ARBITRATION AND EU COMPETITION LAW: NEW RULINGS AND NEW THOUGHTS

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Resumen: *Las normas del Derecho de la competencia de la Unión Europea deben ser tratadas por los jueces nacionales de los Estados miembros que conozcan de demandas de anulación o ejecución de un laudo arbitral como integrantes del orden público en el sentido del Convenio de Nueva York de 1958. Sin embargo, no todas estas normas protegen un orden público de la misma intensidad, ni todas las infracciones afectan al orden público en la misma medida. En consecuencia, el hecho de que los árbitros no hayan aplicado una de estas normas, o la hayan aplicado de un modo posiblemente erróneo, no debe conducir, en todos los casos, a que los jueces realicen la revisión del fondo, ni mucho menos a la anulación o inejecución del laudo. La gravedad de la infracción al orden público protegido por la norma es un criterio que debiera sustituir al carácter flagrante o manifiesto de la infracción para que los jueces estén facultados para revisar el fondo. La reciente jurisprudencia de la Cour d'appel de Paris aplicando las normas que prohíben la corrupción supone un cambio significativo de orientación en la línea que sostenemos con respecto a su jurisprudencia anterior en materia de orden público y podría servir de guía para un cambio similar con respecto al Derecho de la competencia. En este contexto, se entiende mal la cuestión prejudicial presentada por la misma Cour d'appel ante el Tribunal de Justicia de la UE en diciembre de 2014 en el asunto Genentech.*

1. INTRODUCTION

This article deals with the question of the control that judges can exercise (in setting aside or enforcement proceedings) over the application, or lack thereof, of European Union (EU) competition law by arbitrators[2].

Since I write in 2016 about a topic which some of the most authoritative commentators have addressed throughout the last fifteen years I should express my reasons for doing so.

Firstly, in the last two years the Cour d'appel de Paris, whose case-law had hitherto been relied upon by many experts as a model for judicial review, adopted several judgments[3] –on the issue of public policy, although not in the field of competition law- that seem to deviate from its long standing line of case-law initia-

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2 The article contains a somewhat extended version of the speech I delivered on June 9th, 2015 in the "X Congreso Internacional del Club Español del Arbitraje" during the panel chaired by Rafael García-Valdecasas and which also included Fernando Castillo de la Torre, Luca Radicati di Brozolo and Miguel Virgós on the subject of "The European Union and arbitration". This text only deals with articles 101 and 102 of TFEU and does not address State aids, regulated by article 108, and subsequent, and the interesting questions deriving from the possibility of an arbitration award that obliges a Government to pay an indemnification to an undertaking being considered a State aid. These questions have been raised by the European Commission decision of March 30th, 2015 (2015/1470, EUOJ L 232/43, Micula/Rumania) pending appeal before the EU General Court.

3 (2014/30] Cour d'appel de Paris, Pôle 1-Ch. 1, *Gulf Leaders for Management and Services Holding Company c/ SA Crédit Foncier de France,* Nº rép.gén. 12/17681;

Judgment rendered on Octobre 14th, 2014 (*République du Congo /Commisimpex)* by the Cour d'appel de París Pôle 1, Chambre 1., Nº rép.gén. 13/03410

Cour d'appel de Paris, November 4th, 2014 in *Man Diesel & Turbo France / Al Maimana, soiciété de droit irakien Pôle 1, Chambre 1., Nº rép.gén. 13/10256.*

ted in Thalès[4]. Secondly, my rather "maximalist" personal thoughts on the matter, which I have presented at several conferences as well as in three separate texts[5], have evolved and this article is a welcoming opportunity to place them on record. Lastly, in Spain recent and much critized[6] rulings of the Tribunal Superior de Justicia de Madrid ("TSJ of Madrid")[7] have set aside arbitral awards after carrying out a review of their merits on the basis of a violation of public policy principles[8].

The conclusions that I intend to develop in this article are the following[9]: Although EU Competition law must be treated by the judges of the member States as a public policy matter within the meaning of the New York Convention, not all of its provisions embody public policy considerations with the same intensity. Consequently, the fact that arbitrators have not applied a competition rule, or have applied it erroneously, should not always lead to the setting aside/non-enforcement of an arbitration award. For a judge to be able to carry out a review of the merits of an award, it is more important that the breach of the competition rule in question be serious (even if only apparently) than that it be flagrant. Where the court is faced with a competition law infringement that is sufficiently serious, and thus liable to affect public policy, it can conduct a review of the award if one of the parties requests so[10]. The outcome of the judicial review can be either the confirmation/enforcement of the award, or its setting aside/non-enforcement[11].

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4 Cour d'appel de Paris, Ch. 1, Section C, 18 November 2004 *Thalès Air Défense v. GIE Euromissile (2002/19606)*

5 Martínez Lage, S.: *Competencia y Arbitraje*. Gaceta Jurídica de la Unión Europea y de la Competencia, nº 214, 2001, pp. 3-7. Martínez Lage, S.: *El Derecho de la competencia y los límites del arbitraje. Recensión al Discurso de ingreso en la Real Academia de Jurisprudencia y Legislación de D. Antonio Fernández de Buján y Fernández*. Revista General de Derecho Romano, Iustel, n. 23, 2014. Martínez Lage, S.: *Arbitraje y Derecho de la competencia.* Veinticinco años de Arbitraje en España. Libro conmemorativo de la Corte Civil y Mercantil de Arbitraje, Coord. por Fernández Rozas, J.C., CIMA, 2015, pp. 289-296.

