arbitrations* (n 10), 262

⁹⁹ Competition Act 1998, s 47B(1); Class Proceedings Act 1992, SO 1992, c6, s5(1)(b) (Ontario).

¹⁰⁰ ch 2.3.3.1; FRCP (n 97), r 23(c)(1)(A); ICC Rules of Arbitration (2017), rr 9 and 10.

¹⁰¹ at 2.2.3

¹⁰² Bernard Hanotiau *Complex Arbitrations* (n 10), 8-9

his particular dispute collectively could nevertheless be bound by his implied consent where a representative claimant is acting for the other claimants within a group to which that person belongs.¹⁰³

Most methods of creating a representative collective claim have an ‘audit’ trail of consent from each member of the group who is being represented to the representative — even if only on a membership application form — and the extent of the consent of the group members can be verified. Such representative proceedings would satisfy the requirement in the New York Convention that submission to arbitration be by agreement in writing.¹⁰⁴ The parties to the arbitration agreement for the purposes of Article I of the Convention are the representative and the defendant(s).

A *court* asked to refer the parties to arbitration might therefore be justified in only referring the ‘dispute’ as between the defendant and the representative claimant, acting only on his own behalf and that of others who have *already* given him a power to arbitrate. The arbitration would therefore not, at that point, include group members who have not yet expressly consented to participate in the particular collective arbitration proceedings under review, using the representative claimant appearing before the court.¹⁰⁵ Under national arbitration regimes following the principles in the Model Law, the court seised by a group member cannot recognize the ‘potential’ for him to participate in the arbitration and so refuse to act itself in the individual dispute he brings before it.¹⁰⁶

We do not believe, however, that it follows that an *arbitrator* cannot take account of the position of potential group members when considering the numerosity criterion. First, a proposed collective arbitration may clearly affect the position of persons capable of consenting to participate in the arbitration, even if they have not yet done so. For example, findings in an arbitration brought by a group of residents in EU Member State A may well have a *de facto* effect on the position of similarly situated victims in Member State B who are not represented but fall within the (material) scope of the proposed class affected.

Second, an award or refusal to award compensation to a group of direct purchasers from (for example) a cartel may have an effect on the position of indirect purchasers who bought cartel products from those direct purchasers. They are ‘concerned’ by the outcome of the arbitration but not within the existing claimant group which has expressly consented to that particular collective arbitration.

¹⁰³ Hanotiau, *ibid*, identifies adherence by estoppel, by belonging to a group with a community of rights and consolidation on the grounds of good administration of justice as situations where a full chain of consent may not be present: at 20-28, 39-43, 47-49

¹⁰⁴ (n 10) Article II (1)

¹⁰⁵ Andrea Steingruber *Consent in International Arbitration* (n 47), 170; Bernard Hanotiau *Complex Arbitrations* (n 10), 165-167 noting that all of the (existing) parties to the arbitration must have consented to the joinder of additional group members

¹⁰⁶ UNCITRAL Model Law (n 15) Art 8. This general approach is followed in the UK Arbitration Act 1996, s 9(1). However, if the group member is bound by the arbitration agreement, the court will be required to refer his individual dispute to separate arbitration.

We think it would run counter to the right to an effective remedy for competition law breaches if an arbitrator could not take the number of *potential* members of the group into account when deciding whether to proceed with a collective arbitration of the dispute.¹⁰⁷ The fact that claimants who could do so have not yet joined the collective arbitration should not be used to deny them the potential advantages of joining the collective proceeding in the future. Even where there are others who cannot join the existing group but are concerned by the outcome of the claim (our second example above) an arbitrator may need to take account of their positions if the risk of successful challenge to the enforcement of the (collective) award is to be minimised. How far the arbitrator should take account of potential parties may also depend on the public policy in the law governing the arbitration procedure — primarily (as we have seen) the *lex arbitri*.¹⁰⁸ For example, German collective redress legislation recognizes the (non-party) status of “concerned others” (*Beigeladenen*) who have claims which ‘depend’ on the collective claim.¹⁰⁹

In short, application of the numerosity requirement in considering the admissibility of a collective arbitration procedure should address not only the number of persons actually represented at the time the decision to order a collective arbitration is taken, but also those who are *potential* members of the represented group. The number of “concerned others” whose interests may be materially affected by the outcome of the arbitration and who may be able to adhere to it later should also be taken into account.

2.2.2 Commonality of claims made collectively

After considering the number of actual and potential claimants in the arbitration, the arbitrator will also need to consider how closely related the claims of the proposed class members are.¹¹⁰ Do they have enough in common for a collective arbitration to be viable and manageable?

A first point of reference may be any provisions in the law of the arbitration agreement or the civil procedure rules of the *lex arbitri* — is there a test there for the degree of connection between the claims advanced by the members of the group? Since the question of ‘commonality’ is — as discussed in chapter 2 — primarily a question of procedure not substance, any rules in the *lex arbitri* should take precedence. However, given the arbitrator’s wide procedural discretion he clearly cannot be *bound* by any national procedural rules. If no clear test can be found in the *lex arbitri*, is there a European or internationally accepted standard which the arbitrator can use? We believe that there is, as we discuss below.

¹⁰⁷ ch 3.1.1; Directive 2014/104 (n 13), recitals 4-5

¹⁰⁸ Blackaby and Partasides (n 4), 167-170

¹⁰⁹ Kapitalanlegermusterverfahrensgesetz (KapMuG) (19 October 2012, as amended), [2017] BGBl I S 1693, § 14

¹¹⁰ for a general discussion of the ‘commonality’ principle in class actions, see Rachel Mulheron, (n 97), ch 6

Even where there is sufficient commonality, how far will the resolution of the common claims serve to resolve the dispute as a whole?¹¹¹ If the common claims are only incidental parts of the overall picture, they may not justify the use of a formal collective redress mechanism — so do they ‘predominate? If the common issues are to be decided in a collective arbitration how will any individual issues (from claimants and defendants) be dealt with? Are these issues truly *individual*, or can a number of them be grouped as a ‘sub-class’?

a) Degree of connection of claims

Collective redress mechanisms vary widely in the test used to determine whether claims advanced on a collective basis have a sufficient degree of commonality to justify the use of the mechanism. We set out here the more important tests used in a number of the main jurisdictions — starting with the most restrictive and moving to the most permissive:

- ‘the same interest in a claim’ (English CPR 19.6 ‘representative action’)
- ‘placées dans une situation identique ou similaire’ (France, ‘loi Hamon’ 17 March 2014) (‘identical or similar’)
- ‘veroorzaakt door een gebeurtenis of gelijksoortige gebeurtenissen’, (Netherlands, law 23 June 2005, collective settlement of mass claims) (‘similar events’)
- ‘questions of law or fact common to the class’ [which] ‘predominate over questions affecting only individual members’ (US FRCP 23 ‘class action’)
- ‘the claims [...] raise common [but not necessarily identical] issues [of law or fact]’ (Ontario Class Proceedings Act 1992)¹¹²
- ‘give rise to common or related issues of fact or law’ (England CPR 19.10, group litigation order)
- ‘the same, similar or related issues of fact or law’ (England, Competition Act 1998 section 47B, collective proceedings)
- ‘eine Bedeutung für andere Rechtsstreitigkeiten gegeben ist’ (Germany, KapMuG)(‘relevant for other disputes’)¹¹³

These tests clearly need to be considered in the context of the legislation in which they sit. In particular, some of the more permissive ‘commonality’ tests are found in statutes which only allow ‘opt-in’ collective redress (for example the German KapMuG)¹¹⁴ whereas the most restrictive may apply to procedures which automatically include all members of the group without the possibility of an ‘opt-out’ (English representative action).¹¹⁵ It is also noticeable that non-European regimes appear to have a more permissive approach to the commonality issue than those in Europe.¹¹⁶

¹¹¹ *ibid*, 201-208

¹¹² the gloss in square brackets results from the case law of the Ontario Divisional Court in *Johnson v Boulanger*, 64 OR (3d) 208, commented in Rachel Mulheron (n 35), 212-213

¹¹³ n 109, § 3(3)

¹¹⁴ *ibid*, § 9(1)

¹¹⁵ CPR r 19.6

¹¹⁶ Rachel Mulheron (n 97), 166: it is sufficient for there to be common issues of law in Anglo-Saxon class action jurisdictions, whereas continental statutes focus on the factual commonality of the claims.

Is it possible to draw any European general principles on commonality from this diversity (or from international practice) for arbitrators to use?¹¹⁷

The ‘median’ formulation (for use in Europe) appears to be that the claims should be the ‘same or similar’. Some of the tests add a more permissive ‘or related’ element, but this appears far from universal. This difference may not appear significant but, in claims for competition damages, it may be of some importance. If ‘the same, similar or related’ issues are sufficient to create a single class, we suggest that all claims for compensation for harm which are caused by the same breach of competition law (eg. a single cartel) are likely to fall within the ambit of that class. In contrast, where only the ‘same or similar’ claims can form a class, it is likely that direct and indirect purchasers from the infringers would need to be marshalled into separate classes.

Although direct and indirect purchaser claims from a single infringement are clearly ‘related’, in that they rely on the same factual matrix for liability, we doubt that they can be properly described as ‘similar’ to each other. A direct purchaser’s claim against a cartel (which has been the subject of an infringement decision, for example) will normally be focused on establishing the quantum of the overcharge. In contrast an indirect purchaser claim — particularly where the claimant purchased non-cartel products incorporating the cartel goods — will also need to show that the overcharge was passed on to him as an integral part of his claim. Despite the presumptions in the ‘damages Directive’ making this task easier, it is still a qualitatively different claim from that of a direct purchaser — requiring different evidence and legal and economic support.¹¹⁸

Taking a more limited ‘median’ approach to commonality (‘similar’ claims only) not only limits the possible objections to recognition of the award across the EU but would also reduce the possibility of conflicts arising within the class after collective proceedings have commenced.¹¹⁹ Using a wider ‘or related’ test to define commonality must increase the risk of the greater diversity within the class leading to the discovery late in the day of some class members having interests which conflict with each other or with those of the class representative.

b) Predominance of the common claims and dealing with individual issues

The requirement in US civil procedure, that the claims common to the class must predominate over the individual issues which the class members may wish to assert, finds a legislative parallel in some, but not all, other class action litigation regimes.¹²⁰

¹¹⁷ *Abaclat v Argentina*, ICSID ARB/07/5, jurisdiction and admissibility award (4 August 2011) uses a ‘sufficiently homogenous’ test.

¹¹⁸ Directive 2014/104 (n 13), art. 14(2)

¹¹⁹ *Emerald Supplies v BA plc* [2009] EWHC 741 Ch. Morritt Ch noted (para 36) that the proposed group to be represented under CPR 19.6 had potential internal conflicts — group members would not, therefore, have the ‘same’ interest in the claim.

¹²⁰ US Federal Rules of Civil Procedure 23(b)(3); Rachel Mulheron (n 97), 190-191

The arbitrator's approach to this question will, of course, be conditioned by the closeness of the connection required between the claims. If the connection does not need to be particularly close, it is more likely that the common issues will be an important part of the overall group claim. For EU collective competition law claims we have suggested 'the same or similar' — a tight test. Deciding the 'predominance' question will require a consideration of how far the resolution of the common claims, marshalled using this test, will go in resolving the totality of the dispute between the defendant(s) and each group claimant. If the (similar) common issues are merely peripheral to the core of each claimant's overall claim (with individual issues outweighing them), collective treatment may not be appropriate.

It has been suggested that three issues have normally been addressed in (non-European) class jurisdictions:¹²¹

- a weighing of the common and the individual claims ('the comparative shopping list') should be used as a starting point to answer the question 'are the common issues significant enough'?
- will resolution of the common issues significantly advance the resolution of the dispute for *all* class members?
- will the separate resolution of *individual* issues cause the proceedings to degenerate into a unmanageable mass? That is, will the resources needed to adjudicate on the individual issues mean that a collective proceeding is not appropriate.

In practice we suspect that a proper application of these threshold tests comes close to a requirement that the common issues 'predominate' in the collective proceedings. We suggest that an arbitrator might sensibly use them as a basis for his decision on the appropriateness of collective resolution of the same or similar claims presented to him collectively.

How the arbitrator chooses to deal with truly individual issues will depend heavily on the facts of the particular claims: a detailed examination of how best to manage them is outside the scope of this thesis. It may be that most of the 'individual' issues are in fact capable of being grouped together in a number of sub-classes and dealt with *en masse* in this way. And it may be appropriate for certain properly individual issues which are peripheral to the collective arbitration to be dealt with in other litigated, arbitrated or mediated proceedings — although the arbitrator would need to receive a waiver from or on behalf of the claimant(s) in question, relieving him of the duty to resolve the whole of each dispute referred to him.¹²²

2.2.3 Superiority of collective arbitration over other available dispute resolution procedures

Assuming a sufficient number of potential claimants having the same or similar competition claims whose common adjudication would significantly advance the

¹²¹ Mulheron, (ibid,) 208-209

¹²² Blackaby and Partasides (n 4), 23-24. If the arbitration clause is in a standard form, *all* disputes will need to be referred to arbitration — separate arbitration proceedings may therefore be necessary for the individual issues.

overall resolution of the dispute, will this alone be enough to permit an arbitrator to use a collective redress process?

We suggest that an arbitrator should also consider the alternatives to a collective competition arbitration — both from the point of view of the claimants and the defendants.¹²³ This implies a two stage analysis. First what are the (practically) available alternatives — in particular how far does the arbitrator need to consider litigation procedures as well as ADR techniques. Second, what criteria should the arbitrator use to carry out the balancing exercise between these alternatives?

The New York Convention requires courts to refer *all* disputes which fall within the scope of a valid arbitration agreement to arbitration.¹²⁴ This is also the position under arbitration legislation in EU Member States.¹²⁵ Those claimants who have (directly or indirectly) already consented to arbitration at the time the arbitrator considers whether a collective arbitration procedure would be preferable (superior) to alternatives are bound by their choice. The arbitrator will not need to consider whether, for them, collective *litigation* procedures would be superior: they are simply not available.

The arbitrator should not limit his consideration only to those parties who have already consented to arbitration but also to potential parties. Since the potential parties will not, at the point of the arbitrator's evaluation of alternatives, be bound to the particular collective arbitration, the possibility that they will prefer to arbitrate individually — or (if they have yet to consent to arbitration at all) litigate — will need to be taken into consideration. This is likely to be particularly important where the potential size of the “class in arbitration” is large but at the time of the decision on admissibility of collective arbitration, only a small number of class members have adhered to the collective proceedings. How far does the arbitrator's inquiry need to extend?

The extent of this inquiry must depend on the available evidence that there are significant numbers of potential parties who could choose (or not) to bring claims in the collective arbitration. In particular, where the proposed representative — or the defendants — inform the arbitrator of a substantial number of potential claimants in the arbitration able to litigate collectively in a specific jurisdiction, the arbitrators should consider the likelihood and effectiveness of available litigated procedures when addressing the ‘superiority’ criterion. However, we do not believe that an arbitrator either practically can or should engage in a general and hypothetical survey of collective redress litigation procedures across Europe when deciding whether an arbitrated collective procedure is the preferable (superior) way forward.¹²⁶

¹²³ *Abaclat* jurisdiction and admissibility award (n 117), paras 545-546

¹²⁴ Convention (n 10), Art II(3)

¹²⁵ Arbitration Act 1996, s. 9 (UK); code de procedure civile art. 1448 (France)

¹²⁶ The European Commission collects data and has published studies in this area which are available to an arbitrator, eg. *State of Collective Redress in the EU in the Context of the Commission Recommendation*, BIICL (2017) JUST/2016/JCOO/FW/CIVI/0099

In practice, therefore, concern would only arise where an identified and significant part of the group of potential claimants is domiciled in a country which has a significantly more advanced litigated collective procedure regime than that which could be adopted by the arbitrator consistent with the arbitration agreement and the *lex arbitri*. In this rare case, the arbitrator may conclude that collective arbitration in the chosen seat may not be the superior way of resolving the overall competition dispute.

2.3. Approving the representative

Not all forms of collective redress require a representative claimant, but where there are a large number of actual claimants — or, even though the actual claimants are few, a significant number of potential claimants — a representative model is likely to give more effective redress to the claimant class and a greater degree of finality to the defendants, as well as being more manageable for the arbitrator.

What criteria should be applied by an arbitrator to select a representative and what process should be used to apply the criteria?

Potential representatives can be broadly divided into two categories: either persons who have a *prima facie* claim against the infringers — a class member — or bodies which represent their members (for example, trade or consumer associations) who in turn form all or part of the class which has suffered harm. The use of class members as representatives is the ‘traditional’ position in (non-European) class action jurisdictions.¹²⁷ In contrast the use of a representative body (an ‘ideological’ representative) is commonplace in Europe and a class member representative is the exception.¹²⁸ Clearly the criteria used to assess the suitability of a representative body may need to be different from those used to assess a representative class member.

In *Schrems*, the CJEU considered the application of the EU general principle of effectiveness to a representative consumer claim in Austria for breach of EU data protection legislation.¹²⁹ The CJEU was asked whether an *ad hoc* Austrian association representing a group of EU consumers could use the special jurisdiction rules in the EU Regulation on civil jurisdiction to bring a consumer claim on behalf of *all* of them in the Austrian courts.¹³⁰ The CJEU decided that it could not.¹³¹ The special consumer rules in the Regulation only applied where the consumer was himself a direct party to the claim and the representative — despite

¹²⁷ Rachel Mulheron (n 97) 304-305. The US rule is that the representative must be a class member — FRCP (n 97) r 23(a).

¹²⁸ Commission Recommendation on common principles for [...] collective redress mechanisms [...], 11 June 2013, [2013] OJEU L201/60, recital 18

¹²⁹ C-498/16, *Maximilian Schrems v Facebook Ireland Ltd* (25 January 2018) ECLI:EU:C:2018:37

¹³⁰ *ibid*, paras 16-17, applying art 16(1) Regulation 44/2001 [2001] OJEU L 12/1, now art 18(1), Regulation 1215/2012 on the recognition and enforcement of civil and commercial judgments [2012] OJEU L351/1

¹³¹ *Schrems*, *ibid*, para 217

being an Austrian consumer — could not avoid the jurisdiction rules applying to group members by bringing a collective action only in his own name.¹³²

We infer from this finding that the status of the representative (here an *ad hoc* association) is not a bar — at least as a matter of EU public policy — to it representing *any* type of claimant. However, those (such as consumers) to whom EU law affords enhanced protection against being sued abroad would lose that additional protection by participating in a collective claim. The representative litigation claims might still be able to go forward under the general (but not the consumer specific) conflict of law rules — even though this might mean that the (here Austrian) courts would have to decline jurisdiction over some of their claims. For *arbitrated* claims by consumers, this judgment will be of limited significance since EU law in any event requires individual consumers to submit to arbitration post-dispute: some Member States take an even more restrictive view in domestic arbitrations.¹³³

The criteria to be applied to *all* representatives should address the following questions:

- is the proposed representative able properly to represent the common interests of the whole class? In particular there should be no conflicts of interest between the representative and any class members;¹³⁴
- are the claims advanced by the representative typical of the common claims to be decided for the class?¹³⁵
- does the representative have (or have access to) the means and expertise to see the claims through to their conclusion effectively?¹³⁶

Where the proposed representative is not a class member, additional criteria may be needed. The Commission Recommendation on collective redress lays down some basic principles.¹³⁷ In particular;

- is the representative a profit making body or set up for the purposes of conducting the collective proceedings or is it, in contrast a non-profit organization with a significant track record? The Commission recommends a non-profit entity;
- how close are the objects or previous activities of the body to the dispute giving rise to the claims of the class? The Commission recommends a ‘direct’ relationship between them;
- has the body been recognised as having capacity to litigate on behalf of groups by national authorities? The Commission prefers this, but leaves open the possibility of representatives being designated *ad hoc* by the court.

¹³² *ibid*, para 48

¹³³ in the UK, Arbitration Act 1996, s 91

¹³⁴ *Emerald Supplies v British Airways plc* (n 119), para 36

¹³⁵ Rachel Mulheron (n 97) 309-313 on the ‘typicality’ requirement. Although essential under US class action rules, many other class action jurisdictions do not have an *express* ‘typicality’ requirement.

¹³⁶ Commission Recommendation (n 128), recital 18, para 4 (c)

¹³⁷ *ibid*, paras 4-8; *Schrems v Facebook* (n 129), para 47 on group members as representatives

Ensuring that the representative is suitable is not only necessary to allow a proper arbitration process to be carried through effectively, but will also be vital in ensuring that the resulting award is widely recognised. In practice, the arbitrator will need to ensure that the Recommendation's criteria are complied with if the resulting award is to be as fully enforceable as possible in the EU.

Two basic procedures for selecting the representative appear from the civil procedure rules of countries having representative actions. First, as in Australia and under the English representative action, the proceedings may be commenced as a representative collective claim and continue as such until one of the parties makes an application that the representative element should be discontinued.¹³⁸ At that point the tribunal will need to decide whether the representative should be allowed to continue to represent the group which he has asserted he represents. In an arbitration, this method may have the advantage that the arbitrator should have an overview of the representative's conduct of the action to that point and will thus have some evidence to assess suitability.

The second (and better known) class action litigation technique is to address the issue of whether the action should proceed as a representative collective action at the outset of the case in an admissibility or 'certification' decision (either an interim admissibility award or, less likely, a 'peremptory order'). This is the approach adopted in litigation in Canada and the US and also in the English collective competition proceedings regime introduced in the Consumer Rights Act 2015.¹³⁹ It is also the approach adopted in the *Abaclat* international arbitration.¹⁴⁰ This has the advantage, in an arbitrated 'certification' (admissibility) procedure, that the court of the seat could be requested to intervene at an early stage in the proceedings. Where an interim admissibility award has been made, an application may be made to set it aside in the event of 'serious irregularity' (or equivalent grounds) in the collective procedure admitted by the arbitrator.¹⁴¹

There is already a considerable commentary and decisional practice in non-European countries on the criteria for selecting class representatives who are also themselves claimants — as in a US class action.¹⁴² In the remainder of this section we will therefore concentrate on the selection of a "non-class" body as the group representative ("ideological claimant") by reference to the criteria in the Commission Recommendation. We will consider these issues under two broad heads: ensuring the claims are advanced for the whole class and adequacy of 'objects and experience' of the representative body.

¹³⁸ English CPR 19.6; Federal Court of Australia Act 1976, Pt IVA s. 33N

¹³⁹ Class Proceedings Act (Ontario) (n99), s 2, 5; US FRCP (n 97) r 23(c)(1)(A); UK Competition Act 1998, s. 47B (4)

¹⁴⁰ n 117

¹⁴¹ ch 2.3.2 and 2.3.3. Rachel Mulheron (n 97) notes the advantages and disadvantages of a certification procedure: 24-25

¹⁴² Eg. Mulheron, *ibid*, 305-309; S I Strong, *Class, Mass and Collective Arbitration in national and International Law* (2013) OUP 307-308.

2.3.1 Representation of whole class: conflicts of interest and 'typicality'

In deciding if a proposed representative can properly represent the whole of the claimant group, an arbitrator will need to address two questions. First, what is the definition of the class represented? This is essential if the arbitrator is to ascertain if the representative represents all of the class members. Second, do the claims advanced by the representative properly and fairly cover all of the common issues — that is, those same or similar issues to be decided in the collective arbitration?

The representative may propose a description of the class it represents, including a definition of those similar issues common to all members of the class which the arbitrator is asked to determine. However, even where the draft class description is agreed, it will nevertheless be important for the arbitrator to reach his own conclusions and to record them in an award. In particular this should avoid the possibility of the 'agreed' class definition being viewed as part of an arbitration designed to avoid the full effects of the requirement on the defendant(s) to compensate for an EU competition infringement.¹⁴³

The arbitrator will also need to ensure that the group definition is sufficiently clear to enable any potential claimant to be able tell whether they are in or outside the represented group. We suggest that this 'clarity' test needs to be met from the time the arbitrator is asked to make a decision on the commencement (or continuance) of collective proceedings and should be reviewed if the group definition changes.¹⁴⁴

But perhaps the most important requirement of a class definition is that there should be no inevitable conflict as between any members of the class over the outcome of the arbitration of the common issues. To take a simple example in the competition arena, it will be difficult for a direct purchaser from a cartel member to properly be in the same class as one of his customers who bought the cartel goods from him in the period of the cartel.¹⁴⁵ These two claimants will have opposing views on (at least) the 'pass through' defence. This would be the case even though they both have a common issue in determining the size of the harm suffered by the members of the class.

There are two methods of addressing this kind of conflict so as to achieve as wide a coverage as possible for the collective action. The first is to exclude from the common issues (to be decided collectively) any questions on which class members may have conflicting interests. The second method is to divide the main class into sub-classes so that the issues on which there are conflicts can be dealt with separately. This use of sub-classing is common in US class litigation and other common law class action jurisdictions.¹⁴⁶

¹⁴³ Opinion of AG Wathelet in C-567/14 *Genentech* (17 March 2016) ECLI:EU:C:2016:177, para 72

¹⁴⁴ *Emerald Supplies* (n 119), para 35

¹⁴⁵ *ibid*, para 36

¹⁴⁶ for a discussion, Rachel Mulheron, (n 97), 185-188.

Where — as in common law class action jurisdictions — the representative is also a claimant, it will not be possible for him to represent more than one sub-class as he will necessarily have a degree of conflict with the interest of the second group. But the same may not be true of a representative body with no substantive interest itself in the claim.

There appears to be no *necessary* conflict reason for preventing one ‘ideological’ body from representing all sub-classes in the overall arbitration of a series of *related* collective claims. The representative does not himself have an interest in any claim. Clearly, in an exceptional case, where the interests of two sub-classes are substantially opposed, the arbitrator may need to decide that even an ideological claimant cannot act for both groups. It is in any case likely that such a fundamental conflict between two sub-groups would mean that their claims could not both fairly be dealt with in a single overall collective arbitration procedure. And, even if ‘sub-classing’ is possible, it may be necessary for the ‘ideological’ representative to take separate legal advice in respect of the common issues advanced by each sub-group, in order to ensure that it is, and is seen to be, acting in the best interests of the claimants in each sub-class.

So a distinct advantage of the ‘European’ approach to representative claims — using an ‘ideological’ claimant to claim for the overall claimant group — is dealing with ‘sub-classing’. It should be easier to accommodate sub-groups of claimants with similar claims within a single overall collective arbitration of related (sub-classed) disputes which are marshalled by the same ‘ideological’ representative. But how should an arbitrator decide if a body he is asked to approve has the required capability and closeness of purpose to the dispute to be a suitable representative?

2.3.2 Objects and expertise of the ‘ideological’ representative

The Recommendation indicates that any designated representative body should have ‘not-for-profit’ existing objects which should have a *direct* relationship with the type of dispute which forms the basis of the collective claim.¹⁴⁷ The body should also have sufficient expertise and financial resources to represent the whole group in a claim of the kind being brought.¹⁴⁸ These criteria appear uncontroversial.¹⁴⁹

In a further recommendation, the Commission proposes that a representative body should be state designated before it can be a representative in a collective action. Nevertheless, we suggest that this should not prevent the arbitrator from deciding that an undesignated body is suitable to represent the class. An arbitrator is not bound by the detailed procedural requirements of the *lex arbitri*.¹⁵⁰ Moreover, the Recommendation also envisages that representative bodies may be approved on an *ad hoc* basis (by national administrations or

¹⁴⁷ Recommendation (n 128), para 4

¹⁴⁸ *ibid*, para 4(c) and recital 18

¹⁴⁹ Rachel Mulheron ‘The United Kingdom’s New Opt-Out Class Action’, (2017) *Oxford Journal of Legal Studies*, vol 37, no 4, 814 at 827-833

¹⁵⁰ Blackaby and Partasides (n 4), 170-171

courts).¹⁵¹ An arbitrator could also fulfil this procedural function.¹⁵² However, in considering the suitability of an ideological representative body, the arbitrator will need to address each of the other criteria for designation set out in the Recommendation in his admissibility award if risk of successful challenge on enforcement is to be reduced.¹⁵³

The directness of the connection between the collective action and the objects of the representative body is largely left open in the Recommendation. In the UK, collective proceedings in competition litigation may be brought by any person authorised by the Competition Appeal Tribunal (CAT) to do so in that particular action.¹⁵⁴ The CAT has published both Rules and guidance which address how representatives will be authorised in collective competition proceedings.¹⁵⁵

The guidance indicates that the CAT will consider the nature of the representative body and its motivation for being involved in the claim — in particular whether any profit motive could create a conflict of interest with any member of the class.¹⁵⁶ The CAT notes that the potential for a conflict of interest between a law firm or litigation funder and the class members “may mean that such a body is unsuitable” as a representative.¹⁵⁷ For other bodies, particularly those specially set up to conduct collective claims, the CAT will examine the details of the management and constitution of the proposed representative and may take evidence from the managers.¹⁵⁸

Reflecting the Commission Recommendation, the Rules also indicate that the representative body must have sufficient financial resources to meet any likely costs order made against it on behalf of the claimant group.¹⁵⁹ It should also have prepared a plan for conducting the collective competition claim, including:

- a description of the “method” (by which we understand the type of collective proceeding) used to bring the proceedings and the procedures to be used for notifying the group members of the existence of the action;
- a procedure for governance (decision making) and consultation within the group which takes account of the size and nature of the collective claim;
- a financial forecast for the costs of the claim.¹⁶⁰

For arbitrations taking place in England and Wales, we suggest that the arbitrator should require the representative to produce both evidence of its objects and motivation for bringing the collective claim and adequate information covering

¹⁵¹ Recommendation (n 128), recital 18, para 3(d)

¹⁵² Arbitration Act 1996 s. 34; Model Law (n 13), art 19(2)

¹⁵³ Recommendation (n 128), para 4 is couched in mandatory language

¹⁵⁴ Competition Act 1998, s 47B(8)

¹⁵⁵ Competition Appeal Tribunal Rules, SI 2015/1648, r 78; Competition Appeal Tribunal Guide to Proceedings (2015) ,<www.catribunal.org.uk>, paras 6.29-6.36

¹⁵⁶ *ibid*, Rule 78(2)(b); Guide, para 6.31

¹⁵⁷ Guide, para 6.30

¹⁵⁸ as happened in CAT 1266/7/7/16 *Merricks v Mastercard* (21 July 2017), [2017] CAT 16, 36-49; Rachel Mulheron ‘The UK Class Action’ (n 149), 836-841

¹⁵⁹ n 155, Rule 78(2)(d) and Guide para 6.33

¹⁶⁰ *ibid*, Rule 78(3)(c) and Guide para 6.30 (at 73).

the other issues set out in the CAT Rules and guidance. He should, we suggest, specifically address his evaluation of them in his award.

