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Non-compliance with EU competition law as a public policy violation: lessons for FRAND arbitration

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Abstract

This contribution analyzes the case law of the Court of Justice of the European Union (CJEU) dealing with non-compliance with EU competition as a public policy violation under Article V (2) (b) of the New York Convention, when proceedings regarding the recognition or enforcement of a foreign arbitral award take place, as well as it delves into the standards of assessment employed by the courts of EU member states, in particular Germany and Lithuania, to determine the circumstances under which this violation occurs. It is concluded that, in order to mitigate the risk of refusal to recognize or enforce a foreign arbitral award in FRAND licencing disputes, both, arbitral tribunals and parties, during the arbitration proceedings should be active in identifying and addressing potential EU competition law issues.

Keywords

Arbitration, EU competition law, FRAND, New York Convention, recognition and enforcement of foreign arbitral awards, public policy

I Introduction

Technology standardization, if properly performed, promotes innovation and economic growth. However, due to the fact, that standards usually refer to technologies protected by patents, i.e. standard-essential patents (SEPs),[1] standardization may weaken competition and create market entry barriers for those undertakings, which do not own SEPs, and even for the SEP owners themselves. In order to mitigate this negative outcome, SEP owners commit to licence SEPs on fair, reasonable and non-discriminatory (FRAND) terms. Notwithstanding the afore-described measures, such an attempt to provide implementers with the possibility to use SEPs while satisfying the financial interests of SEP holders, quite often lead to conflicts. In such situations, implementers of standardized technology accuse SEP owners for charging excessive licencing fees, whereas the latter fight back by claiming that the former are free riding on their inventions and, in turn, infringe their SEPs without any attempt to participate in good faith negotiations.[2] These issues are particularly crucial as the economy becomes increasingly digital, in turn, demanding for sufficient device connection and interoperability, in order to ensure its development and stable growth. Therefore, in order to avoid the delay of access to standardized technologies, licencing disputes should be solved as efficiently as possible. Oftentimes such disputes are focused on the determination of FRAND-compliant licensing conditions and require a meticulous assessment of not only legal, but also commercial and technical aspects related to a specific technological standard.

Taking into consideration this multifaceted nature of FRAND licencing disputes, alternative dispute resolution mechanisms, e.g. arbitration, are regarded as a promising and flexible tool for dealing with them.[3] In contrast to

1 European Commission, *Motorola – Enforcement of GPRS Standard Essential Patents*, decision of 29 April 2014, case AT.39985, para. 52: "Patents that are essential to a standard are those that cover technology to which a standard makes reference and that implementers of the standard cannot avoid using in standard-compliant products. These patents are known as SEPs. SEPs are different from patents that are not essential to a standard ("non-SEPs"). This is because it is normally technically possible for an implementer to design around a non-SEP without sacrificing key functionality. By contrast, an implementer has to use the technology protected by a SEP when manufacturing a standard-compliant product".

2 European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Setting out the EU approach to Standard Essential Patents, COM/2017/0712 final, 2, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2017:0712:FIN (2 November 2020).

3 E.g. European Commission, Samsung Electronics Enforcement of UMTS Standard Essential Patents – Commitments offered to the European Commission, Case COMP/C-3/39.939, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1301_5.pdf (27 September 2020); European Commission, *Samsung – Enforcement of UMTS Standard Essential Patents*, decision of 29 April 2014, case AT.39939; ECJ, *Huawei Technologies Co. Ltd v. ZTE Corp. und ZTE Deutschland GmbH*, judgment of 16 July 2015, C-170/13, para. 68; Peter G. Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, Journal of International Arbitration, 36 (2019) 5, 575-594.

litigation before the national courts, arbitration is regarded as more suitable for offering global solutions to the afore-mentioned disputes in one single procedure. By referring their dispute to arbitration, parties may avoid receiving contradicting and one jurisdiction-limited court decisions as well as the uncertainty arising from the possibility of further appeal proceedings.[4] However, issues may arise during the recognition or enforcement of the awards rendered by arbitral tribunals. One of the possible concerns in this regard are the situations when the recognition or enforcement of foreign arbitral awards would contradict the public policy of a particular country.[5] Since the European Union (EU) competition law, which is the basis of the FRAND concept in Europe,[6] is regarded as a matter of public policy within the meaning of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[7] the fact that an arbitral award violates this field of law may lead to a rejection of its recognition or enforcement before a court of an EU member state[8].

All this challenges widely recognized strengths of arbitration usually promising a more efficient international commercial dispute resolution in comparison to the proceedings before the state courts. In this context, it is unclear to which extent and depth arbitral tribunals are expected to deal with EU competition law issues arising in FRAND disputes, in order to comply with the public policy requirement and, at the same time, maintain the efficiency and flexibility of arbitration proceedings meaning that the dispute will be resolved within a reasonable time after adequately taking into consideration not only legal, but also commercial and technical particularities of the case.

Against this background, this contribution aims to investigate the standards of assessment employed by the courts of EU member states to determine the circumstances, under which EU competition law violations are regarded as contradicting the public policy within the meaning of the Article V (2) (b) of the New York Convention, as well as the actions, that arbitral tribunals and parties to the FRAND licencing disputes could take, in order to mitigate the risk of refusal to recognize or enforce foreign arbitral awards.

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4 Munich IP Dispute Resolution Forum, FRAND ADR Case Management Guidelines, 2018, available at http://www.ipdr-forum.org/wp-content/uploads/2018/08/frand-guidelines_helvetica_rz6_klein_online.pdf (27 September 2020).

5 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 UNTS 3, Art. V (2) (b).

6 Munich IP Dispute Resolution Forum, FRAND ADR Case Management Guidelines, 2018, 16-17, available at http://www.ipdr-forum.org/wp-content/uploads/2018/08/frand-guidelines_helvetica_rz6_klein_online.pdf (27 September 2020).

7 ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, paras. 37-39; ECJ, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, judgment of 13 July 2006, C-295/04, para. 31.

8 At the moment, there are 27 EU member states: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden; EU countries, available at https://europa.eu/european-union/about-eu/countries_en (27 September 2020).

II Public policy under Article V (2) (b) of the New York Convention

The cross-border enforcement of arbitral awards requires them to be recognized and enforced "in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the [...] articles [of New York Convention]".[9] In spite of the pro-enforcement nature of the New York Convention,[10] Article V (2) (b) of this legal document enables the courts of the contracting states[11] to refuse the recognition or enforcement of an arbitral award when they find it contrary to its public policy.[12] On a general level, this means, that a state court is allowed to refuse to endorse a foreign arbitral award, if it offends "the most fundamental principles of justice and fairness recognized by the enforcement state".[13] Due to the abstract nature of public policy, this provision causes many questions to the courts competent to recognize and enforce arbitral awards with regard to what should be considered as public policy or, at least, what should be the core elements of this category.

It is difficult to understand the category "public policy" in isolation from international legal order and national legal laws. A comparison of English[14] and French[15] versions of the New York Convention reveal, that in this legal document public policy is the English equivalent of the French term "*ordre public*". In countries of civil law tradition, *ordre public* refers to imperative or *jus cogens*[16] legal provisions that cannot be changed by contract or restricted in any other way.[17] This particular concept of *ordre public* exists in the French legal system.[18] Meanwhile, in the English legal system, which belongs to the

9 New York Convention, Art. III.

10 New York Convention Guide, available at http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac_view=-1 (27 September 2020) citing *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier* (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974).

11 At the moment, there are 165 contracting states to the New York Convention; see UNCITRAL, status, available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (27 September 2020).

12 New York Convention, Art. V (2) (b).

13 Peter Chrocziel et al. (eds.), International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden 2016, 123.

14 New York Convention.

15 Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères, New York, 1958, available at https://www.uncitral.org/pdf/french/texts/arbitration/NY-conv/New-York-Convention-F.pdf (27 September 2020).

16 In the legal doctrine *jus cogens* is defined as "the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subject of law may not, under pain of absolute nullity, depart from them in virtue of particular agreements"; Ian Sinclair, The Vienna Convention on the Law of Treaties, 2nd ed., Manchester 1984, 203.

17 Michael Forde, The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions, The International and Comparative Law Quarterly, 29 (1980) 2-3, 259.

18 Michael Forde, The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions, The International and Comparative Law Quarterly, 29 (1980) 2-3, 259.

common law tradition, categories "*ordre public*" and "public policy" are considered to be very close[19], indicating that courts may refrain from following certain contracts, if those "contravene fundamental moral principles (*bonnes mœurs* or *gute Sitten*), or which would offend against some other overriding public interest".[20]

Although legal literature indicates, that there is no consensus on the definition of the term *ordre public*,[21] an aim to provide certain generalizations concerning it exists. For example, it is claimed, that there exist two approaches to the category "*ordre public*".[22] One of them is broader and identifies this term as "public order" or "public policy", both of which include a wide range of aspects.[23] This concept is associated with countries that belong to the common law system, for example, England, and, despite being rather broad, it is considered to be less prone to change.[24] Another, narrower understanding of this term indicates, that *ordre public* includes "fundaments from which one cannot derogate without endangering the institutions in a given society"[25] or, as it is stated, that the term in question "expresses concerns about matters threatening the social structures which tie a society together, i.e. matters that threaten the structure of civil society as such".[26] Against this background, it is possible to state that, in principle, public policy (or *ordre public*),[27] could be associated with those legal norms and principles that are of fundamental importance to the existence and proper functioning of a particular society, its members and the surrounding environment.