6 Fernández Rozas, J.C.: *Riesgos de la heterodoxia en el control judicial de los laudos arbitrales.* La Ley, 12 mayo 2015, p. 1-8. Stampa, G.: *Comentario a las sentencias de la Sala de lo Civil y de lo Penal del Tribunal Superior de Justicia de Madrid de 28 de enero de 2015, de 6 de abril de 2015 y de 14 de abrul de 2015.Ibíd. p. 14-20.*

7 Judgment 13/2015 of January 28th, 2015 of the TSJ of Madrid. ECLI:ES:TSJM:2015:1286

Judgment 27/2015 of April 6th, 2015, of theTSJ of Madrid. ECLI:ES:TSJM:2015:4051

Judgment 31/2015 of April 14th, 2015, of theTSJ of Madrid. ECLI:ES:TSJM:2015:4054

8 While these rulings are not directly related to competition law, but to consumer protection, they have however raised once again in Spain the question of whether public policy, the breach of which is subject to judicial review, may only cover issues of a procedural nature or may also refer to substantive ones. See fn 6.

9 Apart from the obvious conclusion, only relevant with regard to certain Spanish doctrine, that public policy (the control of which is entrusted to the ordinary courts) can be of a substantive as well as a procedural nature.

10 To do so of its own motion it should have, additionally, "available to it the legal and factual elements necessary for the task", as we will see later.

11 Where an infringement is found to be flagrant (after having been deemed to be sufficiently serious) the judge should, almost automatically, set aside the award or refuse to enforce it. The fact that an infringement is flagrant does not constitute a determining factor in the (potential) review of the merits of an award, but rather warrants its setting aside or non-enforcement in cases where the infringement is not only flagrant (evident, notorious, manifest) but also sufficiently serious.

The recent arrêts of the *Cour d'appel de Paris* –although still under appeal (cassation)- seem to point to a significant shift in the Cour's approach towards arbitration and public policy and a welcoming departure from its previous case-law.

2. Overview Of The Case Law Of The Court Of Justice Of The European Union

The case-law of the Court of Justice of the European Union ("CJEU") on arbitration and competition law is well known, but I believe it is nevertheless worth recalling three of its rulings on the subject or, at least, acknowledge my interpretation thereof as a starting point to the ensuing discussion.

In the well-known 1999 Eco Swiss[12] ruling, the CJEU held that *"where[13] its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC (ex Article 85(1))"* (paragraph 37).

It should be recalled that neither the parties nor the arbitrators had raised any issues concerning the validity of the contract under competition law during the arbitration proceedings that lead to the preliminary ruling. Only subsequently did one party invoke Article 81(1) EC (today Article 101(1) TFEU) before an ordinary court to oppose the enforcement of the award.

It is also important to stress that the CJEU made the above statement knowing perfectly well that national competition rules may not be part of the public policy reservation in some EU Member States (as was the case in the Netherlands, where the preliminary reference had originated)[14].

Further, it is also worth recalling that the Court held that Article 81(1) EC (today article 101(1) TFEU) "*may be regarded as a matter of public policy within the meaning of the New York Convention*" (paragraph 39, emphasis added) although this question had not been raised by the referring court.

Authoritative legal scholars have rightly pointed out that the Eco Swiss ruling does not create a new legal remedy for the setting aside of awards, but that it is rather limited to establishing a principle of equivalence: if national law provides for the setting aside of an award for the violation of rules that have a public policy nature (within the meaning of the relevant national law or the New York Convention) it should take into account that, by virtue of EU law, Article 101(1) TFEU is a matter of public policy.

It is true that, as emphasized by another group of legal commentators (hitherto referred to as "maximalists"[15]), the Eco Swiss ruling recalls the principle of uniform interpretation of EU law in stating that *"it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community*

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12 Judgment of the Court of 1 June 1999 *Eco Swiss China Time Ltd v Benetton International* NV. Case C-126/97. ECLI:EU:C:1999:269.

13 It is interesting to observe that the French version of the ruling says "dans la mesure où".

14 Paragraph 24.

15 In my opinion, the distinction between maximalists and minimalists has become quite pointless since no author is purely maximalist, or purely minimalist.

provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied" (paragraph 40)[16].

Two other rulings rendered by the CJEU at a later date (*Mostaza Claro*[17], *2006, and Asturcom*[18], *2009*) concerning arbitral awards that might have potentially violated substantive EU rules have in common with Eco Swiss that, in all three cases, the violation of EU law had not been raised in the arbitration proceedings, but was rather raised for the first time in the subsequent judicial proceedings.

Hence, in *Mostaza Claro*, the infringement of EU law was raised at the judicial setting aside proceeding; in Asturcom the infringement was raised to object the enforcement of the award, as the defendant had neither showed up at the arbitration proceedings nor requested the judicial setting aside of the award[19].

It is important to note, however, that neither of the above two cases involved a violation of the competition rules but rather of rules relating to consumer protection, an area of the law in which both the EU and national legislators, the courts of the Member States and the CJEU are particularly sensitive to imbalances between the consumers of goods and services and the businesses who provide them[20].

In Mostaza Claro, the CJEU concluded that *"a national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment"*. The ruling does not expressly state that the violated provision (Article 6 (1) of Directive 93/13/CEE on consumer protection) has a public policy nature because the referring court did not raise such a question[21], but it does state that it is a mandatory rule in which *"the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, com-*

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16 It follows from the above that Article 101(1) TFEU is a provision of substantive law the violation of which, under conditions that shall be analysed later, may lead to the setting aside or non-enforcement of an arbitral award by a judge from a Member State. A different question is whether arbitrators are obliged to apply competition rules *ex officio*. It is true that in Eco Swiss the CJEU did not directly impose this obligation. But the arbitrators' obligation to render enforceable awards should lead them, after Eco Swiss, to the same result if they want to avoid the possible setting aside of their awards, in the terms that we will discuss later. See Komninos, A.: Case C-126/97, *Eco Swiss China Town Ltd. V. Benetton International NV, Judgment of 1 June 1999, Full Court. Common Market Law Review* 37 p. 475, 2000

17 Judgment of the Court (First Chamber) of 26 October 2006 *Elisa María Mostaza Claro v Centro Móvil Milenium SL.* Case C-168/05. ECLI:EU:C:2006:675

18 Judgment of the Court (First Chamber) of 6 October 2009 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira.* Case C-40/08. ECLI:EU:C:2009:615

19 These two judgments also have in common the fact that they answer several preliminary references lodged by the Spanish courts: the Madrid Provincial Court in Mostaza claro and the 4th Court of First Instance of Bilbao in Asturcom, which highlights the fact that the Spanish courts are particularly sensitive to the protection of consumers, as had already happened in Océano Grupo Editorial and Salvat Editores 2000.