It is likely that, even where the arbitration is taking place elsewhere — or English law is not the applicable law of the arbitration agreement — following the steps set out in the CAT Rules will demonstrate application of the criteria in the Commission Recommendation and will assist maximum recognition and enforcement of the collective award across the EU.

Practice on the suitability of representative claimants from non-European class action jurisdictions usually relates to the adequacy of *individuals* representing the class — ideological representation is rarer.¹⁶¹ There is little extra-judicial guidance — unlike the UK guidance. And, although case law has identified a number of questions which might also be relevant to the representation of a group by an association, these decisions tend to be case specific.¹⁶² Some of them may assist the arbitrator deciding a similar issues but again a detailed review is outside the scope of this thesis.

3. Risk management at recognition of the award: policy scrutiny and notification review

We have to now in this chapter focussed on the risks to a collective competition arbitration which arise at commencement or during the course of the arbitration procedure. These challenges are most likely to be raised in the court of the seat of an arbitration. However, the main time of challenge is likely to be on enforcement, after the collective award is made.¹⁶³

A procedural challenge to the recognition or enforcement of a collective competition award may be brought by a defendant or member of the claimant group dissatisfied with the conduct of the arbitration as far as he is concerned.¹⁶⁴ If the challenge is made outside the seat, it will need to rely on one of the grounds set out in Article V of the New York Convention, which are exhaustive.¹⁶⁵ Our review in the previous section of the main procedural issues affecting the recognition of interim awards on a setting aside application will also be relevant to a setting aside application against the final collective competition award on procedural grounds. For this reason our discussion in this section is focused primarily on the Article V grounds for refusing to enforce an award outside the seat. Challenges appear most likely on one of the following bases:

¹⁶¹ Rachel Mulheron, (n 97), reviews the common law practice (290-303). The advantages and disadvantages of ideological representation are discussed at 303-309.

¹⁶² eg. lack of credibility due to (undisclosed) previous dishonesty convictions, *Davidson v. Citizens Gas & Coke Utility*, 238 F.R.D. 229 (S.D. Ind. 2006), or due to being married to a lawyer involved for the claimants in the action; *Wexler v AT&T Corporation* 15-CV-0686 (FB) (PK) (7 February 2018)

¹⁶³ C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*. [1999] ECR I-3055 requires public policy control for EU competition law compliance at enforcement of an award — ch 3.3.2

¹⁶⁴ UNCITRAL Model Law (n 15) art 36; Arbitration Act 1996 s. 68

¹⁶⁵ UNCITRAL Guide (n 10) 120-128; Born Law and Practice (n 10) 386; Blackaby and Partasides (n 4), 622.

- the award purports to settle claims not within the scope of the arbitration agreement;¹⁶⁶
- there is a breach of the mandatory rules of the *lex arbitri* in the (collective) arbitration procedure;¹⁶⁷
- the challenger was not properly notified of the collective arbitration or not given a proper opportunity to participate;¹⁶⁸
- enforcement of the award would otherwise be contrary to the public policy of the enforcing court.¹⁶⁹

In this section, rather than consider each of these grounds in turn, we will first consider (in 3.1) the standard of scrutiny on one of these grounds of *procedural* challenges to collective competition awards by a foreign enforcing court. Does the English standard of procedural scrutiny — control of ‘serious irregularity’ only — apply more widely? We will then consider (in 3.2) the effect (if any) of a successful challenge on the enforceability of the award before a different EU court than the one seised of the initial challenge. What is the extent — if any — of the authority of this court judgment on the enforceability of the collective award? Finally in this section (in 3.3), we will consider how challenges on the basis of inadequate notification may be mitigated — and in particular the extent to which the parties to the arbitration will need to have waived the (implied) confidentiality of the proceedings and of the award. A degree of publicity of the arbitration proceedings will be necessary to permit group members to participate properly and, therefore, to ensure wide recognition of the award.

3.1 Standard of court scrutiny – is the light touch dead?

Arbitration legislation in most of the leading EU Member States demonstrates a marked ‘pro-arbitration’ stance — particularly at the stage of enforcing arbitration awards already made.¹⁷⁰ For example, the UK Arbitration Act only permits enforcement challenges based on the conduct of the proceedings leading to the award where the arbitrator did not conduct them in accordance with a procedure agreed by the parties or where there is an admitted irregularity in the proceedings.¹⁷¹ Even in these cases, the challenging party must show that the irregularity is serious — that it causes him substantial injustice.¹⁷² And even this

¹⁶⁶ Convention (n 10), art V 1(c); Model Law (n 15), art 36(1)(a)(iii); Arbitration Act 1996 (1)(b) and s 68(2)(b)

¹⁶⁷ The Convention (n 10), art V 1 (d) and Model Law (n 15), art 36 (1)(a)(iv) put this in narrow terms. The applicant’s grounds must rely on the procedure adopted being either not in accordance with the parties’ agreement to arbitrate or — if there is no express agreement — not in accordance with the mandatory rules of the *lex arbitri*. The Arbitration Act 1996 s. 68 (1) and s. 68(2)(c) uses ‘serious irregularity’ as the relevant standard.

¹⁶⁸ Convention (n 10), art V (1)(b)

¹⁶⁹ *ibid*, art V(2)(b);

¹⁷⁰ Arbitration Act 1996 s 67, 68; (France) CPC arts. 1489 and 1492 or, for international arbitrations, art.1514, 1520; (Germany) civil procedure code s. 1055, 1089. UNCITRAL Guide (n 10), 126-128; Luca Radicati di Brozolo ‘Court Review of Competition Law Awards in Setting Aside and Enforcement Proceedings’ in Blanke and Landolt (eds) (n 11); — ‘Arbitration and Competition Law: the Position of the Courts and of Arbitrators’ (2011), 27 *Arbitration International*, issue 1, 1

¹⁷¹ Arbitration Act, s 68(2)(c) and (i)

¹⁷² *ibid*, s 68(2)

right to challenge may be lost if it is not exercised promptly.¹⁷³ On a setting aside application (but not a challenge to enforcement of a foreign award), the English court will remit the matter to the arbitrator for reconsideration if still possible. The court may only decide the question itself if it would be inappropriate for the arbitrator to do so.¹⁷⁴ French legislation similarly only allows challenges to an international arbitration award in case of ‘flagrant’ irregularity.¹⁷⁵

Where EU competition rights have been arbitrated, we have seen that the arbitrator will need to ensure that EU law general principles are observed if the award is to be enforceable in EU Member States.¹⁷⁶ National courts are required to review compliance with EU public policy if a challenge to a collective competition award is made to them.¹⁷⁷ But what is the standard of scrutiny to be used by the national court? Is it free to use the ‘light touch’ generally provided for in national arbitration legislation or is a more intrusive standard required?

The CJEU has been asked to consider the question of how far EU law should intervene to regulate court control of arbitrations on a number of occasions.¹⁷⁸ The judgments of the Court show a considerable reluctance to interfere too greatly in arbitration, but the opinions of its Advocates General have been noticeably more interventionist. However, the CJEU has recently asserted the importance for national courts to be able to control arbitrations and indicated that national courts should not give too wide an interpretation to agreements to arbitrate, which may suggest the beginnings of a more interventionist stance.¹⁷⁹ We have noted that these observations have already had an effect on the practice of national courts asked to recognise arbitration agreements: will they go further?¹⁸⁰

The *EcoSwiss* judgment — introducing the ‘second look’ principle for compliance of arbitration awards with EU competition law — addressed the level of scrutiny required by EU law on enforcement of an award. The CJEU set two important limits on the deftness of national courts’ review of arbitration awards on EU law grounds.

First, the CJEU found that a national court must annul an arbitration award for failure to comply with EU competition law (part of EU public policy)

‘... where *domestic rules of procedure* require it to grant an application for annulment founded on failure to observe national rules of public policy’¹⁸¹

This classic exposition of the EU general principle of equivalence ties the depth of scrutiny — and indeed the remedies available to challengers — to national arbitration enforcement rules. Thus — using the equivalent rules for setting aside

¹⁷³ *ibid*, s 68(1) and s 73

¹⁷⁴ *ibid*, s 68(3)

¹⁷⁵ code de procédure civile (CPC), decret 2011-43, 13 January 2011, art 1514

¹⁷⁶ ch 3.1

¹⁷⁷ *EcoSwiss* (n 163), para 39

¹⁷⁸ ch 3.3.2

¹⁷⁹ C-352/13 *CDC* [2015] ECLI:EU:C:2015:35; C-284/16 *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158

¹⁸⁰ Gerechtshof Amsterdam, *CDC* (n 45); section 2.1.1 of this chapter

¹⁸¹ *Eco Swiss* (n 163), para 37 emphasis added

awards in the Arbitration Act — an English court would only be entitled to take its own view on compliance of an award with EU (competition) law where;

- the challenger can show a serious irregularity affecting the arbitration, or a (significant) error of law; and¹⁸²
- it is not appropriate to remit these questions to the arbitrator for reconsideration.¹⁸³

The equivalent principle — applied to an application for enforcement of a foreign award — under the New York Convention, would similarly prevent a refusal to enforce a collective award unless one of the grounds in Article V of the Convention could be shown.

The CJEU reinforced this ‘light touch’ message elsewhere in the *EcoSwiss* judgment:

....it is in the interests of efficient arbitration proceedings that review of arbitration awards *should be limited in scope* and that annulment or refusal to recognise an award should be possible only in exceptional circumstances.¹⁸⁴

The CJEU refused in *EcoSwiss* to strike down a national court’s setting aside of an award because it had been made outside the three month time limit provided in national *arbitration* legislation. That time limit did not make the exercise of EU law rights ‘excessively difficult’ or ‘virtually impossible’ (principle of effectiveness).¹⁸⁵ This equivalence principle remains the position of the CJEU on the question of the level of court scrutiny of commercial arbitration awards.

In more recent cases dealing with the interaction between EU general principles and commercial arbitration, the CJEU continues to refuse to intervene further in arbitration issues.¹⁸⁶ However — and despite not being followed by the CJEU in either case — the opinions of Advocate General Wathelet in *Gazprom* and, more recently, in *Genentech* show a careful consideration of the scope of the ‘exclusion’ of arbitration from the EU system of ‘mutual trust’ and of the degree of intervention by EU law in the judicial enforcement of arbitration awards.¹⁸⁷

We have noted that, in his *Genentech* opinion,¹⁸⁸ AG Wathelet considered that the well-established French arbitration law requirements, first that any breach of public policy be ‘flagrant’ (*manifeste*) before an international arbitration award may be set aside by a French court, and second the prevention of ‘re-trying’ issues expressly addressed in the award,¹⁸⁹ were contrary to the EU general principle of effectiveness.

¹⁸² Arbitration Act 1996, ss 68(1) and 69(1)

¹⁸³ *ibid*, ss 68(3) and 70(2)

¹⁸⁴ *Eco Swiss* (n 163), para 35 emphasis added

¹⁸⁵ *ibid*, para 45

¹⁸⁶ ch 3.3.2

¹⁸⁷ C-536/13 *Gazprom*, Opinion 4 December 2014, ECLI:EU:C:2014:2414; C-567/14 *Genentech*, Opinion 17 March 2016, ECLI:EU:C:2016:177; ch 3.3.2 above

¹⁸⁸ *ibid*,

¹⁸⁹ France CPC (n 175), art 1514.

The CJEU's response to the Advocate General was brief:

“... it is not for this court, in the context of the preliminary ruling procedure, to review the findings of the sole arbitrator or his interpretation of the licence agreement carried out in the light of [national] law...”¹⁹⁰

Where does this decision leave CJEU's practice on the level of scrutiny of arbitration awards by national courts? It appears that the French courts (and, therefore any other national courts operating under comparable national legislation) cannot be required by EU law to look behind the substance of the arbitrator's award. To the extent that national arbitration law does not permit public policy intervention, the CJEU will not require Member State courts to carry out this exercise, even in the face of allegations of breach of EU public policy.

But if the national court may refuse recognition on public policy grounds under national law — for example on setting aside for serious irregularity of procedure under the Arbitration Act in the UK — it will have to do so where needed to ensure compliance with EU general principles. And, following the *EcoSwiss* judgment, that review must be as detailed as the national court thinks is needed in the circumstances.¹⁹¹

So the 'light touch' scrutiny of awards, provided in most national arbitration legislation in EU Member States, is not dead. However — and despite ignoring AG Wathelet's views in *Genentech* on the inapplicability of the 'flagrant breach' and 'no substantive review' requirements in French law — if the CJEU is asked to revisit the question on a new reference in relation to an alleged 'serious irregularity' in a commercial arbitration procedure, it has sufficient latitude from the reasoning in the Opinion (and in its existing decisional practice) to allow it do so.

Such a reference might potentially arise if an arbitrator has adopted something which could be qualified as an 'opt-out' collective procedure. This might be compatible with the public policy of the law of the arbitration agreement and of the *lex arbitri*, but said to offend against public policy in another Member State where recognition is sought. If the challenge included an argument that 'opt-out' mechanisms are contrary to EU general principles (as suggested, for example, in the Commission Recommendation),¹⁹² a question is likely to be referred to the CJEU under Article 267 TFEU.

Although we believe that arbitrated 'opt-out' classes — and this may in any event be an oxymoron, given the need for consent to arbitrate — *may* be compatible with EU public policy, this question is not yet fully settled.¹⁹³ In particular the Commission Recommendation proceeds on the basis that collective redress will operate primarily on an 'opt-in' basis — with the 'express consent' of all parties. If a challenge to any apparently 'opt-out' arbitration procedure were successful,

¹⁹⁰ C-567/14 *Genentech*, judgment (7 July 2016), ECLI:EU:C:2016:526, para 38

¹⁹¹ *EcoSwiss* (n 163), para 32

¹⁹² Commission Recommendation on collective redress (n 128), paras 21-23

¹⁹³ ch 3.2.1

what would be its effect on the recognition of the collective competition award across the EU?

3.2 Effect of challenge to awards — a second look at public policy

We have seen that, provided the arbitrator is properly seised and adheres to some — fairly self-evident — principles when setting the collective procedure to be followed, the risk of a successful ‘total’ challenge to the recognition of the collective competition award in EU courts should be low. But how far is a court order denying recognition either binding or persuasive on other courts?

In short, it is not binding but it might, depending on the grounds for refusal, be persuasive. Arbitration — and therefore court judgments in support of arbitration — are excluded from the scope of the Brussels Regulation.¹⁹⁴ This position is reflected in the recitals to the revised Brussels Regulation.¹⁹⁵ We have seen that this EU legislation regards the New York Convention system as distinct from the EU civil law enforcement architecture — as confirmed in the case law of the CJEU.¹⁹⁶ The Brussels Regulation will only apply to confer binding effect on a *court* judgment relating to an ‘arbitration case’ where the absence of a valid and applicable arbitration agreement has already been expressly found by that court.¹⁹⁷ Recognition of foreign awards is not affected by the Brussels Regulation at all, as it is exclusively internationally governed — for commercial awards — by the New York Convention.

This conclusion is reinforced by the CJEU’s judgment in *Gazprom*.¹⁹⁸ The CJEU declined to confirm that its *West Tankers* decision bound the Lithuanian court to refuse to recognize the Stockholm arbitrator’s interim award requiring a partial stay of Lithuanian court proceedings.¹⁹⁹ The interim award was not an ‘anti-suit’ injunction issued by a court in an EU Member State within the scope of the ‘mutual trust’ system of EU civil court enforcement. The consequences of non-compliance with the interim award by the Lithuanian state were not within the scope of EU law but rather international treaties and national arbitration laws, which alone applied to enforcing the interim award.²⁰⁰

In effect the CJEU found that the ‘cordon sanitaire’ between the EU court-based judgments enforcement system and international commercial arbitration had to be maintained. Any failure to comply with EU general principles in an arbitration could *only* be addressed at a ‘second look’ by a national court on enforcement of the award and on EU public policy grounds. The CJEU did not — unsurprisingly in view of its decision on the inapplicability of EU law to the point — deal with how

¹⁹⁴ Regulation 1215/12, [2012] OJEU L351/1, art 1(2)(a)

¹⁹⁵ *ibid*, recital 12; C-180/89 *Marc Rich & Co KG v Societa Italiana Impianti* [1991] ECR I-3855; C-391/95; *Van Uden* [1998] ECR I-7091

¹⁹⁶ ch 3.3.1

¹⁹⁷ Regulation 1215/12, (n 194) recital 12

¹⁹⁸ C-536/13 *Gazprom* (13 May 2015), ECLI:EU:C:2015:316, based on Regulation 44/2001 [2001] OJEU L12/1

¹⁹⁹ C-185/09 *Allianz SpA and Generali Assicurazione v West Tankers Inc* [2004] ECR I-663, discussed at 3.3.2

²⁰⁰ *ibid*, paras 36-38

the public policy exception in Article V of the New York Convention should have applied in that case.

Advocate General Wathelet in contrast did give an opinion on this point. He considered the meaning of the term ‘public policy’ (*ordre public*) in an international private law context when enforcing arbitration awards.²⁰¹ He started from the UNCITRAL guide to its arbitration rules — referring to US practice — which notes that

Enforcement of foreign arbitral awards may be denied [on public policy grounds] only where enforcement would violate the state’s most basic notions of morality and justice.²⁰²

This dictum, or a very close approximation of it has been adopted by the courts in England, Germany and France among others.²⁰³

The Advocate General then examined the case law of the CJEU on the definition of EU ‘public policy’.²⁰⁴ He concluded that the CJEU has yet to set out the criteria against which a provision of EU law should be assessed to be considered ‘fundamental’, but he considered that they must be the

... body of principles that form part of the very foundations of the [EU] legal order.²⁰⁵

The rules contained in the Brussels Regulation on the recognition and enforcement of judgments — and the exclusion of arbitration from them — did not, in his view, reach that standard.²⁰⁶ This compels the conclusion that the bar for applying EU public policy to refuse to recognise arbitration awards containing findings on EU competition law remains — following Advocate General Wathelet’s reasoning — set at a very high level. A court may continue to apply the public policy standards of scrutiny required under its own law in international competition arbitrations.²⁰⁷

3.3 Notification in collective arbitration — ensuring procedural fairness

3.3.1 When will notification be relevant?

Any arbitration — carried out by consent — must give adequate notice to all parties to participate in forming the arbitration tribunal, to make their case and to be informed of the course of the arbitration. This is the main procedural concern in class litigation and is likely to be a main ground of enforcement challenge in

²⁰¹ Opinion 4 December 2014 (n 187), para 166-172

²⁰² *ibid*, citing UNCITRAL Guide (n 10) 240 at para 4 and *Parsons & Whittemore Overseas v Société Générale de l’Industrie du Papier* (CA 1974) 508 F 2nd 969 at 974

²⁰³ Opinion (n 201), paras 168-170 and authorities cited there

²⁰⁴ *ibid*, paras 173-177;

²⁰⁵ *ibid*, para 177, citing C-415/05P *Kadi and Al Barakaat International v Council and Commission* [2008] ECLI:EU:C:2008:461, para 304; Christoph Liebscher ‘European Public Policy – A Black Box’ (2000) *Journal of International Arbitration*, vol 17, 73-88

²⁰⁶ Opinion *ibid*, para 185

²⁰⁷ C-567/14 *Genentech Inc v Hoechst GmbH* (judgment, 7 July 2016), ECLI:EU:C:2016:526, para 38

collective arbitrations.²⁰⁸ It will be particularly relevant in representative claims. Article V of the New York Convention permits a court which is requested to enforce a foreign arbitration award to refuse to do so where (in essence) the ‘party against whom the award is invoked’ was not given proper notice of the arbitration proceedings or of the appointment of the arbitrator. This requirement is mirrored in the Model Law.²⁰⁹

The UK Arbitration Act deals with the same issue in setting aside proceedings in a slightly different way. It places a general procedural duty on the arbitrator to act fairly and impartially as between the parties including giving them a fair opportunity to present their case.²¹⁰ Breach is a ‘serious irregularity’ in procedure allowing a court to set aside an award.²¹¹ However, the court may remit the case to the arbitrator to remake his award following a proper procedure if appropriate. And the right to challenge a serious irregularity may be lost if not raised as soon as possible (‘forthwith’) after the challenger found out about it.²¹²

How then should an arbitrator — and the parties — approach the question of informing the group members in a collective competition arbitration so as to ensure that individual claimants’ cases are all fairly heard and also reduce the risk of successful ‘notification’ challenge?

The starting point must be the agreement to arbitrate. For agreements to submit an existing competition dispute to (collective) arbitration, the agreement will be able to include express terms to ensure that the notification process complies with the basic requirements of fairness. It will therefore need to include provision for notifying group members.²¹³

Who should supervise this process? For a representative claim, it would be sensible for the parties to agree that the representative should carry out this task, but provision may be needed for the arbitrator to step in if the representative does not properly fulfil his mandate.²¹⁴ The final responsibility for the regularity of the arbitration procedure must rest with the arbitrator (not the representative) if his award is to be fully recognised and enforceable under the New York Convention.²¹⁵

For a mass claim, the position is more complex, since there is no ‘intermediary’ between the body of claimants and the arbitrator. Two solutions appear possible. Either the arbitrator should appoint the lawyers for one of the claimants as ‘class counsel’ — mirroring the procedure in the English GLO where a supervising

²⁰⁸ Eg. S I Strong *Class, Mass and Collective Arbitration* (2013), OUP, 64-66 and 319-321; Bernard Hanotiau (n 10), 274

²⁰⁹ (n 15), art 36(1)(a), mirroring the Convention (n 10) Art V (1)(b).

²¹⁰ s 33(1)(a)

²¹¹ s 68(2)(a)

²¹² ss 68 (1) , 70(2) and 73

²¹³ The Rules and guidance for the UK Competition Appeal Tribunal require a plan for notification before the collective proceedings order can be made — (n 155), r 78(3)(c) , Guide, 73

²¹⁴ This would mirror the general case management power of the UK CAT in Rule 88 (n 155)

²¹⁵ The arbitrator is required to give reasons and sign the award for it to be valid under the Model Law (n 15, art 31)

solicitor is often appointed to manage the conduct of the common issues.²¹⁶ Or the arbitrator could appoint an agent to deal with the management of notifications — possibly (in England) a registered (and regulated) claims management company.

Any of the solutions adopted above will need to be consistent with the consent of the parties in the arbitration agreement. For (post-dispute) submission agreements, they should therefore be dealt with expressly. For pre-dispute arbitration clauses, there is a low possibility that the parties will have expressly consented to a notification procedure for multi-party or class claims. A few arbitration institutions — the American Arbitration Association being the most prominent, but also including the German DIS — have supplementary rules which set out in some detail how collective or class claims are to be conducted. Both the AAA and the DIS supplementary rules have express provision to reverse the presumption of confidentiality.²¹⁷ But neither of them fully apply unless the parties have separately expressly consented to arbitration under the relevant supplementary rules.

In the absence of consent to a specific form of collective arbitration — and therefore to a specific notification scheme — the arbitrator will need to craft his own rules within the scope of the parties consent to collective arbitration. That procedure must also — if the competition award is to be fully enforceable in EU Member States — comply with EU law general principles.

The boundary of the widest application *ratione personae* of the collective award is described by finding who — within the scope of the proposed class definition — could potentially consent to the arbitration.²¹⁸ But it will only be enforceable against those who have in fact been able to participate.²¹⁹ As against this, there is an implied presumption that arbitrations are confidential.²²⁰ Creating a notification regime which satisfies a ‘fairness’ of notice test, striking the right balance between a wide scope (and therefore enforceability) of the award and an expected degree of confidentiality in an arbitration, is unlikely to be straightforward. The balance may also differ from case to case.

We nevertheless suggest that some guiding principles on notification — derived from existing litigation practice and arbitration rules — can be put forward:

- the EU law requirement for EU public policy review on recognition of the award by a court does not remove the ability of arbitrators to choose an appropriate procedure to regulate their proceedings within the scope of

²¹⁶ CPR 19.13, PD 19B para 2.2

²¹⁷ AAA Supplementary Rules for Class Arbitration, rule 9(a), at <www.adr.org>; DIS Supplementary Rules for Corporate Law Disputes, section 5, <www.disarb.org>

²¹⁸ section 2.2.1 above discusses the position of potential adherents to the arbitration

²¹⁹ New York Convention (n 10) Art V (1)(b) allows an enforcing court not to recognize an award if the challenging party was unable to present his case

²²⁰ in England *Hassneh Insurance Co of Israel v Mew* [1993] Lloyd's Rep 243 (HC) and commentary at Blackaby and Partasides (n 4), 125-6; Gary Born *International Commercial Arbitration* 2 ed (2014) Wolters Kluwer, Chapter 20, 2779-2831, with commentaries noted at 2779 fn 1;

the competence given to them by the parties.²²¹ The European Court of Human Rights has confirmed that recourse to arbitration is compatible with Article 6 of the ECHR²²² and this decisional practice is transferred into the EU Charter of Fundamental Rights and thus the (fundamental) ‘general principles’ of EU law;²²³

- the notification procedure chosen must allow an effective vindication of directly applicable EU law rights.²²⁴ It must not ‘render excessively difficult nor virtually impossible’ the assertion of those rights. So, the notification system chosen must not be too onerous either for the representative or, importantly, for the members of the group;
- assuming (direct or indirect) consent to collective arbitration, the ‘opt-in’ principle normally applying to EU collective claims will not prevent indirect or deemed notifications of all group members. The ‘opt-in’ requirement is already satisfied by the consent to arbitrate so that even group members who do not actively participate in the proceedings should not be able to object to the recognition of the collective award as concerns them, as long as they received adequate notice, sufficient to allow them to participate if they wish;²²⁵
- where the request to arbitrate is made by a representative, consent to the choice of arbitrator can be properly given by the representative for the whole group which has validly empowered him to act.²²⁶ That arbitrator is therefore competent to set a notification regime applying to the whole (collective) claim;
- if a potential group member (a person who has consented to arbitration but not adhered to the group making the collective claim) later wishes to join the arbitration, he must impliedly — if not expressly — waive any objection to the state of the arbitration at the time he joins it, including any possible defects in notice;²²⁷
- any notification in the arbitration proceedings will need to properly inform not only the current claimants in the group but any known potential claimants. For example, notices may need to be in a number of different EU languages to be fully effective. It will be important for future enforcement for notices to set out clearly and precisely to whom (which types of claimant) they are directed;
- given probable implied confidentiality of arbitration proceedings, the defendants will need to have expressly or impliedly waived any confidentiality objection for the purposes of adequate notification. Where this waiver is implied by the arbitrator in his admissibility award, notifications to claimants should nevertheless not include defendant’s

²²¹ ch 2.3.1 and ch 3.2-3.3

²²² *Deweert v Belgium* [1980] 2 EHRR 439

²²³ Charter of Fundamental rights of the EU[2016] OJEU C-202/389, art 52(3)

²²⁴ ch 3.3.1

²²⁵ ch 2.3.3

²²⁶ *Abacat v Argentina* ICSID ARB/07/5 — jurisdiction and admissibility (n 117), paras 169-175

²²⁷ It may be sensible for the arbitrator to require an express waiver. This would reflect the statutory provision in the German KapMuG (n 109), ss 1.4 and 4.3

confidential information unless the defendant has expressly agreed to its disclosure or the disclosure is essential to properly inform the class.²²⁸

In essence, *bona fide* efforts must be made to notify all claimants in the group of the commencement and conduct of the collective competition arbitration. If an enforcement challenge is later made against a collective award by a member of the claimant group, the onus should be on that claimant to show that he did not in fact know of the arbitration proceedings. If he could reasonably have known of the collective arbitration proceedings, a court in the EU should enforce the resulting award against him, even in the face of a claim of lack of actual knowledge about the full detail of the arbitration proceedings.²²⁹

To conclude this section, we consider which existing collective redress notification schemes in Europe may be available as a model for an arbitrator to help ensure proper notification of a collective competition arbitration.

3.3.2 Existing European comparators

The DIS supplementary rules for collective claims brought under the German KapMuG require that those who have consented to arbitration shall be given the opportunity to join the arbitration from the outset.²³⁰ The arbitration claim is to be served — in sufficient copies to enable it to be forwarded to all (known) ‘concerned others’ (potential claimants) — with a deadline (of 30 days) for them to adhere to the new claim and become parties.²³¹ Those potential claimants who have not joined as parties within this time at the outset may do so later in the proceedings — but only on the basis that they waive their right to object to any previous step in the arbitration procedure.²³² For this reason, the supplementary rules require ongoing notification of potential claimants, but the information which has to be supplied to them is limited. Orders and decisions of the arbitrator must be provided, but otherwise notification is only required

‘... insofar as it can reasonably be assumed that these are significant for the decision [...] on [...] later joinder to the arbitral proceedings’.²³³

The DIS supplementary rules therefore clearly contemplate that information and notification requirements will differ according to the degree of participation (proximity) of (potential) claimants to the arbitration. But they also clearly establish that interested persons who may possibly never join the arbitration as parties nevertheless need to be kept notified of the principal steps in the arbitration proceedings.