Similarly, to the above-described efforts in delineating public policy, the definitions of this category in the context of the New York Convention provided by national jurisdictions are also rather divergent.[28] Nevertheless, case law aims to limit the grounds for invoking Article V (2) (b) of the New York Convention to situations "when the core values of a legal system have been deviated from".[29] This provision should be used in cases where "it would be impossible for a legal system to recognize an award and enforce it without

19 Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis, 4th ed., London 2012, 343.
20 Michael Forde, The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions, The International and Comparative Law Quarterly, 29 (1980) 2-3, 259.
21 Åsa Hellstadius, A Quest for Clarity: Reconstructing Standards for the Patent Law Morality Exclusion, Stockholm 2015, 161.
22 Åsa Hellstadius, A Quest for Clarity: Reconstructing Standards for the Patent Law Morality Exclusion, Stockholm 2015, 162.
23 Åsa Hellstadius, A Quest for Clarity: Reconstructing Standards for the Patent Law Morality Exclusion, Stockholm 2015, 162.
24 Ian Sinclair, The Vienna Convention on the Law of Treaties, 2nd ed., Manchester 1984, 204.
25 Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis, 4th ed., London 2012, 343.
26 UNCTAD & ICTSD, Resource Book on TRIPS and Development, Cambridge 2005, 375.
27 Further in this contribution, only the term "public policy" will be used.
28 New York Convention Guide, para. 4.
29 New York Convention Guide, para. 4.

abandoning the very fundaments on which it is based"[30]. Indeed, it seems, that the state courts when analyzing what should be regarded as public policy within the meaning of the Article V (2) (b) of the New York Convention, emphasize country's "most basic notions of morality and justice",[31] rules and values whose violation the legal order cannot tolerate even "in situations of international character",[32] the basis of public and economic life or country's perception of justice[33], etc. These examples show, that this provision should be interpreted rather narrowly and invoked in rare cases, when the recognition and enforcement of a foreign arbitral award would lead to severe contradiction to the legal and social norms forming the foundations of a country.

Although, it is considered, that public policy under the Article V (2) (b) of the New York Convention is regarded as the public policy of the forum state, a mere violation of domestic law is unlikely to be a ground to refuse recognition and enforcement of an arbitral award.[34] Nonetheless, certain mandatory rules of a forum state can be regarded as an appropriate public policy defence with regard to recognition or enforcement of arbitral awards.[35] Despite the diverging opinions as to whether specific sets of mandatory rules do meet the standard of the public policy defence, it is claimed, that these rules should be regarded as a part of public policy in terms of recognition and enforcement of foreign awards "when they reflect that forum's fundamental concepts of morality and

30 New York Convention Guide, para. 4 citing the Comments of the Netherlands Government, *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards: Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards E/2822/Add.4, 2; the Comments of the representative of the French Government, Holleaux, *Travaux préparatoires*, Summary Record of the Eleventh Meeting, E/CONF.26/SR.11, 7; Jan Paulsson, The New York Convention in International Practice – Problems of Assimilation, ASA Special Series No. 9, (1996) 100, 113.

31 New York Convention Guide, para. 5 citing *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

32 New York Convention Guide, para. 8 citing Parisian Court of Appeal, *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v. M. N'DOYE Issakha*, judgment of 16 October 1997.

33 New York Convention Guide, para. 9 citing *Oberlandesgericht* (OLG) München, 34 Sch 019/05, judgment of 28 November 2005; OLG Düsseldorf, VI Sch (Kart) 1/02, judgment of 21 July 2004; OLG Bremen, (2) Sch 04/99, judgment of 30 September 1999; *Bundesgerichtshof* (BGH), III ZR 269/88, judgment of 18 January 1990.

34 New York Convention Guide, para. 13 citing Australian Federal Court, *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd*, FCA 276, judgment of 23 March 2012; Colombian Supreme Court of Justice, *Petrotesting Colombia S.A. & Southeast Investment Corporation v. Ross Energy S.A.*, judgment of 27 July 2011; Parisian Court of Appeal, *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v. M. N'DOYE Issakha*, of judgment of 16 October 1997; Lithuanian Court of Cassation, *K.M. v. UAB A. Sabonio Žalgirio krepšinio centras*, judgment of 4 November 2011.

35 New York Convention Guide, para. 18 citing Luke Villiers, Breaking in the "Unruly Horse": The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards, Australian International Law Journal, (2011), 155, 179-80.

justice, from which no derogation can be allowed".[36] One of the sets of such legal rules is competition law,[37] whose status in the context of the Article V (2) (b) of the New York Convention will be analyzed in the following chapter.

III Non-compliance with EU competition law as a public policy violation under the New York Convention

A EU law perspective

Despite the fact, that each competition law regime is designed to advance goals suited for economic, social and political realities as well as institutional framework of a specific country,[38] and is susceptible to changes over time,[39] on a general level, this field of law is regarded as aiming to protect consumers and economic systems by ensuring fair competition.[40] EU competition law, which is also not free of the afore-mentioned considerations, is "is one of several instruments used to advance and serve"[41] a myriad of values and goals of the EU.[42] Consistently with its public policy-oriented character, EU competition law was explicitly recognized by the Court of Justice of the European Union (CJEU) as a matter of public policy in the context of the New York Convention.

In the *Eco Swiss* case, CJEU has established, that Article 85 of the European Community Treaty (now Article 101 of the Treaty of the Functioning of the European Union[43] [TFEU]) "constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market".[44] Thus, a state court, which received an application regarding the

36 New York Convention Guide, para. 18 and 26 citing Emmanuel Gaillard/John Savage (eds.), Fouchard, Gaillard, Goldman On International Commercial Arbitration, The Hague, Boston & London 1999, 996.

37 New York Convention Guide, para. 18.

38 Ariel Ezrachi, EU Competition Law Goals and the Digital Economy, BEUC Discussion Paper, 2018, 19, available at https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf (27 September 2020).

39 Giorgio Monti, EC Competition Law, Cambridge 2007, 3.

40 Peter Chrocziel et al., International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden 2016,123.

41 Ariel Ezrachi, EU Competition Law Goals and the Digital Economy, BEUC Discussion Paper, 2018, 3, available at https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf (27 September 2020).

42 Ariel Ezrachi, EU Competition Law Goals and the Digital Economy, BEUC Discussion Paper, 2018, 3, available at https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf (27 September 2020).

43 EU, Treaty on the Functioning of the EU, OJ C 202 of 7 June 2016, 47.

44 ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 36.

> "annulment of an arbitration award must grant that application if it considers that the award [...] is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy".[45]

Thus, EU competition law falls under the matter of public policy within the meaning of Article V (2) (b) of the New York Convention.[46] This means, that recognition or enforcement of a foreign arbitral award can be refused by the courts of EU member states based on the afore-mentioned provision, if an award contradicts public policy due to non-compliance with EU competition law. In spite this rather clearly established position with regard to EU competition law and Article V (2) (b) of the New York Convention, it is claimed, that

> "the extent of review of arbitral awards for violation of competition law and the seriousness of the violation required to justify setting aside or refusal of enforcement are yet to be settled".[47]

Indeed, the same as there is no EU-wide definition of public policy,[48] the standards of assessment in the EU legal framework to determine the circumstances in which EU competition law violations should be regarded as contradicting the public policy under the New York Convention are not clear or uniform. The uncertainty as to the extent to which state courts are under

45 ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 41.

46 ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 39. AG *Wathelet* considers Articles 101 and 102 of the TFEU as a matter of public policy (ECJ, *Genentech Inc. v. Hoechst GmbH & Sanofi-Aventis Deutschland GmbH*, judgment of 7 July 2016, C-567/14, opinion of AG Wathelet, paras. 55-72) and this position is supported in the legal scholarship (e.g. Michail Bron, Viešosios tvarkos kategorija kaip arbitražą ir konkurencijos teisę siejantis veiksnys, Teisė, 69 [2008], 124 citing Claus-Dieter Ehlerman/ Isabela Atanasiu [eds.], European competition law annual 2001: effective private enforcement of EC antitrust law, Oxford, Portland & Oregon 2003, 420. Also see Peter Chrocziel et al., International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden 2016, 124). In addition, not only Articles 101 and 102 of the TFEU, but also secondary EU law based on these two provisions may constitute public policy; Peter G. Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, Journal of International Arbitration, 36 (2019) 5, 592-593.

47 Peter Chrocziel et al., International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden 2016, 124 citing Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Philipp Landolt (eds.), EU and US Antitrust Arbitration: A Handbook for Practitioners, Volume I, Alphen aan den Rijn 2011, 755, 772-773; Giacomo Biagioni, Review by National Courts of Arbitral Awards Dearing with EU Competition Law, in: Mel Marquis/Roberto Cisotta (eds.), Litigation and Arbitration in EU Competition Law, Cheltenham 2015, 281, 282.