20 In the TSJ of Madrid cases referred to in note 4, the asymmetry between a bank and its customers (to the extent that the asymmetry is owed to their respective size, even if the latter was a company rather than a consumer) is, in my opinion, the genuine ratio decidendi, although the legal relationship is not formally governed by consumer law.

21 The Provincial Court of Madrid assumes that the arbitration agreement in this case includes an unfair contractual clause and is, consequently, non-binding for the consumer, ex Article 6(1) of Directive 93/13/CEE (para. 19).

pensating in this way for the imbalance which exists between the consumer and the seller or supplier" (paragraph 38).

In Asturcom, the CJEU expressly stated that *"in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the Directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy".*

It is also important to underline, although this is only relevant for the ex officio application of public policy rules, the Court's elucidation of the principle of equivalence in the following assertion: *"Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task*[22]*, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature."*

However, in Eco Swiss, as well as in the two aforementioned rulings, the CJEU was silent on what has commonly been referred to, albeit somewhat vaguely, as the "standard of review", and has in doing so left open a debate that has divided academics and national courts for the past fifteen years. According to Ph. Landolt, "this wording [in the Asturcom ruling *"where it has available to it the legal and factual elements necessary for that task"]* will be relevant when the question of the standard of Member State public policy review of international arbitrations finally arrives before the ECJ".

3. The Case-Law Of The Member States, In Particular France And Spain

It is necessary to begin by examining the French case-law since the *Cour d'appel de Paris* was the first to establish a standard of control in respect of the ordre p*ublic reserv*ation in the seminal Thalès[23] and SNF/Cytec [24] rulings. This line of reasoning was subsequently confirmed by the Cour de Cassation in 2008[25], which established that *"control should be limited to the flagrant, effective and concrete nature of the pretended violation"* [26].

The need to meet these three requirements, which constitute the legal expression of what has hitherto been referred to as the minimalist approach, was confirmed once again in February 2014 by the French Cour de Cassation in the M.Schneider ruling[27].

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22 The Spanish version of this sentence is at the very least ambiguous, if not outright wrong, as it adds a temporal dimension to the conditional one: "Tan pronto como se disponga de los elementos…". Although in this case Spanish is the official language of the proceedings, it is essential to go to the French version (the language of the the CJEU's proceedings) which, despite its theoretical ambiguity confirms the correctness of the English translation: "dès qu'elle dispose des éléments…".

23 *See supra,* fn 4.

24 Cour d'appel de Paris, 23 March 2006, SNF/Cytec (CT0051)

25 Cour de Cassation France, chambre 1 civ., 4 June 2008, SNF/Cytec, Bull. n° 162.)

26 « Le contrôle se limite au caractère flagrant, effectif et concret de la violation alléguée ».

27 Cour de Cassation France, civ. 1ère, 12 February 2014, Bull. n° 22.

The triple requirement and, in particular, the requirement that the infringement be flagrant has thus far been followed, albeit with some variations, by most of the courts of the Member States (including Sweden and Latvia, according to L. Idot[28]) with the notable exceptions of the court of appeals of the Hague (MDI[29], 2005) and certain German courts.

In Spain, the court of appeals of Barcelona followed a similar line of reasoning in its 2009 Regencós/Total ruling, where it held that: *"It is one thing for the arbitrator to resolve the dispute without applying, or without duly taking into account, mandatory or prohibitive public policy norms…and another, which the court hearing the setting aside proceedings is not authorised to do, to correct the evaluation of evidence carried out by the arbitrator, together with his or her subsequent decision resolving the dispute submitted to arbitration through the application of those same mandatory rules… [The only thing that the court can control] is "that the arbitrator has resolved the dispute after proper interpretation and application of the law, and that he has done so in such a way that is not illogical or manifestly contrary to the prohibition laid down in the norm, taking into account the block exemption Regulations and the Commission's guidelines"*[30].

Also in Spain, the Tribunal Superior de Justicia (TSJ) of the Basque Country in its well-known ruling delivered in 2012 in the *France Telecom/Euskatel* case[31], through which it granted exequatur to an award rendered in Geneva in proceedings administered by the ICC, held from the beginning that arbitration *"means reducing the involvement of the courts to a bare minimum, if not eliminating it completely"*[32]. However, it subsequently added that a *"limited but effective public policy control"* should exist[33]. Otherwise, *"impunity in cases where arbitration is used fraudulently to escape public policy prohibitions would be encouraged"*[34].

In order to elucidate what the aforementioned control should consist of, this TSJ holds that *"the analysis should also extend to the rationale behind the decision taken in the arbitration proceedings, that is, the reasoning"*. [And moreover adds that the reasoning] *"should be controlled according to the standard of reasonableness,…, commonly used in the case-law of the Constitutional court in appeals for constitutional protection"*.[35]

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28 Idot, L.: L'étendue du contrôle de la sentence. Colloque CEPANI, Bruxelles, 9 décembre 2010, p. 16

29 Hague Court of Appeal, 24 March 2005, in case 04/694 and 04/695, Marketing Displays International Inc. v. VR Van Raalte Reclame B.V.