The rules and guidance of the UK Competition Appeal Tribunal also give some useful pointers in a European collective procedure context as to how to approach

²²⁸ by analogy with the requirements on the European Commission in its public enforcement actions (Commission Regulation 773/2004 [2004] OJEU L123/18, Art 16(1)) and in the competition damages Directive 2014/104 (n 13), art 5(3)(c)

²²⁹ cf UK CAT Rules (n 155), r 90

²³⁰ (n 109), s 2.1

²³¹ *ibid*, ss 2.2 and 3.1

²³² *ibid*, s 4.3

²³³ *ibid*, s 5.1

the notification of the claimant group.²³⁴ The competition collective proceedings regime in England requires notice to be given — to all class members — at a minimum at the following stages of the action:²³⁵

- when a collective proceedings order is made (the ‘class’ is ‘certified’);
- if the class representative settles his claims or withdraws from being a representative;
- when any judgment or order is made in the action; and
- before any hearing to determine the amount of any class member’s share of damages awarded.

The content of the notice of the collective proceedings order (certification notice) must be approved by the CAT itself — and is likely to vary from case to case.²³⁶ The content of other notices is set out in the CAT rules and essentially consists in sending copies of the order made by (or notice filed with) the CAT to the class members.²³⁷ Other notices to the whole class are not mandatory, although the CAT has a reserve power to order notice to be given.²³⁸ Importantly, the CAT Rules specifically provide that a failure of a class member to respond to (or to have received) a valid notice does not affect the validity of the procedural step taken in the collective proceeding unless the CAT specifically otherwise orders.²³⁹

The similarities of the class notification regimes in the UK CAT and under the DIS supplementary rules are strong. Both procedures require all orders of the tribunal to be notified to each group member. Similarly (and rather obviously) each group member must be notified of the creation of the collective proceeding and be given enough information — approved by the tribunal — to decide whether (continued) participation in the collective proceedings is in his interests.

We suggest that the minimum set of notification requirements in the CAT Rules is a good guide to European practice — at least currently — for all collective actions and should be the basis for any arbitrator’s notification decisions in a collective competition arbitration. Provided that these steps have been taken, we believe that a group member should not be able to have the collective award set aside as against him on the grounds of inadequate notice of the proceedings.

4. Conclusions: best management of policy risk

Parties and arbitrators are able to craft collective competition proceedings in the EU so that they should avoid serious challenge — either in the seat of arbitration or on recognition or enforcement in another EU court. Optimising the arbitration agreement to achieve the best outcome is, of course, significantly easier where the agreement to arbitrate submits a collective dispute to arbitration after it has arisen. Nevertheless, even where pre-dispute arbitration clauses form the basis

²³⁴ n 155

²³⁵ Guidance, (n 155), para 6.55

²³⁶ CAT Rules (n 155), r 81, Guidance, *ibid*, para 6.56

²³⁷ *ibid*, r 91(3)

²³⁸ *ibid*, r 88(2)(d)

²³⁹ *ibid*, r 90

of consent to arbitrate, the degree of procedural discretion left to the arbitrators should normally permit a wide choice of form of collective procedure.

To summarise on risk management:

1. The request for collective competition arbitration should carefully define the 'legal relationship' under which the dispute has arisen and expressly demonstrate the causal link between the arbitration agreement — particularly if it is 'pre-dispute' — and the breach of (competition) obligation complained of.
2. As most arbitration claims for damages for EU competition law infringements will be on a non-contractual basis, the parties will not be fully free to choose the law to apply to the determination of the substantive dispute in these cases, even in a submission agreement. Nevertheless, EU choice of law legislation normally permits discretion in the arbitrator to find an applicable substantive law in one of the countries where the competition harm occurred and with which the dispute has a close connection.
3. This choice of substantive law also imports the choice of law for a number of 'quasi-procedural' questions which are important for collective competition arbitration. The framework for the remainder of the procedure will primarily be given by the law — and therefore *ordre public* — of the seat of arbitration (*lex arbitri*).
4. To ensure a single legal system applies to all procedural (and quasi-procedural) questions, the parties and the arbitrator should ensure, if possible, that the substantive law, the law of the arbitration agreement and the *lex arbitri* are the same. The seat of arbitration will need to be a place where the competition infringement had an effect on the claimant group and which — after a *prima facie* review of the relevant facts — the arbitrator considers to be a place with which the infringement has a close connection.
5. In exercising his discretion to admit a collective arbitration procedure, the arbitrator should consider whether collective treatment is appropriate in view of:
 - the number of actual and potential parties to the claims;
 - the degree of commonality of the claims presented collectively; and
 - whether collective arbitration is preferable (superior) to other reasonably available means of finally resolving the specific disputes and achieving adequate redress for the claimants.
6. When carrying out the admissibility assessment, the arbitrator should consider groups of claimants with the 'same or similar' claims. This (relatively) limited scope to collective arbitration should ensure that the final collective award achieves maximum recognition and enforceability across the EU. 'Related' claims may need to be resolved in a separate

collective arbitration, or at least using separate sub-groups within an overall collective procedure.

7. The arbitrator will also need to consider the type of collective procedure most appropriate in the circumstances. Where he decides to use a 'representative' procedure, he must also decide if the proposed representative is able properly to sustain the representation of the whole proposed class throughout the proceedings. In doing so he should have regard to the requirements in the Commission Recommendation. In practice, this means that he will need to conclude that:
 - the representative has no conflict with the interests of any member of the proposed class;
 - the evidence used by the representative to advance the claims is derived from claimants who are typical of the class;
 - where an association or other 'ideological' claimant is put forward, its purpose (objects) should have a close connection with the subject of the dispute;
 - the representative has (or has been offered) sufficient funding and expertise to pursue the collective arbitration and has a plan for doing so.
8. It is possible (but not inevitable) that the same 'ideological' representative may be able to represent two or more separate but *related* sub-classes of claimants in a single overall collective arbitration proceeding.
9. Any court challenge to the enforcement of a collective competition award should be decided on a 'light-touch' basis. In particular, it will not be open to the court to re-try the arbitrator's factual findings. A judicial public policy review of the exercise of the arbitrator's *procedural* discretion to admit collective procedures should be exceptional. Even where the challenge is one of substantive jurisdiction — for example the inability to participate properly in the formation of the arbitration tribunal²⁴⁰ — court intervention should be rare.
10. The proper remedy for a successful application to set aside an interim admissibility award should be to remit the matter to the arbitrator for reconsideration except where this is inappropriate or no longer possible.
11. A successful challenge to enforcement of the final award should only bind the parties to the challenge (the applicant group member and the defendant) within the jurisdiction of the court. However, where the award is set aside on (fundamental) EU public policy grounds, that court judgment may nevertheless have a persuasive effect in other civil courts in the EU.
12. In order to minimise the risk of enforcement challenge on the procedural ground of inadequate notice, the arbitrator should ensure that all actual and known potential parties within the scope of the 'class in arbitration'

²⁴⁰ Arbitration Act 1996, s 30(1)(b)

are kept informed of the main events in the arbitration. At a minimum they should all be informed:

- of the decision to permit the collective arbitration to proceed and — where applicable — the time within which class members must decide whether or not to join;
- of the appointment or withdrawal of the representative;
- of any interim award made;
- of any settlement of all or part of the collective claim;
- before a final award of damages assessing each class member's individual share in the compensation awarded.

These recommendations should ensure that collective competition arbitration — carefully crafted — can form the basis for a widely recognised and enforceable arbitrated competition redress award. The collective award is, in the large majority of cases, likely to be fully enforceable across the EU and — assuming it relates to infringements also having an effect more widely — potentially across the world.

In the next chapter we consider the factors which — given the importance identified in this chapter of choosing the most appropriate seat of arbitration — parties wishing to achieve maximum coverage for the resolution of their dispute should address before they agree to the seat of the arbitration. Our focus will be on EU countries, but we will also consider the enforceability of class arbitration awards made outside the EU.

5 The choice of seat of the collective competition arbitration

1. *Importance of seat of arbitration*
 2. *'Opt-out' arbitration procedures: why definition is relevant*
 - 2.1. *'Opt-out' and public policy in England*
 - 2.2. *'Opt-out' and public policy in Germany*
 3. *Consolidation or other multiparty procedures*
 - 3.1. *Consolidation of arbitrations under national legislation*
 - 3.2. *Arbitration institution rules on consolidation*
 - 3.3. *Summary on consolidation and group proceedings*
 4. *Competition arbitration outside the EU: effect in EU countries*
 - 4.1. *Is the award within the New York Convention?*
 - 4.2. *Public policy and recognition of 'global' awards in Europe*
 - 4.2.1. *non-EU class procedures and public policy*
 - 4.2.2. *substantive competition law and public policy*
 - 4.3. *Summary on recognition of non-EU awards*
 5. *Conclusions on seat of arbitration*
-

1 Importance of seat of arbitration

For competition arbitrations — most likely to be non-contractual in substance — the interplay of the three relevant legal systems, and the public policy limits they imply, requires careful choice by the parties of the 'correct' system(s) to support the procedural solutions which they wish to use to marshal all the claims to be arbitrated.

We assume in this chapter that relative simplicity and effectiveness in procedure will be paramount in this choice. This ought to lead the parties to the collective competition arbitration — and the arbitrator — to aim for a single law as the substantive law governing the dispute, as the law of the arbitration agreement and as the *lex arbitri*. We have seen how the parties are unable to choose the substantive law to govern a non-contractual obligation to compensate arising from a competition infringement.¹ Since the substantive law also includes a number of 'quasi procedural' matters, the parties' choice of the law governing the arbitration agreement is also likely to be limited.² It is, for example, likely to be inconvenient (at least) for the question of whether the competition obligation can be transferred to a representative entity (if some of the group members wish to do this) to be decided using a different law — and set of public policy principles — from the question of whether the representative is properly authorized to represent group members.

Although the parties do not have freedom to choose the substantive law — nor therefore much of the law applying to the agreement to arbitrate — the same restrictions do not apply to an arbitrator. The arbitrator may well have a fairly

¹ Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJEU L199/1, Art 6(4); ch 4.2.1

² *ibid*, art 15

wide choice of available substantive laws in most collective competition arbitrations, which often have widely dispersed effects.³ But he will need to select one with which the obligation in dispute has a ‘manifestly’ close connection.⁴ Although the parties’ choice of the law of the arbitration agreement — or of the substantive law of a related contract if the non-contractual claim is closely connected to a contract — may assist, it is open to the arbitrator to use a different law. Indeed, if the (substantive) law indicated by the parties is not the law of a place where the competition infringement had an effect, he will be obliged to do so.⁵

The parties however retain a far wider ability to choose the seat of arbitration. This will imply the choice of *lex arbitri* — the principal legal and public policy framework for the arbitration procedure. Choice of an appropriate seat for the arbitration — alongside choice of appropriate arbitration institution rules — will therefore be the main method for the parties to ensure a coherent procedural ‘policy’ background which is favourable to collective competition arbitration. Our consideration of the choice of seat in this chapter will look at the three main contentious areas of admissibility for collective arbitration procedure:

- to what extent are ‘opt-out’ representative actions likely to be permitted?
- when can consolidation rules be used to admit a group (non-representative) collective procedure?
- how far can a collective anti-trust award made outside Europe be recognised and enforced in the EU?

Although EU law — through its general principles and recent institutional additions to the *acquis communautaire* — has brought a significant degree of ‘levelling up’ of public policy treatment of collective competition claims in EU Member States, there is still substantial divergence in practice between them.⁶ Choosing the ‘right’ seat of arbitration remains important.

For reasons of brevity our (overview) comparison of *leges arbitri* will be limited to the systems of England and Germany — as two of the most important economies (and sources of competition cases) in Europe, and both having developed arbitration centres and advanced collective redress legislation. The diversity of approach in these countries will enable a broader consideration of the issues and possible solutions available in the EU.

Choice of the seat of arbitration is likely to be particularly important if the arbitrator — within the scope of his competence — wishes to admit an ‘opt-out’

³ Luca Radicati di Brozolo ‘Arbitration and Competition Law: the Position of Courts and Arbitrators’, (2011) *Arbitration International*, vol 27, no 1, 19-20

⁴Rome II (n 1), art 4(3). Where the infringement is of EU competition rules (all of the effects are ‘European’), the arbitrator may not need to select a single national substantive law, but instead rely solely on EU law. This might give greater flexibility in the ‘quasi-procedural’ questions which are not regulated in detail by EU law principles.

⁵ Rome II Regulation (n 1), art 6(3) and 6(4)

⁶ State of Collective Redress in the EU in the Context of the Implementation of the Commission recommendation, JUST/2016/JCOO/FW/CIVI/0099, November 2017, British Institute of International and Comparative Law for the European Commission, <ec.europa.eu>, (accessed August 2018)

type of collective procedure. If the procedure admitted amounts to a ‘serious irregularity’ (to use the English legislative formulation), a party or group members said to be included in the proceedings may apply to the court to have the admissibility award set aside.⁷ In practice this is likely to mean that an arbitrator’s admission of an ‘opt-out’ type procedure would be challenged at an early stage in the court of the seat of arbitration.

Where an award resulting from the collective competition arbitration needs to be enforced elsewhere, the foreign enforcing court is entitled to apply its own public policy criteria in deciding whether to enforce the award.⁸ UNCITRAL guidance on the New York Convention notes that:

Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be *impossible* for a legal system to recognize an award and enforce it without abandoning the very fundamentals on which it is based.⁹

The greater degree of scrutiny of arbitration *procedure* permitted to a supervising court in the seat of arbitration on a setting aside application, as compared with a court elsewhere asked to enforce the resulting award, is clear. It is significantly rarer that a fault of procedure will be so fundamental (in particular taking account of the EU law requirements discussed earlier) that it would make it impossible to enforce the final collective award.¹⁰ In practice, the choice of seat (and *lex arbitri*) will be determinative of the acceptability of advanced (‘opt-out’) forms of collective redress procedure (section 2 below). It may also determine how far pending arbitrations may be joined or consolidated to create a group proceeding (section 3). And we consider the use of non-EU arbitration seats in section 4.

2. ‘Opt-out’ arbitration procedures: why definition is relevant

To see how public policy might affect the decision of an arbitrator to use an ‘opt-out style’ procedure, the term ‘opt-out’ needs to be explained a little further.¹¹ The Commission Recommendation applies an apparently simple test:

‘...on the basis of the express consent of the natural or legal persons claiming to be harmed (‘opt-in’ principle).’¹²

The implication of this test is that any group formed otherwise than on the basis of the express consent of the parties is not ‘opt-in’. However, it does not necessarily follow that it is ‘opt-out’. ‘Opt-out’ proceedings are defined (in

⁷ Arbitration Act 1996, s 68(1) and s 72(2)

⁸ Convention on the recognition and enforcement of foreign arbitral awards, New York, 1958, UNTS I-4739 (vol 330), (‘Convention’), Art V(2)(b)

⁹ UNCITRAL Secretariat Guide on the Convention on the recognition of foreign arbitral awards, United Nations, New York, (2016), 240 para 4 (emphasis added)

¹⁰ *ibid*, 126-127; Gary Born *International Arbitration Law and Practice* (2016) Kluwer Law International, 383-384; Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 6 ed, (2015) OUP, 569 and 610

¹¹ Ch 1.3

¹² Commission Recommendation on common principles for compensatory and injunctive collective redress mechanisms, 11 June 2013, [2013] OJEU201/60, para 21

England) as being brought on behalf of a group described in the collective proceedings order except those who *expressly* choose *not* to belong to it.¹³

Neither of these formulations properly covers claimants within the group description who have expressly consented (directly or indirectly) to arbitration of the dispute (so, can be said to have ‘opted-in’) but have expressed no preference as to whether they wish to belong to the particular group bringing the collective claim (so, cannot be said to have ‘opted out’). The language of ‘opt-in’ and ‘opt-out’ may therefore be unhelpful in the context of collective arbitration. Most claimants concerned by a collective competition arbitration will fall into the ‘middle’ group identified above — at least during most of the arbitration procedure.

An arbitrated resolution of a collective competition dispute is capable of binding and being enforced by claimants in this ‘middle’ position if they are found to have impliedly consented to collective arbitration. Separate express consent to *collective* arbitration — in addition to the initial consent to arbitrate — is not required. The ‘middle ground’ of claimants, having consented to arbitration, are bound by the collective award.¹⁴

The fundamental public policy principle likely to be at stake — the right to fairness of procedure — is enshrined in Article 6 of the European Convention on Human Rights (or Article 47 EU Charter), or their domestic constitutional equivalents.¹⁵ But, as the European Court of Human Rights (ECtHR) found in *Deweer*,¹⁶ arbitration may be compatible with Article 6 — even if the full set of ‘fair process’ guarantees normally provided in a litigation context is not adhered to — on the basis that the parties *impliedly* waive their rights to the full suite of protection. The ECtHR held:

49. The ‘right to a court’, which is a constituent element of the right to a fair trial, is no more absolute in criminal than in civil matters. It is subject to implied limitations [...] it is not the Court’s function though to elaborate a general theory of such limitations [...] In the contracting States’ domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters [...]

Nevertheless, the court emphasized that the consent to the waiver — contained in the agreement to arbitrate — has to be freely given. Belgium was condemned because, in Mr Deweer’s case, the court found an element of duress — the national judgment was “tainted by constraint”.

‘Untainted’ consent to an implied waiver of procedural rights is, therefore, an acceptable basis, even for the most advanced collective competition arbitration procedures for the purposes of the ECHR and thus under the EU Charter.¹⁷

¹³ Competition Act, 1998 s 47B(11)

¹⁴ ch 2.3.2; SI Strong, *Class Mass and Collective Arbitration in National and International Law* (2013) OUP, 121-125

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, UNTS I-2889, vol 213 (ECHR); Charter of Fundamental Rights of the European Union, [2012] OJEU C326/02

¹⁶ *Deweer v Kingdom of Belgium* [1980] 2 EHRR 439

¹⁷ interpreted in accordance with the corresponding rights in the ECHR — Charter, *ibid*, art 52(3)

Provided that the award demonstrates that the arbitrator in fact gave each member of the claimant group the *opportunity* to participate in the arbitration or to decide individually not to do so — even if that opportunity was not used — the *Deweer* principle should mean that all of the claimant class members (even those whose consent to collective arbitration was only implied and who did not actively participate in the proceedings) will be bound by the outcome.

This conclusion is consistent with the law and public policy in England and Germany — although for slightly different reasons — as we discuss next. These are the two European countries having respectively the most advanced rules for competition damages claims and the most permissive rules for collective actions. The position in other countries (for example France) may be less clear cut.¹⁸

2.1 ‘Opt-out’ and public policy in England and Wales

There are two specific litigation procedures dealing with collective competition redress in England, the Group Litigation Order (GLO)¹⁹ and the action for competition ‘collective proceedings’.²⁰

The GLO was introduced in 2000 as part of the reforms of the English civil procedure rules made that year to improve ‘access to justice’ (in the broad sense of the term). It is a ‘group’ mechanism, enabling a large number of claims to be managed together to achieve a single judgment on the common (group) litigation issues.²¹

The English GLO is a properly ‘opt-in’ procedural device for collective redress — a claim must be started for each member of the group.²² It does not depart from internationally accepted practice relating to party autonomy. A collective competition award with English *lex arbitri* made using a collective procedure modelled on the GLO, would clearly not be open to challenge on arbitrability or other related public policy grounds in the English courts. And a foreign collective award following this procedural pattern should also be fully enforceable in England by or against each claimant group member. The tribunal majority in the ICSID *Abaclat* decision expressly referred to the English GLO as an example of the collective procedure it was adopting in that case, based on a purposive approach to interpreting the ICSID Treaty and the parties’ agreement to arbitrate under the BIT.²³ Although the GLO-type procedure may not be suitable for all kinds of collective claims, it can nevertheless be of practical significance as a collective redress model for arbitrators and arbitration institutions, as the *Abaclat* case itself indicates.

¹⁸ a country by country overview is given in Philippe Billiet (ed) *Class Arbitration in the European Union* (2013) Maklu

¹⁹ CPR 19.10 – 19.15 and PD19B

²⁰ Consumer Rights Act 2015, sch 8 – now Competition Act 1998, ss 47A-47E; Rachel Mulheron ‘The United Kingdom’s New Opt-Out Class Action’ (2017), *Oxford Journal of Legal Studies*, vol 37, no 4

²¹ on GLOs, Adrian Zuckerman, *Zuckerman on Civil Procedure — Principles of Practice*, 3ed, (2013) Sweet & Maxwell, 676-683

²² PD19B, para 6.1A

²³ *Abaclat and others v Argentine Republic*, ICSID, ARB/07/05, para 483

However, without the power given to the English court under the GLO procedure in CPR 19 to compel *all* claims raising the common issues to be included on the group register, a collective arbitration procedure modelled on the GLO will probably struggle to achieve a comprehensive outcome to the collective competition dispute.²⁴ In a litigation GLO, each claimant must have commenced his claim before the GLO can apply to him. In an arbitrated 'GLO' equivalent, this would mean that each claimant would have to give notice to arbitrate — either indirectly through a representative (as in *Abaclat*) or directly. In the latter case, the various nascent arbitration proceedings would need to be consolidated — a procedure discussed in section 3.

If the (possibly limited) reach of a 'GLO' type collective arbitration seated in England might not be capable of resolving the whole dispute, the arbitrator may need to consider a procedure modeled on that in the Competition Act 1998 which introduced — for the first time in England — 'opt-out' collective proceedings for competition claims.²⁵ 'Opt-out' collective proceedings are defined as:

- [...] collective proceedings which are brought on behalf of each class member except –
- (a) any class member who opts out by notifying the representative in a manner and by a time specified that the claim should *not* be included in the collective proceedings [...].²⁶

A collective competition award in an arbitration seated in England, using a procedure modeled on the Competition Act 'opt-out' procedure, could therefore not be set aside on the ground of 'serious irregularity' (ie. on public policy grounds).²⁷ Parliament has enacted a statute which expressly allows 'opt-out' proceedings: and they cannot therefore be contrary to the public policy ('by abandoning the very fundamentals') of English law.²⁸ The collective award will bind those claimant class members who actively participate in the proceedings — even indirectly — and will clearly not bind those who (expressly) 'opt-out' of the award in accordance with the procedure admitted by the arbitrator. But, as we have discussed, even those class members in the 'middle' — consenting to that arbitration, but neither having actively participated in the arbitration nor expressly opting out of it — will also be bound.

The conclusions above assume that the arbitrator has properly directed himself as to the scope of his own jurisdiction: court control of the jurisdictional 'Kompetenz-Kompetenz' power is not limited to purely public policy considerations.²⁹ Nevertheless, the questions 'have these claimants consented to collective arbitration?' and 'who exactly does the representative in fact represent?' are properly for the arbitrator, if necessary in an interim award on

²⁴ CPR 19.12(3) and PD 19B para 6.1. Contrast the position in Germany:

Kapitalanlegermusterverfahrensgesetz (last amended 12 October 2012), BGBl I 2182 (KapMuG)

²⁵ n 20

²⁶ *ibid*, s 47B(11), emphasis added

²⁷ Arbitration Act 1996, 68(2)(b) and (i)

²⁸ UNCITRAL Guide (n 9), 240

²⁹ Arbitration Act 1996, s 32(1), s 68

jurisdiction and admissibility.³⁰ The English courts follow the ‘light touch’ approach to intervention in arbitration.³¹ England is, therefore, a potential arbitral seat with an arbitration policy and legislative framework which is ‘friendly’ to collective competition arbitrations of all kinds.

2.2 ‘Opt-out’ and public policy in Germany

The German legal system accords strong protection to the principle of party autonomy, giving it constitutional status.³² Despite this, the German legislature has enacted provisions outside the competition arena which include a strong element of representative procedure: *Kapitalanlegermusterverfahrensgesetz* (KapMuG).³³ This applies to damages claims by groups of shareholders alleging certain types of abuse in relation to false trading in private company shares and similar securities. In addition, the Bundestag passed legislation in mid-2018 extending a form of collective redress similar to the English GLO to consumer claims.³⁴

At first impression, the collective procedure in the 2012 KapMuG resembles the procedure used in the English Group Litigation Order or by the ICSID Tribunal in the *Abaclat* arbitration.³⁵ Changes to the legislation introduced in 2012 have made it easier for claimants to join the model case and also allow court approved settlement of all claims included in the model case (*Musterverfahren*) even where not all group members agree. The requirement in the German statute for a formal commencement of proceedings by each claimant (as in the GLO) has also now been relaxed.³⁶

Essentially the KapMuG is a test case action. A proposed representative claimant (*Musterkläger*) lodges a claim with a competent court which — if it admits the representative claim — will set up a ‘group register’ for the model case. All of the other known securities holders (*Beigeladenen*) potentially affected by the claim — whose names will normally appear on the relevant share register — must be formally notified of the proceedings. The claim then proceeds between the representative claimant and the defendant — with the *Beigeladenen* being kept informed and able to join the model proceedings — until judgment. The effect of the judgment is expressly set out:

[...] wirkt der Musterentscheid für und gegen alle Beteiligten des Musterverfahrens unabhängig davon, ob der Beteiligte alle im Musterverfahren festgestellten Tatsachen selbst ausdrücklich geltend gemacht hat.³⁷

³⁰ eg *Abaclat* jurisdiction and admissibility award (n 23)

³¹ *Fiona Trust and Holding Company v Privalov* [2007] EWCA Civ, 20, para 19; Blackaby and Partasides (n 10), 93-94.

³² Grundgesetz für die Bundesrepublik Deutschland (as at 13 July 2017), art 101

³³ n 24

³⁴ Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage, 12 July 2018, BGBl I 1151; commenting on the draft law, Astrid Stadler ‘Musterfeststellungsklage im deutschen Verbraucherrecht?’ (2018) VuR issue 3, 83

³⁵ nn 23 and 24

³⁶ n 24, s 19

³⁷ KapMuG s 22(1): ‘[...] the model case ruling shall have effect for and against all parties to the model case proceedings, irrespective of whether the party itself has expressly complained of all the points in dispute in the model case proceedings.’ (trans. Federal Ministry of Justice)

Two important points arise from this paragraph. First, the representative action only has effect as against represented claimants who were notified of it *before* the representative judgment was made (and who will therefore have had the opportunity to participate). This distinguishes the KapMuG procedure from a US or UK ‘class’ action, where the class need not necessarily be finally and fully notified until *after* the judgment on the damages claim has been given or the class settlement approved.

Second, the judgment is binding on *all* of the notified securities holders, regardless of whether they actually participated in the proceedings. That is, non-responding represented (and notified) claimants are bound by the judgment, in the same way that an ‘opt-out’ representative (class) action binds all represented parties, whether responding or not. This strongly contrasts the German KapMuG procedure with the English GLO which only binds those who have expressly joined the proceedings.

The more recent 2018 German consumer protection collective action law appears, however, to proceed on a similar basis to the English GLO. It is closely modeled on the European Commission collective redress Recommendation: qualified entities may represent consumers in disputes with traders.³⁸ An entity must represent a class of at least ten consumers.³⁹ However, unlike the KapMuG — but as with the English GLO — the collective judgment only binds those consumers who have notified their claims for entry into the claim register for that collective action.⁴⁰ There is no binding effect on consumers who have been notified of the *Musterfeststellungsklage* but have not responded.

Does all this then mean that ‘opt-out’ collective competition claims are arbitrable in Germany? There appear to be two potential limitations to using a KapMuG type of procedure in competition arbitration. First, the limitation of the KapMuG procedure in court litigation to financial services (securities) claims could be argued to prevent an arbitrator from using a comparable procedure in a competition claim. And second are there any general factual differences between securities claims and competition claims which might apply to prevent a collective competition arbitration procedure modelled on the KapMuG?

It appears difficult to maintain that an arbitrator sitting in Germany, looking to apply a collective redress procedure modelled on the KapMuG to competition claims, could be said to offend ‘basic notions’ of German public policy.⁴¹ The Bundestag has expressly permitted this kind of procedure and it must be assumed that it complies with the German Basic Law — including principle of party

³⁸ Zivilprozessordnung (ZPO) (German code of civil procedure), new § 606, (law of 12 July 2018 — n 34)

³⁹ *ibid*, § 606(30)(2)

⁴⁰ *ibid*, §§ 608 and 613(1)

⁴¹ UNCITRAL Guide (n 9), 240, para 4

autonomy.⁴² Indeed the Bundesgerichtshof in its ‘Arbitration II’ decision reached precisely this conclusion.⁴³

In that case the Bundesgerichtshof dismissed an appeal against a judgment upholding a referral to *collective* arbitration under an arbitration clause in the articles of a German private limited company. It upheld the arbitrability of the collective shareholder claims in German law provided four conditions — necessary to ensure fundamental procedural fairness protection — were met by the arbitration procedure:

- 1) all of the parties had to be bound by an arbitration agreement — in this case in the company’s statutes;
- 2) all parties must also have had the opportunity to take part in the formation of the arbitration tribunal — or have consented to its appointment by a neutral third party;
- 3) all of the parties to the arbitration agreement must have had the opportunity to participate in the arbitration — on either the claimant or respondent side — even if they did not in fact do so;
- 4) parallel collective arbitrations should be avoided — all claims relating to a single dispute are to be consolidated into one arbitration proceeding.⁴⁴

Provided these four conditions are met, the arbitration award will bind all of the parties to the arbitration agreement (in that case, all of the shareholders) in respect of that dispute. However, it is worth noting that the number of parties to the ‘Arbitration II’ claim was relatively low — in single figures. If the number of parties to the arbitration is higher, it may be that a German supervising court would take a strict view of compliance by an arbitrator with these four principles to ensure that the parties’ fundamental rights are upheld. This may mean that some group members — particularly if they can show defects in notification (principle (3)) — could be outside the enforceable scope of the collective award

A further possible reason for not permitting a ‘KapMuG’ competition procedure, is that the KapMuG currently only applies expressly to shareholder claims. For this reason the rules developed by the German Arbitration Institution (DIS) for arbitrating collective claims — considered in more detail in section 3 — also only apply to ‘securities’ arbitrations. However, the four principles formulated by the Bundesgerichtshof were crafted to ensure a minimum standard of legal protection against a background of the German constitutional rules (the ‘fundament’ of the German legal order).⁴⁵ Although developed in the context of a securities claim, they can easily be transferred to other contexts of mass harm — including competition claims. Effectively, we suggest, they express the general ‘due process’ public policy requirement for collective arbitration — both in a German public policy context and probably more widely in Europe.