48 Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 812.

obligation to analyze the compliance of foreign arbitral awards with competition law has brought about distinct practices in different EU legal systems, i.e. the maximalist and minimalist approaches.[49] The maximalist perspective recognizes

> "the fundamental nature of competition law [...], along with the importance of the courts' ability to review awards and the risk of arbitration being used as a tool to circumvent competition rules".[50]

This approach perceives competition law issues as highly complex[51] and advocates for analyzing both, the procedure and the substantive reasoning of an arbitral award, in such a way, that could be considered very close to a review on the merits.[52] In contrast, the minimalist approach argues, that reviewing further than a "first quick look" equals to a revision of arbitral awards on the merits, which not only threatens the principle of finality of arbitral awards, but would even exceed the resources of many national courts to deal with complex competition law issues.[53] In addition, from the minimalist perspective, arbitral awards "should only be overturned in cases of serious breach of public policy and that there should be sufficient trust in arbitration and arbitrators".[54] As a compromise, it is proposed, that an award should be subject to full control, but refusal of recognition and enforcement should be applied selectively.[55]

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49 E.g. Philippe Billiet, Arbitrators' means to ensure compliance with competition law and limits of court review on awards in Europe, Arbitration, 76 (2010) 1, 91; Gordon Blanke, CJEU shuns consideration of review of EU competition law awards in Genentech, Global Competition Litigation Review, 9 (2016) 4, R49-R51; Peter Chrocziel et al., International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden 2016, 124; Christoph Liebscher, EU Member State Court Application of Eco Swiss China Time Ltd v. Benetton International NV: Review of the Case Law and Future Prospects in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 818-819.

50 Philippe Billiet, Arbitrators' means to ensure compliance with competition law and limits of court review on awards in Europe, Arbitration, 76 (2010) 1, 91.

51 Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 819.

52 Dominic Wong, The "middle way" review standard of arbitral awards – safeguarding effective EU competition law enforcement: theoretical appraisal, practical application and potential obstacles, Global Competition Litigation Review, 9 (2016) 1, 5.

53 Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 819.

54 Philippe Billiet, Arbitrators' means to ensure compliance with competition law and limits of court review on awards in Europe, Arbitration, 76 (2010) 1, 91.

55 Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 819 citing Christophe Seraglini, L'affaire Thalès et le non-usage immodéré de l'exception d'ordre public (ou les dérèglements de la dérèglementation), Cahiers de l'arbitrage, 3 (2006), 99.

One of the most significant examples of the maximalist approach on the EU level was demonstrated by the Advocate General (AG) in the *Genentech* case. While analyzing the scope of review of arbitral awards from the perspective of EU public policy, AG *Wathelet* stated, that the limitations on the scope of review of foreign arbitral awards particularly

> "the flagrant nature of the infringement of international public policy and the impossibility of reviewing an [...] award on the ground of such an infringement where the question of public policy was raised and debated before the arbitral tribunal"[56]

contradict the principle of effectiveness of EU law.[57] Furthermore, by adding that "the courts of the Member States are not bound to comply with the answers to questions concerning EU law given by arbitral tribunals",[58] he proposed a comprehensive assessment of arbitral awards with regard to the EU competition law rules. However, despite the fact, that the CJEU agreed with the Opinion of the AG with regard to the substance of the case, the question on the extent of review of arbitral awards in the light of EU competition law, in principle, was not discussed in the judgment and left open[59].

In contrast to the rather bold opinion of the AG, the position of the CJEU in relation to the intensity of review of arbitral awards is not that clear-cut. On the one hand, the fact, that CJEU in its case law has unambiguously established, that arbitral tribunals are not courts of the EU member states[60], and avoided to perform a comprehensive analysis of above-indicated arguments of the AG in the *Genentech* case,[61] could be regarded as a support for the maximalist approach and, thus, an extensive review of foreign arbitral awards by the courts of EU member states. On the other hand, in its case law, CJEU has also acknowledged, that a review of an arbitral award "may be more or less extensive depending on the circumstances"[62] and even stated, that in order to preserve efficient arbitration proceedings, "review of arbitration awards should

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56 AG Wathelet, *Genentech Inc. v. Hoechst GmbH & Sanofi-Aventis Deutschland GmbH*, C-567/14, opinion of 17 March 2016, para. 58.

57 AG Wathelet, *Genentech Inc. v. Hoechst GmbH & Sanofi-Aventis Deutschland GmbH*, C-567/14, opinion of 17 March 2016, para. 58.

58 AG Wathelet, *Genentech Inc. v. Hoechst GmbH & Sanofi-Aventis Deutschland GmbH*, C-567/14, opinion of 17 March 2016, para. 69.

59 ECJ, *Genentech Inc. v. Hoechst GmbH & Sanofi-Aventis Deutschland GmbH*, judgment of 7 July 2016, C-567/14, paras. 32-44.

60 ECJ, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG*, judgment of 23 March 1982, C-102/81, para.13; ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 34; ECJ, *Gazprom OAO v. Lietuvos Respublika*, judgment of 13 May 2015, C-536/13, para. 36.

61 For more see Gordon Blanke, CJEU shuns consideration of review of EU competition law awards in Genentech, Global Competition Litigation Review, 9 (2016) 4, R49-R51.

62 ECJ, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG*, judgment of 23 March 1982, C-102/81, para. 14. Also see ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 32.

be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances"[63], hinting towards the minimalist approach. Nevertheless, the fundamental importance of EU competition law in ensuring proper functioning of the internal market, and, when in doubt with regard to the correct interpretation of EU competition law provisions, the impossibility for an arbitral tribunal to refer for a preliminary ruling to the CJEU,[64] characterize arbitral tribunals as more limited than state courts. Depending on the circumstances of each specific case, this could be an argument for the national courts to review arbitral awards with regard to EU competition law rules under Article V (2) (b) of the New York Convention with greater scrutiny.[65]

In view of the discussed above, it is evident, that there is no clear EU-wide position with regard to the extent of the review of arbitral awards before the national courts and "required intensity of the competition law violation".[66] Against this background, further, this contribution will investigate the standards of assessment employed by the competent national courts in Germany and Lithuania, to determine the circumstances, under which EU competition law violations are considered as contradicting public policy within the meaning of Article V (2) (b) of the New York Convention.

B German law perspective

In Germany, foreign arbitral awards are recognized and enforced under Section 1061 of the Civil Procedure Code of Germany.[67] According to Section 1061 (1) sentence 1 of the Civil Procedure Code of Germany, New York Convention is the basis for the recognition and enforcement of foreign arbitral awards in this country.[68] Therefore, a violation of public policy under

63 ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 35.

64 ECJ, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG*, judgment of 23 March 1982, C-102/81, para. 10; ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 40.

65 Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 820.

66 Peter G. Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, Journal of International Arbitration, 36 (2019) 5, 593. One of the widely given examples of this division are the French representing the minimalist approach and the Belgian courts supporting the maximalist point of view (e.g. Philippe Billiet, Arbitrators' means to ensure compliance with competition law and limits of court review on awards in Europe, Arbitration, 76 [2010] 1, 86-97; Peter Chrocziel et al., International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden 2016, 124).

67 Code of Civil Procedure (last amendment 12 December 2019), Federal Law Gazette I 3786, Sec. 1061, available at http://www.gesetze-im-internet.de/zpo/BJNR005330950.html (27 September 2020) (in German).

68 Code of Civil Procedure, Sec. 1061 (1) sentence 1.

Article V (2) (b) of the New York Convention is one of the grounds for refusal to recognize and enforce a foreign arbitral award in Germany.

The Supreme Court of Germany defines a breach of public policy under the afore-mentioned provision of the New York Convention as "a serious deficiency that affects the foundations of state and economic life in Germany".[69] Public policy is considered to be violated within the meaning of Article V (2) (b) of the New York Convention, if the result of a foreign arbitral award submitted for recognition and enforcement before a court in Germany is "evidently irreconcilable with the fundamental principles of the German legal order"[70]. It is also stated, that there should be "grave" violations, "severe" defects, "evident" or "irreconcilable" violations of the legal order"[71] to make the discussed provision of the New York Convention applicable. Nevertheless, a violation of mandatory German law may not fall under Article V (2) (b) of the New York Convention "as long as it has not yet reached this serious quality".[72] The benchmark for the assessment of a possible contradiction of an arbitral award to public order in the context of Article V (2) (b) of the New York Convention is the *ordre public international*, which is regarded as even more recognition-friendly than the internal public policy under Section 1059 (2) No. 2 (b).[73]

In spite of the rather considerable amount of German case law with regard to recognition and enforcement of foreign arbitral awards in Germany in the

69 German Supreme Court, III ZR 192/84, judgment of 15 May 1986, para. 4. For case law of lower instances in this regard, see: Higher Regional Court of Karlsruhe, 9 Sch 02/09, decision of 4 January 2012, para. 2 (b) (bb); Higher Regional Court of Munich, 34 Sch 019/05, decision of 28 November 2005, para. 3 (b); Higher Regional Court of Düsseldorf, VI Sch (Kart) 01/02, decision of 21 July 2004, paras. 24 and 29.