30 AP de Barcelona (Sección 15) Sentencia num. 220/2009 30 junio 2009. *"Una cosa es que el árbitro resuelva el conflicto sin aplicar o tener en cuenta las normas imperativas o prohibitivas de orden público… y otra, vedada al órgano judicial que conoce de la acción de anulación, es que pueda corregirse la valoración probatoria del árbitro y la consecuente decisión que, con aplicación de esas normas imperativas, resuelve la controversia sometida a arbitraje … [Lo único controlable] es " que el árbitro haya resuelto la controversia tras una adecuada interpretación y aplicación de dicha normativa [que] no resulte ilógica o manifiestamente contraria a la prohibición de la norma teniendo en cuenta los Reglamentos de exención por categorías y las directrices de la Comisión"* (paragraph 5).

31 Auto del TSJ del País Vasco, Sala de lo Civil y Penal, de 19 de abril de 2012, France Telecom c. Euskaltel, Rec. 5/2011, ECLI:ES:TSJPV:2012:2

32 *"significa si no eliminar totalmente sí reducir al mínimo indispensable el papel de [los] órganos jurisdiccionales".*

33 *"control limitado pero efectivo del orden público".*

34 *"se estaría fomentando la impunidad en los casos en los que el arbitraje sea utilizado fraudulentamente para escapar [de las prohibiciones del] orden público".*

35 *"El análisis debe alcanzar también a las razones que fundamentan la decisión adoptada, en el procedimiento arbitral, en definitiva, a la motivación ". Y añade que la motivación "deberá ser controlada conforme al canon de razonabilidad que,…, comúnmente utiliza la jurisprudencia constitucional en los recursos de amparo".*

In this long and well substantiated ruling, the TSJ of the Basque Country clarified the meaning of "standard of reasonableness" by laying down the following requirements, the compliance with which must be verified by the ordinary judge:

"That the arbitration award…contains the elements and rationale for the judgment which allow the grounds of the decision to be known.

And that such motivation has a legal basis, that is, that it shows that the arbitration award is the result of a recognizable interpretation and application of the law. Although,…, it does not include a supposed right to the correct arbitral selection, interpretation and application of legal provisions…But it does however entail a guarantee that the decision is not the result of an arbitrary application of the law, or that it is manifestly unreasoned or unreasonable or that it contains a manifest error. In such a case, the application of the law would amount to nothing but mere appearance."[36].

The above text initially rejects a strict minimalist approach (in the somewhat simplistic sense in which it has been often used) insofar as it states that "a review limited solely to the outcome of the award in most cases does not guarantee effective public policy control"[37]. However, in putting the judicial control of the violation of competition law in the same category as the control exercised by the Spanish Constitutional Court in constitutional complaints ("recursos de amparo"), and by excluding the guarantee to *"a supposed right to the correct arbitral selection, interpretation and application of the legal precepts"*, the TSJ of the Basque Country limits itself to controlling that the award is not *"manifestly unreasoned or unreasonable or that it contains a manifest error"*, and in doing so it seems to follow the French case-law although, in my opinion, the position adopted by the TSJ is more reasoned and nuanced as it does not invoke the requirement of flagrancy.

Yet it seems that the *Cour d'appel de Paris*, which played a pioneering role in the development of this case-law, has shifted its position and has abandoned the requirement of flagrancy (or the manifest nature) of the infringement in cases in which the fact that the contractual obligation was entered into as a result of corrupt behaviour is relied on by a party for the setting aside or non-enforcement of an award[38].

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36 *"Que la resolución arbitral … contiene los elementos y razones de juicio que permiten conocer cuáles han sido los criterios que fundamentan la decisión. Y que dicha motivación contiene una fundamentación jurídica, es decir, que permite conocer que la decisión arbitral es fruto de una interpretación y aplicación del Derecho reconocible. Si bien, …, no incluye un pretendido derecho al acierto arbitral en la selección, interpretación y aplicación de las disposiciones legales…. Aunque, sí conlleva la garantía de que la decisión no sea consecuencia de una aplicación arbitraria de la legalidad, no resulte manifiestamente irrazonada o irrazonable o incurra en un error patente ya que, en tal caso, la aplicación de la legalidad sería tan sólo una mera apariencia."* All quotations belong to the excellent preliminary legal ground.

37 *"[Un] examen exclusivamente limitado al resultado del laudo en la mayor parte de las ocasiones no garantizaría el control eficaz del orden público"*. See also, in the same sense, the recent judgement of the TSJ of Madrid, case JUR\2015\110835, judgement of March 24th, 2015, (*Mercantil Hijos de J.A. Arroyo / CEPSA Comercial*), which rejects the setting aside of an award delivered in an arbitration administered by the *Corte Española de Arbitraje,* on the basis of an alleged infringement of article 101 TFEU. The TSJ confirms the correct application of both article 101 and EU Regulation 330/2010 carried out by the arbitrator, after examination of the law, the case law applicable to the case, and the evaluation of the evidence presented during the arbitration proceeding.

38 Or was, in itself, a corrupt obligation: a payment aimed at corrupting wills. See, below, M. Schneider case.

Hence, in the first of these rulings, which is known to me, Gulf Leader/ Crédit Foncier[39], rendered on March 4th, 2014, the court held that:

"Where it is claimed that an award gives effect to a contract obtained by corruption, it is for the judge in set aside proceedings, seized of an application based upon article 1520-5° of the Code of Civil Procedure, to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality of the agreement and to appreciate whether the recognition or enforcement of the award violates international public policy in an actual and concrete manner[40]" (Emphasis added).

As the reader will surely have noticed, the requirement of flagrancy[41] has disappeared in this ruling. The other two requirements, however, have remained (the violation must be "actual and concrete"). Consequently, the Cour d'appel carries out a review of the merits, albeit briefly: It defines the legal concept of corruption, and finds it to be proven that a commission had been paid to a company but it also notes that a link between the recipient of the funds and the entity called upon to take a decision favouring the other party had not been relied on, and much less proven. The court thus rejected the application for annulment. The key point, however, is that the judges carried out their own assessment of the facts which had been proven during the arbitration proceedings, and decided on the basis of their own definition of corruption.