⁴² §§ 1030(1) and (2) ZPO allow arbitration in all kinds of disputes involving the economic interests of the parties.

⁴³ BGH II ZR 255/08 (6 April 2009), BGHZ 180-221. For a commentary, Christian Borris, ‘Germany and the DIS Supplementary Rules’ in Bernard Hanotiau and Eric Schwartz (eds) *Class and Group Actions in Arbitration* (2016), ICC

⁴⁴ *ibid*, judgment, para 8; Borris, *ibid*, 82

⁴⁵ judgment, (n 43), para 13

However, the KapMuG procedure is based on an assumption that it is possible to identify individually all of the holders of a particular stock or security in respect of which the claims are being asserted, so that the arbitrator or court can verify that all interested parties have each been properly notified of the *Musterverfahren*.⁴⁶ This will not always be possible for claims by a dispersed group of victims of an anti-competitive practice. The availability of ‘opt-out’ arbitration using a KapMuG procedure may well depend on whether the claimant group is made up of direct or indirect purchasers of products in relation to which the competition mass harm occurred. ‘KapMuG-based’ collective arbitration proceedings on behalf of a group of *indirect* purchasers from an infringer of EU competition law may be problematic, due to the practical impossibility of accurately individually identifying every claimant at the outset of the proceedings.

However, we suggest that this difficulty is not present with a representative collective claim by a group only of *direct* purchasers (from a cartel or a dominant undertaking for example). The direct purchaser group claimants ought to be able to provide purchase receipts, or defendant cartel members should normally have a list of their own direct customers which they can, if necessary, be ordered to produce.

As long, then as group members have each been properly notified (and the other three requirements in ‘Arbitration II’ are addressed),⁴⁷ a group of direct purchasers will be bound by the result of a German-seated collective competition arbitration even if they do not themselves intervene in the arbitration proceedings — that is, an ‘opt-out’ style collective arbitration brought by a group of direct purchasers (at least) should be recognized and enforceable in Germany.

3 Consolidation or other multiparty procedures

3.1 Consolidation of arbitrations under national legislation

The alternative type of collective redress to a representative action is a group claim. In essence, this amounts to the joinder of parties or consolidation of a number of individual cases based on their degree of connection, but without the ‘intermediation’ of a representative claimant.⁴⁸ Some grouping techniques — the English GLO being an example — may be quite sophisticated and require significant case management input. But simpler forms of procedure based on the consolidation of sufficiently similar claims — possibly with the use of test cases — are also possible.

⁴⁶ cf the requirement for consumers (likely to be dispersed) to give notice under § 608 ZPO (n 40); also, S I Strong ‘Collective Arbitration under the DIS Supplementary Rules for Corporate Law Disputes: a European Form of Class Arbitration?’ (2011) ASA Bulletin, vol 29, 45.

⁴⁷ eg. by adopting the relevant parts of the DIS Supplementary Rules for Corporate Law Disputes (2009), <disarb.org/en/>, esp ss 4,5 and 11

⁴⁸ ch 1.3; Strong (n 14), 74-75; Rachel Mulheron *The Class Action in Common Law Legal Systems* (2004) Hart, 99

The ease of use of grouped forms of collective procedure in competition arbitration will be increased if the *lex arbitri* provides for — or at least permits — the consolidation of individual competition arbitrations into a single action where the connection between those claims is close enough. However, most EU Member States' arbitration legislation does not allow consolidation of arbitrations already commenced without the consent of all of the parties to those arbitrations.⁴⁹ The only prominent EU jurisdiction expressly to permit a court to do this is the Netherlands.⁵⁰

Dutch arbitration legislation allows a Dutch court to consolidate pending arbitrations where the degree of connection between them means that

‘...the good administration of justice [makes] it expedient that they are heard and determined together to avoid the risk of irreconcilable decisions’.⁵¹

The parties may agree that a neutral third party — for example an arbitration institution — is allowed to order the consolidation of an arbitration pending in the Netherlands with other arbitrations (even those seated abroad). In contrast the jurisdiction of the supervising Dutch *court* is limited to consolidating two or more domestic arbitrations — without the agreement to appoint a neutral third party, international consolidation of arbitration proceedings is not possible.

The UK Arbitration Act appears more typical of European practice: s 35(2) is clear

(2) Unless the parties agree to confer such power on the [arbitration] tribunal, the court has no power to order consolidation of proceedings or concurrent hearings

A proposal during the consultation on the Act to include an express power in the court to order consolidation of similar proceedings over the objections of one or more of the parties was rejected as infringing the principle of party autonomy.⁵² Although the expert committee was content to allow the parties to agree to consolidation, it strongly suggested that appropriate drafting of arbitration agreements or of arbitration institution rules to permit consolidation of a number of pending arbitration was the correct way forward.⁵³ The last revision of the French arbitration legislation similarly does not include a power of the supervising court to compel consolidation.⁵⁴

3.2 Arbitration institution rules on consolidation

Consent to consolidation of arbitrations can of course be given indirectly by using the rules of an arbitration institution which allow an appointing authority to consolidate a number of related arbitrations. This practice is far from universal. Notably, for example, the UNCITRAL arbitration rules do not deal with consolidation at all, although the arbitrator may allow joinder of additional

⁴⁹ Blackaby and Partasides (n 10), 149-151; Born *Law and Practice* (n 10), 227-228

⁵⁰ Dutch Code of Civil Procedure (Wetboek van Burgelijke Rechtsvordering), art 1046

⁵¹ *ibid*, art 1046(2)

⁵² Departmental Advisory Committee ‘*Report on the Arbitration Bill*’, February 1996, para 180 — published in (1991) *Arbitration International* vol 13, issue 3

⁵³ *ibid*, para 182

⁵⁴ Decret 2011-4813, 13 January 2011, on the reform of arbitration

parties.⁵⁵ Although a detailed examination of all of the rules of European arbitration institutions is outside the scope of this thesis, we consider the rules of some major institutions which do allow the consolidation of arbitrations over the immediate objections of one or more of the parties.⁵⁶

The main set of rules which permit consolidation are those of the International Chamber of Commerce.⁵⁷ Article 10 permits the ICC Court to consolidate two or more arbitrations ‘at the request of a party’ where (in particular):

‘... the claims in the arbitration are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship and the court finds the arbitration agreements to be compatible.’⁵⁸

Compared with the circumstances in which more advanced national civil procedure rules allow joinder and consolidation of claims, this test appears restrictive.⁵⁹ By requiring the parties to each of the arbitrations to be the same, the power of the ICC Court will not extend to consolidating a mass of *similar* claims — between a defendant and numerous claimants — in a group arbitration. The choice of the ICC Rules would not, of itself, allow an arbitrator to create a collective group competition procedure relying on consolidation since all of the various parties would need to consent to this. The London, Stockholm and Vienna arbitration institution rules have similar — although perhaps slightly more liberal — provisions.⁶⁰ Joinder of parties to an ICC arbitration is only permissible before the appointment of the arbitral tribunal, unless all of the parties to the arbitration agree.⁶¹ The London, Stockholm and Vienna rules are more flexible in this regard.⁶²

There are more permissive regimes. In particular the Swiss Rules of International Arbitration⁶³ permit the Court of the Swiss Chambers to decide that if a notice of arbitration is submitted between parties already involved in another arbitration;

‘... after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings’.⁶⁴

Consultation of the parties is thus required, but their (further) consent to consolidation is not.

⁵⁵ UNCITRAL Arbitration Rules (2010), United Nations, Vienna, <uncitral.org>: r 17(5) deals with joinder

⁵⁶ for a recent review Gordon Smith ‘Comparative Analysis of Joinder and Consolidation Provisions under Leading Arbitral Rules’ (2018) *Journal of International Arbitration*, vol 35, issue 2, 173

⁵⁷ International Chamber of Commerce Rules of Arbitration, March 2017, <iccwbo.org>

⁵⁸ *ibid*, r 10(c)

⁵⁹ Strong (n 14), 198-201. The 2012 rules discussed there remain unchanged in the 2017 version.

⁶⁰ LCIA Arbitration Rules (2014), art 22(1)(viii)-(ix), <lcia.org>; Arbitration Rules of the Stockholm Chamber of Commerce (2017), rr 14 and 15, <sccinstitute.com>; VIAC Rules of Arbitration and Mediation (Vienna Rules) (2018), r 15, <viac.eu>

⁶¹ n 57, r 7

⁶² n 60: LCIA r 22(1)(viii); SCC, r 13; VIAC r 14.

⁶³ Swiss Rules of International Arbitration (2012), art 4, <www.swissarbitration.org>

⁶⁴ *ibid*, art 4(1)

The Swiss rules then go further:

The Court may proceed in the same way [...] between parties that are not identical to the parties in the pending arbitration.⁶⁵

The test which the Court⁶⁶ must apply in deciding whether to consolidate arbitrations between non-identical parties is an ‘all the circumstances’ test and the links between the parties and the state of progress of the arbitration proceedings to be consolidated are to be taken into consideration. This mechanism looks much more like a ‘traditional’ consolidation power in national civil litigation procedure rules than the ICC equivalent. We suggest it is clearly capable of being used to craft a group collective competition claim.

Unsurprisingly, given the permissive stance of the Dutch arbitration legislation, the rules of the Netherlands Arbitration Institute also permit consolidation of arbitrations even where not all of the parties have directly consented to this.⁶⁷ The consolidation procedure provided in the rules mirrors that in Dutch legislation — a third person must be appointed to decide if the arbitrations should be consolidated. But if not all of the parties agree on an appointee, the Netherlands Arbitration Institute administration may appoint the third person directly.⁶⁸ Arbitrations may be consolidated

....insofar as it does not cause unreasonable delay in the arbitration proceedings [...] and the two arbitration proceedings are so closely connected that the good administration of justice renders it *expedient* to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.⁶⁹

The German arbitration rules (DIS) go further still — but only in a set of supplementary collective proceedings rules.⁷⁰ It appears that these should be included in the agreement to arbitrate by separate express consent from each of the parties — the supplementary rules indicate that use of the general DIS Arbitration Rules does not imply incorporation of the supplementary rules.⁷¹ Since these DIS supplementary collective arbitration rules are the most advanced of their kind in Europe, they repay closer attention. However, the lessons from them may not be universally applicable, as they are specifically designed to be used with the KapMuG (and closely follow the requirements set out the Bundesgerichtshof in ‘Arbitration II’) — essentially a hybrid between a representative and a group collective claim.⁷²

⁶⁵ *ibid*,

⁶⁶ here the Arbitration Court of the Swiss Chambers Arbitration Institution — Swiss Rules (n 65), Introduction, para(6)

⁶⁷ Netherlands Arbitration Institute, Arbitration Rules (2015), art 39

⁶⁸ *ibid*, Art 39(3(b))

⁶⁹ *ibid*, art 39(4), emphasis added

⁷⁰ Deutsche Institute für Schiedsgerichtsbarkeit, Supplementary Rules for Corporate Law Disputes (DIS-SRCoLD), 15 September 2004 (n 47). The main DIS rules have recently been revised (2018) but the general rule still requires the consent of all parties to consolidation (r 8); Christopher Boog, Philip Wilmasena ‘The 2018 DIS Rules: New Rules for a Renewed Institution’ (2018) ASA Bulletin, vol 36, issue 1, 10-30

⁷¹ Supplementary Rules, *ibid*, s 1

⁷² section 2.2 above

The DIS supplementary rules are accompanied by a model arbitration clause. It is important to note that this clause expressly sets out that parties must consent not only to arbitration but also to be bound by the arbitration clause even if they are ‘concerned others’ (*Beigeladenen*) who have not individually exercised their rights in the arbitration.⁷³ So the drafters of the supplementary DIS rules — having taken a view on the policy requirements of German law as a backdrop to collective arbitration procedure — do not appear to embrace wholeheartedly the view of the ICSID tribunal in *Abaclat* that separate express consent to collective arbitration is not required. At the least, the DIS supplementary rules ‘play it safe’ and assume that there will be cases where an arbitrator will not be able to *imply* existing consent to collective arbitration from other factors.

The DIS supplementary rules mainly make provision for the proper notification of parties and concerned others and for the conduct of the proceedings. Interestingly, however, they also contain — in Article 9 — relatively elaborate provision for dealing with parallel arbitration proceedings headed ‘combination of jurisdiction’.

Rather than give the DIS secretariat the power to compel consolidation of parallel arbitrations, the supplementary rules adopt a rather different approach. Where there are a number of arbitration proceedings with a single subject matter requiring to be resolved together in one arbitration, the first filed arbitration will go forward and subsequent arbitrations are declared ‘inadmissible’.⁷⁴ The parties to the second or later arbitrations become ‘concerned others’ in the lead proceedings and may apply to join the first arbitration as parties if they wish, in the same way as any other *Beigeladenen*.⁷⁵

Clearly the effectiveness of this procedure necessarily depends on the adherence of the parties in the second or subsequent arbitrations to an arbitration clause in the standard DIS supplementary form. Without this, it is difficult to see how the mandatory ‘inadmissibility’ procedure is binding on the parties to the later arbitrations. The DIS supplementary procedure is properly a ‘combination of claims’ based on express consent, given in the DIS supplementary standard clause by all of the parties to arbitration, to be treated as *Beigeladenen* in — and bound by the outcome of — the first arbitration, even if they do not actively participate in it.

If the DIS supplementary clause is not included, the generally applicable DIS Arbitration Rules do contain provision for consolidation of pending arbitrations, but only with the consent of all of the parties.⁷⁶ However, section 18 — dealing with multiple claimants or defendants — does give the arbitrator an express power to decide on the admissibility of multi-party proceedings.⁷⁷ It should therefore be possible for an arbitrator having jurisdiction under a standard DIS clause — for example in a supply contract between an infringing manufacturer

⁷³ n 70, model clause para 2; also Christian Borris (n 43) 82-84

⁷⁴ Supplementary Rules (n 70), s 9.2

⁷⁵ *ibid*, s 9.4

⁷⁶ n 70, s 8

⁷⁷ *ibid*, s 18.1

and its customers — to admit a procedure in a collective competition arbitration which is modeled (in large part) on that in the supplement. In particular, where several closely linked arbitrations have been commenced with the same aim, all of the parties may agree to stay all but one of them (so that it forms in effect a ‘test’ arbitration) for reasons of procedural economy. Alternatively the arbitrator may be able to discern implied consent to a single multi-party arbitration under these new sections in the general DIS arbitration rules.

3.3 Summary on consolidation and group proceedings

There are a variety of European models for consolidating a number of arbitrations into a group (‘mass’) form of collective action. The usual method — exemplified by the UK arbitration legislation — is to only allow consolidation where the parties have consented to this either directly or through using the rules of an arbitration institution which allows consolidation.

Many institution rules do not expressly address the possibility for the institution to consolidate two arbitrations over the immediate objections of some of the parties. Those that do take differing approaches. The ICC rules — likely in practice to be the most important given their widespread use — take a cautious approach and only allow the ICC Court of Arbitration to consolidate arbitrations in relatively limited circumstances. Other rules take a broader approach — with the Swiss rules being the most liberal (and therefore the most useful for creating a ‘mass’ action). And the German DIS rules allow parties to consent specifically to a ‘class action’ supplement — but only, on its face, in shareholder claims — and make provision to ensure that only one arbitration is carried forward.

The widespread incorporation of arbitration institution rules in agreements to arbitrate should mean that the most effective way of facilitating grouped (‘mass’) collective competition arbitration will be for arbitration institutions to adopt rules addressing this phenomenon — notably by modernising their rules on consolidation.

4. Collective competition arbitration outside the EU: effect in EU countries

Ensuring that the law applicable in a collective arbitration of an EU competition dispute is coherent — so that the substantive law of the obligation to compensate, the proper law of the agreement to arbitrate and the *lex arbitri* are consistent with each other — will normally mean seating the competition arbitration in an EU (or EEA) state where the infringement of EU competition law has had an effect.⁷⁸ However, many infringements of competition law having their effect in the EU arise from anti-competitive behaviour on an intercontinental or even worldwide scale.⁷⁹

⁷⁸ Regulation 864/2007(n 1), art 6(3); ch 4.2.1 above

⁷⁹ high profile recent examples include the ‘air freight’ cartel — Commission decision, 17 March 2017, case AT.39258, [2017] OJEU C188/14, and the abuse of dominance by Google — Commission decision 18 July 2018, case 40099 (nyr)

Actions by groups wishing to claim compensation for competition (anti-trust) infringements are routinely litigated in a number of *fora* and in some — notably the USA — are also arbitrated on a collective basis.⁸⁰ Where the collective arbitration of a wider international anti-trust dispute has taken place outside Europe and the award made is to be enforced both in the EU and elsewhere, will the principles we have examined apply to permit the enforcement of the award through an EU civil court?⁸¹

4.1 Is the foreign award within the New York Convention?

The recognition and enforcement obligation on contracting States to the New York Convention applies to arbitration awards (and thus to agreements to arbitrate leading to an award).⁸² We have seen that this necessarily requires consent to arbitration from each of the persons who are to be bound by the award — even if that consent is indirect or implied.⁸³

Class ‘arbitration’ awards — particularly in the US — have arisen in two main ways. First, there are cases where the arbitrator — relying on the parties’ (implied) consent to class arbitration — himself certifies a class action, as in the *Stolt Nielsen* case. He has therefore interpreted the agreement to arbitrate to include class arbitration and the outcome of the proceedings is an award which (unless set aside by the supervising court) is within his competence.⁸⁴ But, second, there are cases where a *court* has certified a class whose representative has then proceeded to arbitrate the substantive dispute on a class-wide basis — as in the *Green Tree* case.⁸⁵

For class arbitration awards following the second type of procedure, with the coercive power of a court used to form the class, there must be a serious question as to whether the ‘class’ element of the dispute resolution is properly within the scope of the parties’ consent to arbitrate. The New York Convention permits contracting States to refuse to enforce an award if the award covers matters outside the scope of the arbitration agreement.⁸⁶ If a *court* has had to intervene to certify a class to empower the representative claimant to bring the class action in arbitration, consent to class arbitration from those class members who do not expressly join must at least be open to serious doubt.

However, the Convention exception does not allow the enforcing court to review the substantive findings in the award under the guise of a consideration of the arbitrator’s competence: the unenforceable ‘class’ element should be severed from the substance of the award.⁸⁷ The collective award would therefore remain enforceable by (and against) claimants who have expressly adhered to the

⁸⁰ James H Carter ‘Class Arbitration in the United States: Life after Death?’ in Hanotiau and Schwarz (eds.) (n 43)

⁸¹ Strong (n 14), 346-357

⁸² UNCITRAL Guide (n 9), 39

⁸³ ch 2.3

⁸⁴ *Oxford Health Plan v Sutter*, 569 US 564 (2013)

⁸⁵ *Green Tree Financial Corp v Bazzle*, 539 US 444, (2003)

⁸⁶ Convention (n 8), art V(1)(d)

⁸⁷ UNCITRAL Guide (n 9), 173, para 3

collective arbitration. The general ‘pro-arbitration’ assumption underpinning the Convention — requiring the recognition and enforcement of award except in exceptional circumstances — should be maintained.⁸⁸ It is only where the award clearly oversteps the bound of the arbitrator’s competence — if the award deals with matters ‘not *contemplated* by the parties’ — that it should not be enforced.⁸⁹

An enforcing court may also refuse to recognize an award if the arbitral procedure did not accord with the arbitration agreement or with the *lex arbitri*.⁹⁰ However, we have seen that use of this ‘safety valve’ will only be available where substantial prejudice is shown by the applicant resisting enforcement.⁹¹ This may go as far as requiring him to demonstrate that the outcome of the arbitration, as regards him, would have been substantially different if his preferred procedure had been followed.⁹²

A court in Europe would therefore be able (and probably must) refuse to recognize under the New York Convention those procedural parts of an ‘award’ which are ordered by a foreign court. In contrast, where a collective award is based on an initial finding by the *arbitrator* that the arbitration agreement permits class arbitration and that finding is *subsequently* confirmed by a foreign supervisory court, the supervisory court’s later judgment does not alter the fundamentally consensual nature of the class award. It should therefore be enforceable in the EU as against all consenting class members unless it can be shown — in relation to an individual claimant — that the limited exceptions in Article V of the New York Convention apply.

4.2 Public policy and recognition of ‘global’ awards in Europe

Nevertheless, even assuming the collective award is within the competence of the arbitrator, the New York Convention permits courts to refuse recognition of a foreign award on the basis of their own public policy.⁹³ But ‘public policy’ (*ordre public*) for these purposes has a narrow meaning.⁹⁴ On this basis, we believe that, when considering the recognition of anti-trust collective awards made outside the EU, an EU enforcing court must address the basic principles we have already discovered:

- recognition and enforcement of non-EU arbitration awards by a national court in the EU is governed by national laws made in the light of their state’s obligations under the New York Convention. The CJEU confirmed in *Gazprom* that EU law will not normally interfere with the recognition of an award by a national court;⁹⁵

⁸⁸ *ibid*, 78-81

⁸⁹ Convention (n 8), art V(1)(c) — emphasis added; UNCITRAL Guide, (n 9), 177

⁹⁰ Convention (n 8), art V (1)(d); UNCITRAL Guide (n 9), 189-194

⁹¹ UNCITRAL Guide (n 9), 199-200; Arbitration Act 1996, s 68(1); Blackaby and Partasides (n 10), 632-633

⁹² UNCITRAL Guide, *ibid*,

⁹³ Convention (n 8), art V(2)(b)

⁹⁴ UNCITRAL Guide (n 9), 244-247; Blackaby and Partasides (n 10), 641-644

⁹⁵ C-536/13, *Gazprom v Lithuania* (13 May 2015) ECLI:EU:C:2015:316, para 44

- most national systems of arbitration legislation only permit a ‘light-touch’ court intervention in international arbitration. In particular, a court review of the substance of the arbitrator’s award is not permitted;⁹⁶
- however, EU courts must — on a ‘second look’ on an application for *enforcement* of an arbitrator’s award — ensure compliance with EU public policy. The EU competition rules are questions of EU public policy.⁹⁷ However, the precise boundaries of what else constitutes EU public policy in an arbitration context are not defined by CJEU case law.⁹⁸

A collective competition award made in a seat outside the EU therefore potentially faces several hurdles before it can be enforced within the EU. First the dispute must be arbitrable in the country of the seat of arbitration: the procedure used must be admissible — comply with public policy requirements — there. Second, it must comply with the fundamental public policy (*ordre public*) requirements of the EU Member State where enforcement is sought. And third, it must comply with EU public policy — in particular the requirement to ensure uniform application of competition policy in Articles 101 and 102 TFEU.

An arbitrator sitting outside the EU, requested to resolve a competition dispute on behalf of a group of claimants wishing to enforce the award in an EU Member State, will therefore need to address — on the face of the award — the compliance of his decision with (at least) the first and third of these sets of public policies. It will be prudent to request the arbitrator to address both substantive EU competition law issues and the admissibility (as a matter of EU law) of the collective procedure chosen. Nevertheless, if he does so, that award should be enforced without a ‘re-trial’ of the admissibility of the collective procedure or the substantive competition issues.⁹⁹

4.2.1 Non-EU class procedures and public policy

Taking a US class anti-trust award of damages in a cartel case as an example, how might public policy be used in the EU civil court of enforcement to refuse recognition of the award under Article V of the New York Convention? We have noted that the enforcement of awards in EU courts is still a matter of national law — as underlined by the CJEU in *Gazprom* — even if EU public policy must also be respected.

As a first indication, practice in Member States regarding the recognition of requests to recognise US *litigated* class action judgments varies considerably. For example, the Amsterdam District Court recognized a US ‘opt-out’ class action judgment as early as June 2010,¹⁰⁰ while the French courts have long regarded

⁹⁶ eg. France, Code de procédure civile, arts 1520 and 1521 (para 3)

⁹⁷ C-126/97, *EcoSwiss China Time v Benetton International* [1999] ECR I-3055; ch 3.3 above.

⁹⁸ Opinion of Advocate General Wathelet in C536/13 *Gazprom* (4 December 2014), ECLI:EU:C:2014:2414

⁹⁹ UNCITRAL Guide (n 9), 126-127

¹⁰⁰ *Royal Ahold NV* (23 June 2010), IJN:BM:9324; Duncan Fairgrieve and Eva Lein (eds) *Extraterritoriality and Collective Redress* (2012) OUP, 88-89

opt-out class action judgments as unenforceable.¹⁰¹ In other EU Member States – the UK and Belgium for example, where domestic ‘class’ action regimes have only recently been introduced — the position is less clear.¹⁰² International law does not provide a comprehensive framework for the recognition and enforcement of foreign judgments — relying instead on bi-lateral treaties of uneven application. In particular the United States is not party to any bi-lateral or multi-lateral treaties on civil judgment recognition.¹⁰³

In contrast, the context for the recognition of ‘class’ arbitration awards is rather different — an enforcing court in Europe will be bound by its national legislation implementing the state’s international obligations under the New York Convention. The ‘pro-arbitration’ stance evident from the New York Convention and the UNCITRAL Model Law, and from most national arbitration legislation — including that of the United States — should ensure wide ranging recognition of ‘class’ award.¹⁰⁴

Even if an arbitrator chose to adopt a procedure modelled on (for example) US FRCP 23 — the “class action” — he could only do so as regards parties who have consented to arbitrate the competition claim he is resolving, either expressly or impliedly using a “class” procedure.¹⁰⁵ Giving consent to arbitration necessarily requires the party to ‘opt-in’ to the arbitration agreement so that many of the public policy objections to recognition of class judgments — based on lack of consent — should fall away. In particular — and provided that the arbitrator has properly considered whether the arbitration agreement permits him to admit a collective claim — a procedure, by which the arbitrator declares his award binding on all parties (consenting to arbitration) who have not ‘opted out’ within a certain time, is capable of being compatible with EU public policy. The EU position (as notably set out in the Commission Recommendation) is that collective proceedings should normally proceed on an ‘opt-in’ basis — that is, with the agreement (consent) of the parties to be bound.¹⁰⁶ In arbitrated outcomes, this consent exists in the agreement to arbitrate.

The potential for fundamental policy differences regarding the admissibility in arbitration of a collective procedure appears — perhaps paradoxically — to be lower than for jurisdictional challenges based on substantive differences of competition law.

¹⁰¹ Brief for the Republic of France (amicus curiae) in *Morrison v National Australia Bank Ltd* (26 February 2010), 26-29, <scotusblog.com>; Fairgrieve and Lein (ibid.),

¹⁰² Mark Stiggelbout ‘The Recognition in England and Wales of United States Judgments in Class Actions’ (2011) *Harvard International Law Journal*, vol 52, no 2, 433

¹⁰³ ‘Enforcement of Judgments’, US Department of State — Bureau of Consular Affairs, <travel.state.com> (accessed August 2018); S I Strong, ‘Recognition and Enforcement of Foreign Judgments in US Courts: Problems and Possibilities’ (2014) *Review of Litigation*, vol 33, no 1

¹⁰⁴ UNCITRAL Model Law on International Commercial Arbitration (2006), United Nations, Vienna, arts 2A(2) and 5 and Explanatory Note, para 15; Born Law and Practice (n10), 1

¹⁰⁵ *Stolt-Nielsen SA v Animal Feeds International Corp*, 559 US 1 (2010); ch 2.4.2.2 above

¹⁰⁶ Commission Recommendation (n 12), para 21

4.2.2 Substantive competition law and public policy

The criticisms of US anti-trust competition (anti-trust) class judgments in the context of the EU system of competition enforcement are well rehearsed elsewhere.¹⁰⁷ As a general ‘rule of thumb’ the EU competition law prohibitions on cartels and other pricing or market sharing agreements between competitors mirror those applied in all other jurisdictions with developed competition law regimes.¹⁰⁸ EU competition law tends to be more intrusive than other regimes in relation to ‘vertical’ agreements — for example between suppliers and distributors. US practice tends to be non-interventionist here,¹⁰⁹ while EU law applies a set of relatively detailed rules depending on the market share of the parties to the agreement.¹¹⁰ This is as a result of the dual function of EU competition law — both ensuring economic efficiency and (unlike peer regimes) contributing to the maintenance of the EU Single Market

Potentially even greater divergence can arise in relation to the EU competition prohibition on abuse of market dominance where the US equivalent applies in a rather different and far more limited set of circumstances.¹¹¹

We suggest that, if an arbitrator outside the EU finds that the resolution of the dispute *necessarily* leads to different substantive (competition law) outcomes, depending on whether he is applying the non-European substantive anti-trust law of the seat or EU competition rules, he may be required — if he is to make an award valid in the seat of arbitration — to decide according to the forum’s substantive anti-trust law. If the court of the seat could consider that the award disregards domestic anti-trust rules to such an extent that the public policy of the seat may be violated, the award would be vulnerable to a successful application to set it aside. However, in this case, the award might not then be enforceable in the EU, if the misapplication of EU competition law is so serious as to trigger an EU public policy review. A further European collective arbitration could be required if claimants are to be compensated for harm arising in the EU.¹¹²

4.3 Summary on recognition of non-EU awards

The ‘triple lock’ of compliance with EU public policy — including substantive competition rules — and the fundamental public policy requirements in the law of the agreement to arbitrate and the *lex arbitri* (if different), may mean that some non-European collective competition awards cannot be enforced in the EU. The ‘public policy’ exceptions in Article V of the New York Convention may apply

¹⁰⁷ eg. Deborah Hensler, *Class Action Dilemmas: Pursuing Public Policy Goals for Private Gain*, (2000) Rand; Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems*, (2008) Hart

¹⁰⁸ eg. US ‘Sherman’ Act 1890, 26 Stat 209, 15 USC 1, s 1; Anti-monopoly Law of the People’s Republic of China (30 August 2007), art 13, <npc.gov.cn/englishnpc/law/2009-02/20/content_1471587.htm> (accessed August 2018)

¹⁰⁹ *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877 (2007)

¹¹⁰ Commission Regulation 330/2010, on the application of Article 101(3) [...] to categories of vertical agreements and concerted practices, [2010] OJEU L102/1

¹¹¹ *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398 (2004)

¹¹² C-126/97 *EcoSwiss* (n 97)

— particularly where US anti-trust law is the *substantive* law of the dispute being arbitrated.