70 Stephan Wilske/Lars Markert, in: Volkert Vorwerk/Christian Wolf (eds.), Beck'scher Online-Kommentar ZPO, 37th ed., München 2018, Sec. 1061 mn. 52 citing OLG Saarbrücken, SchiedsVZ 2012, 47 (50); OLG München, SchiedsVZ 2012, 339 (341); Jens-Peter Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd ed., Köln 2008 mn. 2678; Jens Adolphsen, in: Thomas Rauscher/Wolfgang Krüger (eds.), Münchener Kommentar zur Zivilprozessordnung, 5th ed., München 2017, Art. V UNÜ mn. 70.

71 Maxi Scherer, The Public Policy Exception under Article V (2) (b) – Methodological Approaches of Arbitral Awards, available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=19D45A9F-4C06-4F5B-A56C-65F84BFE52DE (27 September 2020), 2 citing Joachim Münch, in: Thomas Rauscher/Wolfgang Krüger (eds.), Münchener Kommentar zur Zivilprozessordnung, 4th ed., München 2013, Art. V UNÜ mn. 70; Reinhold Geimer, in: Richard Zöller (ed.), Zivilprozessordnung, 29th ed., Köln 2011, Sec. 1061 mn. 31.

72 Stephan Wilske/Lars Markert, in: Volkert Vorwerk/Christian Wolf (eds.), Beck'scher Online-Kommentar, 37th ed., München 2018, Sec. 1061 mn. 48 citing OLG Jena, SchiedsVZ 2008, 44 (45); OLG Celle, BeckRS 2007, 10067 II.2.d aa; BGH, SchiedsVZ 2014, 151 (153); BGH, NJW 2009, 1215 (1216); BKN Arbitration/Kröll, mn. 136; BGH, SchiedsVZ 2014, 98.

73 Stephan Wilske/Lars Markert, in: Volkert Vorwerk/Christian Wolf (eds.), Beck'scher Online-Kommentar, 37th ed., München 2018, Sec. 1061 mn. 48 citing BGH, NJW 1986, 3027 (3028); SchiedsVZ 2018, 53 = NZG 2017, 227 Rn. 56; OLG Karlsruhe, SchiedsVZ 2012, 101 (104); OLG Stuttgart, BeckRS 2003, 18189 mn. 178; BGH, SchiedsVZ 2014, 98; 2014, 151 (153).

context of Article V (2) (b) of the New York Convention, non-compliance with EU competition law as public policy violation was not analyzed that extensively.[74] Nevertheless, there are certain notable decisions taken by the German courts in this regard.

The Higher Regional Court of Thüringen while dealing with an arbitral award rendered by the International Chamber of Commerce (ICC) primarily stated, that the principle of prohibition of *révision au fond* applies, when a procedure for recognizing and enforcing a foreign award under the New York Convention takes place.[75] The court emphasized, that, in principle, a substantial review[76] of a foreign arbitral award cannot take place, and that a material inaccuracy[77] in such an award should be accepted, as it is with the errors in foreign court decisions.[78] Thus, according to the German court, recognition and enforcement proceedings established by the New York Convention, aim at preventing abuse committed by private arbitrators and not to transform arbitral tribunals into decision-making bodies of lower instance.[79] The court emphasized, that if a state allows arbitral tribunals to make decisions instead of courts, it must accept, that arbitral awards might violate certain provisions of law.[80] This even applies to situations when mandatory rules not forming part of the public policy are violated.[81]

With regard to the EU competition law, the Higher Regional Court of Thüringen recognized, that public law provisions designated to maintain the

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74 This conclusion was drawn after reviewing certain legal scholarly literature, e.g. Stephan Wilske/Lars Markert, in: Volkert Vorwerk/Christian Wolf (eds.), Beck'scher Online-Kommentar, 37th ed., München 2018, Sec. 1061 mns. 48-52.2; Dennis Solomon, Interpretation and Application of the New York Convention in Germany, in: George A. Bermann (ed.), Recognition and Enforcement of Foreign Arbitral Awards, Volume 23, 368; Maxi Scherer, The Public Policy Exception under Article V (2) (b) – Methodological Approaches of Arbitral Awards, available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=19D45A9F-4C06-4F5B-A56C-65F84BFE52DE (27 September 2020).

75 Higher Regional Court of Thüringen, 4 Sch 03/06d, decision of 8 August 2007, part IV, 6.

76 In German, *sachliche Nachprüfung*; Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 6.

77 In German, *sachliche Unrichtigkeit*; Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 6.

78 Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 6.

79 In German, *Vorinstanz*; Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 6.

80 Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 6.

81 Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 6-7. Also the Higher Regional Court of Thüringen stated, that not all provisions of mandatory law constituted public policy, rather, public policy comprised only those provisions of mandatory law which affected the foundations of public and economic life and basic ideas of justice, including basic rights under the German Constitution, good morals, all fundamental principles of German law, and basic guarantees of procedural justice, such as the right to be heard; Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 7.

economic system as well as national and EU competition law fall under the scope of protection of public policy.[82] However, due to the fact, that the license agreement concluded between the parties to the dispute had no impact on German or EU market, the court stated, that the arbitral award resolving this dispute did not violate EU competition law under Article V (2) (b) of the New York Convention.[83] This conclusion was in conformity with the ICC arbitral award and, because of the prohibition of *révision au fond*, was reached by the Higher Regional Court of Thüringen without an extensive revision of this award on the merits with regard to the EU competition law[84]. Therefore, this decision of the German court could be reasonably regarded as demonstrating the minimalist approach with regard to the standard of review of foreign arbitral awards in the context of the New York Convention.

In contrast, the Higher Regional Court of Düsseldorf has demonstrated a maximalist approach while deciding on the recognition and enforcement of an ICC arbitral award under Article V (2) (b) of the New York Convention. In this case, the arguments of the party to the dispute, who was against the recognition and enforcement of the foreign arbitral award, were that the contested license agreement violated EU competition law and, due to the non-compliance with the requirement of written form established in the German Competition Act, was void.[85] The German court stated, that, when deciding on recognition or enforcement, it was bound neither by the interpretation of law, nor by factual findings of the arbitral tribunal,[86] and performed an extensive review with regard to the facts and law of the dispute. Among many aspects, in this decision, the Higher Regional Court of Düsseldorf acknowledged, that both, EU and domestic competition law provisions, form part of the public policy of Germany.[87] However, those provisions of German law, that set certain requirements for the form of an agreement, but do not have any function of regulating the state economic or legal system, are not regarded as falling under the public policy.[88] Finally, notwithstanding the extensive examination of the ICC arbitral award, the German court endorsed it.

Considering all the discussed above, it is possible to conclude, that, in principle, German law demonstrates preference towards a more limited review of foreign arbitral awards with regard to public policy contradictions, including

82 Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 8. In this decision the court uses the term "ordre public" when speaking about public policy.

83 Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 9.

84 Higher Regional Court of Thüringen, 4 Sch 03/06, decision of 8 August 2007, part IV, 9.

85 Higher Regional Court of Düsseldorf, VI Sch (Kart) 01/02, decision of 21 July 2004, para. 17.

86 Higher Regional Court of Düsseldorf, VI Sch (Kart) 01/02, decision of 21 July 2004, para. 23.

87 Higher Regional Court of Düsseldorf, VI Sch (Kart) 01/02, decision of 21 July 2004, para. 24.

88 Higher Regional Court of Düsseldorf, VI Sch (Kart) 01/02, decision of 21 July 2004, para. 28.

the EU competition law violation-based ones, under Article V (2) (b) of the New York Convention. Even the case law favouring an extensive scrutiny of arbitral awards, which would amount to review on the merits, clearly distinguishes violations of competition law provisions of a more fundamental nature, i.e. that would have a "function to regulate the economic or legal system"[89], as falling within the discussed concept of public policy.

C Lithuanian law perspective

In comparison to Germany, Lithuania has a much shorter tradition of recognizing and enforcing foreign arbitral awards, i.e. since 12 June 1995.[90] According to Article 809 (1) of the Code of Civil Procedure of the Republic of Lithuania, foreign arbitration awards may be enforced in the territory of Lithuania only after they have been recognized by the Court of Appeal of Lithuania, which is the institution authorized to recognize these awards.[91] An arbitral award rendered in any contracting state to the New York Convention can be recognized and enforced in Lithuania in accordance with the provisions of the Law on Commercial Arbitration of the Republic of Lithuania and the New York Convention.[92] The ruling of the Court of Appeal of Lithuania regarding the recognition and enforcement of a foreign arbitral award may be appealed to the Supreme Court of Lithuania,[93] but neither of the courts can review an award on substantive grounds.

It seems, that, until now, competent Lithuanian courts, i.e. the Court of Appeals of Lithuania and Supreme Court of Lithuania, have not dealt with public policy objections related to the EU competition law when deciding on the recognition or enforcement of foreign arbitral awards.[94] However, taking into

89 Higher Regional Court of Düsseldorf, VI Sch (Kart) 01/02, decision of 21 July 2004, para. 28.

90 1958 metų Niujorko konvencija dėl užsienio arbitražų sprendimų pripažinimo ir vykdymo, available at https://www.e-tar.lt/portal/en/legalAct/TAR.883784C7E407 (27 September 2020).

91 Code of Civil Procedure of the Republic of Lithuania, Valstybės žinios, 6 April 2002, No. 36-1340, available at https://www.e-tar.lt/portal/en/legalAct/TAR.2E7C18F61454/KIrWqbIBih (27 September 2020), Art. 809 (1).