A violation of the rules proscribing corruption can also be found in the *République du Congo /Commisimpex* judgment, rendered on October 14th, 2014 by the same Cour d'appel[42]. In this ruling, the court carried out the same assessment, repeated the aforementioned paragraph verbatim and, after carrying out a brief review of the merits –including an assessment of the facts- rejected the application for annulment on the grounds that the only proof of the allegedly corrupt behaviour was a "general climate of corruption" that afflicted the country at the time the contract was signed.

On November 4th, 2014 the *Cour d'appel* ruled again in a similar way in *Man Diesel & Turbo France / Al Maimana, soiciété de droit irakien*[43], although in this case the procedure in question was not for the annulment of an award but was rather an appeal against the ordonnance of the judge who had granted the exequatur in France of an award delivered in Switzerland. Again, the Court replicated the argu-

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39 (2014/30] *Cour d'appel de Paris, Pôle 1-Ch. 1, Gulf Leaders for Management and Services Holding Company c/ SA Crédit Foncier de France, nº 12/17681.*

40 I am using the English translation of Peterson, P. available at : http://kluwerarbitrationblog.com/blog/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/ In it I have changed, in the last line, the conjunction or for the conjunction and so that it matches the original French text, which reads *« Lorsqu'il est prétendu qu'une sentence donne effet à un contrat obtenu par corruption, il appartient au juge de l'annulation, saisi d'un recours fondé sur l'article1520-5° du Code de procédure civile, de rechercher en droit et en fait tous les éléments permettant de se prononcer sur l'illicéité alléguée de la convention et d'apprécier si la reconnaissance ou l'exécution de la sentence viole de manière effective et concrète l'ordre public international »*

41 « Flagrant : Qui est tellement visible qu'on ne peut le nier, en parlant d'une faute, d'un crime. Mensonge flagrant. Injustice flagrante. Il est principalement usité dans cette locution, Flagrant délit, Délit où l'on est pris sur le fait. Le voleur fut pris en flagrant délit. En cas de flagrant délit ». Dictionnaire de L'académie française (8 ème édition). « Qui est évident, visible au point de ne pouvoir être nié » (Larousse).

42 Paris, Pôle 1, Chambre 1., nº 13/03410

43 Paris, Pôle 1, Chambre 1., nº 13/10256

ment which stated that, in cases of corruption « *it is for the judge in set aside proceedings, … to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality … and to appreciate whether the … enforcement of the award violates international public policy in an actual and concrete manner".* The Court then reiterated its own legal definition of corruption and carried out its own assessment of the facts and ultimately concluded that the defining elements of corruption had not been proven in the arbitration proceedings. It consequently dismissed the appeal[44].

The removal in the above three rulings of the requirement of "flagrant" (while maintaining those of "actual" and "concrete") is very significant. The Court first stated that in cases of corruption judges hearing the setting aside or enforcement proceedings must find all the elements which enable them to rule on the alleged illegality, which only needs to be actual and concrete, but not necessarily flagrant[45].

(From what we know[46], some of these rulings are pending appeal before the Cour de cassation, which has relatively recently –on February 12th 2014, in Schneider vs CPI, Falkony y Akiya- confirmed a ruling of the same Cour d'appel which followed the traditional triple requirement approach. The Cour de cassation argued that the application for the setting aside of the award in fact intended an ex novo investigation of the merits of the case, a task which is not for the judges[47]).

One might think that the change in the position of the Cour d'appel de Paris' in the three rulings under discussion is of a purely formal nature, and that it relates solely to the choice of words, because what the Court does in all three rulings is in fact carry out a brief review of the merits and, at the end of the day, to confirm the three contested awards. It is true that the review of the merits is short, hardly a few paragraphs, but it is equally true that the Court lays down its own definition of corruption and assesses the results of the evidence taken by the arbitrators.

Although the Cour d'appel did not expressly say as much, what is in my opinion relevant about the above three rulings is that the rationale for going into the merits –exceptionally and forcing the principles governing arbitration- is the seriousness of the ground for nullity being pleaded. Specifically, the (potential) existence of a conduct contrary to the rules that proscribe corruption.

4. A New Approach To The Problem: Seriousness Rather Than The Flagrancy Of The Infringement Is What Matters

In light of the foregoing, I wonder whether the judge in set aside (or enforcement) proceedings, when a competition law infringement is pleaded, should not follow a similar criterion.

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44 In contrast with the two cases mentioned above, in this case the contract whose binding effect was being questioned was the contract requiring the payment of the allegedly corrupt commission, not the contract signed through corruption.

45 The question of where the judges have to find ("identify") all the elements in law and in fact, to pronounce upon the alleged illegality, has not received an answer in these rulings.

46 http://kluwerarbitrationblog.com/blog/2014/12/10/the-french-law-standard-of-review-for conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement of-a-flagrant-breach-now-gone

47 Literal quote : "le recours en annulation tendait, en réalité, à une nouvelle instruction au fond de l'affaire, la cour d'appel l'a à bon droit rejeté ». It is important to stress that in this ruling by the Cour de cassation the violation of public policy being pleaded related to the rules prohibiting corruption, as in the three cases under discussion.

I owe the following reflections, which rectify in part what I stated publically a few months ago, to the reading of recent works of L. G. Radicati di Brozolo[48] , A. Komninos[49] and L. Idot[50] as well as to my recent own personal experience in the field of competition law arbitration[51].

In my opinion, it is the seriousness rather than the flagrancy of certain infringements of competition law which justify a review of the merits.

Hence not all cases where arbitrators fail to apply, or perhaps erroneously apply, competition rules, thereby allowing certain agreements to produce certain legal effects, give rise to a serious infringement of the competition rules. In my opinion, not all of these infringements constitute a violation of public policy capable of triggering a review of the merits of an award which, due to the very nature of arbitration, should only occur in exceptional cases.

Indeed, a clear-cut violation of Article 101 TFEU that would under no circumstance be authorized under Article 101(3) TFEU is not the same as an agreement which could, under certain conditions, be declared compatible with competition law. While the former is always a case of public policy infringement, that may not always be the case for the latter.