These differences and difficulties should not be overstated, however. The majority of trans-Atlantic competition law cases litigated to date have been cartel infringements: the differences in the substantive competition law treatment of cartels in the EU and the US are minimal. In trans-Atlantic cartel cases it should always be possible for a competent arbitrator to reach a reasoned award complying with both EU and US substantive laws. Nor — as we have demonstrated — should the use of US-style class procedures in the arbitration *in itself* prevent the enforcement of the award in Europe. The public policy landscape in Europe for collective redress has changed dramatically in the last five years and looks set to change further.¹¹³ Very few judges in European *fora* can now legitimately find that a representative ‘class’ procedure justifies a refusal to recognize a properly reasoned collective award made in a non-EU seat.

5. Conclusions on seat of arbitration

We therefore draw the following conclusions on the choice of the appropriate seat of a collective competition arbitration:

1. For collective competition claims made on a contractual basis (by direct purchasers) the parties are free to choose the substantive law applying to the contract, the proper law of the (separate) agreement to arbitrate — assumed to be the substantive law if no other choice is made — and the *lex arbitri*, through choice of the seat of arbitration;
2. In contrast EU legislation on choice of law in non-contractual competition cases effectively means that the principal jurisdictional variable available *to the parties* in collective competition claims is the choice of the seat of arbitration;
3. Even for non-contractual collective claims, the parties and the arbitrator — who has significant discretion over the choice of substantive law — will likely prefer that all three of the laws applying to the arbitration (substantive law, law of the arbitration agreement, *lex arbitri*) are the same, or at least fully consistent with each other. The public policy boundaries to the arbitrator’s discretion to admit advanced collective redress procedures should then be coherently applicable;
4. The consequent importance of the seat of arbitration (and *lex arbitri*) in determining the procedural framework within which the arbitrator must exercise his discretion means that the choice of a seat with developed collective *litigation* rules is advisable to reduce the risk of successful challenge to admissibility of a collective procedure. The UK, the

¹¹³ Proposal for a Directive on representative actions for the protection of the collective interests of consumers, COM (2018) 184, 11 April 2018

Netherlands and Germany are those EU Member States which currently have the most advanced collective proceedings rules in the EU;¹¹⁴

5. Supervising courts in other European countries with less developed collective redress procedures — France, for example — may nevertheless not prevent the use of advanced collective redress procedures in international arbitrations seated there provided that they do not give rise to a ‘flagrant’ (‘serious’) disregard of applicable public policy criteria;
6. Where a ‘group’ collective arbitration procedure is envisaged, consent from all parties to consolidate arbitrations already commenced will be required under most national arbitration legislation. This consent can, however, be given indirectly by incorporating the rules of arbitration institutions into the agreement to arbitrate. Practice in this area differs significantly between institutions;
7. As all arbitrations can only proceed with the consent of the parties to be bound, even an award from a non-EU seat using an apparently ‘opt-out’ or class procedure should be compatible with the EU’s stated ‘opt-in’ policy. Only if the ‘class’ element of the ‘award’ is imposed by the order of a foreign court, will that award fall outside the scope of the New York Convention and so not be fully recognized. However, such an award should continue to be enforceable by or against the parties who have freely consented to arbitrate collectively;
8. Where a collective (class) arbitration of a competition dispute has taken place in a non-EU country — eg. the USA — the award should only be refused enforcement on the grounds allowed in Article V of the New York Convention. Public policy may only be invoked against enforcement of the final award for ‘flagrant’ non-compliance with either substantive EU competition law or with fundamental public policy requirements (*ordre public*) in the EU state of enforcement;
9. A ‘policy’ based challenge to a non-EU award based on material differences in the applicable substantive competition (anti-trust) laws and EU law may have a greater chance of success than a procedural challenge. But a properly reasoned foreign award of damages against members of a price fixing or market sharing cartel should always be enforceable across the EU.

Collective arbitration therefore offers a substantial jurisdictional advantage over class litigation. If the proceedings are properly conducted, a ‘class’ award — wherever made — should be recognized and enforced throughout the EU.

A collective award of course only binds those members of the class who have consented to arbitration of their competition disputes. However, the increasing availability of ‘collective settlement’ mechanisms in some EU Member States may

¹¹⁴ However, the current Dutch regime does not permit collective litigation to recover damages: it is a settlement mechanism only — see ch 6. There are current proposals for reform: Wetsvoorstel, afwikkeling van massaschade in een collectieve actie, 16 November 2016

provide an avenue for a collective award — reached through a representative procedure — to be extended by court order even to group members who have not consented to arbitration. We consider this possibility — to increase both the scope of redress and the finality of the resolution of the competition dispute — in the next chapter.

6 Arbitration as ‘consensual dispute resolution’— using national collective settlement legislation

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1. Introduction: growth of collective settlement in Europe

The two advantages of collective redress — for claimant groups, the wider scope of redress and, for defendants, greater finality — have led to proposed or enacted national ‘collective settlement’ procedures in some EU Member States.¹ Where the harmed group (or its representative) can agree an outcome with the defendant(s) to remedy the effects of the mass harm event (here, the competition infringement) — for example prompted by a defendant’s leniency application — collective settlements can offer quick and comprehensive finality (and redress) without the need for litigation.

However, the availability of (national law) collective settlement mechanisms — extending the binding effect of the settlement agreement to ‘non-active’ group members by court order — is currently limited to a very few Member States (essentially the UK for competition claims, Germany for securities claims, and the Netherlands with a general system).² There is no EU wide collective settlement mechanism. And existing collective settlement frameworks do not address the — fairly common — situation where all sides wish to reach an acceptable outcome to a number of competition claims, but remain in dispute about some elements of the remedies to be applied. In particular, ‘follow-on’ cases, where most of the

¹ ‘State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation’ BIICL for the European Commission; November 2017, JUST/2016/JCOO/FW/CIVI/0099, 10

² *ibid*; Competition Act 1998 s 49B; Kapitalanlegermusterverfahrensgesetz (19 October 2012) BGBl I 2182, ss17-19; Wet om collectieve afwikkeling van massaschade (24 July 2005) as last amended by law of 26 June 2013, StB 2013, 255

contentious factual issues on liability will have been dealt with in the public enforcement decisions — leaving dispute over amount of compensation — are likely to fall within this category.

This chapter considers the possibility of combining collective competition arbitration — with its advantages of scope and flexibility over litigation — with available national collective settlement regimes to create a ‘hybrid’ collective redress solution. The aim of this hybrid would be to achieve the widest possible resolution of the dispute by extending its reach to claimant group members who have not consented to arbitration but who would be within the scope of a national collective settlement order in the terms of the collective award. This hybrid system would retain the main advantage of (collective) arbitration — the potentially wide enforceability of the award under the New York Convention — with the advantages of ‘last generation’ court based collective settlement regimes now emerging in the EU.

Arbitration is not, of course, the only way in which a collective settlement, put to a court for approval, might be reached. In particular, mediated settlements could be used as the basis for a collective settlement application to a national court. However, the advantage of arbitration — EU-wide enforceability of the resolution of the dispute (the award), even in countries where there is no national collective settlement legislation — might be lost.

For the court approving a settlement, a potential key advantage of arbitration over other ‘softer’ forms of ADR is that, on contested issues of fact (including economics), the court will know that the issues have been tested against evidence by a neutral third party. Assuming a suitably appointed and reasonably expert arbitration panel, this is likely to mean that the approving court could abridge its consideration of the fairness of the collective settlement presented to it. In essence, contentious questions will already have been decided ‘*en contradictoire*’ by the arbitrator in the collective award. This could well mean a greater court acceptance of proposed settlements based on arbitration than on other forms of ADR where no impartial decision has been reached.

The earliest national collective settlement regime was in the Netherlands — the law on the collective settlement of mass harm (2005).³ It applies to all kinds of mass harm and allows settlements on behalf of a collective group to be approved by the Amsterdam Court of Appeal. Court approval makes the settlement binding on all members of the settlement class described in the application by the representative entity.⁴ Class members are allowed a period to opt out of the settlement before it becomes binding on them.⁵

³ as last revised by the law of 26 June 2013, inserted into the Dutch Civil Code (BWB), book 7:15 and the Code of Civil Procedure, book 3:14 (paras 1013-1018)

⁴ BWB, *ibid*, 7:908

⁵ Bas van Zelst ‘Class Actions and Arbitration: Alternative Approaches based on Dutch Experiences with Collective Redress’ (2018) *Journal of International Arbitration*, vol 35, issue 2, 203-224

A similar system has been introduced in the UK for competition claims. The UK regime allows for both the settlement of commenced claims and for settlement of claims not already commenced in litigation. The 2015 inclusion in the Competition Act 1998 of a stand-alone collective settlement regime for competition claims administered through the Competition Appeal Tribunal was inspired by the Dutch model.⁶ However, unlike the Dutch regime, the UK system is limited to collective settlements of infringements of UK or EU competition law and does not apply more generally.

In this chapter we first consider whether collective competition arbitration is ‘consensual dispute resolution’ for EU law purposes. We conclude that it can be. In the light of this conclusion, we address the interface between collective settlement approval and the New York Convention. We conclude that a collective settlement order can extend the scope of an award to non-consenting parties in the court’s jurisdiction and that there is unlikely to be an effect on the enforceability of the *award* under the Convention.

Finally we consider how best to increase the effectiveness of this ‘hybrid’ model. In particular, if the competent national courts for recognising arbitration awards and for approving collective settlements are different, how best should the recognition and approval process be managed?

2. Promoting consensual dispute resolution

2.1. What is EU ‘consensual dispute resolution’?

National legislation in the EU on collective settlements — when being used to resolve disputes over directly effective EU law rights such as competition law — must be interpreted and applied in the light of EU law general principles and the ‘*acquis communautaire*’.⁷ Both of the main EU law instruments relevant to collective competition redress recommend or require Member States to facilitate non-court settlements.⁸ However, the language they each use to do this varies slightly. The ‘damages’ Directive explicitly indicates that ‘consensual dispute resolution’ includes arbitration.⁹ The term ‘consensual dispute resolution’ is broadly defined in the body of the Directive:

‘consensual dispute resolution’ means *any* mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages;¹⁰

⁶ n 2; Department for Business Innovation and Skills, ‘Private Actions in Competition Law’, consultation document (April 2012), 44

⁷ ch 3.1.2; C-106/89 *Marleasing v. La Comercial* [1990] ECR I-4153 at 4159; Aidan O’Neill *EU Law for UK Lawyers*, 2ed (2011) Hart, 63

⁸ Directive 2014/104 on damages actions for breach of EU competition law, [2014] OJEU L349/1, art 18; Commission Recommendation on collective redress (11 June 2013), [2013] OJEU, L201/60, paras 25-28

⁹ Directive *ibid*, recital 48

¹⁰ *ibid*, art 2(21), emphasis added

The recitals to the Directive give a little more detail

[...] 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 out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation.¹¹

The Recommendation (perhaps unhelpfully) uses different terminology and recommends that Member States “ensure that judicial collective redress mechanisms are accompanied by appropriate means of *collective alternative dispute resolution*” — both before any litigation takes place and during it.¹² The Recommendation emphasises that this should depend on the consent of the parties involved in the case.¹³

Is there any significance in this difference in language? We do not believe so. In particular, both phrases appear capable of including arbitration, although — unlike the Directive — the Recommendation is not explicit on this point. However, since the Recommendation was made on the same day as the Directive was proposed, we do not believe that the concepts can have been intended to differ. And the term ‘alternative dispute resolution’ (ADR) used in the Recommendation is commonly used in other contexts to include arbitration.¹⁴

So, both the Directive and the Recommendation — especially when read together — enjoin Member States to facilitate (collective) arbitration in competition cases. Does this EU impetus mean that a national settlement order (the resolution of a collective dispute using an approved settlement) and an award (resolution of a collective dispute using arbitration) can be dovetailed together to create a ‘hybrid’ solution? We believe the answer will depend on three factors:

- a) the terms of the consent to arbitrate;
- b) the process through which the award is reached; and
- c) the interpretation of the national collective settlement legislation being used.

Whether as a result of the impetus from the Commission Recommendation and ‘damages’ Directive, or from domestic policy concerns, EU Member States and the European Commission are developing a variety of collective settlement mechanisms.¹⁵ The most advanced collective settlement regimes allow the

¹¹ *ibid*, recital 48

¹² Recommendation (n 8), paras 25-26, emphasis added

¹³ *ibid*, para 26

¹⁴ Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 6 ed (2015) OUP, 40-41; Adrian Zuckerman, *Civil Procedure: Principles of Practice*, 2 ed (2013) Sweet & Maxwell, 46-47, para 1.126; Directive 2013/11 on alternative dispute resolution for consumer disputes, [2013]OJEU L165/76, art 2(1) (scope), includes ADR processes both proposing but also imposing a resolution; also Henry Brown and Arthur Marriott, *ADR Principles and Practice*, 3 ed, (2011) Sweet & Maxwell;

¹⁵ European Commission proposal for a Directive on representative actions for the protection of the collective interests of consumers, COM/2018/184 (11 April 2018), art 8; State of Collective Redress (n 1), 10

representative of a group of victims to apply to the competent court for a settlement agreement reached between him and a defendant to be declared binding on all group members (unless they opt-out) — even where they are not themselves actively ‘involved’ in the dispute resolution proceedings or expressly party to the settlement.¹⁶

2.2 Arbitration award as a ‘settlement’ of a collective competition claim

2.2.1 Scope of the terms ‘arbitration’ and ‘settlement’

Before turning to consider the three factors noted at (a) — (c) above, we believe that a consideration of the scope of the terms ‘arbitration’ and ‘settlement’ is needed to guide our argument that a collective award may be within the scope of national collective ‘settlement’ laws.

The outcome of a ‘foreign’ dispute resolution process must have three features if it is to be recognised and enforceable as an *award* under the New York Convention:

- it should be made by an arbitrator — so arbitrators must have been appointed;
- the decision must finally resolve a dispute — either in whole or material part; and
- the decision must be binding on the parties (and not subject to substantive review by another arbitration body).¹⁷

The absence of one of these elements may either invalidate the proceeding entirely or transform it into another type of alternative dispute resolution procedure. However, the exact contours of the type of proceeding which can be an ‘arbitration’ are not well established: neither the New York Convention nor national legislation provide a definition.¹⁸ Whether a dispute resolution outcome is an award depends on its nature and content viewed in the light of the purpose of the Convention and relevant national laws.

An arbitration proceeding leading to an award has been said to have four necessary elements:¹⁹

- consent to resolve disputes under the agreement to arbitrate;
- use of a non-state decision maker selected directly or indirectly by the parties (to distinguish from court-based dispute resolution);
- resolution of the dispute by the chosen decision maker is binding on the parties through the award (to distinguish from mediation);

¹⁶ as in the UK or the Netherlands (n 2)

¹⁷ UNCITRAL Secretariat Guide to the convention on recognition and enforcement of foreign arbitral awards (2016) UN, Vienna, 12-14

¹⁸ *ibid*, 11-12, paras 19-20

¹⁹ Gary Born, *International Arbitration: Law and Practice*, (2016) Kluwer Law International, 2-4

- use of a procedure under which the parties are heard before the resolution of their dispute (to distinguish from some forms of expert determination).

These ‘definitions’ of ‘award’ and ‘arbitration’ clearly do not have precise boundaries — a flexibility which we believe assists in using arbitration as a complement to collective settlement procedures. Similarly to the ‘softness’ of what constitutes ‘arbitration’, the scope of the term ‘settlement’ is also not sharply defined in national legislation.

The UK competition legislation does not define the term ‘settlement’ as used in the provisions allowing the Competition Appeal Tribunal or the Competition and Markets Authority to approve non-court resolutions of collective competition disputes. These were enacted before the implementation of Directive 2014/104 into the laws of the UK, and the UK implementing legislation to the Directive repeats the definition of ‘consensual dispute resolution’ given in the Directive without reference to the term ‘settlement’.²⁰

Similarly the UK civil procedure rules do not *define* ‘settlement’, although the description in Part 36, dealing with formal settlement offers, does make it clear that there has to be an offer which is accepted and which will permit the court to discontinue all or part of a claim. So, a procedure leading to a ‘settlement’ includes at least two of the four elements noted above: there must be consent to the resolution of the dispute by the parties and the settlement must bring an end to at least some of the claims made (that is, it is binding on those who consent).

A ‘settlement’ is clearly also one of the ways in which a litigated dispute may be ‘resolved’ — the others being unilaterally (through withdrawal of the claim) or following a court hearing. But is the term ‘settlement’ *fully* coterminous with ‘consensual dispute resolution’? From the operative parts of the ‘damages’ Directive, it appears not.

The Directive defines the term ‘collective settlement’ as

...an agreement reached *through* consensual dispute resolution ²¹

The Directive therefore appears to envisage consensus (agreement) to engage in a dispute resolution *process* — implicitly with a view to a settlement — followed (if possible) by a further agreement embodying the outcome of the dispute. That is, it is an A-P-A-R mechanism (where A is agreement, P is process and R is resolution). In contrast, the majority of arbitration awards will be reached through an A-P-R process. There must be an initial agreement to arbitrate, but there is no necessity for a second agreement between the parties before a resolution of the dispute is reached.

This conclusion that ‘settlement’ is not necessarily the same as ‘consensual dispute resolution’ is not, however, clear-cut. The recital to the Directive explaining the reasons for encouraging ‘consensual dispute resolution’ is rather ambiguously worded:

²⁰ SI 2017/385, sch 1, para 6

²¹ n 8, art 2(22), emphasis added

To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. That might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. [...] ²²

This drafting of the recital implies that *any* outcome of ‘consensual dispute resolution’ must be a ‘consensual settlement’ — one party to which will be a ‘settling infringer’. On this wider view, any arbitration proceeding — as we have seen, within the scope of ‘consensual dispute resolution’ — would thus lead to a ‘collective settlement’ (the award).

The Commission Recommendation is similarly ambiguous as to whether the terms ‘collective alternative dispute resolution’ and ‘settlement’ match exactly in scope. It recommends:

Collective alternative dispute resolution and settlements

The Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to *settle* the dispute about compensation consensually or out-of court [...]

The Member States should [therefore] ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation. Use of such means should depend on the consent of the parties involved in the case. ²³

The Recommendation thus confirms that all forms of ‘collective alternative dispute resolution’ should depend on the consent of the parties ‘involved in the case’ — we suggest indirectly as well as directly — and are settlements. But it appears (particularly from the paragraph title) to suggest that collective ADR and (collective) settlements are terms with a difference in meaning — there would be no need to reference the term ‘settlement’ separately if it were a complete synonym with ADR.

Nevertheless, we believe that this ambiguity should best be explained by interpreting these paragraphs so that that the encouragement to settle (recommended in the first sentence) is to be carried out through (collective) alternative dispute resolution *procedures* (‘means’). It appears that ‘collective ADR’ describes the process through which the settlement is to be achieved. The collective ADR process is to be carried out only with the agreement of the parties, but the Recommendation does not require a ‘double’ agreement. ‘Settlements’ using both A-P-A-R and A-P-R (ie. arbitration) mechanisms would be included in

²² *ibid*, recital 51

²³ Recommendation (n 8), paras 26, emphases and square brackets added

the term ‘collective alternative dispute resolution’. This conclusion is reinforced by the general acceptance that arbitration is a form of ADR procedure.²⁴

From this analysis of the wording of both the Directive and the Recommendation we can summarise the position under the current EU ‘*acquis*’ as follows:

- both ‘consensual dispute resolution’ and ‘collective alternative dispute resolution’ should be interpreted as having the same scope;
- that scope can include arbitration;
- both terms describe *processes* (‘means’) of resolving a dispute by agreement; and
- the outcome of the processes envisaged by both terms may be characterized as a (collective) ‘settlement’.

It follows from this that the outcome of a collective arbitration procedure — the (collective) award — can be characterized as a (collective) ‘settlement’ of the dispute for the purposes of both the Directive and the Recommendation.

However, our textual conclusion that — for EU law purposes — a collective arbitration award can be a ‘settlement’ may be counter-intuitive, particularly after a hard-fought arbitration procedure. Notably, two of the four characteristics we have identified for distinguishing an *arbitration* procedure — the use of a (non-State) *decision* maker and the use of a ‘contradictory’ dispute resolution procedure — will not be present in any resolution which could normally be described as a ‘settlement’.

Further factors nevertheless support our textual conclusion. Although the term ‘collective settlement’ may not have the same meaning in EU law and in national laws, in case of ambiguity in the scope of national procedural legislation (applied to enforce EU law rights), national authorities and courts must give effect to the EU ‘*acquis communautaire*’.²⁵ This will require an interpretation of the (national) term ‘settlement’ so as to give best effect to EU collective redress principles.

We therefore believe that the outcomes of arbitrations (ie. the awards) can be used as settlements in some — but not all — cases. We turn to consider the three defining factors noted in section 2.1 (terms of contract, process and national legislation) to examine when this might be possible.

2.2.2 Terms of the arbitration agreement

Since the task of the arbitrator is primarily defined by the consent of the parties in the agreement to arbitrate, the intention of the parties to ‘settle’ the dispute using arbitration will depend to a substantial extent on the terms of their consent.

International arbitration practice appears to support the proposition that an arbitration award can be a ‘settlement’. The standard ICC arbitration clause reads:

²⁴ n 14

²⁵ Ch 3.1.2; Renato Nazzini *Competition Enforcement and Procedure*, 2 ed (2016) OUP, 435

All disputes arising out of or in connection with the present contract shall be *finally settled* under the Rules of Arbitration of the [ICC][...] ²⁶

Similarly, the model clauses proposed by the Vienna International Arbitral Centre, the American Arbitration Association and the Stockholm Chamber of Commerce all use the term ‘settle’ to describe the activity carried out by the arbitrator under their rules. However, other arbitration institutions have chosen the more neutral term ‘resolve’ to describe this same activity in their model clauses — notably in the London Court of International Arbitration model clause but also in the Swiss Chamber and in the Australian (ACICA) model clauses. It should therefore be easier for a court, asked to approve a ‘settlement’ resulting from an (English language) arbitration proceeding, to do so where the (pre-dispute) arbitration agreement is in (for example) ICC standard terms than in LCIA terms.

Importantly, the New York Convention — the main international instrument dealing with commercial arbitration — provides that contracting States are required to recognize or enforce awards given in cases

.... concerning a subject matter capable of *settlement* by arbitration ²⁷

We considered this arbitrability exception in some detail in chapters 2 and 3, and for current purposes we merely note the use of the term ‘settlement’ to describe the outcome of an arbitration proceeding.

Nevertheless, a purely textual interpretation — in only one of the several languages in which the New York Convention is authentic — can do no more, we suggest, than permit the issue to be raised. ²⁸ It is unlikely to be conclusive of the parties’ intentions when they concluded the agreement to arbitrate. Moreover, the UNCITRAL Model Law apparently takes a different view of the term ‘settlement’. ²⁹ It recommends that, if ‘during the arbitral proceedings’, there is a settlement of the dispute, the arbitrator should terminate the proceedings and (if requested) record the settlement in the form of an award on agreed terms. The Model Law indicates that this award should have the same status and effect as any other arbitration award. ³⁰ The Model Law thus introduces a distinction between agreed awards (which are undoubtedly ‘settlements’ on the generally accepted A-P-A-R model) and other awards (using the A-P-R model). ³¹

It is therefore not fully clear whether international arbitration instruments unambiguously accept that all arbitration awards can be settlements. And in many cases, the use of the term ‘settle’ in the agreement to arbitrate may have been intended by the parties as a synonym for ‘decide’ — further evidence of the scope

²⁶ emphasis added

²⁷ Convention on the recognition and enforcement of foreign arbitral awards, New York, 1958, UNTS I-4355, Art II (1), emphasis added

²⁸ The French text of the Convention does not use similar language, preferring the more neutral verb ‘régler’ (resolve) — ‘... portant sur une question susceptible d’être réglée par voie d’arbitrage.’ (ibid)

²⁹ UNCITRAL Model Law on International Commercial Arbitration, (2006) UN, Vienna, art 30

³⁰ ibid, art 30(2)

³¹ in the UK, the Model Law distinction between agreed awards and other awards is enacted in Arbitration Act 1996, s 51

of the parties' consent may need to be considered by the arbitrator. Nevertheless, consistent with the theory that arbitration is the product of the parties' consent, it must, we believe, follow that — if the parties have consented to 'settle' their dispute by arbitration under a clause expressly providing for this — an arbitration award made within this conferred jurisdiction is capable of being considered a 'settlement' even where the procedure has followed the A-P-R route. Even where the arbitration agreement only empowers the arbitrator to 'resolve' or 'decide' the (collective) dispute, but a further agreement on the substantive issues is reached before he makes his final determination (so an A-P-A-R procedure) and it is recorded as an award, that award too will be a settlement.

And where the parties submit an existing dispute to arbitration, it should be possible to agree the wording of the submission agreement so that it fits the requirements of relevant national collective settlement regimes. It may even be possible (and sensible) to record the intention of the parties to seek approval of the award as a collective 'settlement', if this can be agreed at the outset.

From this overview, it is doubtful whether international arbitration law or practice permits *all* awards which are made (without a further post-commencement agreement) to be considered 'settlements'. A closer inspection not only of the arbitration agreement but also the procedure followed by the arbitrator, conditioned by the wording of the national collective settlement legislation being applied, may be required.

2.2.3 Procedure followed by the arbitrator

The procedure through which the (collective) dispute is resolved by arbitration — leading to the outcome which the national court will be asked to approve as a 'settlement' — may have an impact on whether that outcome can properly be treated as a 'settlement' for national law purposes.

There are likely to be two main concerns: first, whether the process has been properly adapted to a 'collective redress' setting and, second, in relation to the extent of any court intervention in the arbitration process.

If the arbitrator has not followed a procedure which is adapted to ensure that group members are properly involved in the arbitration, the award might not be a 'settlement' (requiring concurrence of wills, even indirect) between all of them and the defendants. For collective arbitrations where the representative is acting under a power of attorney or similar mandate — as in the *Abaclat* case — the question of whether the group members' consent has been adequately sought is one going immediately to the arbitrator's jurisdiction.³² A court approving a collective settlement application will need to be satisfied that 'non-assigning' group members to be bound by the order were properly involved in the 'settlement' process.

³² ch 2.3.3

The answer to the second question (extent of court intervention) depends not only on the national collective settlement legislation itself, but also on both the status of the arbitrator (can he be said to act on the parties' behalf?) and on the status of the award.

It is very difficult to argue that an arbitrator is acting in a similar way to an agent or representative of the parties, to conclude (indirectly) an agreement between them. In particular, the duty of the arbitrator to reach a decision which is binding on the parties — probably against the immediate wishes of at least one of them — appears obviously incompatible with him acting on behalf of both of them. This duty to decide in the face of continuing dispute is one of the main differences between an arbitration — falling within the scope of the New York Convention — and other forms of ADR such as mediation or an expert neutral evaluation of a complex factual situation.

Thus the sources of the arbitrator's authority to act are never *purely* contractual.³³ National arbitration legislation normally gives arbitrators substantial additional powers to resolve a dispute even in the face of inaction or procedural disagreement of the parties. For example, if the parties cannot agree on the appointment of the arbitrator, national law may permit a party to the arbitration to impose his own arbitrator.³⁴ And arbitrators (or chosen arbitration institutions) may in some cases appoint further arbitrators if a party refuses to nominate his own choice to sit on the panel.³⁵

On the status of the award, is it possible to draw a bright line as to when court intervention in support of an arbitration so reduces the consensual element in the arbitration proceeding that the final award can no longer be a 'settlement'? We do not think so.

Under UK rules, we have seen that a 'settlement' requires the acceptance of an offer (ie. consent) which leads to the resolution of all or part of a dispute. If the court intervention is simply to confirm the decision of the arbitrator, we do not believe that this alters the fundamentally consensual nature of the process resulting from the original agreement to arbitrate — and its outcome. However, where the court intervention in the arbitration process is more fundamental, the outcome might not be capable of definition as a 'settlement. For example, on the facts in the *Bazzle* case in the US, where the district court certified a 'class in arbitration', the procedure leading to the use of the 'class' (collective) procedure could never (we suggest) be sufficiently consensual to lead to a 'settlement' between the defendant(s) and the whole of the *court defined* class.

³³ The debate as to whether arbitration is a contractual dispute resolution device — as sustained in many continental European countries — or has a strong element of the quasi-judicial — for example meriting a high degree of immunity from suit for arbitrators — is beyond the scope of this thesis: eg.; Julian Lew, Lukas Mistelis and Stefan Kroll *Comparative international Commercial Arbitration* (2003) Kluwer International, 71-82 (esp. citations at 72 fn2); Andrea Steingruber *Consent in International Arbitration* (2012) OUP, 12-16; Gary Born *International Commercial Arbitration*, 2 ed. (2014) Wolters Kluwer, 214-217; Blackaby and Partasides (n 14), 34-35

³⁴ eg. Arbitration Act 1996 s 16 (5).

³⁵ *ibid*, s 17

2.2.4 National collective settlement laws

Whether an award can be a ‘settlement’ for the purposes of national collective competition settlement regimes depends not only on the interpretation of the agreement to arbitrate and on the course of the arbitration procedure, but also — evidently — on the interpretation of the national collective settlement legislation. For collective EU competition claims, that legislation will need to be interpreted in the light of the EU law and guidance.³⁶

Taking as an example the fact pattern of an hypothetical *CDC* hydrogen peroxide arbitration — with the claims against the cartel being arbitrated in Frankfurt using CDC as the representative claimant — the application for approval on an ‘opt-out’ basis of a ‘collective settlement’ (using the arbitration award made in Germany) might currently be brought either in Amsterdam or in London. The application would seek to bind all members of the class defined in the award and resident in the UK or the Netherlands to the ‘settlement’, whether or not they consented to arbitration of their cartel dispute with CDC.