92 Law on Commercial Arbitration of the Republic of Lithuania, Lietuvos Respublikos Seimas, Valstybės žinios, 2 May 1996, No. 39-96, available at https://www.e-tar.lt/portal/en/legalAct/TAR.952D5CAC35AC/MbLvdPAAkN (27 September 2020), Art. 51 (1).

93 Law on Commercial Arbitration of the Republic of Lithuania, Art. 51 (3).

94 This was concluded after making a search in a public database of Lithuanian court decisions "Liteko" (search criteria: (i) (a) Court – "Lietuvos apeliacinis teismas" [Court of Appeals of Lithuania]; (b) type of case – "civilinė byla" [civil case]; (c) Search in text – "arbitražas", "konkurencija", "viešoji"; (ii) (a) Court – "Lietuvos apeliacinis teismas" [Court of Appeals of Lithuania]; (b) type of case – "civilinė byla" [civil case]; (c) Search in text – "arbitražas", "konkurencijos", "viešoji"; (iii) Court – "Lietuvos Aukščiausiasis Teismas" [Supreme Court of Lithuania]; (b) type of case – "civilinė byla" [civil case]; (c) Search in text – "arbitražas", "konkurencija", "viešoji"; (iv) Court – "Lietuvos Aukščiausiasis Teismas" [Supreme Court of Lithuania]; (b) type of case – "civilinė byla" [civil case]; (c) Search in text –

consideration the Constitution of the Republic of Lithuania recognizing the protection of freedom of fair competition as one of the foundations of the economic system of the country[95] and the above-discussed case law of the CJEU acknowledging EU competition law as a matter public policy,[96] it is possible to conclude, that EU competition law forms part of the public policy in Lithuania within the meaning of Article V (2) (b) of the New York Convention. In addition, more general questions with regard to public policy as the ground for non-recognition and non-enforcement of arbitral awards have been analyzed by the competent Lithuanian courts.

Lithuanian case law establishes, that, generally, the "term 'public policy' is interpreted in the doctrine and practice of international arbitration as international public order"[97] and "includes the fundamental principles of fair trial, as well as the mandatory norms of law establishing the basic and universally recognized principles of law".[98] Furthermore, the Supreme Court of Lithuania, has stated, that not any contradiction with the mandatory legal norms of Lithuania can be a sufficient ground for refusing to recognize the arbitral award.[99] The violation of public policy can be established, when the recognition or enforcement of an arbitral award would be contrary to the fundamental principles of law and moral norms established in the Constitution,

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"arbitražas", "konkurencijos", "viešoji", available at http://liteko.teismai.lt/viesasprendimupaieska/detalipaieska.aspx [27 September 2020]) and reviewing the following scholarly literature on arbitration-related issues in Lithuanian law, Michail Bron, Viešosios tvarkos kategorija kaip arbitražą ir konkurencijos teisę siejantis veiksnys, Teisė, 69 (2008), 122-131; Rimantas Daujotas, Užsienio arbitražo sprendimo peržiūrėjimo ribos pripažinimo ir vykdymo procese pagal Niujorko konvenciją, available at http://rdaujotas.com/wp-content/uploads/2018/10/R.-Daujotas.-Niujorko-konvencija-arbiražas-pripažinimas-ir-vykdymas.pdf (27 September 2020); Beata Kozubovska/Rita Griguolaitė, Su Konkurencijos Teise Susijusių Ginčų Spręstinumas Arbitražu, JURISPRUDENCIJA, 22 (2015) 2, 360-381.

95 Constitution of the Republic of Lithuania, Adopted by citizens of the Republic of Lithuania in the Referendum of 25 October 1992, Lietuvos aidas, 10 November 1992, No. 220-0, available at https://www.e-tar.lt/portal/en/legalAct/TAR.47BB952431DA/asr (27 September 2020), Art. 46 (1).

96 E.g. ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97.

97 Lithuanian Supreme Court, *A. V individual company v. K. C. Schwarz*, 3K-3-612/2004, judgment of 17 November 2004; Lithuanian Supreme Court, *AS "Super FM" v. "UAB Laisvoji banga"*, 3K-3-434/2006, judgment of 19 July 2006; Lithuanian Supreme Court, *OAO "Gazprom" v. Republic of Lithuania*, 3K-7-458-701/2015, judgment of 23 October 2015; Lithuanian Supreme Court, *Suraleb Inc. v. AAB "Minsko traktorių gamykla"*, 3K-3-267-611/2017, judgment of 15 June 2017, etc.

98 Lithuanian Supreme Court, *A. V individual company v. K. C. Schwarz*, 3K-3-612/2004, judgment of 17 November 2004; Lithuanian Supreme Court, *AS "Super FM" v. "UAB Laisvoji banga"*, 3K-3-434/2006, judgment of 19 July 2006; Lithuania Supreme Court, *OAO "Gazprom" v. Republic of Lithuania*, 3K-7-458-701/2015, judgment of 23 October 2015; Lithuanian Supreme Court, *Suraleb Inc. v. AAB "Minsko traktorių gamykla"*, 3K-3-267-611/2017j, judgment of 15 June 2017, etc.

99 Lithuanian Supreme Court, *"Interperformances Inc" v. R.J.*, 3K-3-483-421/2015, judgment of 25 September 2015.

which are recognized on the international level, as well as when the arbitral award or arbitration agreement has been obtained by coercion, deception or threat, etc.[100] Arbitral awards dealing with the rights and obligations of the parties arising from a contract, the purpose of which is contrary to public policy, e.g. smuggling, deception or other illegal activities, may be considered contrary to public policy.[101] Also the Supreme Court has established, that both, the case law of Lithuanian and foreign courts,[102] in the context of Article V (2) (b) of the New York Convention coincides "and leads to a very narrow interpretation of the international public policy clause".[103] Thus, as it is mentioned in legal scholarship, the violation of an arbitral award disputed on the basis of Article V (2) (b) of the New York Convention must be "flagrant, effective and concrete"[104] and "pierce the eyes".[105]

Lithuanian case law also demonstrates a narrow view with regard to the extent of review of an arbitral award. The Supreme Court has stated that, based on the wording of the New York Convention, there is no possibility of reviewing the content of an arbitral award even in the event of errors of fact or law and, in order to ensure the finality of arbitration awards, judicial intervention in their assessment is minimized and the autonomy of arbitration proceedings is recognized.[106] The absence of the general prohibition on reviewing the merits (*révision au fond*) of a foreign arbitral award would mean,

100 Lithuanian Supreme Court, *"Interperformances Inc" v. R.J.*, 3K-3-483-421/2015, judgment of 25 September 2015; Lithuanian Supreme Court, *Belaja Rus v. Westintorg Corp.*, 3K-3-443/2008, judgment of 10 November 2008.

101 Lithuanian Supreme Court, *"Interperformances Inc" v. R.J.*, 3K-3-483-421/2015, judgment of 25 September 2015; Lithuania Supreme Court, *L. B. v. Republic of Lithuania*, 3K-3-363/2014, judgment of 27 June 2014.

102 E.g. Canadian Superior Court of Justice, *Re Corporación Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al.*, judgment of 22 September 1999; Canadian Supreme Court, *Desputeaux v. Éditions Chouette (1987) Inc.*, judgment of 21 March 2003; Croatian Supreme Court, Gž 2/08-2, CLOUT No. 1068, judgment of 30 May 2008; Hanseatic Higher Regional Court, 6 Sch 11/98, judgment of 4 November1998 (cited in: Lithuanian Supreme Court, *"Interperformances Inc" v. R.J.*, 3K-3-483-421/2015, judgment of 25 September 2015.

103 Lithuanian Supreme Court, *"Interperformances Inc" v. R.J.*, 3K-3-483-421/2015, judgment of 25 September 2015; Lithuanian Supreme Court, *L. B. v. Republic of Lithuania*, 3K-3-363/2014, judgment of 27 June 2014.

104 Rimantas Daujotas, Užsienio arbitražo sprendimo peržiūrėjimo ribos pripažinimo ir vykdymo procese pagal Niujorko konvenciją, available at http://rdaujotas.com/wp-content/uploads/2018/10/R.-Daujotas.-Niujorko-konvencija-arbiražas-pripažinimas-ir-vykdymas.pdf (27 September 2020), 9 citing Parisian Court of Appeal, *Thales Air Defence SA v GIE Euromissile*, decision of 18 November 2004; Luca G. Radicati di Brozolo, Res Judicata in International Arbitral Awards, ASA Special Series 2011.

105 Rimantas Daujotas, Užsienio arbitražo sprendimo peržiūrėjimo ribos pripažinimo ir vykdymo procese pagal Niujorko konvenciją, available at http://rdaujotas.com/wp-content/uploads/2018/10/R.-Daujotas.-Niujorko-konvencija-arbiražas-pripažinimas-ir-vykdymas.pdf (27 September 2020), 9 citing Parisian Court of Appeal, *Thales Air Defence SA v GIE Euromissile*, decision of 18 November 2004; Luca G. Radicati di Brozolo, Res Judicata in International Arbitral Awards. ASA Special Series 2011.