To this effect, an agreement that has the object of restricting competition is certainly not the same as an agreement that merely restricts competition by effect.

Or, using North American terminology, the failure to apply a per se prohibition is not the same as the failure to observe a prohibition derived from a rule of reason.

A restriction of competition contained in a single contract between two parties is not the same as a restriction contained in a series of standard term contracts between a manufacturer and all its distributors.

It is not the same to grant enforcement to a price-fixing and/or market sharing agreement between competitors than to grant enforcement to a clause establishing the duration of an exclusive dealing agreement the validity of which ultimately de-

48 Radicati di Brozolo, L.: *Court Review of Competition Law Awards in Setting Aside and Enforcements Proceedings.* EU and US Antitrust Arbitration. A handbook for Practitioners: Edit. by Blanke, G. and Landolt, Ph. Kluwer Law International, 2011, pp. 755-789.

49 Komninos, A.: *Arbitration and EU Competition Law.* International Antitrust Litigation: Edit. by Basedow, J., Francq, S. and Idot, L. Hart Publishing, 2012, pp. 191-222.

50 Idot, L.: *L'étendue du contrôle de la sentence.* Colloque CEPANI, Bruxelles, 9 décembre 2010.

51 After having put these ideas down on paper, I have come across an article by Ch. Seraglini where he defends a very similar position: Seraglini, C.: *Le contrôle de la sentence au regard de l´ordre public international par le juge étatique : mythes et réalités.* Gazette du Palais, nº 80, 2009, p.11: "Aussi, l'adjectif flagrant pourrait-il être utilement remplacé par les adjectifs sérieux ou grave, ce qui éviterait de confondre gravité et évidence": "For this reason, the adjective flagrant may be replaced by serious or grave, which would prevent confusing seriousness with obviousness".Rereading Komnino's first comment on Eco Swiss, quoted in fn 48, the germ of this idea can also be found on page 476. More recently, Willian Schubert has defended a similar position in: Willian Schuber. 2015. "Reviewing Arbitration Award for Competition Law Violations: A Playbook for Courts Implementing the New York Convention" Expresso available at: http://works.bepress.com/william_schubert/1. Specifically, Schubert posits that judicial reviews should be limited to "the small group of serious horizontal restraints that national competition laws universally condemn such as: price fixing, territorial market allocation, output restrictions and bid rigging". p. 63. However, Schubert's outstanding work is written from the more global perspective of the New York Convention and it does not, in my opinion, pay sufficient attention to the case-law of the CJEU.

pends on the interpretation of a provision contained in the respective EU block exemption Regulation[52].

As Radicati di Brozolo rightly points out[53], a situation where an award perpetuates a restriction of competition is not the same as an award granting compensation to a party after having taken into consideration all the elements of the case, including a specific clause which might be of doubtful validity given the existence of a potential breach of a Block Exemption requirement.

Judges should be aware that when the parties have decided, freely and validly, to submit a dispute to arbitration, they have opted for a swift resolution thereof and have moreover chosen to put it in the hands of specialized professionals, which also implies a will to *"reduce the role of the courts to a bare minimum"* [54]. Judicial intervention delays the outcome of the case and, more often than not, leaves it in the hands of non-specialized professionals[55], contrary to the original will of the parties, although one of them might later unilaterally decide that it would prefer a different solution because it suits him better.

It is of course true that EU competition law, often as a reflex, creates rights for individuals (Courage judgment[56]) which judges and arbitrators must protect. However, in my opinion, an arbitrator's potential lack of awareness of these rules – or a questionable application thereof- should not always trigger the (exceptional) mechanism for the review of an award and force judges to examine the substance of the case, a review which is contrary to the very nature of arbitration.

If the public interest protected by the rules of competition law is not threatened by a sufficiently serious attack, judges must not become allies of the losing party in the arbitration proceedings and unduly lengthen the settlement of the dispute, thereby betraying its own nature and often putting the dispute in the hands of non-specialized professionals.

In other words: when dealing with a possible competition law infringement, the position of a national judge called to review an arbitral award is not the same as when he is in charge of the direct application of EU competition rules. Consequently, even if he may have doubts concerning the interpretation of a certain rule

52 The Spanish Supreme Court, meeting in a plenary session of its first chamber, very recently had to explicitly correct its previous interpretation of regulation 2790/99 with regards to the authorised duration of certain exclusive purchasing agreements of fuel which were exempt under Regulation 1984/83, previously in force. (STS 12/01/15 REPSOL Ribera Baixa, Recurso 1279/2011). This interesting ruling declared the nullity of a set of agreements because one of them – the exclusive fuel purchasing agreement - was declared null and void (since there had been a regulatory change that affected the maximum authorised duration of such agreements) and the Court thought it necessary to restore economic balance between the parties by also rendering the other agreements null and void. However, in my opinion, the nullity of the agreements declared by the Civil chamber of the Supreme Court pursuant to Article 101(2), does not necessarily imply that the contractual relationship is a violation of public policy so serious that it would warrant the setting aside of an award that had not made the same interpretation as the Supreme Court now.

53 Judgment of the Court of 20 September 2001 Courage Ltd v Bernard Crehan. Case C-453/99. ECLI:EU:C:2001:465.

54 Court order of theTSJ of the Basque Country 19 de abril de 2012, France Telecom c. Euskaltel, Rec. 5/2011, ECLI:ES:TSJPV:2012:2

55 Which the above court order refers to as the "denaturalization" and "discrediting" of arbitration.

56 Judgment of the Court of 20 September 2001 *Courage Ltd v Bernard Crehan*. Case C-453/99. ECLI:EU:C:2001:465.

that would justify the request for a preliminary ruling, before referring the case to the CJEU, he should first decide whether the possible infringement would amount to a serious attack of the public policy protected by these rules.