In the Netherlands, the application will need to be made by a ‘stichting’ (representing the claimant group) and by the defendants, acting jointly. Similarly, the application to the Competition Appeal Tribunal in London will need to be made jointly by the representative — fulfilling the UK legislative requirements to be a representative claimant — and the settling defendants.³⁷ Thus — under both currently enacted collective settlement regimes — *all* parties to the settlement (also the parties to the award in our hybrid model) must join the application for a collective settlement order to be made.

Although the collective award itself might be used as the settlement presented to the court — where it is made on agreed terms (‘A-P-A-R’) and even, in many cases, where the process used to reach it is ‘A-P-R’ — further joint consent to the collective settlement application will be needed to fulfill these national procedural requirements. The overall process would then become ‘A-P-R-A’. In order to avoid difficulties where it may be doubtful if an award handed down after an A-P-R process can properly be treated as a ‘settlement’ (for example, because there was incompatible court intervention in the procedure or the arbitration agreement is not satisfactorily worded), in some cases the ‘settlement’ might better be framed as the agreement to make the application on the terms of the award (and not as the award itself). The award would then become — in effect — the evidence of the terms of the parties’ agreement to settle the dispute.

The difficulty with this approach is, of course, that, at the time the application is made, there is no longer any dispute to settle as between the defendant and the group members who have adhered (opted-in) to the arbitration — it has been dealt with by the collective award. But that resolution of the dispute only applies to the parties consenting to arbitration at that point. Other (non-consenting) members of the group represented by the ‘stichting’ or representative will not be

³⁶ ch 3.2

³⁷ Competition Act 1998 s. 49B(2); Dutch Civil Code (n 3), book 7, art 907(1).

bound by the award. The application therefore puts forward a proposed settlement on the terms of the award as between them and the applicant defendant(s). The (same) terms of the award will (assuming the application is approved unaltered) then bind all class members in the jurisdiction.

The distinction, between enforcement using national arbitration legislation for consenting group members and enforcement using collective settlement laws for others, may nevertheless be relevant if a defendant needs to use the outcome of the proceedings to bar any later claims by some of the group members. Enforcement of the award (as against consenting group members) will need to use the arbitration legislation of the court seised, but should be relatively straightforward in EU states. In contrast, the settlement order will need to be enforced using the general provisions of private international law — in the EU, set out in the Brussels I Regulation.³⁸ Extraterritorial enforcement of collective settlement orders is a novel proceeding and has been controversial.³⁹ Where possible, a well-advised defendant should (currently) rely on the widely accepted principles of the New York Convention and national laws made to reflect it, rather than looking to use a collective settlement order outside the jurisdiction of the court which made it.

Is this analysis affected by the requirement to apply EU general principles? We have noted that the ‘damages’ Directive and the Commission Recommendation encourage Member States to prompt parties to a collective dispute to settle it ‘consensually or out-of-court’, including by arbitration. Both the Directive and the Recommendation of course form part of the ‘*acquis communautaire*’. Where national legislation (including on arbitration) is ambiguous or incomplete, Member State courts are required to interpret the legislation so that their judgments give effect as far as possible to the purpose of relevant parts of the *acquis*.⁴⁰ As we noted above, the term ‘collective settlement’ is not defined in the relevant UK legislation. Similarly the Dutch legislation simply speaks of an ‘agreement’ between the parties making the application for approval, without defining how that agreement is to be reached.⁴¹ This will mean that, in borderline cases, where the court is unclear whether an award might be a ‘settlement’, it should prefer to accept rather than reject the award-based application for collective settlement of the EU competition dispute.

2.2.5 Collective awards as collective settlements: summary

The following summary can be offered — noting nevertheless that the law in this area is not yet at all developed.

An arbitration procedure leads to an outcome which can be a ‘settlement’. This conclusion is supported at an international level by the (English language) text of

³⁸ Regulation 1215/12 on the recognition and enforcement of civil and commercial judgments [2012] OJEU L351/1

³⁹ Duncan Fairgrieve and Eva Lein (eds) *Extraterritoriality and Collective Redress* (2012) OUP 82-87

⁴⁰ C-106/89 *Marleasing v. La Comercial* [1990] ECR I-4153 at 4159

⁴¹ BWB (n 3), art 907(1)

the New York Convention and by the preferred wording of arbitration clauses from some leading international arbitration institutions — for example, the ICC. However, in other language versions of the Convention (French) and for other arbitration institutions — for example the LCIA — the outcome of an arbitration may be a (broader) ‘resolution’ of the dispute.

EU legislation in this area, despite the differences in terminology — ‘consensual dispute resolution’ and ‘collective alternative dispute resolution’ — should be read as having a scope which includes arbitration. An outcome of a ‘consensual dispute resolution’ procedure is a ‘consensual settlement’. It is not clear from the EU legislation whether this settlement is the *only* outcome available or if others are also (implicitly) envisaged. National collective settlement legislation — at least when being used to resolve disputes of directly effective EU law (including EU competition law) — should be interpreted to give effect to the EU rules on collective settlement.

The wording of the arbitration agreement from which the arbitrator derives his jurisdiction will also be important: did the parties intend to ‘settle’ the dispute? Appropriate drafting to reflect the parties’ intention to settle will be easier in a post-dispute agreement to submit to arbitration.

A distinction is also made in international arbitration practice — for example, in the UNCITRAL Model Law — between arbitration awards in agreed terms and other awards. This distinction is reproduced in national arbitration legislation: it is clear that an arbitration award on agreed terms must be a ‘settlement’.

The use of awards which are not agreed as the basis for a ‘collective settlement’ will depend on the detail of national collective settlement and arbitration legislation, as well as the wording of the arbitration agreement evidencing the intention of the parties, and the procedure leading to the award. But an arbitrator not only derives his authority from the will (consent) of the parties. National legislation gives an arbitrator (once appointed) substantial non-consensual procedural powers and national courts may intervene to support these. Therefore, a minority of arbitration awards which are *not* made under an agreement to ‘settle’ a dispute by arbitration, which are not on agreed terms and where there has been intervention by the court of the seat in a way which interferes with the consent of the parties, may not be ‘settlements’ for the purposes of national collective settlement legislation.

Since the application to a competent national court for approval of the collective settlement has to be made by all parties to the settlement, the agreement to the joint court application ought itself to be a ‘settlement’, even if the award might not alone be sufficiently ‘consensual’. This additional agreement should fulfill national law requirements for a ‘settlement’ agreement even in cases where the award itself is not a ‘settlement’.

National (UK and Netherlands) court-based collective settlement legislation is therefore available to approve all collective competition arbitration awards on agreed terms. A minority of other collective competition awards might not be

capable of qualification as a ‘settlement’, but the agreement to apply for approval will evidence the ultimate settlement of the dispute. We therefore believe that collective awards resolving disputes arising from ‘mass harm’ breaches of EU competition law can be treated as a ‘collective settlement’ or evidence of it under these advanced national collective settlement regimes.

3. Collective settlement approval and the New York Convention

Our proposed ‘hybrid’ procedure would give an outcome binding not only on claimant group members having consented to arbitration but also on others within the scope of national (court-based) settlement orders. The extent of this additional scope to the dispute resolution will be important for parties — particularly defendants — in assessing the attractiveness of a collective settlement application. The collective settlement orders available under current UK and Dutch legislation bind all group members represented by the applicant within the jurisdiction of the approving court unless they opt-out of the settlement within the time period set out in the order.

3.1 Collective settlement process not affected by Convention

The use of national collective settlement procedures to extend the scope of the dispute resolution might come at the price of diluting the recognition and enforcement of the underlying arbitration award under the New York Convention. In short, is this ‘hybrid’ process still ‘arbitration’, or does court intervention to approve the settlement take the ‘award’ outside the scope of the Convention? In particular, since the courts approving the collective settlement application and the courts with jurisdiction for applications for recognition of arbitration awards are different in both the UK and the Netherlands, will the parties have to choose between approval or arbitration enforcement?

The Convention expressly does not purport to deprive any interested party of a right to use an award which is otherwise allowed under the laws of a country where he might wish to enforce it.⁴² This ‘more favourable right’ provision has been relied on primarily where the national laws available for enforcing *arbitration* awards are more liberal than the requirements of the New York Convention.⁴³ However, given the general wording of Article VII — which refers to *any* right to use the award in a manner allowed by law — it would appear that the use of an arbitration award in proceedings to approve a collective settlement also falls within this ‘more favourable’ rights exception.

Nor is recognition of the collective award at the seat necessary before it can be used to provide a platform for a collective settlement application. An arbitration award resolves the dispute referred to arbitration even if it has not been recognised by a court, and so it has legal effects (not least in preventing the litigation of the same issues) even without court enforcement.⁴⁴ Where the

⁴² Convention (n 27), art VII(1)

⁴³ UNCITRAL Guide (n 17), 298-299 (para 32) and 302 (esp para 4)

⁴⁴ Blackaby and Partasides (n 14), 560-561; in *Dowans Holding SA v Tanzania Electrical Supply Co Ltd.*, [2011] EWHC 1957, the court noted that the main innovation of the 1958 Convention was to

parties have agreed that it ‘settles’ the dispute between them, it should be useable to support a collective settlement application without additional procedural steps. However, we discuss in section 4 whether it might nevertheless be advisable to seek recognition of the collective award in its seat — particularly if collective settlement applications are to be made in countries outside the seat.

3.2 Arbitration enforcement affected by collective settlement?

We have considered how the effect of a collective competition arbitration award can be enhanced by court approval under one of the competition settlement regimes available in EU Member States. But can such approval adversely affect the recognition and enforcement of the underlying collective award under the New York Convention?

The ‘hybrid’ procedure we are proposing in this Chapter requires the award resulting from a collective competition arbitration to be used as the basis for an (agreed) application for approval as a ‘collective settlement’ under national legislation. That is, the award exists *before* the approval order is made and is thus independent of it.⁴⁵ In principle, therefore, it should continue to bind all those who have consented to arbitration, independently of the collective settlement order.⁴⁶

We will suggest that — while not required under the New York Convention — a collective award might usefully be first recognised in the country of the seat of arbitration if it is to be used in this way.⁴⁷ Nevertheless, a potential alternative method of seeking recognition of the collective resolution of the dispute in the seat of arbitration could be through an application for a collective settlement order there — if available in the *lex arbitri*.⁴⁸

If the settlement order is made as applied for, the award would be enforceable as a collective settlement in the country of the seat. But if the court called on to approve the award as a collective settlement either does so only in part or refuses to make an order at all, could this affect the enforceability in foreign courts of the underlying collective award under the New York Convention?

remove the previous requirement that an award to be recognised in its seat before it could be relied upon elsewhere.

⁴⁵ In contrast, if there is a settlement followed by an award, that award should record that it is made on agreed terms. The New York Convention is silent on the question of whether such an award is enforceable under the Convention rules (UNCITRAL Guide (n 12) 16-17. Where a settlement is reached before arbitration has been commenced — for example through mediation — the resulting outcome is not an arbitration award — Christopher Newmark and Richard Hill ‘Can a Mediated Settlement become an Enforceable Arbitration Award’ (2000) *Arbitration International*, vol 16, issue 1, 81

⁴⁶ Born *Law and Practice* (n 19), 406

⁴⁷ Blackaby and Partasides (n 14), 634-635. The grounds on which an award may be confirmed or struck down by a court of the seat of arbitration are not regulated by the New York Convention.

⁴⁸ Arbitration Act 1996, s 101(3)

Article V(1)(e) of the Convention permits — but does not require — an enforcing court outside the country of arbitration to refuse to recognize an award if the award has been set aside or suspended by a ‘competent authority’ of the country in which it was made. In both the Netherlands and the UK, the court competent to hear arbitration enforcement claims is not the same as the court which is competent to approve a collective settlement. It appears generally accepted that the term ‘competent authority’ in Article V of the Convention refers to a court having competence in arbitration matters — thus excluding the courts which can approve collective settlements in the Netherlands and the UK.⁴⁹

Furthermore, courts have also rejected the argument (put forward by defendants resisting enforcement) that court recognition of an award in the seat of arbitration means that the award has been ‘merged’ with the recognition judgment so that it is no longer properly an arbitration award. It was argued that this meant it could no longer be enforced under the Convention: this argument has been rejected by several courts.⁵⁰ It must necessarily follow that any court order approving a collective settlement (made by a court not competent to recognize arbitration awards) will also not ‘merge’ with the award to take it outside the scope of the Convention.

The enforceability of a collective award should not, therefore, be *prevented* by the grant (or refusal) of approval of the award in collective settlement court proceedings. Of course, it is quite possible that a defendant, determined to resist enforcement of the award, could rely on arguments endorsed by the adverse collective settlement judgment to prevent the award being enforced against him on other grounds allowed in Article V — for example that it offends against *ordre public* in the enforcement court.

In practice, however, the scope for a defendant in this position to resist international enforcement of the award will be limited. The grounds for refusing to recognize an award in Article V of the New York Convention are exhaustive — an enforcing court may not rely on other grounds to refuse recognition.⁵¹ We have discussed in Chapter 3, the (non) applicability of the arbitrability and public policy exceptions in Article V(2) of the Convention in the context of collective competition arbitration, and concluded that they do not bar enforcement of a collective award. As to the other grounds (in Article V (1)), none of them allow a court to refuse recognition of the award on the *sole* ground that a court outside the seat of arbitration has disapproved of or refused to enforce the award.⁵²

4. Optimising collective settlement through arbitration

How can the ‘hybrid’ model we have proposed best be optimized to give maximum effectiveness (both in compensation and finality) to the parties?

⁴⁹ UNCITRAL Guide (n 17), 271-218, para 21

⁵⁰ *ibid*, paras 18-19

⁵¹ Blackaby and Partasides (n 14), 622; Born *Law and Practice* (n 19), 385

⁵² some countries’ arbitration laws (eg France) permit their courts to recognize an award even in the face of refusal by the supervising court

As we noted in the previous chapter, the main variable available to the *parties* to a competition arbitration to increase the effectiveness of the resolution of their dispute is the choice of the seat of arbitration. Here, we therefore first consider whether the availability of a developed collective settlement regime should influence the choice of seat. Second we address the question — raised in the previous section — whether the parties (or at least the claimant) should have the collective award recognized in the (EU) seat of arbitration before it is presented as a collective settlement. Although not required by the New York Convention, recognition of the award under national arbitration legislation may present advantages for the parties — particularly where collective settlement applications are to be made outside the seat.

Finally in this section, we consider the (related) issue of how far awards made in a seat outside the EU can be used as the basis for a collective settlement application.

4.1 How much choice of collective resolution forum is there?

Given the few current opt-out collective settlement mechanisms available in the EU, it is not obvious that the majority of arbitrations of EU competition disputes can be seated in a country having a collective settlement regime.

For our discussion here, it is important — given this currently limited coverage of national collective settlement regimes in the EU — that a national collective settlement application can be made while retaining the effect of the collective award elsewhere. Although the parties may wish to seat the arbitration in the territory of the court or tribunal to which the collective settlement application is likely to be made, this may not be desirable or indeed possible in all cases. In particular, if a single law is to be the law governing the (non-contractual) substance, the law of the arbitration agreement and the *lex arbitri* — to simplify procedural decision making — the limitations resulting from the choice of law rules for non-contractual competition cases (which apply also to the ‘quasi procedural issues), in the Rome II Regulation, may in practice condition the parties’ choice of seat.⁵³

The starting point for choosing the seat is, of course, the arbitration agreement. Unlike litigated dispute resolution, the facts of a particular dispute do not play the main role in determining the seat of arbitration, which is primarily determined by the choice of the parties (express or implied). If the parties agree on a place of arbitration — whether in the original arbitration clause or subsequently (for example in an agreement to submit an existing dispute to arbitration) — then that will be the seat of arbitration.⁵⁴ Clearly, it is easier to optimize the arbitration proceedings after the dispute has arisen and the arbitration agreement can be better tailored to the facts of the specific case.

⁵³ Regulation 864/2007 on the law applicable to non-contractual obligations, [2007] OJEU L199/40, art 6(3); see discussion in ch 4.2.1.3

⁵⁴ Arbitration Act 1996 s 3(a); Blackaby and Partasides (n 14), 99; Born *Law and Practice* (n 19), 120

Where there is no agreement on the seat of the arbitration, the arbitrator (or arbitration institution) is usually empowered by national legislation or institution rules to choose the seat of arbitration.⁵⁵ The factors considered in chapter 5 will need to be taken into account both by the parties or (if they have not made a choice of seat) by the arbitrator or appointing arbitration institution. In addition, factors such as availability of appropriate expert arbitrators, convenience and language may also play a role.⁵⁶

In contrast, the jurisdiction of the national courts to accept collective settlement applications is set out in legislation (or the relevant country's conflict of law rules). The connecting elements between the dispute and the court *forum* are likely to be fact based (not choice based) and choice may therefore be much more restricted than the choice of arbitral seat. For this reason alone, care will be needed to ensure the greater flexibility of arbitration is not lost when crafting a 'hybrid' process.

The UK collective settlement regime requires all claims which are to fall within the collective settlement to be *capable* of being brought individually before the Competition Appeal Tribunal. The principal jurisdiction criteria for non-contractual competition claims are — as we have seen — either that a defendant is domiciled in the UK or that the infringement caused harm in the UK.⁵⁷ For competition claims to which neither of these criteria apply, the CAT has no power to make a collective settlement order. Even where it has jurisdiction, the CAT will only make a collective settlement order if the collective dispute appears to be suitable for treatment on an 'opt-out' basis — and the settlement order only applies to bind claimants within the class domiciled in the UK.⁵⁸ The collective settlement *agreement* could, of course, provide for other claimants to adhere to the settlement (opt-in) if they wished to do so.

The collective settlement regime in the Netherlands may have a wider territorial reach — as well as applying more widely in substantive scope than just to competition claims. In *Converium*, the Amsterdam Court of Appeal asserted wide jurisdiction under the current Dutch collective settlement legislation on the basis that the case was one of contract — the settlement agreement — whose place of principal performance was in the Netherlands.⁵⁹ And it extended the reach of its order to claimants outside the Netherlands — although its approach was heavily criticised.⁶⁰

The Dutch collective redress regime is under legislative review. The revised draft is currently (mid 2018) before the Second Chamber of the States-General in the Netherlands.⁶¹ It requires the collective application to have a close connection

⁵⁵ Arbitration Act 1996, s 3

⁵⁶ Born *Law and Practice* (n 19), on selection of seat of arbitration, 120-125

⁵⁷ Regulation 1215/12 (n 39), arts 4 and 7(2)

⁵⁸ Competition Act 1998, s 49B(9) - (10)

⁵⁹ *SCOR Holdings (Switzerland) AG (formerly Converium) and ors v Liechtensteinische Landesbank AG* (17 January 2012) IJN:BV 1026; Fairgrieve and Lein (eds) (n 39), 79-81

⁶⁰ Burkhardt Hess, 'Cross-Border Collective Litigation and the Regulation 'Brussels I' (2010) 2 IPrax (Praxis der Internationalen Privat- und Verfahrensrechts), 116 at 120

⁶¹ Wetsvoorstel, afwikkeling van massaschade in een collectieve actie, 16 November 2016, at

with the Netherlands.⁶² The explanatory memorandum to the proposal notes that this ‘scope rule’ is viewed as complying with the Netherlands’ obligations under international and EU private international law.⁶³

The revision to the collective actions law in the Netherlands will bring Dutch procedure closer to the UK position and is presumably intended to address the criticisms leveled at the *Converium* decision.⁶⁴ However, the territorial scope of the Netherlands collective settlement order is still potentially significantly wider than that in the UK, since there is no requirement that *each* of the claimants to be included in the settlement are within the Netherlands jurisdiction. Even under the revised legislation (once enacted) it will still be possible for a collective settlement between a widely dispersed class and a number of (joint) defendants — one of whom should be domiciled in the Netherlands — to be approved by the Amsterdam Court of Appeal with binding effect for represented claimants in other countries.

It is also likely that the jurisdiction of the UK Competition Appeal Tribunal or the Amsterdam Court of Appeal — and, in future, possibly other EU countries with a collective settlement mechanism — will be engaged on the basis that the competition infringement had an effect in their countries.⁶⁵ This is uncontroversial if the binding (opt-out) effect of the collective settlement order is limited to claimants in the approving court’s territory. However, the extension of a collective settlement on a binding basis to group members who are both domiciled elsewhere and who did not take any steps in the collective proceedings — solely on the basis of harm said to be caused to them in the territory of the approving court — will be controversial.

We conclude that — if a collective settlement approval mechanism is envisaged to widen the scope of the award resolving a collective competition dispute — the choice of seat of the preceding arbitration is probably best limited to a European country where a (jointly liable) defendant is domiciled, unless there are compelling reasons pointing to another seat. The *lex arbitri* should also, if possible, permit advanced collective redress mechanisms so as to minimise the risk of the arbitrator’s use of collective procedure being held to be a ‘serious irregularity’ of procedure and his award being set aside on that basis.⁶⁶

But it is not *essential* that the collective arbitration be seated in the UK or the Netherlands: the collective award can still be used as the basis for a collective settlement application there. The application for approval will need to demonstrate that the jurisdiction criteria set out in the UK or Dutch national

<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/11/16/wetsvoorstel-afwikkeling-van-massaschade-in-een-collectieve-actie> [retrieved August 2018], inserting a proposed new Article 305a into Book 3 BWB

⁶² BWB, proposed Art 305a.3(b)

⁶³ Explanatory memorandum, 12 (para 4.7) at

<https://www.rijksoverheid.nl/documenten/kamerstukken/2016/11/16/memoratie-van-toelichting-afwikkeling-van-massaschade-in-een-collectieve-actie> [retrieved August 2018]

⁶⁴ n 60

⁶⁵ Regulation 1215/12 (n 38) art 7(2)

⁶⁶ Chs 4 and 5 above

collective settlement rules are met in respect of the claimant group: we consider how best to address these issues in the next section.

4.2 Recognition of collective award in seat: desirable or not?

Returning to our hypothetical *CDC* hydrogen peroxide arbitration (section 2.2.4) — and again assuming a seat of arbitration in Germany — CDC (the assignee of the claims) and one or more defendant hydrogen peroxide manufacturers may wish to apply for a collective settlement order in the Netherlands or the UK. Despite the immediate legal effect of the collective arbitration award given by the arbitrator in Germany, they may nevertheless also wish to have the award recognized by the German court before making the collective settlement applications, in particular to forestall any possible later jurisdiction disputes before the Dutch and English courts as to the scope of the award. This section deals with potential recognition applications for arbitrations seated in the EU: we consider the position for arbitrations seated elsewhere in the next section.

We suggest that — although not required — a recognition application might be particularly useful where:

- one of the defendants has concerns about the scope of the collective jurisdiction of the arbitrators as found in the award ;
- a party is dissatisfied with the fairness of the collective arbitration procedure; or
- a non-active group member disputes the (hypothetical) scope of CDC's power to represent him under the terms of the assignment (or other mandate), and thus disputes the arbitrator's jurisdiction.

Although the recognition judgment of the German court handed down in these circumstances is neither required under the New York Convention, nor binding on other courts under the Brussels I Regulation,⁶⁷ it should have a highly persuasive effect on subsequent courts — including those asked to approve a collective settlement application.

Which court will this be? The two developed EU collective settlement opt-out regimes — in the UK and Netherlands — cannot be administered by all domestic courts. The UK collective settlement order can only be made by the Competition Appeal Tribunal and a collective settlement can only be approved under Dutch law by the Amsterdam Court of Appeal. In contrast, national arbitration legislation normally confers any power to supervise an arbitration on the civil court for the place where the arbitration has its seat — the High Court or a county court in the case of arbitrations in England and the district court of the seat for the Netherlands.⁶⁸

Two consequences follow from this:

⁶⁷ n 38, recital 12

⁶⁸ Arbitration Act 1996 s 105(1): the Dutch civil procedure code — book 4, art 1072 — allows the parties to designate the supervising district court

- it will not be open to the parties to seek approval of a collective settlement based on an award before the award becomes final. For as long as the arbitration proceedings are still in motion, a court application (for example against an interim admissibility award) will need to be made to the court nominated as the supervising court under national *arbitration* legislation;
- the collective settlement approval may require evidence (and possibly a hearing) in addition to that already undertaken in the arbitration. For example, the approving court may need to order notice to the settlement class as a whole (if this has not already been done) — not just to those who have participated in the arbitration — and may also request further evidence to be provided. The collective settlement is therefore — both procedurally and (possibly) substantively — distinct from the recognition of the arbitration award.

Taking the first of these, any differences between the parties — in particular as to the admissibility of the collective procedure — arising during the arbitration will need to be resolved by the arbitrator, with a possible set aside application to the supervising court against his award in the event of ‘serious irregularity’. For arbitrations seated in the UK, the Arbitration Act requires any party wishing to raise an issue of ‘serious irregularity’ to do so promptly, or the right may be lost.⁶⁹

If a set aside application is made to the supervising court — for example arguing that the procedure should not be of an ‘opt-out’ type — what will be the effect of the supervising court’s order on the later exercise of discretion by a court approving a collective settlement? The order made by the German (supervising) court on a procedural set aside application is most likely to remit the matter to the arbitrator for reconsideration in the light of the court’s findings, if the arbitration is ongoing. Even where the set aside application is against a final award, the court will apply different — arbitration — tests for public policy (fairness) than those in the collective settlement provisions of the UK Competition Act if an application were made to the CAT.⁷⁰ The court order will not, therefore, bind the CAT on any subsequent collective settlement application. However, since the matter will have been examined both by the arbitrator and by the supervising court, it can be expected that the supervising court’s order — and any subsequent award of the arbitrator in the light of it — should be highly persuasive in the later collective settlement application before the CAT. We suggest this consequence is likely even if (as in our example) the collective arbitration is seated outside the UK and the supervising court making the order is therefore situated abroad.

The position may be a little more nuanced in the Netherlands, since the court empowered to approve collective settlements — the Amsterdam Court of Appeal — may well be the appeal court for decisions of the (first instance) Dutch district courts supervising most arbitrations in the Netherlands. It is perhaps less likely that an appellate court will necessarily find persuasive the findings of a lower court over which it exercises jurisdiction. However, on the facts of our hypothetical, the supervising court would be in Germany and so outside the

⁶⁹ Arbitration Act s 73(1)

⁷⁰ *ibid*, s 68(3)

appellate jurisdiction of the Amsterdam Court of Appeal — suggesting that the Amsterdam court may wish to have greater regard to the German court's findings.

As to the second consequence noted above — need for additional evidence — the discrete nature of national collective settlement proceedings may mean that a number of collective settlement applications in different jurisdictions will be desirable for a single collective award if the competition harm is widely dispersed. We have noted that the 'opt-out' effect of a collective settlement order is focused on — and in the case of the UK regime limited by statute to — the country of the court making the settlement order. At present there is no EU or international mechanism for the mutual recognition of (opt-out) collective settlement orders — in contrast to the position for arbitration awards. Nor is there any mechanism for co-ordination of court ordered settlement procedures — for example on giving notice to the class. This may mean that substantially the same requirements may need to be repeated to satisfy different courts if several collective settlement applications need to be made.

The parties will therefore need to reach a 'cost-benefit' view on where applications for collective settlement should be made. Although at present the number of viable 'opt-out' settlement approval options is limited, the impetus given by the European Commission's collective redress Recommendation can be expected to increase the number of EU jurisdictions offering a collective settlement mechanism. It is to be hoped that at least some degree of informal co-operation between courts seised of substantially the same collective settlement applications will develop over time.

4.3 Use of collective awards made outside the EU

The discrete nature of the arbitration and the collective settlement procedures available in the EU means that it is not necessary for the arbitration to have its seat in a country where the settlement is to be approved. An arbitration which has its seat outside the EU may therefore also be used in support of a collective settlement application in (currently) London or Amsterdam. Provided that the arbitrated claims — or at least those for which settlement approval is sought — are within the jurisdiction of the approving court, any award should be useable as a basis for an approval application. There is no requirement in English law for a foreign arbitration award only to be enforced in the English courts using the process set out in the Arbitration Act 1996, and this appears to be the position elsewhere.⁷¹

When can competition awards made outside the EU can be refused enforcement on public policy grounds under Art V(2)(b) of the New York Convention?⁷²

⁷¹ Arbitration Act 1996, s 66 is permissive; similarly, in France, code de procédure civile 1514-1516. New York Convention (n 38), art VII (1) permits the continued use of awards under 'more favourable' national legislation

⁷² eg. Assimakis Komnenos 'Arbitration and EU Competition Law' in Jurgen Basedow, Stephanie Francq and Laurence Idot (eds) *International Anti-trust Litigation* (2012) Hart 219-221; Renato Nazzini *Competition Enforcement and Procedure*, 2 ed (2016), 435-442, indicating a degree of convergence in US and EU practice; Luca Radicati di Brozolo 'Court Review of Competition Law

Although the requirement for a national enforcing court in the EU to consider whether EU competition rules have been complied with — in accordance with the standards set in its own arbitration legislation — is a matter of public policy across the Union, the CJEU has repeatedly refused to find that questions on the enforcement of commercial arbitration awards are otherwise within the scope of EU law.⁷³ This should — although the exact point has not been decided — also apply to awards made outside the EU. Provided they pass the EU ‘public policy’ threshold as set out in the CJEU’s *EcoSwiss* judgment, they should be enforceable in the same way as awards made in the EU.⁷⁴ Nevertheless, where the parties intend to ‘convert’ a non-EU collective or class award into a collective settlement in competent EU courts, it may be sensible to first apply for recognition of the award in a Member State under its arbitration legislation, so that the public policy requirement of compliance with EU competition law is shown to be met through an EU court order on the *award*.