106 Lithuanian Supreme Court, *"Interperformances Inc" v. R.J.*, 3K-3-483-421/2015, judgment of 25 September 2015.

that regardless of the resolution of a dispute between the parties in the manner of their choice, a subsequent comprehensive judicial review would replace the award rendered by the arbitral tribunal and, this way, would negate the contractual and private nature of the arbitration proceedings as well as prevent the parties from enjoying the advantages which they sought in choosing it.[107]

In the view of all the discussed above, generally, a Lithuanian court should not extensively review the content of an arbitral award, reconsider the issues submitted to the arbitral tribunal or make an assessment of the facts. According to the Supreme Court of Lithuania, an assessment of an arbitral award from the point of view of public policy within the meaning of Article V (2) (b) of the New York Convention could in no case be so detailed as to review the substance of the award or some of its issues.[108] In addition, during this procedure, it should not be examined, whether an arbitral tribunal has properly established and assessed the facts, how the evidence was analyzed in the arbitration proceedings as well as whether procedural and substantive rules have been properly applied.[109] This does not mean, that a court in the process of recognition and enforcement of an arbitral award does not have to familiarize itself with the content and reasoning of it, in order to ascertain whether the grounds for non-recognition established under the New York Convention do not exist.[110] However, only in cases, where the violation of public policy cannot be fully assessed on the basis of the content of an arbitral award and it is due to unexamined circumstances and evidence, the court during the recognition of an award may assess aspects, that were not examined by the arbitral tribunal (e.g. in order to establish the unlawful conduct of the parties or arbitrators which constitutes a violation of public policy).[111]

Although a violation of EU competition law has never been analyzed as a basis for objection to recognition or enforcement of a foreign arbitral award under Article V (2) (b) of the New York Convention before the courts of Lithuania, in view of the case law of the CJEU, legal scholarship recognizes EU competition law as a matter of public policy to be reviewed by the Lithuanian courts.[112] Taking into consideration the case law discussed above, it is clear, that an assessment of an arbitral award with regard EU competition law and other issues arising from Article V (2) (b) of the New York Convention should be restricted and not be equal to a review on the merits.

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107 Lithuanian Supreme Court, *"Interperformances Inc" v. R.J.*, 3K-3-483-421/2015, judgment of 25 September 2015.

108 Lithuanian Supreme Court, *L. B. v. Republic of Lithuania*, 3K-3-363/2014, judgment of 27 June 2014.

109 Lithuanian Supreme Court, *"Interperformances Inc" v. R.J.*, 3K-3-483-421/2015, judgment of 25 September 2015; Lithuanian Supreme Court, *L. B. v. Republic of Lithuania*, 3K-3-363/2014, judgment of 27 June 2014.

110 Lithuanian Supreme Court, *L. B. v. Republic of Lithuania*, 3K-3-363/2014, judgment of 27 June 2014.

111 Lithuanian Supreme Court, *L. B. v. Republic of Lithuania*, 3K-3-363/2014, judgment of 27 June 2014.

112 Michail Bron, Viešosios tvarkos kategorija kaip arbitražą ir konkurencijos teisę siejantis veiksnys, Teisė, 69 (2008), 128; Beata Kozubovska/Rita Griguolaitė, Su Konkurencijos Teise Susijusių Ginčų Spręstinumas Arbitražu, JURISPRUDENCIJA, 22 (2015) 2, 378-379.

D Outlook

The above-discussed German and Lithuanian case law reveal that, in principle, courts of both jurisdictions share similar approach, in particular, with regard to the narrow interpretation of the notion of public policy and rather strict limits on the extent of review of the arbitral awards.[113] Regardless of this general agreement, it is evident, that the boundaries of judicial review of arbitral awards with regard to EU competition law and the level of seriousness of a violation required for justifying the refusal of recognition or enforcement in the context of Article V (2) (b) of the New York Convention are not that obvious.[114] In particular, this situation creates difficulties for FRAND licencing disputes, that, apart from being multijurisdictional and technologically as well as commercially complex, involve significant competition law issues. Therefore, it is important to discuss the possibilities of keeping a balance between the finality of an arbitral award, the autonomy of the parties to the dispute and the sufficient protection of EU competition law, when recognition and enforcement of awards resolving these disputes under the New York Convention in EU member states take place.

IV EU competition law and FRAND arbitration: in search for balance

Generally, EU institutions demonstrate support for referring FRAND disputes to alternative dispute resolution bodies. Arbitration as one of the ways of determining FRAND licensing terms for SEPs was welcomed by the European Commission in the antitrust proceedings against Samsung Electronics.[115] In addition, CJEU also supports the idea of FRAND royalty rates to "be determined by an independent third party".[116] According to the European Commission, if a dispute regarding FRAND licensing terms arises,

> "the assessment of whether fees charged for access to IPR [intellectual property rights] in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR".[117]

113 Except, Higher Regional Court of Düsseldorf, VI Sch (Kart) 01/02, decision of 21 July 2004.

114 E.g. Peter G., Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, Journal of International Arbitration, 36 (2019) 5, 593.

115 European Commission, Samsung Electronics Enforcement of UMTS Standard Essential Patents — Commitments offered to the European Commission, case COMP/C-3/39.939, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1301_5.pdf (27 September 2020); European Commission, *Samsung Electronics enforcement of UMTS Standard Essential Patents*, decision of 29 April 2014, case AT.39939.

116 ECJ, *Huawei Technologies Co. Ltd v. ZTE Corp. und ZTE Deutschland GmbH*, judgment of 16 July 2015, C-170/13, para. 68.

117 European Commission, Guidelines of 14 January 2011 on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Communication), OJ C 11, 1, para. 289.

Furthermore, it points out, that "there is no one-size-fit-all solution to what FRAND is: what can be considered fair and reasonable differs from sector to sector and over time".[118] Considering this, it is rather clear, that each comprehensive assessment on whether licencing terms of SEPs fulfil the FRAND commitment requires sufficient level of legal, technical and commercial knowledge. Thus, neutral arbitrators not only having experience in arbitration proceedings, but also possessing expertise in patent licensing, standardization, competition law and other relevant fields may be particularly suitable for dealing with FRAND licencing disputes.[119]

Nevertheless, the above-mentioned legal, technical and commercial complexity of situations concerning FRAND commitment and the implications that SEP licensing disputes may bring for the competition on the market in question, make foreign arbitral awards resolving these disputes susceptible to public policy objections under Article V (2) (b) of the New York Convention. Apart from the situations when arbitrators indeed fail to observe significant breach of EU competition law, this may also be an opportunity for a party, who is merely not content with the outcome of the case, to seek for *révision au fond* of an arbitral award, a way of delaying the grant of a SEP license or paying for it under the FRAND terms determined by the tribunal. This may not only threaten widely recognized benefits of arbitration proceedings (efficiency,[120] subject-matter expertise,[121] flexible and tailor-made proceedings,[122] a single solution enforceable in many jurisdictions[123]), that are particularly important for FRAND-related disputes, but also its fundamental principles, i.e. finality of an arbitral award[124] and autonomy of the parties.[125] Against this background, there

118 European Commission, Setting out the EU approach to Standard Essential Patents (Communication), COM/2017/0712 final, 6.

119 Munich IP Dispute Resolution Forum, FRAND ADR Case Management Guidelines, 2018, 28, available at http://www.ipdr-forum.org/wp-content/uploads/2018/08/frand-guidelines_helvetica_rz6_klein_online.pdf (27 September 2020).

120 Beata Kozubovska/Rita Griguolaitė, Su Konkurencijos Teise Susijusių Ginčų Spręstinumas Arbitražu, JURISPRUDENCIJA, 22 (2015) 2, 372-373; Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, Cambridge 2017, 4.

121 Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, Cambridge 2017, 4.

122 Munich IP Dispute Resolution Forum, FRAND ADR Case Management Guidelines, 2018, 8 and 16 available at http://www.ipdr-forum.org/wp-content/uploads/2018/08/ frand-guidelines_helvetica_rz6_klein_online.pdf (27 September 2020).

123 Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, Cambridge, 2017, 4.

124 Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 806; Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, Cambridge, 2017, 2-3; Peter Chrocziel et al., International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden 2016,123.

125 Munich IP Dispute Resolution Forum, FRAND ADR Case Management Guidelines, 2018, 8, available at http://www.ipdr-forum.org/wp-content/uploads/2018/08/frand-guidelines_helvetica_rz6_klein_online.pdf (27 September 2020).

is a need to consider how to keep a balance between these principles and sufficient protection of public policy, when recognition and enforcement of foreign arbitral awards concerning these disputes under the New York Convention take place.

Among all the grounds for refusal to recognize or enforce foreign arbitral awards under Article V of the New York Convention, courts of contracting states may review an award *ex officio* only in respect to the aspects set out in part 2 of the mentioned article.[126] This means, that parties to the dispute do not need to raise any public policy-based objections based on Article V (2) (b) of the New York Convention, in order for them to be examined by a state court. In the light of the possibility of an *ex officio* review of an arbitral award, neither parties, nor the arbitral tribunals should ignore the susceptibility of FRAND licencing disputes to public policy considerations based on EU competition law.[127] In contrast, this should encourage both, parties and arbitral tribunals, to prepare for this challenge by, to the extent possible, anticipating and considering the potential EU competition law-based implications that an award dealing with FRAND licencing may have on the public policy of those EU member states, where it will be recognized and enforced. However, for the parties and arbitral tribunals of the afore-specified disputes to be able to prepare, the EU-wide standards of review of arbitral awards under Article V (2) (b) of the New York Convention should also demonstrate certain harmony.