Therefore, I believe that the seriousness of the infringement, possibly but not necessarily in conjunction with the requirement of flagrancy, must be present in the deliberations of the judges who are called upon to review the award and must be prioritized: if the alleged infringement is not serious enough to affect public policy judges should not examine the merits of the case, and much less set aside or declare the award non-enforceable even if the infringement is flagrant[57]. As has been said time and again, judges cannot transform setting aside and non-enforcement/non-recognition proceedings into a second instance just because one of the parties has pleaded a violation of public policy.

If the alleged violation is sufficiently serious to affect public policy, judges should examine the merits of the case, the result of their examination being either the confirmation /execution of the award or its annullment /denial of its execution[58].

5. The Surprising Preliminary Reference Lodged By The Cour D'appel De Paris In The Genentech Case

From this point of view, I find it difficult to understand –and I hereby correct what I stated publically a few months ago- the preliminary reference sent to the CJEU in September of 2014 by the Cour d'appel de Paris in a proceeding for the setting aside of an award, where it asks the following question: *"Must the provision of Article 81 of the Treaty (now Article 101 TFEU) be interpreted as precluding effect being given, where patents are revoked, to a licence agreement which requires the licensee to pay royalties for the sole use of the rights attached to the licensed patent?*[59]'.

In my opinion, neither the patent licence agreement nor the clause in question have the object of restricting competition, although the clause may have that effect to the extent that it reduces the economic resources of a competitor. Neither does it seem, taking into consideration the facts available to us, that the case involves a series of agreements.

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57 « Flagrant : Qui est tellement visible qu'on ne peut le nier ».Dictionnaire de L'académie française (8 ème édition)

58 If the violation, apart from being sufficiently serious, is also flagrant (which would imply that judges have at their disposal more elements than necessary to conduct the review), judges should set aside the award, or declare it non-enforceable.

59 Request for a preliminary ruling from the Cour d'appel de Paris (France) lodged on December 9th, 2014 — Genentech Inc. v Hoechst GmbH, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH (Case C-567/14) (OJEU 2015/C 073/18). Hoechst lodged an appeal with the *Cour de cassation* against the *Cour d'appel* order that had raised this preliminary reference, pleading that the preliminary reference, in itself, implied a control of the merits of the award which was forbidden to the *Cour d'appel*. The *Cour de cassation* in its ruling of November 18th, 2015 declared the appeal inadmissible since the *Cour d'appel* had only used the faculty granted to it by the procedural code to raise preliminary references to the CJEU, and the use of this faculty did not incur in any *excès de pouvoir*. (Cass. 1ère civ., 18 novembre2015, n°1426482, publié au Bulletin).

Additionally, from what we know[60], it seems that the competition law question had already been raised in the arbitration proceedings and addressed by the arbitrator[61].

In any event, if a public interest were to be affected the requesting party could always lodge a complaint against the award, despite it being final, with the European Commission[62].

Consequently, from my point of view, the effects of the legal relationship in this case are not serious enough to affect the public policy that is under the protection of competition law, even if they were found to contravene Article 101.

Perhaps this preliminary reference could have been broken down into two questions, the first of which would ask the CJEU if the public policy interest protected by Article 101 TFEU would be affected by the fact that an arbitral award requires the licensee of a patent licence agreement to pay a royalty to the licensor even if the patent is declared invalid.

Such a question would have allowed the CJEU to reflect on issues similar to those touched upon in the present article, but also on others such as the serious danger posed to arbitration as a means of quick resolution of disputes by the imposition of a duty on the courts deciding on the setting aside or enforcement of an award to lodge a preliminary reference in all the cases where similar questions as the ones in Genentech are raised, even if the legal relationship that the award might validate does not affect public policy or affects it only in a marginal way.

A question such as the one we have formulated could perhaps receive an answer along the following lines: "[In a case like this], regardless of whether it must be interpreted in one way or another, Article 101 does not oblige a court from a Mem-

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60 Cour d'appel de Paris, P 1, Ch. 1, arrêt du 23 septembre 2014, n° 12/2810

61 It should also be noted that the party requesting the setting aside of the award states that the infringement of competition law does not derive from the clause itself but rather from the interpretation that the award makes of that clause; and that it was not requesting the lodging of a preliminary reference to the CJEU, but merely intended to consult the European Commission.

62 There is a very similar precedent in the case-law of the European Commission. In the Tenth Report on Competition Policy (1980), p. 88, there is mention of an intervention of the Commission following a complaint lodged by the party sentenced to pay certain royalties which succeeded, after sending a statement of objections, in getting the parties to amicably void the award in question in the face of a warning that they would be sanctioned for violating the then Article 85(1) ECT (Preflex/Lipski).

Additionally, although in a quite different field of activity, arbitrators dealing with antitrust matters should pay attention to the very recent judgment of the CJEU of 22nd October 2015, which dismisses the appeal of AC-Treuhand AG, and, contrary to Advocate General N. Wahl's Conclusions, considers that "it cannot be inferred from the Court's case-law that Article 81(1) EC concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed the markets upstream or downstream of that market or neighbouring markets or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice". In this concrete case, the Court considers that "notwithstanding the fact that AC Treuhand is a consultancy firm, it cannot be concluded that the action taken by ACTreuhand [monitoring of the obligations entered into by producers to implement the cartels], in that capacity constituted mere peripheral services that were unconnected with the obligations assumed by the producers and the ensuring restrictions of competition". Consequently, the two fines imposed by the EC on AC Treuhand, both in the sum of EUR 174 000, were confirmed. (Judgment of the Court 22nd October 2015 in Case C-194/14 P AC-Treuhand AG v. Commission. ECLI:EU:C:2015:717).

ber State, whose jurisdiction to review an award is limited to cases of violation of public policy, to conduct a review of the merits”[63].

A selection of articles on the topic, in chronological order:

Komninos, A.: Case C-126/97, *Eco Swiss China Town Ltd. V. Benetton International NV, Judgment of 1 June 1999, Full Court.* Common Market Law Review 37 459-478, 2000.