If the EU claimant group members are mainly domiciled in a Member State which has a collective settlement regime, an application for approval of the award as a settlement *may* nevertheless be an alternative to recognition of the non-EU award under the country’s arbitration laws. An application for approval of the award as a settlement may be preferable to the more ‘traditional’ route of seeking recognition of the award under relevant national arbitration legislation as the scope for objections by class members to the award may be reduced. This will be particularly true where the application is based on an award made after a collective (class) anti-trust arbitration in the US. However, even when approving a collective settlement of an EU competition law dispute under national settlement legislation, the EU approving court must ensure that EU law is properly applied.⁷⁵

This ‘competence reticence’ of the CJEU, may influence the position of national courts (both on arbitration recognition and collective settlement applications), but where the infringement(s) resolved by the US arbitration award also cover EU harm — and the procedure dealt fairly with properly represented EU victims of the trans-Atlantic anti-competitive practice — the award could also be used as the basis of collective settlement applications in Europe. Using this procedure will be particularly attractive where the class arbitration in the US has resulted in an award on agreed terms, as this is more likely to be accepted as a ‘settlement’ by an approving court in Europe.

For countries where a settlement approval order is made, it will additionally bind those class members resident there who have not consented to arbitration (unless they opt-out), giving wider coverage — and therefore greater finality — to the resolution of the dispute. This was the preferred route used in the *Converium* case, where the application to the Amsterdam court for a collective settlement order followed on from the settlement of US class *litigation* against the same

Awards’ in Gordon Blanke and Philip Landolt (eds) *EU and US Anti-trust Arbitration* (2011) Wolters Kluwer, 779-781

⁷³ ch 4.3.1; C-567 *Genentech Inc v Hoechst GmbH*, 7 July 2016, ECLI:EU:C:2016:526, para 38

⁷⁴ ch 3.3.2; C-126/97 *EcoSwiss China Time Ld v Benetton International NV* [1999] ECR I-3055

⁷⁵ C-453/99 *Crehan v Courage* [2001] ECR I-6297, para 23; Vivien Rose and David Bailey (eds) *Bellamy & Child: European Union Law of Competition*, 7 ed, (2013) OUP, 1203-1206

defendants.⁷⁶ The use of collective arbitration — rather than resorting to US class action litigation — as the basis for the application for approval of a settlement has, we suggest, a number of advantages.

The principal advantage is that the resulting collective award should be enforceable in EU Member States under their arbitration legislation even if opt-out collective settlement approval is not available. This is not the case with (for example) US class action *judgments*, which are generally not recognized in European countries.⁷⁷ The other advantages are those of arbitration generally, in particular the ability for the parties (the representative and the defendants) to select an arbitration tribunal with appropriate expertise in the subject matter of the dispute — likely to be particularly attractive for competition law disputes which are often complex and where the effects of the infringement may vary significantly from sector to sector. The near total global recognition and enforceability of arbitration awards, under the New York Convention, should make it possible to achieve a single resolution to those worldwide competition infringements — typically cartels — with actors not only from North America and Europe, but also more widely.

Finally, for the court or national tribunal to which the application for approval of the settlement is made, the advantages in economy of process and use of the expertise of the arbitration panel in evaluating the fairness of the consensual outcome to the competition dispute should be obvious. This is particularly likely to be true where the approving court has no particular expertise in the competition law subject matter of the dispute and might otherwise have to hear extensive further expert evidence to determine the fairness of the proposed settlement, in particular as regards ‘absent’ claimant group members.

5. Conclusions: possible and desirable to marry the two systems

The possible use of a ‘hybrid’ collective redress procedure — combining collective arbitration and the national collective settlement procedures available in the EU — is capable of giving the parties to the collective competition dispute both greater finality and more extensive redress than collective arbitration alone. It is likely to become more attractive as more EU Member States adopt ‘last generation’ stand-alone collective settlement regimes.

We conclude that:

1. The EU ‘*acquis communautaire*’ encourages collective ‘consensual dispute resolution’ (which has the same meaning as ‘collective ADR’) for resolving disputes involving directly effective EU law. This includes resolving disputes through (collective) arbitration;
2. ‘Consensual dispute resolution’ describes a process through which a resolution is reached — here the arbitration *proceedings*. The successful outcome of the consensual dispute resolution process is a ‘consensual

⁷⁶ n 59

⁷⁷ ch 5.4.2.1

- settlement'. An arbitration award is thus capable of being a 'consensual settlement';
3. Many (but not all) arbitration awards will be 'consensual settlements'. Where the award is made on agreed terms or where it is made under an arbitration agreement which expressly provides for 'settlement' of a dispute by arbitration — for example the ICC standard arbitration clause — it will probably be a 'consensual settlement';
 4. National 'opt-out' collective settlement regimes in the EU (currently only in the UK and the Netherlands) allow national courts to approve the terms of a 'collective settlement'. The interpretation of the term 'collective settlement' in relevant national legislation should be read as far as possible to conform with the EU scope of collective 'consensual dispute resolution';
 5. A court order approving a collective settlement will bind those persons within the scope of the settlement order who have not opted-out of it and who are within the jurisdiction of the approving court;
 6. Whether the binding effect of approval can extend beyond those class members domiciled in the territory of the court approving the settlement will depend on the terms of the national collective settlement legislation and the application of the Brussels I Regulation. However, it is unlikely that a single settlement approval order will be able to bind all potential EU claimants in most cases where use of this 'hybrid' procedure would be useful;
 7. Nevertheless, the *court* approval of the fairness of a settlement — based on a collective arbitration award — is likely to have substantial persuasive effect for other courts in the EU. Where a subsequent court is asked to enforce the arbitration award, the settlement approval will indicate that the arbitration procedure and outcome was considered just and reasonable by another court.⁷⁸ The approval is also likely to be persuasive for foreign courts requested to approve a collective settlement in equivalent terms under their own collective settlement regimes (as they become more frequent);
 8. Although not necessary for the successful use of our proposed 'hybrid' procedure, the chance of wide enforceability is likely to be increased by seeking recognition of the collective award in the seat of arbitration;
 9. A successful application for approval of a collective arbitration award as a settlement will not prejudice the enforcement of the award under national arbitration legislation in those EU countries which (as yet) have no collective settlement regime. The New York Convention preserves the right of the parties to the arbitration to use the award under 'more favourable' national legislation if available;
 10. Arbitration awards made outside the EU can also be used as the basis for a collective settlement application. However, the award will likely face a higher degree of scrutiny by the approving court — not least to ensure EU competition law (as a matter of public policy) has been properly complied with. For this reason, a non-EU award might best be enforced by seeking recognition under the New York Convention by a competent EU national

⁷⁸ the UK test — Competition Act 1998, s 49B(8)

court before any applications for European collective settlement approvals are made.

In our next — and final — chapter we summarise the conclusions reached so far in this thesis and offer some recommendations — primarily for parties to a collective competition dispute considering collective arbitration — as to how best to achieve maximum finality and redress from the collective proceedings.

7 Improving collective competition arbitration in the EU: recommendations and conclusions

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7.1 Introduction

In our final chapter, before concluding on our focus questions, we offer some recommendations for arbitrators and arbitration institutions to facilitate collective arbitration of competition claims in the EU. We also consider the possible future direction of the EU '*acquis*' in this area — specifically, the recent European Commission proposal on consumer collective redress.

Simply because collective arbitration of competition damages claims may be possible with cross-European effect, this does not mean that it is desirable in all cases. The advantages and disadvantages of collective competition (anti-trust) *litigation* proceedings generally have been well rehearsed: we have also addressed the theoretical issues with collective arbitration earlier in this thesis. Here we offer a summary of some of the practical factors which should influence whether resolution of a particular competition dispute through collective arbitration might be an attractive option.¹

7.2 Appropriateness of collective competition arbitration

7.2.1 From the defendant competition infringer's viewpoint

Although collective arbitration of claims made — probably on a contractual basis — against a defendant infringer by his direct purchasers may well be an attractive alternative to being sued, defendants will likely only be willing to use

¹ S I Strong 'Incentives for Large-Scale Arbitration' in Bernard Hanotiau and Eric Schwarz (eds) *Class and Group Actions in Arbitration* (2016) ICC, 146

collective arbitration to settle their competition damages exposure if it can give a wide finality to disputes arising from their wrong doing — including also claims by indirect purchasers. A set of such indirect purchaser claims can only be arbitrated collectively if the infringer sees commercial advantage for him in consenting to submitting the dispute between him and prospective group members or their proposed representative to collective arbitration. In EU competition cases, this will be most likely where the infringer has committed itself to either accept competition leniency from the European Commission or a national competition authority, or has otherwise settled administrative competition proceedings. Defendant infringers must be satisfied that collective arbitration of the potential claims against them will benefit them in terms of efficiency (cost) of proceedings, speed and finality (comprehensiveness) of outcome.

Assuming again that the infringer has a choice as to whether or not to arbitrate — that is, that there is no existing arbitration clause between him and the claimant group members which governs the dispute — collective arbitration in the EU will be most attractive where there is a dispersed group of claimants in several EU Member States, whose claims cannot be sensibly dealt with by joinder in a single EU national court. This is most likely where there is a significant *known* body of direct or (more likely) indirect purchasers of the products covered by the infringement decision domiciled in several EU Member States. Those purchasers are also most likely to be SMEs or individuals whose discrete claims may be relatively small.

There also has to be a real dispute — so, where the infringer and a number of willing claimants have already agreed to settle (for example after a mediation), arbitration will not be available. But in most EU competition cases there will be at least some persisting disagreement between the infringer and some claimants as to the extent of the harm caused by the anti-competitive behaviour. Although Commission guidance on assessing harm caused by competition infringements gives useful pointers, it necessarily has to be applied to the facts of each infringement, and it is here that disputes will normally arise.

The group being represented (within the scope of a collective claim) must also be capable of identification with a reasonable degree of certainty, so that the infringer can take a sensible view on the likely finality of outcome of the proposed collective arbitration. Here, collective arbitration has a distinct advantage over non-contentious forms of collective ADR, since the arbitrator will need to define the claimant group in his admissibility award. Any disagreement on the scope of the arbitration — for example, as to who a representative in fact represents, or who has in fact (at least *prima facie*) suffered harm so as to have a cause of action — can be addressed in a binding decision at an early stage of the process.

The expertise of the representative (if the collective redress claim is a representative one) and advisers available both to the infringer and (particularly) the claimant group — as well as the availability of suitably experienced arbitrators — is also likely to have a substantial influence on the

attractiveness of collective arbitration of competition claims to defendants and claimants alike. This should enable the issues in dispute between the claimants and defendants to be quickly identified, a suitable collective procedure to deal with them to be admitted and for the collective competition award to avoid obvious substantive errors of EU competition law.

Many of these threshold issues may be addressed in the drafting of the agreement to submit the dispute to arbitration. But these considerations should also apply where a group of (direct) claimants wish to use a pre-dispute arbitration agreement to base a collective procedure. We have seen in chapter 2 that additional (express) consent to collective arbitration is not required: an arbitrator is allowed to imply consent to collective proceedings. CJEU jurisprudence has, however — and in contrast to the position of many national courts — at least implicitly taken a restrictive view of the scope of arbitration clauses. The EU legislative restriction on pre-dispute arbitration clauses in consumer contracts may also need to be taken into account if the proposed claimant group is made up mainly of consumers and an existing agreement to arbitrate is said to form the basis of the consent of the group.

From this we conclude that collective competition arbitration on the basis of existing ‘standard’ arbitration agreements is — at least for the foreseeable future — likely to remain unusual, and that the development of practice in this area will depend on the creation of a sufficient ‘pull’ for parties (especially defendants) to submit their EU competition disputes to collective arbitration after they have arisen.

Nevertheless, experience in the US has shown that anti-trust arbitrations on the basis of pre-dispute arbitration clauses can be a viable means of collective redress. Despite the reservations of the US Supreme Court towards class arbitration, over 400 class arbitration claims have been registered with the American Arbitration Association since 2003.² As collective arbitration becomes an increasingly viable means of resolving cross-European competition disputes, the use of pre-dispute arbitration agreements by direct purchaser claimants is likely to increase. Arbitration institutions may be able to offer better assistance in this area, and we consider how this development might be supported in our recommendations at 7.4 below.

7.2.2 From the claimants’ viewpoint

The claimant’s attraction to any collective action needs to be considered at two levels: that of the individual group member and that of the representative of the group (in a representative action), or the coordinator (or lead lawyer) where the action is a group action.

The attraction of collective arbitration for an individual member of the claimant group will depend on it providing the best available level of redress with an

² These are not, however, limited to anti-trust claims: James H Carter ‘Class Arbitration in the United States: Life After Death?’ in Hanotiau and Schwarz eds, (n1), 15; also, Christopher Drahozal ‘Class Arbitration in the United States’, *ibid*, 27-28

efficient and cost-effective procedure for him. The speed of recovery, from his standpoint, may well depend on the point in the process at which he is required to join (or decide whether to 'unjoin') the collective arbitration. An admissibility decision permitting latecomers to adhere to the collective arbitration will give at least the appearance of a short timeframe between the first necessary action by the typical individual group member and the award of compensation, even if the collective arbitration proceedings as a whole in fact take longer than this 'average'.

The available level of redress to individual claimants is likely to be enhanced by being able to make a collective claim with the widest possible scope, increasing the bargaining power of the claimant group. Cost effectiveness will also depend on the potential size of the claimant group — the overall costs of an arbitration of this type are not likely to vary substantially according to the number of claimant group members above a viable minimum, so spreading those costs among a larger group will inevitably be of benefit.

The position of a representative claimant or lead lawyer — and thus the attractiveness to him of collective arbitration compared with other forms of available collective redress — may be more complex. He will — particularly if an officer of a member organisation — be required to act only in the best interests of the group members. The need for maximum redress at minimum cost and delay will therefore also be the main guide for representative claimants.

However, as discussed in literature on class litigation, the issue of potential conflict between a representative and the group he represents in a collective claim is a real one: it applies also to collective arbitration.³ The situation of the representative is also complicated by the likelihood that he will need to rely on external sources of finance to be able to sustain the collective claim on behalf of even a modest group — and the interests of the provider of the finance may also need to be considered in the design (and possibly the conduct) of the collective arbitration.

A detailed consideration of the 'third party' financing of arbitration is outside the scope of this thesis, but the Commission Recommendation does include provisions which seek to ensure that third party funders do not have conflicts of interest with any claimants and do not interfere in the conduct of the collective claim.⁴

Most important here is the requirement that the funder should not influence the conduct of the claim.⁵ The 'agency' issue identified above will be magnified if not only the representative claimant but also a funder having influence over the conduct of the claims has an interest in its outcome which could diverge from

³ Sometimes called 'agency bias'. SI Strong, *Class, Mass and Collective Arbitration in National and International Law* (2013) OUP, 322-324; Rachel Mulheron, *The Class Action in Common Law Legal Systems* (2004), Hart, 283-284

⁴ Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms, 11 June 2013, [2013] OJEU L201/60, paras 14-16

⁵ *ibid*, para 16(a)

that of the group members. It may well be appropriate for the arbitrator to address this issue when making an admissibility decision — particularly if asked to do so by the defendant or a member of the claimant group.

These issues — how the collective action is funded and any potential ‘agency’ issues surrounding the representative claimants (and their legal and other advisers) — could also have a significant impact on the attractiveness of a particular collective arbitration to individual group members. Their concern, that they should be able to trust the leaders of the collective action to act in their best interests, will clearly need to be taken into account when setting the structure of the collective claim. If the action is to achieve maximum finality and redress — by attracting the largest possible numbers of claimants — the attractiveness to the members of the claimant group will need to be carefully considered.

7.2.3 Common interests for defendant and claimants

The principal common interest between the defendant and the claimant sides will be to ensure that the scope of the collective arbitration is as wide as possible. This will ensure maximum finality of outcome and thus efficiency of the collective procedure and of the redress it provides.

There are (at least) two main areas where both defendants and claimants have a common interest in the ‘design’ of the collective arbitration: first making sure that the arbitrator (and the rules of the arbitration institution, if any) are adequate and appropriate for collective arbitration and, second (as noted), ensuring that the arbitration is appropriately transparent and can be widely announced to potential claimant group members.

- **Choice of arbitrators and rules**

Given all parties’ interest in seeing an adequately constituted arbitration tribunal, what considerations should they address? It is first worth noting that — under most advanced arbitration legislation — all of the parties to the arbitration have the right to participate in the selection of the arbitration panel.⁶ This has given rise to some difficulties in multi-party arbitrations and various solutions have been adopted — for example in the supplementary collective arbitration rules of the DIS.⁷ The use of a neutral appointing authority for at least the chairman — and, most usually, all of the members — of a three person panel appears the most common.⁸ The use of arbitration institution rules which

⁶ UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments adopted in 2006, (2008) UN, Vienna, Art 11; Arbitration Act 1996, ss 16-18; France, code de procédure civile, arts 1452-1453, 1506(2).

⁷ Bernard Hanotiau, *Complex Arbitration: Multiparty, Multicontract, Multi-Issue and Class Actions* (2005) Kluwer Law International, 200-209; ch 5.2.2 above for discussion of the DIS supplementary rules

⁸ eg. UNCITRAL Arbitration Rules 2010, UN, Vienna, art 9; Stockholm Arbitration Rules, 2010, art 13.

use a neutral third party to appoint the arbitration panel will, therefore, be advisable.⁹

Regardless of whether the parties or a third party appoint some or all of the arbitrators, we suggest that the common interests of the parties in collective competition disputes require account to be taken of the experience of the arbitrators in two key respects.

The first is a need to be familiar with industrial economics. Since competition arbitrations — collective or otherwise — are likely to require evidence of effect flowing from the EU competition infringement in order to assess compensation, understanding of the various available economic models used to do this will be necessary for the arbitration tribunal to reach a properly grounded award. In contrast we do not believe that an in-depth knowledge of competition *law* is required. Most compensation claims for breach of EU competition law follow on from competition authority infringement decisions, so any difficult issues of substantive competition law should already have been addressed. Even where there is no public law decision on the infringement at the base of the collective claim, the extensive European Commission guidance on the law in this area should enable any competent arbitrator — in the same way as a national judge — to apply the law without serious difficulty.¹⁰

The second area of desirable expertise is in what the US Supreme Court has called the ‘oft-dominant procedural aspects’ of collective dispute resolution.¹¹ The tribunal must be in a position properly to evaluate the (possibly competing) requests of the parties on the shape and scope of the collective procedure in order to reach a balanced decision on admissibility. The reasoning adopted must be capable of withstanding robust public policy scrutiny, not only by the supervising court in the seat of the arbitration but also by courts where the collective award will need to be enforced against members of the claimant group wishing to assert that they are not bound by it. As commentary on the *Abacat* admissibility decision shows, some criticism of the conclusions reached by the arbitrator is perhaps inevitable in any contested collective proceedings.¹² The arbitrator should have the experience in multi-party or collective claims to ensure that such criticism is not sufficiently grounded to lead to the invalidity of all or a substantial part of the collective procedure admitted.

- **Transparency**

The normal implied confidentiality of arbitration will need to be adapted for collective arbitration of competition claims. Notification to group members (and probably potential group members) of, at least, certain major events in the

⁹ eg. ICC Arbitration Rules, 2017, arts 12-13; LCIA Arbitration Rules, 2014, art 5.7; France, Cour de Cassation, 7 January 1992, *BKMI and Siemens v Dutco*, Bull. Civ. 1, no. 2; Hanotiau (n 7), 200-201

¹⁰ Communication on quantifying harm in actions for damages (13 June 2013), [2013] OJEU C167/19 together with the accompanying Practical Guide doc COM (2013) 3440

¹¹ *AT&T Mobility Inc v Concepcion*, 563 US 1(2011), 13

¹² S I Strong (n 3), 269-270; ch 2.3.2.1 and the authorities cited there at n 96

arbitration procedure will be required if the arbitration proceeding is to avoid being vitiated by a 'serious irregularity' permitting a supervising court to intervene.¹³ The need to balance these notification requirements on the one hand with the protection of the legitimate business secrets of the defendants on the other should be assessed by the arbitrator on a case by case basis. For 'follow on' claims, however, much of this work will have been done by the competition authority during the administrative proceedings leading to its decision. The 'public' version of this decision should form the factual basis of notification to claimants or other publicity needed to support the collective arbitration proceedings.

Given the implied confidentiality of the arbitration beyond these notification requirements, the parties may need to agree expressly how far publicity of the collective arbitration should go. The common interest of both sides in achieving a collective outcome to the competition dispute which addresses the widest number of (actual or potential) claimants should mean that agreement on initial publicity for the action ought to be achievable. The parties will also need to agree that the award — or at least a comprehensive summary of it — should be publicly available if group members not already bound by the award are allowed a further period to 'opt-in' (for example, where they are domiciled outside the seat of arbitration).

However, arbitration institutions may also be able to help shape this process by offering guidance or even making express provision for publicity in any rules they may make for collective competition arbitrations:¹⁴ we will look at this again in our recommendations in section 7.3 and 7.4.

We have to now in this thesis largely focused on the position of the parties to a collective competition arbitration and addressed risk management options available to them. In this final part of our thesis we consider briefly what the consequences of our conclusions might be for (respectively) an arbitrator in a collective competition claim, arbitration institutions and finally public authorities.

7.3 Recommendations for arbitrators of collective competition claims

Assuming consent to arbitrate an EU competition dispute collectively, how should an arbitrator use his procedural discretion to make an award which will be recognised and enforced as widely as possible in the EU? The arbitrator's interest (and possibly duty¹⁵) to do this should match the incentives of both sets of parties to obtain a resolution to the dispute which is both as comprehensive and as final as possible. The factors influencing the parties' procedural choices in a collective competition arbitration, considered earlier in this thesis, will therefore be very relevant to arbitrators. Indeed, if the agreement to arbitrate is

¹³ ch 4.3.3

¹⁴ The American Arbitration Association publicizes class arbitrations: AAA Supplementary Rules for Class Arbitrations, (2003), art 9, www.adr.org [accessed September 2018]

¹⁵ Arbitration Act 1996, ss 1(a), 34(1); ICC Rules (n 9), art 41; Nigel Blackaby and Constantine Partaisdes *Redfern and Hunter on International Arbitration*, 6 ed (2015) OUP, 608

made after the dispute has arisen, so that the parties submit their dispute to collective arbitration, it is likely that the arbitrator's procedural discretion will be limited — the submission agreement should itself set out much of the agreed procedure.

The principal questions, specific to a collective arbitration, that an arbitrator is likely to need to address at the admissibility stage are:

- is this case more appropriate for group or for representative treatment?
- if a representative collective action is admitted, is there a suitable representative?
- what steps are necessary to notify and publicise the collective arbitration and when?

In considering these issues the arbitrator will primarily need to bear in mind the likely reaction of the supervising court in the seat of arbitration, although the possible reaction of courts where the award will necessarily have to be enforced should also be taken into account. We have considered the legal framework for each of these questions in earlier chapters. In our conclusions here we offer (in brief) some concrete suggestions, under each of the three heads above, to mitigate recognition or enforcement risks for arbitrators asked to admit a collective procedure.

7.3.1 Group or representative procedure

The type of procedure to adopt may depend on the openness of the law of the seat (as well as of the parties) to using a representative procedure, as contrasted with (more generally acceptable) group procedures. As we noted in chapter 1, there is not a bright line between the two types of procedure, with (for example) claims under the KapMuG in Germany falling on the line between group and representative proceedings.

Where the harm caused by the competition infringement is widely dispersed among a large number of potential claimants, it is likely to be appropriate to use a representative proceeding. For example, if a representative consumer body wishes to arbitrate a large number of consumer claims arising from a competition breach, this design of collective procedure is likely to be acceptable in a large number of EU Member States. This is particularly true since EU law — through the consumer ADR Directive — encourages the use of non-contentious means of redress in consumer cases.¹⁶ Current Commission proposals for collective consumer redress reinforce this *acquis*.¹⁷

However, the arbitrator will need to consider how the consent of individual consumers to arbitrate should be evidenced, since this will be key to determining the scope of the proceedings. Where the *lex arbitri* (or the law of a Member State in which the award will clearly need to be enforced) requires specific consent

¹⁶ Directive 2013/11 on alternative dispute resolution for consumer disputes, 21 May 2013, [2013] OJEU L165/63

¹⁷ Proposal for a Directive on representative actions for the protection of the collective interests of consumers, 11 April 2018, COM (2018)184 (final)

from consumers to arbitrate — and not just a general consent empowering the representative to act — the arbitrator will also need to take steps to verify the terms of the post-dispute consent given.¹⁸

Although the number of actual group members is clearly a major factor in the consideration of whether to admit a representative procedure, it should not be the only one. First, group procedures are still possible (although increasingly unwieldy) with larger numbers of claimants, as experience in using the English group litigation procedure shows.¹⁹ However, without the coercive powers of the court to group all claims including common issues in a single proceeding (regardless of the consent of the group members), it is likely that arbitrating the claims of large numbers of consumers on a group basis will be impracticable. We suggest that, if the number of (actual or potential) claimant group members is so high that consolidation (if available) of their claims in a single arbitration is not practicable, a representative action should be admitted instead.

The choice between a group collective arbitration or representative proceedings may also depend on the degree of similarity of the group members' claims and thus the extent of any individual issues which need to be resolved. A set of homogenous claims — by consumers purchasing from a dominant firm for example — is likely to be better dealt with by a representative action.

The number of claimants needed to make the collective arbitration proceeding viable is also a very relevant factor in this choice. A representative proceeding, based on a single test claim and able to resolve a large number of near-identical instances of harm, would be the most efficient vehicle for identifying, gathering and managing individual consumer claimants without the need for extensive and burdensome arbitration procedures. Using a representative may also facilitate the use of the resulting award as the basis for national collective settlement applications if desired.²⁰

In contrast a significant but manageable number of differentiated claims (for example, by SMEs having purchased from a cartel for the purposes of their 'downstream' business) may be better dealt with in a group action. Where there is a well-scoped group of claimants who are not at the end of the supply chain, so that there may be individual issues — in particular on the 'pass through' of loss by them to their customers — an appropriately calibrated group proceeding may be more efficient. It is likely to be easier for an arbitrator to deal with individual issues using a group procedure — where a representative would probably struggle to represent each individual claimant impartially — especially if there is a possibility of inconsistency of evidence or outcome between the 'median' group award and a significant number of individual claims.

¹⁸ Eg. France, code civil, art 1989

¹⁹ but see Civil Justice Council 'Developing a More Efficient and Effective Procedure for Collective Actions', (November 2008), www.judiciary.uk under 'Advisory Bodies', 86-87, [retrieved October 2018]

²⁰ as they require joint application by a claimants' representative and the defendant(s) ch 6.2.2 above

This could be particularly true where the consent to arbitrate is derived from a pre-dispute arbitration clause. Although we have demonstrated that express consent to a collective procedure is not a requirement for the arbitrator to admit collective competition claims, nevertheless it will likely be easier to imply such consent where a group procedure — allowing a somewhat greater degree of procedural autonomy to group members — is to be admitted. A choice of ‘friendly’ arbitration institution rules by the parties may also assist — as we discuss in the section 7.4.

7.3.2 Suitability of representative

We have noted that the principal criteria for selecting a representative for a collective claim are, first, the ability to act free from outside influence and conflicts of interest and, second, having sufficient financial and other capacity (including professional expertise) to conduct the collective proceedings properly.²¹ But, if faced with alternative proposals for a representative all with roughly equal capacity and ability, how should an arbitrator choose between them?

We suggest that, in a European context, an ‘ideological’ representative — not having a direct interest in the outcome of the proceedings — is preferable on a practical level to an individual claimant representative.

First, a representative entity (but not an individual acting as an ‘ideological’ representative²²) will almost certainly have more ‘strength in depth’ than a claimant acting as representative. In addition to being conflict free, the representative entity will also likely be able to provide more human resource to the case, enabling possible absences from the ‘front line’ of key decision makers to be substituted more easily. This in turn is likely to make the collective proceedings more efficient.

Second, there is a significant tradition across the EU Member States for associations — particularly consumers’ associations — to represent their members’ interests in claiming compensation for various kinds of mass harm. The use of individual claimant representatives (backed by specialist law firms) is seen as being typical of “US style” class actions, and may encounter enforcement difficulties in some European jurisdictions on that basis.

Third, if the ‘hybrid’ model — using the arbitration award as a basis for seeking the approval of a national court to a ‘settlement’ — is envisaged, the representative will probably need to be able to demonstrate a significant degree of impartiality and ‘representativity’ for its request to be admissible in the national court(s) approving the settlement.²³ Although the requirements of

²¹ ch 4.2.3

²² in the UK collective claim, *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9, Mrs Gibson was acting in her capacity as General Secretary of the National Pensioners’ Convention — she was accepted as a suitable representative by the Tribunal (para 139).

²³ Bas van Zelst ‘Class Actions and Arbitration: Alternative Approaches Based on the Dutch Experience with Collective Redress’ [2018] *Journal of international Arbitration*, 203, para 2.4(d)

national settlement legislation may differ in detail, the essentials are likely to be the same as those an arbitrator will use when admitting a representative proceeding in arbitration. Nevertheless, current national ‘settlement’ legislation varies as to whether *individuals* may be representatives: the UK settlement legislation permits this but, in contrast, the Dutch collective settlement legislation requires the application to be made by an ideological claimant entity (*‘stichting’*).²⁴

7.3.3 Notification and publicity

We have noted that, for a collective arbitration procedure to avoid a successful challenge to recognition or enforcement, the group members will need to be informed of the main steps in the proceedings — including the decision admitting the collective proceedings, any offers of settlement received and the final award. The — express or implied — consent to arbitrate collectively therefore necessarily includes consent to these notifications (at least as long as legitimate commercial confidentiality is respected as far as possible). But should the arbitrator be able to decide if further publicity is needed, and if so in what circumstances?