The need for a certain degree of a common approach with regard to FRAND disputes in this context, can be observed from the stance of the EU, which, on the one hand, acknowledges its competition law rules as a matter of public policy within the meaning of Article V (2) (b) of the New York Convention,[128] but, on the other hand, supports the resolution of these disputes, that have EU competition law as their significant component, by arbitration or other alternative dispute resolution bodies.[129] In spite of the situations where decisions of the courts in different EU member states as to the same arbitral award are in direct contradiction[130], and rather broad consent,

126 New York Convention Guide, paras. 53-56. Also see Peter Chrocziel et al., International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden 2016,121.

127 Peter G. Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, Journal of International Arbitration, 36 (2019) 5, 593.

128 ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 35.

129 E.g. European Commission, Samsung Electronics enforcement of UMTS Standard Essential Patents – Commitments offered to the European Commission, case COMP/C-3/39.939, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1301_5.pdf (27 September 2020); European Commission, *Samsung Electronics enforcement of UMTS Standard Essential Patents*, decision of 29 April 2014, case AT.39939; ECJ, *Huawei Technologies Co. Ltd v. ZTE Corp. und ZTE Deutschland GmbH*, judgment of 16 July 2015, C-170/13, para. 68.

130 E.g. famous French SNF case and Belgian SNF case (Parisian Cour d'appel, *SNF SAS/Cytec Industries BV*, decision of 23 March 2006, YB Comm. Arb.; Cour de cassation, *SNF SAS/Cytec Industries BV*, decision of 4 June 2008, YB Comm. Arb.; Tribunal de première instance de Bruxelles, *Cytec Industries BV v. SNF*

that the extent of scrutiny of arbitral awards as well as the type and seriousness of competition law violations required to justify refusal of their recognition or enforcement are still not clear,[131] there are hints towards a certain degree of convergence between minimalist and maximalist approaches[132] and suggestion of a common viewpoint consisting of common principles on how an assessment of arbitral awards before domestic courts of EU member states should take place. These principles also seem to be relevant for FRAND licencing disputes.

There is a general opinion, that a review of arbitral awards under Article V (2) (b) of the New York Convention is essential for ensuring, that arbitration is not used as a way to avoid the application of competition law.[133] Therefore, the recognition and enforcement of arbitral awards violating EU competition law issues in certain, but exceptional circumstances, should be denied.[134] The position of the CJEU in the *Eco Swiss* case also falls within the same lines.[135]

SAS, 2005/7721/A, decision of 8 March 2007, YB Comm. Arb. XXXII [2007]; Cour d'appel de Bruxelles, *Cytec Industries BV v. SNF SAS*, 2007/AR/1742, decision of 22 June 2009, Rev. arb. 2009). For a commentary see Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 797-802.

131 E.g. Peter Chrocziel et al., International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden, 2016, 124; Peter G. Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, 5 Journal of International Arbitration, 36 (2019) 5, 593.

132 E.g. Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 819; Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 772-280; Dominic Wong, The "middle way" review standard of arbitral awards – safeguarding effective EU competition law enforcement: theoretical appraisal, practical application and potential obstacles, Global Competition Litigation Review, 9 (2016) 1-14.

133 E.g. OECD, Arbitration and Competition, 2011, 49, available at https://www.oecd.org/daf/competition/abuse/49294392.pdf (27 September 2020); Philippe Pinsolle, Private enforcement of European Community competition rules by arbitrators, International Arbitration Law Review, 7 (2004) 1, 22; Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 773.

134 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 773; Dominic Wong, The "middle way" review standard of arbitral awards – safeguarding effective EU competition law enforcement: theoretical appraisal, practical application and potential obstacles, Global Competition Litigation Review, 9 (2016) 1, 10 citing ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97.

135 ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 35.

The above-indicated position essentially means, that a violation of EU competition law may qualify as a contradiction to public policy in the context of Article V (2) (b) of the New York Convention, only when it is "concrete, effective and serious".[136] Thus, it should be obvious, that an arbitral award in a concrete situation genuinely poses a threat to the goals of EU competition policy and it is not just an incorrect application of the legal rules, a failure to apply them or non-conformity with a decision of a competition authority.[137] Consistently with this, in legal scholarship there are more opinions suggesting to apply the fundamentality test meaning, that a breach of public policy under Article V (2) (b) of the New York Convention should be recognized only in those cases where it is related to fundamental provisions[138], but not to "the full body of EU competition law".[139] This position could be illustrated by the already discussed decision of the Higher Regional Court of Düsseldorf. Here, the German court ruled, that non-compliance with a requirement established in the German Competition Act for an agreement to be in a written form was excluded from the breach of public policy, because such a legal norm is neither recognized as fundamental, nor is it essential in the legal and economic system of the state, where the arbitral award is recognized and enforced.[140] Thus, non-compliance with non-fundamental competition law rules should not be a basis to hold a breach of public policy under Article V (2) (b) of the New York Convention. Considering the fact, that oftentimes arbitration seeks to provide world-wide solutions to FRAND licencing disputes, even when there is a certain discrepancy between the content of the arbitral award and competition law provisions, that are not considered fundamental in a certain

136 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 775 citing Christophe Seraglini, L'affaire Thalès et le non-usage immodéré de l'exception d'ordre public, Cahiers de l'arbitrage, 2 (2005), 5, para. 32 et seq.; ECJ, *Mostaza Claro v. Centro Movil*, judgment of 26 October 2006, C-168/05; Parisian Court of Appeal, *Thalès v. Euromissile*, judgment of 18 November 2004, Rev. arb., 271.

137 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 774-775 citing Assimakis Komninos/Markus Burianski, Arbitration and Damages Actions Post-White Paper: Four common Misconceptions, GCLR, 2009, 27.

138 Michail Bron, Viešosios tvarkos kategorija kaip arbitražą ir konkurencijos teisę siejantis veiksnys, Teisė, 69 (2008), 124 citing Christoph Liebscher, The healthy award – challenge in international arbitration, Kluwer Law International, The Hague 2003; Claus-Dieter Ehlerman/Isabela Atanasiu (eds.), European competition law annual 2001: effective private enforcement of EC antitrust law, Oxford, Portland & Oregon 2003, 420. Also see Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 815-816.

139 Peter G. Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, Journal of International Arbitration, 36 (2019) 5, 593.

140 Higher Regional Court of Düsseldorf, VI Sch (Kart) 01/02, decision of 21 July 2004, para. 28.

EU member state, the reviewing court should respect the finality of an award and not treat it as a contradiction to public policy.

In a similar vein in legal scholarship, it is stated, that a difference of opinion between an arbitral tribunal and a court on a competition law issue should not be regarded as a breach of public policy.[141] Also, it is pointed out, that discrepancies between two national competition law systems of EU member states on how they see a certain matter should not be a reason for public policy-based rejection of a foreign arbitral award.[142] In the event, that

> "the arbitral tribunal follows – absent final determination by the CJEU or the General Court of the European Union – the interpretation of EU competition law given by one Member State court, a contradicting interpretation by another Member State court cannot, as a general rule, render the arbitral award a violation of competition law-based public policy".[143]

This position is supported by the fact, that arbitral tribunals when facing issues as to the interpretation of the EU law do not have the right to refer to the CJEU for a preliminary ruling.[144] These observations are highly relevant for arbitral tribunals dealing with FRAND licencing disputes characterized in their cross-border nature.

The duty of an arbitral tribunal to *ex officio* analyze issues related to the EU competition law was not explicitly discussed in the *Eco Swiss* case. However, the CJEU has clearly stated, that arbitral awards are likely to face scrutiny based on violation of public policy due to non-compliance to EU competition law[145] under Article V (2) (b) of the New York Convention. Although this position of CJEU generally does not bind international arbitrators[146], it still

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141 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 775.

142 Peter G. Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, Journal of International Arbitration, 36 (2019) 5, 593.

143 Peter G. Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, Journal of International Arbitration, 36 (2019) 5, 593 citing: one example from the SEP/FRAND area would be the competition law violation of any non-FRAND license offer (German courts' tendency) versus the competition law violation of only offers that deviate significantly from the FRAND level (Justice Birss' tendency in Unwired Planet), cf. Peter G.. Picht, Unwired Planet v. Huawei: A Seminal SEP/FRAND Decision from the UK, GRUR Int., 569 (2017) (citations omitted).

144 ECJ, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG*, judgment of 23 March 1982, C-102/81, para. 10; ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 40.

145 "[A] national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy"; ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, C-126/97, para. 41.