Radicati di Brozolo, L.: *L’illicéité « qui crève les yeux » : critère de contrôle des sentences au regard de l’ordre public international (à propos de l’arrêt Thalès de la Cour d’appel de Paris).* Revue de l’Arbitrage, Volume 2005, Issue 3, pp. 529-560.

Ruiz-Jarabo Colomer, D.: *L’inclusion du droit de la concurrence dans l’ordre public communautaire : en effeuillant la marguerite. Concurrences,* nº 3, 2006, pp. 29-32.

Gaillard, E. : *La jurisprudence de la Cour de cassation en matière d’arbitrage international.* Texte de la Conférence donnée à la Cour de cassation le 13 mars 2007.

Gaillard, E.: *Extent of Court Review of Public Policy.* New York Law Journal, Volume 237, no. 65, 2007.

Mourre, A.: *Note sous 2 juin 2009, Cour d’appel de Bruxelles (Belgique) 17ème Ch.* Revue de l’Arbitrage, Extrait Comité français de l’Arbitrage, Volume 2009 Issue 3, pp. 594-599.

Seraglini, C.: *Le contrôle de la sentence au regard de l´ordre public international par le juge étatique : mythes et réalités.* Gazette du Palais, nº 80, 2009, p. 5.

Idot, L.: *L’étendue du contrôle de la sentence.* Colloque CEPANI, Bruxelles, 9 décembre 2010.

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63 On 17 March 2016, this article being in press, Advocate General Wathelet delivered his Opinion in the Genentech case proposing the Court to examine the merits and give the following answer to the Paris Cour d’appel: “Article 101 TFEU does not require, in the event of revocation or non-infringement of patents protecting a technology, the annulment of an international arbitral award giving effect to a licence agreement which obliges the licensee to pay royalties for the sole use of the rights attached to the licensed patents where the commercial purpose of the agreement is to enable the licensee to use the technology at issue while averting patent litigation, provided that the licensee is able to terminate the licence agreement by giving reasonable notice, is able to challenge the validity or infringement of the patents, and retains his freedom of action after termination”. After a quick reading of this Opinion my brief comments are the following: 1) The Opinion proposes the Court to review the merits of the case, contrary to what I defend in this article; this is not surprising since the request for the preliminary ruling did not raise this issue; paragraph 66 of the Opinion rejects the conclusion that certain infringements to Article 101 “would be permissible”; this is obvious; the question is whether any infringement of Article 101 should always be considered as implying a violation of public policy capable of triggering a review of the merits of an award; this question, in my opinion, is still unanswered. 2) The Opinion rejects the limitation of the scope of the review of arbitral awards to “flagrant” cases, (even if cases where the competition issues had not been debated during the arbitration procedure were not to be covered by such limitation) as the French government and Hoechst sustained, following the traditional French case law; this would be “contrary to the principle of effectiveness of EU law”, A.G. Wathelet says. 3) The Opinion supports the way of reasoning of the arbitral award particularly when it states that the arbitrator’s interpretation of the licensee’s obligation to pay running royalties for the use of certain technology “was not conditional on that technology being or remaining patent protected”. 4) Following the European Commission’s position, the Opinion concludes that in a case like this –see the wording of the Conclusion quoted at the beginning- similar to the one decided by the ECJ in the Ottung judgement (C-320/87), there is not any infringement to Article 101(1) and (2) and, consequently, there is no need to apply and interpret any block exemption, whether regulation 316/2014 or 772/ 2004. 5) If this Opinion was to be followed by the Court of Justice, it would certainly allow the Paris Cour d’appel to reject the annulment demand and confirm the award. But I still wonder whether the Court should not reconsider the preliminary question from the beginning and answer the following one: if a national court, when dealing with a demand for annulment or enforcement of an arbitral award, is obliged to apply Article 101 with the same standard as in ordinary judicial proceedings..

Radicati di Brozolo, L.: *Arbitrage et droit de la concurrence : vers un consensus*. Les Cahiers de l'Arbitrage, nº 1, 2010, pp. 181-199

Komninos, A.: *Assistance by the European Commission and Member States Authorities in Arbitration.* EU and US Antitrust Arbitration. A handbook for Practitioners: Edit. by Blanke, G. and Landolt, Ph. Kluwer Law International, 2011, pp. 727-753.

Radicati di Brozolo, L.: *Court Review of Competition Law Awards in Setting Aside and Enforcements Proceedings.* EU and US Antitrust Arbitration. A handbook for Practitioners: Edit. by Blanke, G. and Landolt, Ph. Kluwer Law International, 2011, pp. 755-789.

Caprasse, O.: *L'application du droit européen de la concurrence par l'arbitre, 2012,* http://hdl.handle.net/2268/143381 Radicati di Brozolo, L.: *Arbitration and Competition Law: The Position of the Courts and of Arbitrators.* Arbitration International, The Journal of the London Court of International Arbitration, Volume 27, number 1, 2011, pp. 1-26.

Komninos, A.: *Arbitration and EU Competition Law.* International Antitrust Litigation: Edit. by Basedow, J., Francq, S. and Idot, L. Hart Publishing, 2012, pp. 191-222.

Landolt, P.: *Arbitration and Antitrust: An overview of EU and national case law.* E-Competitions, nº 45083, 2012, pp. 1-7.

Radicati di Brozolo, L.: *Mandatory rules and International Arbitration.* The American Review of International Arbitration, vol. 23, 2012, pp. 49-74.

Rodger, B.: *Competition Law Preliminary Ruling: A Quantitative and Qualitative Overview Post Regulation 1/2003.* Global Competition Litigation Review, 2014, pp. 125-139. Soriano Hinojosa, A.: *De la tradicional inarbitrabilidad del Derecho de la competencia a su paulatina aceptación general.* LA LEY Unión Europea, nº 31 ·0 November 2015, p. 1-39.