If the arbitration agreement submits an existing dispute to arbitration, it should be possible for the parties to agree on a publication plan for the dispute resolution process — or at least to give the arbitrator discretion (perhaps within certain limits) to order publicity for the collective proceedings. The position is more complex where the agreement to arbitrate is a pre-dispute clause. Given the implied confidentiality of arbitration proceedings, it is likely that the arbitrator would need a clear express indication of consent (particularly from defendants) to go further than the notifications strictly necessary for an admissible collective procedure. However, where there is a dispute between the claimants and the defendants on publicity, it is nevertheless for the arbitrator to make a decision if requested to do so. In most cases he should be able to approve some form of public communication, even if much of the detail disclosed by the parties in the collective arbitration will have to remain confidential.

7.4 Recommendations for arbitration institutions

Many of the conclusion we have reached in this (and preceding) chapters will be relevant to arbitration institutions considering revising their rules and guidance to accommodate collective competition cases. In this section we focus on three areas where we believe that incremental changes by arbitration institutions may enable arbitrated collective redress to develop in a more structured and comprehensive way.

First, we consider if arbitration institutions could sensibly amend their rules on consolidation of arbitrations to help arbitrators who wish to use group collective procedures in a competition arbitration. Second — and in the light of our conclusion in chapter 2 that separate express consent to collective arbitration is

²⁴ Competition Act 1998, s 49B(7); Wetboek van Burgerlijke Rechtsvordering, art 1014

not required — we consider whether arbitration institutions should develop supplementary rules for collective arbitration. Are they helpful, or would careful guidance for arbitrators and parties be of more practical use? Third, we look again at the transparency issue we have already addressed in the previous section. Can arbitration institutions assist by offering arbitration rules or guidance on notification or publicity in collective arbitrations?

7.4.1 Consolidation and group arbitration

Arbitration legislation in Europe often does not permit consolidation of arbitrations already begun unless all of the parties to them agree.²⁵ However agreement to consolidation may be contained in the rules of an arbitration institution which the parties have agreed should govern their arbitration. Institutions may, therefore, be in a position to improve the use of group collective actions by amending their rules on consolidation. And, of course, consolidation is not needed for claims which have yet to be commenced — that is, those where the harm has been caused but the victims have yet to assert an individual claim. For representative actions, all claimants represented will be in this position, so our recommendations here necessarily only relate to group collective actions.

There is currently a range of European arbitration institution practice and rules on consolidation, although we suggest that they can broadly be grouped into the following categories:

- **permissive model:** the arbitration institution gives the arbitrator quasi-judicial powers (within his jurisdiction) to consolidate similar or related pending arbitrations. A leading example is the arbitration rules of the Swiss Chambers;²⁶
- **delegation model:** the consolidation of arbitrations already commenced is entrusted not to (one of) the existing arbitrators, but to a third party. This avoids an appearance of conflict of interest in the arbitrator making the decision to consolidate — potentially transferring jurisdiction over all related disputes to himself. Leading examples of the delegation model are found in the rules of the Netherlands Arbitration Institute — which reflect the permissive requirements of Dutch law — and of the ICC.²⁷ However Article 10 of the ICC Rules is restrictive in the discretion it gives to the third party (the ICC Court): the arbitrations to be consolidated must be between the same parties and concern the same legal relationship;
- **non-intervention model:** the majority of arbitration institution rules do not have particular provisions on consolidation — the LCIA rules being a prominent example.²⁸ The availability of consolidation thus depends on the *lex arbitri* (in the absence of express consent to consolidate in the agreement to arbitrate) and in practice this is likely to mean that consolidation will need additional express consent from all parties.

²⁵ Arbitration Act 1996 s 35(2); ch 5.3

²⁶ Swiss Rules of International Arbitration, 2012, art 4

²⁷ Netherlands Arbitration Institute Arbitration Rules (2015), art 39; ICC Rules (n 9), art 10

²⁸ LCIA Arbitration rules (2014), r22.1 (vii) — joinder, and (ix) — consolidation: full consent is required in both cases

Assuming an interest in amending currently absent or restrictive rules, what should arbitration institutions seek to include?²⁹ Despite the availability of permissive models in some rules, we do not believe that it is necessary for institutions to give arbitrators quasi-judicial powers to consolidate arbitrations in order to enable effective group collective competition procedures. And there is a strong possibility that — if these new consolidation powers are included in the general rules (rather than specific collective redress supplements) — offering arbitrators the widest consolidation powers may not be acceptable to the generality of users of the institution's rules.

Taking a middle ground, and using the current ICC rules as a basis for discussion, what changes might be sufficient to enable group collective arbitration to prosper? We saw in chapter 4 that a median view of legislation and judicial practice in the EU suggests that the arbitrator should be able to group the same *or similar* claims into a single collective proceeding. However, using this test would require at least a *prima facie* examination of the substance of the claims made, which is likely to be outside the remit (and indeed resources) of the consolidating authority (for example, the ICC Court).

Instead we propose that the changes should be applicable by an examination of the agreement(s) to arbitrate. Two principal aspects appearing in the current ICC Rules should be maintained. First — and obviously — all of the parties to the (commenced) arbitrations should have agreed to the application of the rules of the institution which is co-ordinating their consolidation. Second, it also appears obvious that all of the disputes should arise from the same 'defined legal relationship' — that is, in our context, from disputes arising from the same infringement of EU competition law. To allow arbitrations of disputes relating to different factual matrices to be consolidated would make the arbitrator's task of rendering a coherent and fair award unduly difficult — and in any case likely not be in accordance with the (implied) intentions of the parties.

We nevertheless suggest three changes which we believe will enable a group claim to be sensibly pursued and administered. First, the ICC requirement that the claims to be consolidated should all arise under the *same* arbitration agreement will need to be relaxed if group collective claims are to be possible. We recommend that arbitrations commenced under arbitration agreements in the same *terms* — for example the ICC standard clause — should be capable of consolidation. This will ensure that arbitrations commenced between different parties (and thus under different agreements to arbitrate) can be arbitrated using the same express or (probably) implied consent to collective proceedings.

Second, we recommend that the requirement that the arbitrations to be consolidated must be pending between the *same* parties should also be relaxed so that similar arbitrated claims can be consolidated. Instead the claims should be capable of consolidation if they arise from (substantially) the same cause of

²⁹ at the November 2015 ICC Annual Meeting (Paris, 30 November 2015), it was doubted that amendment was needed. The papers presented at that meeting are in Hanotiau and Schwarz (eds) (n 1)

action. Although the similarity of the claims will need to be verified, verification of the scope of arbitrations to be consolidated can be carried out through a consideration of the references to arbitrate, and so should not need significant pre-arbitration investigation. The requests for (competition) arbitration need to have a significant degree of commonality for collective proceedings to be properly manageable: inevitably the third party (the ICC Court) will need to carry out some *prima facie* inquiry. But a review of the evidence is not needed. In addition, it appears obvious that at least one of the parties (probably the defendant for collective competition arbitrations) should be the same in each of the arbitrations to be consolidated.

Third — and again on the basis that we are considering arbitrations already commenced — the institution itself should be given the power to appoint at least the chair of the arbitration panel in the absence of unanimous agreement from the parties to the arbitrations to be consolidated. Although — borrowing from Rehnquist CJ's dissent in the *Green Tree* case³⁰ — this may limit the parties' immediate choice of arbitrator, the effectiveness of a simplified consolidation procedure would be impaired if unanimous agreement were an absolute requirement. Using a neutral third party to appoint the arbitrator (or the chair) is consistent with both the Netherlands legislation — requiring the use of a neutral to appoint the chair of the panel when arbitrations are consolidated — and with the decision of the German *Bundesgerichtshof* in 'Arbitrability II'.³¹ Where the group claimants in the arbitrations cannot agree on the arbitration panel member to be appointed by them, then the chair should select the claimant panel member after consultation with the claimants.³²

7.4.2 Are supplementary rules desirable for collective arbitrations?

Although separate express consent to collective arbitration is not required for a collective procedure to be admissible, supplementary arbitration institution rules for collective arbitrations exist in both Europe and the US. The German DIS supplement is presented on the basis that the parties must expressly choose the supplementary rules if they are to apply — which we have concluded is not necessary as a matter of law and may be too restrictive in practice. However, even if not expressly chosen, such supplements may assist arbitrators in framing their collective proceedings where they have found consent on other grounds.

An arbitration institution may need to address two issues in crafting rules to suit collective competition arbitrations: should a different model clause for collective arbitrations be proposed? And what additional rules should be included?

As to the first question, an alternative form of (pre-dispute) arbitration clause would not appear to be necessary and may even be counter-productive. The decision of the US courts in *Bazzle* and following cases, albeit made against the landscape of a functioning collective redress system in the seat of arbitration, apparently had no difficulty in discerning implied consent to class arbitration

³⁰ *Green Tree Financial Corp v Bazzle* 539 US 444 (23 June 2003), Rehnquist CJ dissent, 5

³¹ BGH 6 April 2009, II ZR 255/08; Schieds VZ 2009, 233

³² eg. Swiss rules (n 26), art 8; Dutch rules (n 27), art 14

from a generally worded arbitration clause. Although the criticism by the dissent in *Bazzle* in the US Supreme Court³³ — particularly in relation to the right to participate in choosing one's own arbitrator — appears well aimed, the concerns expressed can be addressed by careful use of a neutral appointment system.

And discrete collective redress wording may even be counterproductive to collective procedures, since it may give unwilling defendants the opportunity to argue that failure to choose the special arbitration clause negates any implication of consent to collective proceedings.

As to the contents of any additional rules, we suggest that the areas which might need particular attention include

- the rules on consolidation of arbitrations (discussed above and in chapter 5);
- principles for the selection of representatives or lead claimants in group proceedings (discussed in chapter 4);
- separate rules for notification of the proceedings to interested persons (also discussed in chapter 4 and in the next section);

However, given the scarcity of collective arbitrations to date (at least in European countries) and the diversity of circumstances presenting themselves to arbitration even in the relatively narrow competition field, we would suggest that — as an initial step — arbitration institutions might better present assistance to collective arbitration as guidance to arbitrators and parties rather than formally adopted rules.

Where consent to arbitration is post-dispute (likely in many representative competition claims) the parties can choose to incorporate all (or some) of the guidance in a suitable way in their agreement to arbitrate — for example directing the arbitrator to follow the guidance unless he finds there is a good reason not to. They may not need to use the whole of a 'ready to wear' rules-based model which may not exactly fit the circumstances of the particular proceedings. And where the arbitrator is acting under implied consent to arbitrate collectively, derived from a pre-dispute arbitration clause, such guidance is likely to be of more assistance to him than supplementary rules where, as noted, a party may be able to argue it had not consented to the collective element when the arbitration agreement was made.

The flexibility of guidance — in contrast to formal institution rules — will also enable the support to arbitrators to adapt with changes in law and national and EU recommendations and guidance in this area. So, for example, the DIS supplementary rules are very closely based on the current version of the KapMuG (and limited in application to shareholder arbitrations). However, Germany has recently enacted collective redress legislation to introduce a 'GLO' type procedure of general application.³⁴ The current KapMuG supplement may thus be outdated.

³³ n 30

³⁴ Musterfeststellungsklagegesetz, 12 July 2018, BGBl I 2018, 1151

We suggest that the guidance for arbitrators from arbitration institutions might usefully at least cover the areas we have addressed above and in chapter 4 of this thesis — assisting the arbitrator and the parties to give a wide effect to their intention to arbitrate collectively as much of the competition dispute between the infringers and victims as is possible in a single action.

7.4.3 Notification and transparency

The need in a collective arbitration for a minimum set of notifications to (actual and known potential) group members runs counter to the general requirement that both the conduct of the arbitration proceedings and the resulting award are confidential to the parties. Although we suggest that consent to collective arbitration implies consent to the necessary disclosure of the award (and also of the major steps in the arbitration process), arbitration institutions may in particular consider an amendment to their rules — at least for multiparty arbitrations — to permit an arbitrator to disclose information to other persons where this is necessary to enable the proper performance of their function of resolving the (multiple) dispute(s) in arbitration.³⁵ This change alone would add significantly to the effectiveness — and therefore attractiveness to parties — of collective arbitrations under that institution's rules.

There are of course disadvantages to allowing disclosure at the discretion of the arbitrator — particularly given the widespread expectation in the business community that arbitration provides a swift, final and confidential way of resolving disputes. Consequently, a change in arbitration institution practice would need to be limited to those situations — for example collective proceedings — where disclosure is necessary in order to achieve a fair resolution of the dispute as a whole. The majority of arbitrations will remain (largely) in confidence.

Wide awareness raising activity in the arbitration community (and perhaps more broadly), focused on these changes may nevertheless be needed to acclimatise potential parties to multi-party and collective arbitrations to the new confidentiality provisions. This may not be as difficult as it first appears. Investment treaty arbitrations — despite often being conducted using general arbitration proceedings and rules (eg. UNCITRAL) — are widely accepted as not being fully confidential, in view of the broader interest in their outcome. We suggest that the widely dispersed harm typically caused by competition infringements, as well as the EU public interest in ensuring that those who are harmed (but may not have realised it) have an effective remedy against the infringer, also militate in favour of disclosure of at least the essentials of collective competition arbitration proceedings.

³⁵ This may already be possible under some *leges arbitri*, as the implication of confidentiality in arbitration is not universally accepted: Mark Friedman and Luca Radicati di Brozolo 'ILA International Commercial Arbitration Committee's Report on "Confidentiality in International Commercial Arbitration"' (2012) *Arbitration International*, vol 28, no. 3, 355

Although arbitration institutions can significantly improve the climate for collective competition arbitrations by changes to their guidance and their support to arbitrators and parties — and possibly even though amendments to their rules — public authorities (both at a national and EU level) are perhaps even better placed to encourage redress through collective arbitration.

7.5 Public authority initiatives and collective arbitration

Governments and the EU Commission can also play a significant part in the encouragement of collective competition arbitration. We assume for this section that the international treaty background to arbitration — both the New York Convention and the EU Treaties — remains constant. However, EU legislation may change in the medium term, at least as regards collective redress for consumers: the European Commission published a proposal for a Directive in April 2018 which could pave the way for cross border EU class actions in certain areas of EU law³⁶ — although the proposal did not include the competition ‘damages’ Directive in the list of instruments whose enforcement could be carried out using the proposed consumer collective action.³⁷

At a national level, the collective settlement procedures already available in some Member States might be improved or more widely adopted — not least as the Commission Recommendation encourages Member States to ensure the availability of collective ADR. The 2018 proposed consumer ‘class action’ Directive would encourage — but still not require — Member States to set up self-standing collective settlement regimes for consumers, although little detail is given on how Member States might wish to do this.³⁸ Revising existing Commission competition guidance — for example its guidance to national judges — to take more account of the specific challenges of collective action generally, and of arbitrations in particular, may also assist arbitrators asked to resolve a collective competition dispute.

7.5.1 Commission consumer redress proposal and arbitration

The proposed Commission Directive builds on current EU legislation in the consumer protection area, notably the ‘injunctions’ Directive — which is to be repealed entirely — and the consumer ADR Directive. The scheme adopted by the proposal is that, as in the ‘injunctions’ Directive, consumer bodies authorised by Member States — ‘qualified entities’ — will be able to apply to the court for an order, made for the benefit of consumers in a harmed group, to remedy breaches of directly effective EU law.³⁹ As in the Recommendation, the proposal would require the qualified entities to be non-profit making and to have a ‘legitimate interest’ in enforcement of the type of EU law where the infringement has taken place.⁴⁰ The proposal would also allow Member States to maintain

³⁶ n 17

³⁷ *ibid*, Annex I

³⁸ *ibid*, art 8 — ‘Member States may provide that a qualified entity and a trader [...] can jointly request a court [...] to approve it.’

³⁹ *ibid*, art 5

⁴⁰ *ibid*, art 4(b), but compare Recommendation’s ‘direct interest’ (n 4, para 4(b))

more effective existing or future regimes (ie. the proposal does not seek to harmonise the law in this area at EU level).⁴¹

However, unlike the Recommendation the proposal is both more limited in scope — harmed business customers of infringing undertakings would not be able to take advantage of the court-based collective redress mechanisms proposed — but potentially broader in the types of collective redress mechanisms which it permits. In particular, although the Recommendation takes an ‘exceptionalist’ approach to the question of ‘opt-out’ collective redress actions for compensation, the proposed Directive, in contrast, *requires* Member States to allow what appear to be ‘opt-out’ collective claims for compensation in certain circumstances.⁴²

The ‘baseline’ position is however, ‘opt-in’. The proposal would require Member States to enable ‘qualified entities’ to apply for a court order for compensation (or a similar remedy) for a group of harmed consumers.⁴³ It would be open to Member States (but not obligatory for them) to require the ‘mandate’ of each consumer to be bound by the order.⁴⁴ Exceptionally, however, Member States will not be allowed to require this individual ‘mandate’ in two situations.

First, the mandate of the individual consumers ‘shall not constitute a condition to initiate the action’ where the consumers who have suffered harm are identifiable — but not necessarily yet individually identified — and have each suffered ‘comparable’ harm caused by the same practice.⁴⁵ Again this differs slightly from the Recommendation. Although the requirement that the harm arise from the same practice is equivalent to the definition of “mass harm event” in the Recommendation, there is no requirement in the Recommendation that the type of harm suffered by the group should be ‘comparable’.⁴⁶

In practice this difference is unlikely to be of particular importance, given our conclusion in chapter 4 that the median standard for collective redress claims in the EU is that the group members should each have suffered similar (“comparable”) harm from the infringement founding the claim for compensation, but it does nevertheless represent an evolution in the Commission’s thinking in this area.

This first exception also does not require Member States to create a fully ‘opt out’ mechanism: they would be able to comply with the proposed Directive by requiring consumers who wished to be bound to opt in later, either during the course of the action or after the final decision is made. The existing French collective redress action — first introduced in 2014⁴⁷ — which combines representative actions with a final opt-in requirement, is thus capable of complying with what is proposed by the Commission.

⁴¹ Proposal, *ibid*, art 1(2)

⁴² *ibid*, art 6

⁴³ *ibid*, art 6(1)

⁴⁴ *ibid*,

⁴⁵ *ibid*, art 6 (3)(a)

⁴⁶ cf Recommendation (n 4), para 3

⁴⁷ Law 2014-344, 17 March 2014

The second exception to the ‘opt-out’ baseline is potentially more far reaching. The Commission proposes that, where individual consumer losses are so small that it would be ‘disproportionate’ to distribute the redress fund to each of them, the Directive would require Member States to allow the fund to be paid over to a public purpose serving the interests of consumers in general — a *cy-près* payment.⁴⁸ Given the likely numbers of affected consumers and the small size of the payments, again the individual mandate of the consumers is not required in this second exceptional case.

How would the proposal affect the possibility for arbitrators to craft a collective competition redress procedure across the EU?

We start from the assumption that the Commission’s proposal complies with (at least) the fundamental principles of EU law — if the proposal were to become a Directive it would form part of the *acquis communautaire*. The recitals to the proposal confirm this.⁴⁹ Focusing on the two exceptions to the ‘baseline’ opt-in position, it is highly likely that an arbitration procedure which allows a representative to represent claimants who may not have ‘expressly’ opted-in to the arbitration at the beginning of the proceedings would *not* be contrary to the fundamental principles of EU law. Where there is an identifiable group of claimants — for example all those having adhered to a pre-dispute arbitration agreement with an infringer — who have been harmed (in a ‘comparable’ way) by a breach of directly effective EU competition law, almost any procedure within their consent enabling them to bring an arbitrated representative action collectively will thus be compatible with the general principles of EU law.

The second exception has potentially even greater implications. The Commission’s proposal here implies the mandatory use of an ‘opt-out’ mechanism — no express mandate from the individual consumer being required at any stage in the collective proceedings. Implicitly, therefore, the Commission believes that even a ‘full’ opt-out procedure can be compatible with the general principles of EU law.

Even as a proposal — nevertheless expressing the European Commission’s position on the application of EU general principles of law to collective redress — the draft Directive is of significance. And, since the application of EU general principles in a collective redress context ought not to be materially different for (at least) SMEs than for consumers, we suggest it gives substantial comfort to parties and arbitrators wishing to use more advanced collective arbitration procedures, even outside the consumer area.

If adopted, the draft Directive would have even greater impact. For the purposes of our discussion, the proposals on collective settlements are key.⁵⁰ The Commission proposes two types of collective settlement mechanisms. For the first type of mechanism, the proposal encourages (but does not require) Member

⁴⁸ Proposal, *ibid*, art 6(3)(b); on *cy-près* distributions, Rachel Mulheron (n 3), 426

⁴⁹ Proposal, *ibid*, recital 42

⁵⁰ *ibid*, art 8

States to set up a procedure to allow a defendant and a qualified entity, who have reached agreement to compensate consumers, to apply to that State's courts for the settlement to be approved.⁵¹ The approving court would be required to assess the legality and the fairness of the settlement.⁵²

The draft Directive's provisions on the effect of an approved collective settlement are rather scanty — presumably because the Commission intends the detail to be included in the settlement agreement itself. The proposal only specifies two consequences from an approved settlement. First, the individual consumers must be allowed to 'accept or refuse' the settlement.⁵³ This formulation — which does not state when in the proceedings this possibility must be made available — is clearly capable of catering both for opt-in and opt-out collective settlements. Second, the settlement must also be 'without prejudice' to any *additional* rights to redress the individual consumers may have.⁵⁴ Again it is not clear from the current draft what these rights are 'additional' to — presumably in addition to the scope of the dispute as set out in the approved collective settlement agreement. It would therefore be important for the parties (and the approving judge) to be clear in the settlement or the judgment what claims are within the scope of the settlement, as well as who exactly is within the class on whose behalf the dispute has been settled.

The second type of collective settlement in the proposed Directive would result from an agreement to compromise a collective action already commenced in litigation.⁵⁵ Member States would be required to empower their courts to require parties to attempt a settlement during the proceedings. The conditions for approval of this type of settlement and its effects (specified under the draft Directive) are the same as for 'stand-alone' settlements.

As we noted in chapter 6, the possibility of combining collective arbitration with national collective settlement regimes, to form a widely applicable 'opt-out' resolution of an EU cross border competition claim, is likely to be an attractive one. Although the Commission has not proposed *requiring* Member States to introduce stand-alone collective settlement procedures, we suggest that this is one of the most useful — and least contentious — actions Member States could introduce to improve the attractiveness of collective competition arbitration.

7.5.2 National collective settlement regimes.

The 2018 report on the impact of its 2013 collective redress Recommendation, noted that — although a number of Member States have recently introduced collective 'out of court' settlement rules — "access to collective out of court dispute resolution schemes adjusted to the specific context of collective redress" is still not available in many Member States.⁵⁶ There are however, a number of

⁵¹ *ibid*, art 8 (1)

⁵² *ibid*, art 8(4)

⁵³ *ibid*, art 8(6)

⁵⁴ *ibid*,

⁵⁵ *ibid*, Art 8(2)

⁵⁶ European Commission, 25 January 2018, COM (2018) 40 final p 15

national legislative initiatives underway to either improve or introduce such schemes.⁵⁷

As we noted in chapter 6, one of the main issues which national legislation could address to promote the use of collective arbitration in tandem with collective settlement is clarity on the definition of the term ‘settlement’ so that it can include collective arbitration awards. Some existing national collective redress regimes are now being revised. In particular, the Dutch law on collective settlements is — as we have noted — in the late stages of legislative review. If enacted the new law will enable the Dutch courts to award damages on a collective basis (and not simply endorse settlements reached voluntarily between the parties).⁵⁸ The position on the extra-territorial effect of a collective judgment will also be amended to that it conforms more closely to the accepted position under the Brussels Regulation.⁵⁹ The use of Dutch law and settlement techniques would likely become even more attractive.

The German collective redress legislation has also been recently revised.⁶⁰ The regime envisaged will cover all types of mass harm event — not just those in the corporate sector — where the claimant group has a minimum number of members.⁶¹ The process appears to resemble that in the current French legislation — where the court first gives a ‘declaratory’ judgment in favour of the claimant group and then proceeds to distribute compensation to all claimants who adhere to the case. The new legislation contains specific provisions allowing collective settlements — it appears both before and after commencement of litigation — to be approved by the court. The approval will be given on a semi-‘opt-out’ basis: group members who have previously indicated their participation in the action have a month from publication of the proposed settlement to decide whether to accept it. It will become binding on the remainder provided that not more than 30% of participating claimants opt-out.⁶² When brought into force, this new settlement provision could also be used as the basis for a ‘hybrid’ resolution of a collective competition dispute having wide effect in Germany.⁶³

Although the 2017 study for the European Commission⁶⁴ identified a number of EU Member States where litigated collective settlement mechanisms exist, only the Netherlands, Germany and the UK currently have stand-alone opt-out collective settlement systems which could best be used as a complement to collective arbitration in a hybrid system.⁶⁵ It remains to be seen if the existing

⁵⁷ Germany, 12 July 2018, n 34; Netherlands, legislative proposal 34-608, 28 December 2016

⁵⁸ Dutch proposal, *ibid*, art I, inserting new art 305a in the Dutch Civil Code

⁵⁹ *ibid*, art II

⁶⁰ n 34

⁶¹ introducing new paragraphs §606-§615 into the German civil procedure code (ZPO).

⁶² Law, 12 July 2018, n 34, art 2 — new para 612 German Civil Procedure Rules (ZPO)

⁶³ for a critique of the 2017 draft of the law see Astrid Stadler, ‘Musterfeststellungsklage im deutschen Verbraucherrecht?’ *VuR* 3/2018, 83

⁶⁴ State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation, JUST/2016/JCOO/FW/CIVI/0099 (November 2017), British Institute of International and Comparative Law for European Commission

⁶⁵ *ibid*, 10

Recommendation and the possible future consumer redress Directive will promote further national legislative activity in this area in the near future. If — as expected — it does, the ‘hybrid’ collective arbitration-settlement model proposed in chapter 6 will become considerably more attractive.

7.6 Conclusions

To return to the two questions we asked in the first chapter: first can competition claims be arbitrated collectively in the EU to give an outcome broadly enforceable across the Union? We believe the answer to this first question is clearly ‘yes’.

As shown in chapters 2 and 3, collective competition claims can be arbitrated in the EU and — provided that there is consent to arbitrate collectively (even indirect or implied) — the resulting award is widely enforceable across Europe. A court, called on either to supervise an arbitration within its jurisdiction or to recognise a foreign award, should use its national arbitration legislation to do so — but applied in the light of the “pro-arbitration” stance in both international arbitration law and practice and the EU’s legislation and guidance promoting competition claims and collective redress.

Nevertheless, arbitration procedure and cross-border enforcement of foreign awards is outside the formal competence of the EU, except where it touches *substantive* policy and enforcement areas where the EU has acted (for our purposes, EU competition law enforcement). Differences in national law and practice in relation to collective competition arbitration are therefore likely to persist in Europe. National legislation may imply or even require restrictions on the rights of claimants to join a collective EU competition claim, on the freedom of the parties or the arbitrator to choose or admit an appropriate collective procedure (including those which may appear to be on an ‘opt-out’ basis), or on the standing of representatives in a representative collective claim. But EU law will almost always encourage or permit the arbitrator (or require a supervising court) to disregard those national limits to collective redress where they impede effective application of the EU competition rules to give redress to those harmed by an infringement.

The answer to our second question — how can the effectiveness of collective competition arbitration in the EU be maximized — has been addressed by considering the ‘design’ of a collective procedure, the choice of seat of arbitration and the potential to use arbitration in conjunction with national collective settlement regimes to give a broad finality to the resolution of a competition dispute.

We concluded in chapter 4 that the risks to successful collective competition arbitration arising from remaining national divergence can — within certain limits — be managed. However, we also noted that EU law does not allow the *parties* to the arbitration agreement a full choice of the law(s) which should be applied to most collective competition arbitration. Where the competition claim is arbitrated on a non-contractual basis, EU legislation requires the *arbitrator* to

take a final view of the appropriate applicable law — which must be a law where the competition infringement had an effect and with which the dispute has a close connection. This means that, for the majority of collective competition claims, the main variable within the control of the parties to manage recognition and enforcement risks is the choice of seat of arbitration, which is unaffected by EU choice of law rules.

In chapter 5 we concluded that the seat of arbitration should — if possible — be in an EEA State having a relatively advanced national regime for collective redress. Awards given in collective competition arbitrations seated outside the EU should also be enforceable in the EU, but only where the collective procedure used — and the substantive competition findings reached — do not offend against EU public policy.

The arbitrability of collective competition claims means that they are ‘capable of settlement by arbitration’ — following the wording of the New York Convention. We found in chapter 6 that many arbitration awards may indeed be treated as ‘settlements’ for the purposes both of the EU competition damages *acquis* and national ‘collective settlement’ regimes. The European Commission’s 2013 Recommendation on collective redress gives an impetus to Member States to set up schemes for collective ADR (including arbitration) for disputes involving breaches of directly effective EU law. The scope of such a ‘hybrid’ collective redress system — created by grafting European-wide collective arbitration onto national settlement schemes — should improve the reach of redress and finality of outcome of the overall collective competition proceedings.

A number of relatively small changes to current arbitration practice and national guidance or legislation would undoubtedly greatly assist parties to resolve redress disputes over competition harm collectively, through arbitration. Just as important will be a change in attitude towards collective redress within the arbitration community and more widely. This will depend on successful and fair outcomes to collective competition proceedings using ADR dispute resolution methods (primarily arbitration) — currently very few in number. Parties, arbitrators, institutions and public authorities — as well as legal counsel and funders — all have an interest (and part to play) in further developing this area of collective dispute resolution practice.⁶⁶

It is hoped that this thesis has demonstrated that, even under current rules and practice, a reasonably comprehensive resolution in Europe of mass harm competition disputes through arbitration is possible. With the relatively modest changes we have suggested above, the prospects for a functioning, balanced, EU-wide collective redress mechanism for competition infringements — based on collective arbitration and collective settlements — is a very real one.

⁶⁶ Gary Born *International Commercial Arbitration*, 2 ed (2014) Wolters Kluwer, 1524

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