146 Philippe Pinsolle, Private enforcement of European Community competition rules by arbitrators, International Arbitration Law Review, 7 (2004) 1, 18.

implies an obligation or, at least, creates an incentive for arbitral tribunals to *ex officio* assess EU competition law issues,[147] because each tribunal should have an interest in rendering an effective and enforceable award.[148] With regard to this, the criteria, that may be taken into consideration by arbitrators, when deciding on whether EU competition law issues encountered during the arbitration proceedings should be assessed, are pointed out: (i) the law chosen by the parties or the law applicable to the substance of the case is the law of an EU member state and thus incorporates EU competition rules; (ii) the seat of arbitration is in one of the EU member states and, accordingly, the arbitral award may be the subject of the proceedings of setting aside before the national courts of that member states; (iii) there is a possibility that the arbitral award will be enforced in an EU member state.[149] It is claimed, that "[t]he more these factors come into play, the more EU competition law should be taken into consideration".[150] Against this background and, due to the fact, that FRAND concept, especially in Europe, is based on competition law,[151] in order to increase the chances of endorsement of an arbitral award on FRAND licencing dispute by the courts in EU member states, arbitral tribunals during the proceedings may undertake certain actions to address flagrant violations of EU competition law.[152]

147 Michail Bron, Viešosios tvarkos kategorija kaip arbitražą ir konkurencijos teisę siejantis veiksnys, Teisė, 69 (2008), 125-126 citing Laurence Idot, Casenote on Eco Swiss, Rev. arb., (1999), 642; Renato Nazzini, International arbitration and public enforcement of competition law, ECLR, 2004, 153, 155; Peter Chrocziel et al., International Arbitration of Intellectual Property Disputes – A Practitioner's Guide, Munich, Oxford & Baden-Baden 2016, 126 citing Nigel Blackaby/Constantine Partasides/Alan Redfern/Martin Hunter, Redfern and Hunter on International Arbitration, 6th ed., Oxford 2015, para. 2.138. The question on whether this obligation for an arbitral tribunal really exists does not seem clear (e.g. Peter G. Picht/Gaspare T. Loderer, Arbitration in SEP/FRAND Disputes – Overview and Core Issues, Journal of International Arbitration, 36 [2019] 5, 593).

148 Michail Bron, Viešosios tvarkos kategorija kaip arbitražą ir konkurencijos teisę siejantis veiksnys, Teisė, 69 (2008), 126. Also see Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 817; Philippe Pinsolle, Private enforcement of European Community competition rules by arbitrators, International Arbitration Law Review, 7 (2004) 1, 22 citing Note on the Eco Swiss case by Laurence Idot, Rev. arb., (1999), 642.

149 Philippe Pinsolle, Private enforcement of European Community competition rules by arbitrators, International Arbitration Law Review, 7 (2004) 1, 22.

150 Philippe Pinsolle, Private enforcement of European Community competition rules by arbitrators, International Arbitration Law Review, 7 (2004) 1, 22.

151 Munich IP Dispute Resolution Forum, FRAND ADR Case Management Guidelines, 2018, 16-17, available at http://www.ipdr-forum.org/wp-content/uploads/2018/08/frand-guidelines_helvetica_rz6_klein_online.pdf (27 September 2020).

152 The attention to the importance of actions taken by arbitral tribunals during such dispute resolution proceedings are drawn in the "FRAND ADR Case Management Guidelines" issued by the Munich IP Dispute Resolution Forum (see Munich IP Dispute Resolution Forum, FRAND ADR Case Management Guidelines, 2018,

With regard to the extent of review of an arbitral award in the context of Article V (2) (b) of the New York Convention, it is claimed, that a review of an arbitral award should be "genuine, while at the same time restrained",[153] and concentrate on the awards and its reasoning.[154] This means, that awards should not be checked on the merits, i.e. by re-judging the case, and an in-depth review should be conducted only in exceptional circumstances, but at the same time courts should not decide on recognition and enforcement of the awards automatically.[155] This means, that an exhaustive reasoning in an arbitral award as to the factual and legal aspects of the dispute may be helpful for a state court to assess the award without any need to go for an in-depth scrutiny, in order to make sure that there is no EU competition law-based violation of public policy under Article V (2) (b) of the New York Convention. All this may create an incentive for the arbitrators to explain their arguments and reasons for taking a certain decision as clearer as possible. Similarly to the discussed above, while reviewing arbitral awards, domestic courts should not refuse the recognition and enforcement of an award simply because it deems the application of EU competition law rules or assessment of facts, even the economic analysis, incorrect.[156] Nevertheless, there may be certain exceptional situations, where the court when reviewing an arbitral award may need to go beyond the reasoning. Firstly, it could be those situations, when an award is drafted in such a way, that it is not possible for the court to understand whether EU competition law issues that would constitute a violation of public policy were competently analyzed by the arbitral tribunal.[157] Secondly, it could be those cases, where there is an indication that arbitrators by rendering an award sought to cover up an anticompetitive behaviour.[158] Thirdly, it could be those circumstances, where, despite of high likelihood of a

available at http://www.ipdr-forum.org/wp-content/uploads/2018/08/frand-guidelines_helvetica_rz6_klein_online.pdf [27 September 2020]).

153 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 777 citing Christophe Seraglini, L'affaire Thalès et le non-usage immodéré de l'exception d'ordre public, Cahiers de l'arbitrage, 2 (2005), 5.

154 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 776-777.

155 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 776-777 (citations omitted).

156 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 777-778.

157 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 778

158 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 778-779.

violation of public policy, the issues of competition law were neither raised by the parties, nor addressed by the arbitral tribunal and there are no good reasons for not doing that.[159] Taking into consideration not only the legal, but also the factual complexity of FRAND disputes, arbitrators who supposed to have sufficient expertise and knowledge on issues in standard setting, FRAND commitment and SEP licencing, to the extent possible, should analyze all the relevant not only legal, but also commercial, technical and any other aspects of the disputes and present an exhaustive reasoning in the award. This should provide the reviewing state court with a good overview on potential EU competition law issues amounting to contradiction to public policy in the context of the New York Convention.

The aspects discussed above also raise questions about the conduct of parties to the arbitration proceedings. As it is claimed in legal scholarship, according to the *Eco Swiss* case, the public policy review by the state courts is not conditioned by the behaviour of the parties.[160] Thus, an arbitral award can *ex officio* be reviewed by a court from the point of view of EU competition law regardless of the fact whether the parties raised any competition law issues or not. This may confer more responsibility not only on the arbitrators and encourage them to make their awards compatible with EU competition law rules, but also strengthen the interest of the parties to prepare for dispute resolution by, to the extent possible, considering the potential contradictions that an arbitral award may have with regard to the public policy considerations of those EU member states, where it is going to be recognized and enforced, and address them during the proceedings. Additionally, in this context, parties may also have more interest in finding arbitrators, who would have sufficient expertise in EU competition law. In light of the already discussed nature of FRAND, parties to the dispute may have an incentive to anticipate EU competition law issues potentially amounting to a breach of public policy within the meaning of Article V (2) (b) of the New York Convention and raise them in their submissions to the arbitral tribunal.

Given the fact, that arbitration is a private mechanism of adjudication characterized by the principles of the finality of an arbitral award and autonomy of the parties, that countries agreed to respect, it is possible to conclude, that only violations posing a serious threat to EU competition law should be the basis for refusing the recognition and enforcement of an arbitral award under Article V (2) (b) of the New York Convention. In addition, when reviewing arbitral awards, the domestic courts of EU member states should focus on the reasoning of an arbitral award and only when deficiencies in this part are discovered, an in-depth analysis, in order to reveal EU competition law violations amounting to a breach of public policy, should take place. Thus, generally, the role of the courts should not be to review arbitral awards *de*

159 Luca G. Radicati di Brozolo, Court Review of Competition Law Awards in Setting Aside and Enforcing Proceedings, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 779.

160 Christoph Liebscher, EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects, in: Gordon Blanke/Phillip Landolt (eds.), EU and US Antitrust Arbitration, Volume I, Alphen aan den Rijn 2011, 817.

novo. However, while analyzing the reasoning of the awards, courts have to be attentive to any in-clarities and, if there is a doubt as to a severe violation of EU competition law, a more in-depth analysis should be performed. Considering this background, it is rather evident, that, in order to preserve the advantages of arbitration proceedings, arbitral tribunals and parties to the dispute may have incentives to perform certain actions that would help balancing the afore-mentioned principles of arbitration and the protection of public policy. Generally, in order to avoid long and in-depth scrutiny of an arbitral award and even a refusal to endorse it in the end, arbitral tribunals may put effort in explaining all the relevant circumstances of each case and reason in detail on how they dealt with potential EU competition law issues, whereas the parties, whenever possible, should seek to anticipate and, in turn, raise EU competition law issues during the proceedings. All this is particularly important for FRAND licencing disputes to which arbitration proceedings, if properly conducted, are able to offer legally, technically and commercially sound as well as efficient worldwide solutions.

V Conclusion

During the proceedings for recognition and enforcement of arbitral awards before the courts of EU member states, only violations posing a serious threat to EU competition law should be the basis for refusing to endorse an arbitral award under Article V (2) (b) of the New York Convention. However, taking into consideration the fact, that arbitral awards, in case of a suspicion of a severe EU competition law violation, may *ex officio* be reviewed in-depth by the courts of EU member states, both, arbitral tribunals and parties, in order to mitigate the risk of refusal to recognize and enforce an arbitral award, during the arbitration proceedings should be active in raising and addressing potential EU competition law issues. This is particularly important for FRAND licencing disputes to which arbitration proceedings, if properly conducted, are able to offer legally, technically and commercially sound as well as efficient worldwide solutions.